









**THE CODE OF CIVIL PROCEDURE**  
**( V OF 1908 )**

TO  
THE LEGAL PROFESSION  
IN GRATEFUL RECOGNITION OF  
THEIR WARM APPRECIATION AND SUPPORT

# THE CODE OF CIVIL PROCEDURE

ACT V OF 1908

WITH

EXHAUSTIVE, ANALYTICAL AND CRITICAL COMMENTARIES

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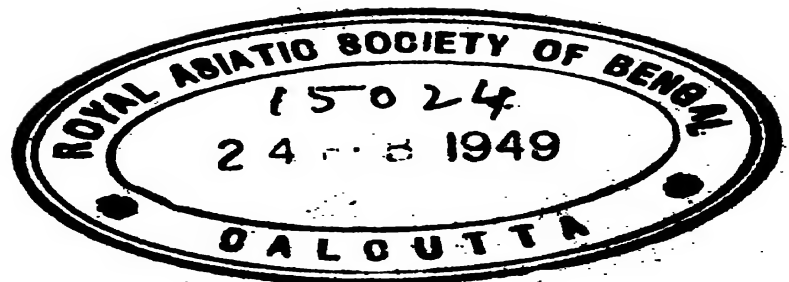
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# ABBREVIATIONS

A. I. R. 1921 All., Bom., etc. ...	...	All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
All. or I. L. R. All. ...	...	Indian Law Reports, Allahabad Series.
Agra. ...	...	Agra High Court Reports.
All. L. Jour. ...	...	Allahabad Law Journal.
All. W. N. ...	...	Allahabad Weekly Notes.
App. Cas. ...	...	Law Reports, Appeal Cases (England).
Beng. L. R. ...	...	Bengal Law Reports.
Bom. or I. L. R. Bom. ...	...	Indian Law Reports, Bombay Series.
Bom. H. C. R. ...	...	Bombay High Court Reports.
Bom. L. R. ...	...	Bombay Law Reporter.
Bom. P. J. ...	...	Bombay Printed Judgments.
Bourke ...	...	Bourke's Reports.
Bur. L. Jour. ...	...	Burma Law Journal.
Bur. L. R. ...	...	Burma Law Reports.
Bur. L. Tim. ...	...	Burma Law Times.
Cal. or I. L. R. Cal. ...	...	Indian Law Reports, Calcutta Series.
Cal. L. Jour. ...	...	Calcutta Law Journal.
Cal. L. R. ...	...	Calcutta Law Reports.
Cal. W. N. ...	...	Calcutta Weekly Notes.
C. P. L. R. ...	...	Central Provinces Law Reports.
Cor. ...	...	Coryton's Reports.
Cr. C. ...	...	Criminal Cases.
Cr. L. J. ...	...	Criminal Law Journal.
E. R. ...	...	English Reports (England).
Hay ...	...	Hay's Reports.
Hyde ...	...	Hyde's Reports.
Ind. App. ...	...	Law Reports, Indian Appeals.
Ind. Cas. ...	...	Indian Cases.
Ind. Jur. (N.S.) ...	...	Indian Jurist (New Series).
Ind. Jur. (O.S.) ...	...	Indian Jurist (Old Series).
Ind. Rul. ...	...	Indian Rulings.
Kar. (I. L. R.) ...	...	Indian Law Reports, Karachi Series.
K. B. ...	...	Law Reports, King's Bench (England).
Knapp. ...	...	Knapp's Reports.
Lah. or I. L. R. Lah. ...	...	Indian Law Reports, Lahore Series.
Lah. L. Jour. ...	...	Lahore Law Journal.
L. J. ...	...	Law Journal (England).
L. R. ...	...	Law Reports (England).
L. R. A. ...	...	Law Reporter, Allahabad.
Low. Bur. Rul. ...	...	Lower Burma Rulings.
Luck. or I. L. R. Luck. ...	...	Indian Law Reports, Lucknow Series.
Luck. Cas. ...	...	Lucknow Cases.
Mad. or I. L. R. Mad. ...	...	Indian Law Reports, Madras Series.
Mad. H. C. R. ...	...	Madras High Court Reports.
Mad. Jur. ...	...	Madras Jurist.
Mad. L. Jour. ...	...	Madras Law Journal.
Mad. L. Tim. ...	...	Madras Law Times.
Mad. L. W. ...	...	Madras Law Weekly.
Mad. W. N. ...	...	Madras Weekly Notes.
Marsh. ...	...	Marshall's Reports.
Moo. Ind. App. ...	...	Moore's Indian Appeals.
Moo. P. C. C. ...	...	Moore's Privy Council Cases.

2008

Nag. (I. L. R.)	...	...	...	Indian Law Reports, Nagpur Series.
Nag. L. Jour.	...	...	...	Nagpur Law Journal.
Nag. L. R.	...	...	...	Nagpur Law Reports.
N.-W. P. H. C. R.	...	...	...	North-West Provinces High Court Reports.
Oudh Cas.	...	...	...	Oudh Cases.
Oudh L. Jour.	...	...	...	Oudh Law Journal.
Oudh W. N.	...	...	...	Oudh Weekly Notes.
Pat. or I. L. R. Pat.	...	...	...	Indian Law Reports, Patna Series.
Pat. H. C. C.	...	...	...	Patna High Court Cases.
Pat. L. Jour.	...	...	...	Patna Law Journal.
Pat. L. Tim.	...	...	...	Patna Law Times.
Pat. L. R.	...	...	...	Patna Law Reporter.
Pat. L. W.	...	...	...	Patna Law Weekly.
Pat. W. N.	...	...	...	Patna Weekly Notes.
Pun. L. R.	...	...	...	Punjab Law Reporter.
Pun. Re.	...	...	...	Punjab Records.
Pun. W. R.	...	...	...	Punjab Weekly Reporter.
Q. B.	...	...	...	Law Reports, Queen's Bench (England).
R. & J's.	...	...	...	Rafique and Jackson's Oudh Privy Council Decisions.
Rang.	...	...	...	Indian Law Reports, Rangoon Series.
Rang. L. R.	...	...	...	Rangoon Law Reports.
R. R.	...	...	...	Revised Reports (England).
R. S. C.	...	...	...	Rules of the Supreme Court of England.
Sar.	...	...	...	Saraswati's Privy Council Judgments.
Shome L. R.	...	...	...	Shome's Law Reports.
Sind L. R.	...	...	...	Sind Law Reporter.
Suther.	...	...	...	Sutherland's Privy Council Judgments.
Suth. W. R.	...	...	...	Sutherland's Weekly Reporter.
Times L. R.	...	...	...	Times Law Reports.
U. P. L. R.	...	...	...	United Provinces Law Reports.
U. P. B. R.	...	...	...	United Provinces Board of Revenue.
Upp. Bur. Rul.	...	...	...	Upper Burma Rulings.
Weir.	...	...	...	Weir's Criminal Rulings.
W. R. (Eng.)	...	...	...	Weekly Reporter (England).

C. A.	...	Court of Appeal.	O.	...	Order.
Cl.	...	Clause.	P.	...	Page.
Cr.	...	Criminal.	P. C.	...	Privy Council.
F. B.	...	Full Bench.	Pt.	...	Point.
F.-N.	...	Foot-note.	R.	...	Rule.
Jour.	...	Journal.	S.	...	Section.
N.	...	Note.	S. B.	...	Special Bench.

In Foot-notes — ('66) means (1866); ('04) means (1904); ('27) means (1927); ('39) means (1939) and so on.

Full year reference is given prior to 1866, like (1818) and *not* ('18), (1865) and *not* ('65) and so on.

**IMPORTANT NOTE :** — *References to Official Reports are invariably given in all cases found in the Official Reports.*



# CHRONOLOGICAL TABLE OF PREVIOUS ACTS AND SUBSEQUENT AMENDING ACTS.

Year.	No. of Act.	Short Title.	How affected.
1841	VIII	Interpleader	Repealed by Act X of 1877.
1847	XVII	Defects in Civil Procedure	" XII of 1873.
1854	IX	Civil Appeals	" XII of 1873.
1859	VIII	Code of Civil Procedure	" X of 1877.
1860	IV	Civil Procedure	" XXIII of 1861.
1861	X	Repealing Enactments relating to Civil Procedure	" XIV of 1870.
1861	XXIII	Code of Civil Procedure	" X of 1877.
1863	IX	Amending the Code of Civil Procedure	" X of 1877.
1864	V	Extension of Civil Procedure to Sind	" VIII of 1868.
1865	XXVII	Civil Appeals Punjab	" XIII of 1879.
1871	XXXII	Oudh Civil Courts Act	" "
1877	X	Code of Civil Procedure	" XIV of 1882.
1878	XVIII	Amending the Code of Civil Procedure	" XII of 1879.
1879	XII	Do.	" XIV of 1882.
1882	XIV	Code of Civil Procedure	" V of 1908.
<b>1908</b>	<b>Y</b>	<b>THE CODE OF CIVIL PROCEDURE</b>	
1909	III	Presidency Towns Insolvency Act	
1914	I	The Code of Civil Procedure (Amendment) Act	Amending S. 8 and S. 67.
1914	IV	The Decentralisation Act	Amending S. 138.
1914	X	The Repealing and Amending Act	Amending Form No. 7 in Appendix E.
1914	XVII	The Second Repealing and Amending Act	1. Amending O. 5. R. 26. 2. Repealing S. 156 and the Fifth Schedule.
1916	XIII	The Amending Act	Amending Ss. 111, 116, 122, 123, 126, 129 and 130.
1917	XXIV	The Repealing and Amending Act	Amending S. 127 and S. 130.
1919	XVIII	The Repealing and Amending Act	Amending S. 122 and S. 123.
1920	XXIV	The Code of Civil Procedure (Amendment) Act	Amending O. 9 R. 5.
1920	XXVI	The Indian Limitation and Code of Civil Procedure (Amendment) Act	1. Amending O. 45 R. 7 2. Inserting new Rule 9A in O. 45. 3. Adding new sub-rule (4) to R. 15 of O. 45.
1920	XXXVIII	The Devolution Act	Amending Ss. 5, 61, 67, 68, 125 & 143.
1921	III	The Code of Civil Procedure (Amendment) Act	Amending S. 55.
1922	IX	The Civil Procedure (Amendment) Act	1. Inserting new S. 35A. 2. Amending S. 104 and O. 41 R. 33.
1923	XI	The Repealing and Amending Act	Amending S. 122 and S. 123.
1923	XXVI	The Code of Civil Procedure (Amendment) Act	Amending S. 60.
1923	XXIX	The Code of Civil Procedure (Amendment) Act	Amending O. 21 R. 32 and R. 33.
1925	XX	The Code of Civil Procedure (Amendment) Act	Amending S. 60

Year.	No. of Act.	Short Title.	How affected.
1925	XXIII	The Legislative Members Exemption Act	Inserting new S. 15A.
1925	XXXII	The Oudh Courts (Supplementary) Act	Amending S. 122 and S. 123.
1926	I	The Small Cause Courts (Attachment of Immoveable Property) Act	1. Amending S. 7. 2. Inserting new R. 13 in O. 38.
1926	VI	The Code of Civil Procedure (Amendment) Act	Amending S. 103.
1926	XXII	The Code of Civil Procedure (Second Amendment) Act	Amending O. 3 R. 1 and R. 4.
1926	XXX	The Negotiable Instruments (Interest) Act	Amending O. 37 R. 2 and Form No. 4 in Appendix B.
1926	XXXIV	The Sind Courts (Supplementary) Act	Amending S. 122 and S. 123.
1927	X	The Repealing and Amending Act	Amending — i. O. 5 R. 27 and R. 28. ii. Heading of O. 28. iii. O. 28 R. 1, R. 2 and R. 3. Adding new sub-section (3) to S. 98.
1928	XVIII	The Repealing and Amending Act	1. Substituting new Rules 2 to 8, 10, 11 and 15 for the Rules in O. 34.
1929	XXI	The Transfer of Property (Amendment) Supplementary Act	2. Substituting new Forms 3 to 11 in Appendix D for the old Forms. 3. Inserting new Rule 8A in O. 34.
1930	XVI	The Transfer of Property (Amendment) Supplementary Act	Amending O. 43 R. 1.
1932	X	The Code of Civil Procedure (Amendment) Act	1. Amending S. 78. 2. Inserting new Rules 19, 20, 21 and 22 in O. 26 with heading.
1934	XXXV	The Amending Act	Amending S. 2, clause (17), S. 60, sub-section (1), clause (j), O. 5, R. 27 and R. 28 and O. 28.
1936	XXI	The Code of Civil Procedure (Amendment) Act	1. Amending S. 51 and O. 21 R. 37. 2. Substituting new Rule 40 in O. 21 in place of the old Rule.
1937	VIII	The Code of Civil Procedure (Amendment) Act	1. Inserting new S. 44A. 2. Amending O. 21 R. 22.
1937	IX	The Code of Civil Procedure (Second Amendment) Act	Amending S. 60.
1937	XVI	The Code of Civil Procedure (Third Amendment) Act	Amending O. 32 R. 3.
1937		The Government of India (Adaptation of Indian Laws) Order	
1939	XXVI	The Code of Civil Procedure (Amendment) Act	Amending O. 21 R. 48.

# **THE CODE OF CIVIL PROCEDURE, 1908**

## **(ACT V of 1908)**

### **VOLUME II**

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THE  
CODE OF CIVIL PROCEDURE  
ACT V OF 1908.

Volume II.

THE FIRST SCHEDULE

ORDER I.—GENERAL.

*Synopsis*

1. Scope of the Order.
2. "Party," meaning of.

**1. Scope of the Order.** — "If we turn to the Code," said Sir Lawrence Jenkins, C. J., in *Krishnappa v. Shivappa*,<sup>1</sup> "we find, as the essentials of a suit opposing parties, a subject in dispute, a cause of action and a demand of relief." This Order deals with the subject of *parties to suits* and *inter alia* with the joinder, misjoinder and nonjoinder of parties and to a certain extent with the joinder of causes of action.<sup>2</sup>

**Joinder of parties.** — All persons may be joined as *plaintiffs* in whom any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist, where if such persons brought separate suits, any common question of law or fact would arise (Rule 1). Where there are *numerous persons*, however, having the same interest in one suit, one or more of such persons may, with the leave of the Court, sue *on behalf of* all such persons (Rule 8). If the joinder of the plaintiffs is likely to embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials (Rule 2). All persons may be joined as *defendants* against whom any such relief is claimed, where, if separate suits were brought against them any common question of law or fact would arise (Rule 3), though it is not necessary that *every* defendant should be interested in *all the reliefs* claimed in the suit (Rule 5). A plaintiff who is in doubt as to the person from whom

Order 1  
General  
Note 1

**Order 1 (General) — Note 1**

1. ('07) 81 Bom 898 (898).
2. ('18) AIR 1918 Cal 858 (859) : 45 Cal 111. (Dissenting from AIR 1914 Bom 198 and 3 Ind Cas 165.)
- ('28) AIR 1928 Cal 199 (200, 201) : 55 Cal 164.
- ('26) AIR 1926 Sind 66 (66) : 19 Sind L R 895.
- (1907) 1 K B 264 (270, 271), *Bullock v. L. G. O.*

and Co. (Referred to in A I R 1918 Cal 858.)

('36) AIR 1936 Cal 650 (651).

('35) AIR 1935 Cal 573 (574) : 63 Cal 168. (O. 1 R. 1 applies to joinder of parties as well as causes of action.)

[See also ('26) AIR 1926 Mad 911 (912) : 49 Mad 886 (889, 842) (FB).]

**Order 1  
General  
Notes 1-2**

he is entitled to relief may, however, join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined between all the parties (Rule 7). The Court can give judgment for or against any one or more of the parties, for such relief as they may be found entitled to, or liable for (Rule 4).

*Misjoinder and nonjoinder of parties.* — If the joinder of parties in the suit is not such as is permitted by O. 1 Rr. 1 and 3, there is a *misjoinder of parties*. If persons who ought to be made parties are not made parties, there is a *nonjoinder of parties*. All objections to the misjoinder or nonjoinder of parties should be taken at the earliest possible opportunity or at or before the settlement of issues (Rule 13). No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it (Rule 9). The Court may also, at any stage of the suit, strike out the name of any party improperly joined or may add a necessary or a proper party, or may, where the suit has been instituted in the name of the wrong person, substitute any other person as the plaintiff (Rule 10).

As to who are necessary or proper parties, see Order 1 Rule 10.

Though Order 1 in terms refers only to "suits," its provisions are also applicable to joinder of parties to appeals.<sup>3</sup>

**2. "Party," meaning of.** — A person can become a party to a suit only by his name appearing on the record of the suit as a party.<sup>1</sup> The mere fact that he is the person really interested in the suit and that the party on the record is only his *benamidar*, does not make him a party.<sup>2</sup> The introduction of a party at one stage of a suit is good for all subsequent stages thereof.<sup>3</sup> The mere fact that a person is joined as a plaintiff in a suit does not entitle him to be associated in a decree in favour of the person who alone has the real title.<sup>4</sup>

That the same person cannot be both a plaintiff and a defendant to one and the same action, even in different capacities, is a rule of procedure well established in common law. But Courts of Equity, in spite of this rule, did justice between the parties, provided all interested were before the Court either as plaintiffs or as defendants.<sup>5</sup> Thus the rule that the same person cannot be both a plaintiff and a defendant loses much of its force in India, where the Courts are Courts of Equity as well as of law, when all the parties are before the Court and their rights can be determined and adjusted.<sup>6</sup>

PARTIES TO SUITS

**O. 1 R. 1**

**R. 1. [S. 26.]** All persons may be joined in one suit as plaintiffs<sup>2</sup> in whom any right to relief<sup>4</sup> in respect of or arising out of the same act or

**3.** ('28) AIR 1928 Lah 688 (689) : 14 Lah 744.

**Note 2**

**1.** ('30) AIR 1930 Cal 263 (264).

**2.** ('30) AIR 1930 Cal 263 (264).

**3.** ('17) AIR 1917 PC 156 (161) : 45 Cal 94 (110) : 44 Ind App 218 (PC).

('27) AIR 1927 Mad 560 (561).

**4.** ('25) AIR 1925 P C 168 (169) : 52 Ind App 211:

6 Lah 888 (PC).

('21) AIR 1921 Bom 414 (415).

('01) 25 Bom 606 (612, 614).

**5.** ('09) 2 Ind Cas 597 (598) (Cal).

('26) AIR 1926 Sind 4 (4).

('01) 25 Bom 606 (612).

[See also ('21) AIR 1921 Bom 414 (415). (25 Bom 606 cited.)]

**6.** ('86) 10 Bom 353 (361).

transaction<sup>5</sup> or series of acts or transactions is alleged to exist, whether jointly,<sup>7</sup> severally<sup>8</sup> or in the alternative,<sup>9</sup> where, if such persons brought separate suits, any common question of law or fact<sup>6</sup> would arise.

O. 1 R. 1  
Notes 1-2

[ 1877, S. 26; R. S. C., O. 16 R. 1. See O. 2 R. 3. ]

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Plaintiffs having different interests.</li> <li>4. Person in whom any right to relief exists.</li> <li>5. Same act or transaction.</li> <li>6. Any common question of fact or law.</li> </ol> | <ol style="list-style-type: none"> <li>7. "Jointly."</li> <li>8. "Severally."</li> <li>9. "In the alternative."</li> <li>10. Appeal.</li> <li>11. Necessary and proper parties. See Notes under Order 1 Rule 10.</li> </ol> |
|---|---|

### Other Topics (miscellaneous)

- |  |  |
|--|--|
| <p>Co-owners or co-sharers for arrears of rent, etc.—Suit by. See Note 5 and O. 1 R. 10 Notes 18 and 20.</p> <p>Co-trustees to recover trust property or for enforcement of trust—Suit by. See Note 7 and O. 1 R. 10 Note 27.</p> <p>Executors — Agents and managers—Suit by. See Note 7.</p> <p>Joint Hindu family—Suit by. See Note 7.</p> <p>Joint owners of property—Suit by. See Note 7 and O. 1 R. 10 Note 18.</p> <p>Parties in mortgage suits. See O. 34 R. 1.</p> | <p>Suits by benamidar. See O. 1 R. 10 Note 27.</p> <p>Suit by creditors to set aside alienations. See Note 7.</p> <p>Suit by committee appointed under Religious Endowments Act. See Note 7 and O. 1 R. 10.</p> <p>Suit by member of Malabar tarwad. See Note 5 and O. 1 R. 10 Note 18.</p> <p>Suit by reversioner. See Note 5.</p> <p>Suit on torts. See O. 1 R. 10 Note 21.</p> <p>Suit regarding partnership. See O. 1 R. 10 Note 15.</p> |
|--|--|

#### 1. Legislative changes. —

1. The words "in respect of, or arising out of, the *same act or transaction or series of acts or transactions*" have been substituted for the words "in respect of the *same cause of action*."

2. The words "*any right to relief*" have been substituted for the words "*the right to any relief*."

**2. Scope of the Rule.** — Under the old Section 26 several persons could not join as plaintiffs in one suit, unless their *causes of action were identical*<sup>1</sup> even though the plaintiffs may have been injured by the *same act* of the defendant<sup>2</sup> and even if the

#### Order 1 Rule 1 — Note 2

1. ('97) 24 Cal 540 (543).
- (1900) 2 Bom L R 987 (968) : 23 All 137 : 27 Ind App 168 (PC). (Same principle applied to appeals.)
- ('04) 26 All 218 (220).
- ('96) 18 All 432 (438). (A, B and C, creditors of D, suing D to avoid transfer by D to defraud creditors.)
- ('84) 1884 All W N 46 (46).
- ('70) 2 N W P H O R 306 (307).
- ('07) 84 Cal 662 (668).
- ('85) 11 Cal 524 (526).
- ('94) 1894 Pun Re No. 29, page 81.
- ('81) 1881 Pun Re No. 8, page 9.
- ('85) 8 Mad 861 (864).

*In the following cases it was held that the cause of action was the same, and that there was no misjoinder :*

- ('99) 22 Mad 494 (499). (Tenants-in-common can sue in one suit for possession against trespasser.)
- ('84) 6 All 632 (638). (Suit for common maintenance of three persons—*Held*, it was a joint matter and that there was no misjoinder.)
- ('12) 16 Ind Cas 84 (85) (Cal). (Plaintiffs deriving their title from different sources but jointly interested can maintain one suit against defendants who kept plaintiffs out of possession.)
- ('08) 1908 Pun Re No. 88, page 120.
- ('96) 19 Mad 335 (336).
- (1900) 13 C P L R 130 (136).
2. ('07) 84 Cal 662 (668).

O. 1 R. 1  
Note 2

cases of the plaintiffs are to be proved by the *same evidence*.<sup>3</sup> Thus, where the plaintiffs, owning separate parcels of land, sued the defendant for trespass on their lands, it was held that they could not join as plaintiffs in one suit inasmuch as their causes of action were different.<sup>4</sup> There was also a difference of opinion as to whether the words "cause of action" referred only to the *infringement* of the right claimed, or whether it included also the facts constituting the *right itself*.<sup>5</sup>

The present rule makes it clear that, for several plaintiffs to join in one suit, it is not necessary that their *causes of action should be identical*.<sup>6</sup> It, however, imposes two other conditions *both* of which must be fulfilled in order to enable them to join in one suit as plaintiffs,<sup>7</sup> namely—

- (1) the right to relief must arise out of the *same act or transaction* or series of acts or transactions, and
- (2) the matter must be such that, if the plaintiffs brought separate suits any *common question of law or fact would arise*. The policy of the rule is that, even in cases where the plaintiffs seek individual reliefs, where the investigation would to a great extent be identical in each individual case, they may unite as co-plaintiffs and thus avoid needless expense.<sup>8</sup>

Under the old English rule corresponding to the present rule it was held in England that several plaintiffs having *distinct and separate causes of action* could not join in one suit as plaintiffs.<sup>9</sup> The rule was amended in October, 1896, and now reads as follows:

"All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions any common question of fact or law would arise. . . . ."

It has accordingly been held in England after the date of the said amendment, that even plaintiffs having distinct causes of action can join in one suit as plaintiffs provided that the right to relief arises out of the same transaction or transactions, and the case is one where if separate suits were brought any common question of law or fact would arise.<sup>10</sup> Thus, where several debenture-holders sued the directors of a company for damages for misrepresentation in the prospectus, it was held that though the plaintiffs had made *separate* contracts, their right to relief arose out of the issue of the prospectus and therefore out of the *same transaction* and they could all join

3. ('02) 26 Bom 259 (266). (A and B suing C for simultaneous assault on them.)

4. ('10) 6 Ind Cas 15 (15) : 34 Mad 55.

5. ('82) 4 All 261 (269, 270) (FB). (Does not necessarily include the facts constituting the right.)

('81) 6 Bom 266 (275). (Includes facts constituting the right.)

('96) 18 All 181 (188). (Do.)

('07) 84 Cal 662 (668).

('06) 88 Cal 867 (870).

('95) 22 Cal 888 (840).

(1900) 8 Oudh Cas 176 (180).

6. ('28) AIR 1928 Mad 831 (832).

('14) AIR 1914 Mad 256 (258).

('85) AIR 1985 Cal 578 (574) : 68 Cal 168. (Rule applies to questions of joinder of parties as well as causes of action.)

('36) AIR 1936 Cal 650 (651). (Where the defendant was the agent of two sets of principals appointed at different times and by different

acts, and the principals sued him for rendition of accounts and having regard to the scope of agency some common questions of fact and law were bound to arise, *held*, that the principals could join their causes of action in one suit, and hence there was no misjoinder of parties : A I R 1918 Cal 855, Relied on.)

7. (1898) 2 Q. B. 44 (50), Stroud v. Lawson.

8. ('28) AIR 1928 Cal 92 (98). (Observed by Fletcher, L. J., in (1910) 2 K. B. 1021.)

('19) AIR 1919 Mad 1148 (1144). (Claim for damages.)

9. (1894) 1894 App Cas 494 (499, 501), Smurthwaite v. Hannay.

(1896) 2 Q. B. 118 (119, 120), Carter v. Rigby.

(1895) 1895 App Cas 661 (668, 684), P. & O. Steam Navigation Co. v. Tsune Kinna.

10. (1901) 1901 App Cas 1 (19, 25), Duke of Bedford v. Ellis.

(1899) 2 Ch 696 (702), Walters v. Green.

in one suit.<sup>11</sup> Similarly, where the Universities of Oxford and Cambridge jointly sued the defendant to restrain him from using the words "Oxford and Cambridge" in the title of his publications, it was held that the right to relief arose out of one transaction or series of transactions, if each publication was a separate transaction, and that the question of publication and the belief that would be induced by such publication were common questions of fact.<sup>12</sup>

The rule lays down who *may* be joined as plaintiffs in the same suit. It does not say that any person *must* join as plaintiff to a suit; nor does it say anything as to who are necessary or proper parties to a suit, whom it may be essential or advisable to join.<sup>13</sup>

The rule merely provides for procedure and has nothing to do with the payment of court-fees. Hence, although under this rule several persons may join as plaintiffs in the same suit, court-fees may have to be paid under the Court-fees Act as if separate suits were brought.<sup>14</sup>

**3. Plaintiffs having different interests.** — Where *A* and *B* are entitled to different interests in a property, as when *A* is the *melwaramdar* and *B*, the *kudiwaramdar* of certain property, it has been held that they can sue together for the recovery of the property from a third person *C*, where the *ground* of their action is common.<sup>1</sup> Where *A* is originally the owner of property and he alienates a portion of it to *B*, can *A* and *B* sue together for the recovery of the property, where the ground of their action is common? Upon this question there was a conflict of decisions under the old Code. It was held by the Allahabad High Court<sup>2</sup> that *A* and *B* could not join in the same suit in such a case as they did not have the same cause of action. But it was held by the High Court of Calcutta,<sup>3</sup> the Chief Court of Punjab<sup>4</sup> and the Oudh Judicial Commissioner's Court<sup>5</sup> that they could join as plaintiffs in such a case. Under the present rule such a joinder is clearly permissible. Thus, in a suit for possession, where one of the plaintiffs is the purchaser from the co-sharer of the other plaintiff, there is no misjoinder.<sup>6</sup>

Similarly, the rule permits a suit being filed by a person in a double capacity, provided the conditions mentioned in this rule are not transgressed.<sup>7</sup> Thus, a person may seek in the same suit, to recover possession of certain properties in his individual capacity and certain other properties in his capacity as the shebait of an idol.<sup>8</sup>

**4. Person in whom any right to relief exists.** — The words "*any* right to relief" are wider than the words "the right to any relief" used in the old Section.<sup>1</sup>

(1929) 1929 W N 88 (89), *Horwood v. Statesman Publishing Co. Ltd.*

(1918) 1 K B 555 (565), *Thomas v. Moore.*

11. (1899) 1 Ch 393 (397), *Drincombier v. Wood.*

12. (1899) 1 Ch 55 (59, 60), *Oxford and Cambridge Universities v. Gill.*

13. ('87) 9 All 486 (491).

14. ('85) AIR 1985 Cal 578 (576) : 63 Cal 168.

#### NOTE 3

1. ('96) 19 Mad 835 (836).  
[See also ('90) 18 Mad 197 (202). (Suit for setting aside instrument.)]

2. ('96) 18 All 131 (140).

('96) 18 All 219 (221).

3. ('06) 33 Cal 367 (370). (Suit by *A* and his vendee of portion of property.)

4. ('08) 1908 Pun W R No. 9.

5. ('99) 2 Oudh Cas 149 (178, 174).

(1900) 3 Oudh Cas 215 (219).

6. ('12) 16 Ind Cas 623 (624) (Cal).

[See also ('29) AIR 1929 All 790 (790)].

7. ('18) AIR 1918 Cal 870 (873, 874). (Claim arising out of same transaction maintainable by plaintiff as shebait or in the alternative in his own right as owner.)

('15) AIR 1915 Bom 284 (285) : 40 Bom 401. (Plaintiffs suing as trustees and as tenants.)

('02) 26 Bom 577 (582).

8. ('28) AIR 1928 Cal 199 (202) : 55 Cal 164.

('18) AIR 1918 Cal 870 (874).

#### NOTE 4

1. (1893) 2 Q B 412 (424, 425), *Hannay & Co. v. Smurthwaite.*

[See also (1886) 17 Q B D 625 (635), *Gort v. Rowney.*]

**O. 1 R. 1**  
**Notes 5-6**

**5. Same act or transaction.** — The present rule enables different plaintiffs to join in one suit where the right to relief alleged to exist in each of them arises out of the same transaction and there is a common question of fact or law to be decided.<sup>1</sup>

The following are some of the cases decided under this rule —

- (1) *A* sold to *B* a certain property which was in the wrongful possession of *C*. *B* sued *C* for profits realized by *C* both before and after the transfer, impleading *A* as a *pro forma* plaintiff. The plaintiff asked for amendment of the plaint so as to add a prayer for a decree in favour of *A* for the profits realized by *C* before the transfer. It was held that the amendment could be allowed.<sup>2</sup>
- (2) Co-sharers suing the lambardar for profits may join in the same suit. The reason is that their several rights arise out of the *same act*, viz., the lambardar's failure to divide the profits among the co-sharers on the due date.<sup>3</sup>
- (3) A mother and her sons, members of a Malabar tarwad, residing together may maintain a joint suit for recovery of their maintenance amounts.<sup>4</sup>
- (4) Co-sharers, although they have been collecting rents separately, may join in the same suit for rent against the tenant, though the rents refer to different periods.<sup>5</sup>
- (5) A contingent reversioner may join as co-plaintiff in the presumptive reversioner's suit to set aside an alleged invalid adoption, the object of the suit being to remove an apprehended injury which is common to the interests of all reversioners, presumptive as well as contingent.<sup>6</sup>

In each of the above cases the plaintiffs' rights arose out of the same transaction or series of transactions and hence, they were held entitled to join in the same suit. Conversely, where the rights of the several plaintiffs do not arise out of the same transaction or series of transactions but arise out of *different transactions*, there can be no valid joinder of such plaintiffs under this rule.<sup>7</sup>

**6. Any common question of fact or law.** — As has been observed already in Note 2 above, it is also necessary that a *common question of law or fact* should arise in the suit. Thus, although the plaintiffs may be suing the same defendant and for a similar relief, and their rights may arise out of the same transaction, they cannot join in one suit where the case of each plaintiff gives rise to *different questions of fact and law*.<sup>1</sup>

*Illustrations*

1. The plaintiffs in a suit were holders of a piper service in a temple and filed a suit for setting aside an order of dismissal passed by the trustee of the temple. The different plaintiffs were entitled to different shares in the inam. The charges of misconduct against the several plaintiffs on

**Note 5**

1. ('38) AIR 1938 Pat 644 (645). (Suit for arrears of maintenance by two widows—No misjoinder as their right arises out of one and the same decree.)
2. ('18) 18 Ind Cas 764 (765) (Cal). (Single suit for maintenance by an excluded co-parcener, his wife and afterborn son is maintainable.)
3. ('01) 3 Bom L R 668 (660). (Mahomedan widow and her daughter can sue jointly husband's heir for their shares of inheritance.)
2. ('29) AIR 1929 Bom 51 (53).
3. ('29) AIR 1929 All 668 (668, 669) : 51 All 994.
4. ('99) 9 Mad L Jour 158 (154).

5. ('11) 10 Ind Cas 891 (892) (Cal).
6. ('45) AIR 1915 P C 124 (127) : 38 Mad 406 : 42 Ind App 125 (P O).  
[See ('98) 1898 Pun Re No. 84, page 294 (FB). (Remote reversioner can sue if nearer reversioner colludes or refuses to join.)]  
[But see ('88) 11 Mad 106 (114). (No fraud or collusion of nearer reversioners of a stanam of Malabar—Remote reversioners have no locus standi.)]
7. ('28) AIR 1928 Pat 411 (412).  
('25) AIR 1925 Bom 843 (842).  
('26) AIR 1926 Sind 66 (68) : 19 Sind L R 395.

**Note 6**

1. (1898) 2 Q B 44 (52, 54), *Stroud v. Lawson*.



which they were dismissed were not identical. It was held that the plaintiffs could not sue together as each of their cases gave rise to different questions.<sup>2</sup>

2. Plaintiffs instituted a suit for the establishment of occupancy rights in their various holdings against the *shrotriendrar*. The genuineness of the *muchilikas* alleged to have been executed by some of the plaintiffs was denied and certain decrees obtained against some of the plaintiffs were challenged as having been fraudulently obtained. It was held that the suit was bad for misjoinder as it gave rise to *different questions of fact and law* in the case of the different plaintiffs.<sup>3</sup>

See also the undermentioned case.<sup>4</sup>

7. "Jointly." — Even in the case of persons *jointly* entitled to any relief the rule only says that all such persons *may* be joined as *plaintiffs* in one suit. This however does not affect the general principle of law that all such persons *must* be made *parties* to the suit *either as plaintiffs or as defendants*.<sup>1</sup> The reason is that all such persons together represent a *single and indivisible* right which cannot be adjudicated upon and no effective decree can be passed by the Court, in the absence of any such person.<sup>2</sup> The following are all illustrations of persons in whom the right to relief exists jointly and who, therefore, must be made parties to the suit in order that an effective decree may be passed therein —

- (1) Joint owners of property suing to recover the same.<sup>3</sup>
- (2) All executors who have proved the will suing to recover the property belonging to the estate of the testator.<sup>4</sup>
- (3) Co-trustees suing to recover trust property.<sup>5</sup>
- (4) Members of a committee appointed under the Religious Endowments Act (1863), suing for the removal of a person acting as a trustee of the endowment.<sup>6</sup>
- (5) Joint promisees under a contract suing to enforce the contract.<sup>7</sup> (See Contract Act, Section 45.)

A suit by creditors to set aside an alienation as being fraudulent within the meaning of Section 53 of the Transfer of Property Act must be *by* or on behalf of all.<sup>8</sup> So also a suit by members of a Hindu joint family to recover a property belonging to the joint family must be *by* or on behalf of all the members.<sup>9</sup>

2. ('26) AIR 1926 Mad 57 (57, 58).

3. ('26) AIR 1926 Mad 1140 (1140).

4. ('39) AIR 1939 Pat 157 (158). (Where a defendant in a suit claims relief *as against* a co-defendant, in respect of the same transaction as that with reference to which the suit is brought, he can be added as a co-plaintiff, for, if he brought a separate suit, a common question of law and fact would arise.)

#### Note 7

1. (1816) 1 Mer 244 (262) : 15 R R 110, Wilkins v. Fry.

('08) 85 Cal 381 (344) : 35 Ind App 78 (P C).

('18) 20 Ind Cas 829 (380) (Cal). (Following 1 Mer 244.)

('27) AIR 1927 Mad 984 (984).

('85) 7 All 318 (315, 317) (F B).

See cases cited in foot-notes (3) to (11) below.

2. [See ('16) AIR 1916 Pat 44 (45) : 1 Pat L Jour 487.]

[See also ('39) AIR 1939 Nag 242 (244) : I L R (1939) Nag 515. (The object of joining necessary parties is to enable the Court to pass an effective decree.)]

3. ('86) 10 Bom 32 (84).

('97) 21 Bom 154 (158, 159).

('03) 5 Bom L R 577 (578).

('08) 7 Cal L Jour 251 (260).

('68) 10 Suth W R 108 (109, 110).

('81) 8 Mad 284 (235).

4. ('28) AIR 1928 Mad 387 (387).

5. ('07) 5 Cal L Jour 527 (533, 534).

('32) AIR 1932 Cal 27 (29).

('18) AIR 1918 Cal 810 (811).

('85) 11 Cal 388 (340).

('82) 8 Cal 42 (50) : 8 Ind App 135 (P C). (Suit to set aside alienation of trust property.)

('22) AIR 1922 Mad 817 (318, 319).

('15) AIR 1915 Mad 1196 (1197) : 39 Mad 456.

6. ('16) AIR 1916 Pat 44 (45) : 1 Pat L Jour 437. ('78) 2 Mad 200 (201).

7. ('05) 2 Cal L Jour 496 (498).

('82) AIR 1932 Mad 583 (584).

[See ('80) 5 Cal 303 (307).]

[See also ('39) AIR 1939 Nag 242 (244) : I L R (1939) Nag 515. (Mortgage in favour of B and D—Suit by B alone—D dying during course of suit—B acquiring D's rights of recovering debt—Non-joinder of D held immaterial.)]

8. ('07) 34 Cal 999 (1006).

9. ('07) 29 All 811 (817). (Debt due to joint family.)

('94) 17 Mad 122 (126). (Do.)

**O. 1 R. 1**  
**Notes 7-9**

Where a number of persons are jointly entitled to the same relief in respect of a transaction and one of them wishes to sue to enforce that relief, the proper course is for him to ask the other persons to join in the suit as co-plaintiffs. If they refuse to join in the suit as plaintiffs, they must be joined as defendants.<sup>10</sup> But the really essential point is that all the persons jointly interested must be on the record as parties, whether as plaintiffs or defendants. Hence, a suit should not be dismissed merely because the plaintiff fails to prove that before joining the persons jointly interested with him as defendants, he asked them to join as co-plaintiffs and they refused to do so.<sup>11</sup>

**8. "Severally."** — Where the same transaction entitles each one of a number of persons to relief severally, i. e., individually and not jointly, they may all join as plaintiffs in the same suit under the present rule if the questions to be decided are common.<sup>1</sup> But this course is not obligatory. One or more of such persons may sue separately to enforce the relief.<sup>2</sup> Thus, where every member of the community has an individual right to worship on a platform round a sacred tree, he may sue alone for the removal of any obstruction placed upon the platform.<sup>3</sup> The other members of the community may also join as plaintiffs in the suit. But this is not necessary for the maintainability of the suit.

**9. "In the alternative."** — *A* and *B* sue *C* alleging that either *A* or *B* is entitled to relief against *C* in respect of a certain transaction. The present rule permits the joinder of *A* and *B* in one suit in such a case.<sup>1</sup> Thus, in the undermentioned case<sup>2</sup> *A*, the widow, and *B*, the adopted son of *C*, a deceased person, sued for a debt due to *C*. The adoption was questioned by *C*'s reversioners. But *A* did not dispute

10. ('80) 122 Ind Cas 597 (598) : 1930 All L Jour 247 (248).

('97) 24 Cal 832 (833).

('97) 21 Bom 412 (421, 422). (Legal representative of deceased partner can sue, if surviving partner impleaded as defendant.)

('17) AIR 1917 Cal 535 (536).

('99) 3 Cal W N 225 (226).

('87) 14 Cal 201 (203).

('78) 1 Cal L Rep 431 (432).

('97) AIR 1927 Lah 129 (129).

('25) AIR 1925 Lah 504 (505).

('05) 1905 Pun Re No. 12, page 65.

('91) 1891 Pun Re No. 42, page 227. (Claim based on contiguity—No restriction as would necessitate all the co-sharers joining.)

('86) 1886 Pun Re No. 87, page 250.

('92) 15 Mad 111 (116).

3 Ind Jour (N S) 203.

('25) AIR 1925 Oudh 71 (71).

11. ('08) 18 Mad L Jour 495 (496).

('03) 24 All 226 (228).

('28) AIR 1928 Cal 506 (507). (Privy Council affirms this view as is seen in 35 Cal 331 (P O.))

('99) 26 Cal 409 (412) (F B).

('97) 1 Cal W N 221 (222).

('81) 12 Cal L Rep 588 (590).

('81) AIR 1981 Lah 445 (446).

('19) AIR 1919 Cal 240 (240). (Consent of the other administrators to implead as *pro forma* defendants.)

('17) AIR 1917 Mad 698 (699).

('06) 29 Mad 302 (303).

('08) 26 Mad 461 (462).

('03) 26 Mad 649 (653) (F B). (Decided "on the terms of the Transfer of Property Act.")

*The contrary view held in the following cases is not good law :*

('97) 1 Cal W N 659 (660). (The co-sharer neither refused to join nor withheld the consent.)

('01) 24 Mad 296 (299). (Case of uralans under Malabar law.)

(1900) 28 Mad 82 (84). (Do.)

('91) 14 Mad 489 (490). (Do.)

('90) 17 Cal 160 (162).

('99) 9 Mad L Jour 312 (312).

**Note 8**

1. ('83) AIR 1932 All 401 (402).

2. ('97) 24 Cal 885 (888, 890).

('01) 1901 All W N 36 (36).

('84) 8 Bom 432 (450).

('07) 6 Cal L Jour 383 (391).

('01) 1901 Pun Re No. 91, page 310.

3. ('97) 24 Cal 885 (888, 890).

**Note 9**

1. ('21) AIR 1921 Nag 9 (10).

('95) 22 Cal 833 (841, 842).

('16) AIR 1916 Lah 47 (47) : 1916 Pun Re No. 10.

('06) 1906 Pun Re No. 9, page 29.

('22) AIR 1922 Mad 174 (176).

('05) 28 Mad 500 (508).

('27) AIR 1927 Oudh 484 (485) : 3 Luck 241.

('08) 26 Mad 647 (649) (F B).

2. ('92) 16 Bom 119 (123, 128).

[See also ('08) 26 Mad 647 (649) (F B).

('04) 28 Bom 94 (99).]

the adoption and joined with *B* in instituting the suit praying that if the adoption was established a decree should be passed in *B*'s favour but that if the adoption was held not proved, a decree should be passed in favour of *A*. It was held, that the suit was not bad for misjoinder as it came within the expression "alternative" in the present rule. But if in the above case the widow disputed the adoption, she and the adopted son could not be joined as plaintiffs in one suit.<sup>3</sup> The reason is that the rule does not warrant the joinder, as plaintiffs in one suit, of rival claimants each of whom denies the right of the other. Where, again, it is not alleged that the right to relief exists in the alternative but the plaintiffs are joined in the hope of getting a decree by something like a mass attack on the defendants and of afterwards dividing the fruits of victory among the plaintiffs by further litigation *inter se*, such a suit, their Lordships of the Privy Council observe, is inconvenient in plan and must be condemned.<sup>4</sup>

**O. 1 R. 1**  
**Notes 9-11**

**10. Appeal.**— The rule contained in O. 1 R. 1 applies to appeals also. Hence, where a suit is filed on foot of a promissory note executed by the first defendant in favour of the second defendant and assigned by the latter to the plaintiff and is dismissed as against the first defendant but is decreed in full against the second defendant, the plaintiff and the second defendant can prefer a joint appeal to have the first defendant *also* made liable.<sup>1</sup>

**11. Necessary and proper parties.**— See Notes under Order 1 Rule 10.

**R. 2.** [New.] Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

**O. 1 R. 2**

[R. S. C., O. 16 R. 1.]

**1. Power of Court to order separate trials.**— This rule is new and empowers the Court in suits in which more plaintiffs than one are joined, to order separate trials, or require any one plaintiff to elect to carry on the suit or to make any other appropriate order.<sup>1</sup> It, however, applies only to cases in which the plaintiffs are *properly joined* in a suit under Rule 1, but in which separate trials or election is necessary for avoiding embarrassment or inconvenience or delay. It has no application to cases of misjoinder of plaintiffs.<sup>2</sup> Where the same plaintiff sues for possession of several properties in separate capacities, as for instance, in a personal capacity and in the capacity of a trustee, the Court may order separate trials.<sup>3</sup>

The High Court can, in revision, subject to the *conditions* laid down in Section 115 *ante*, interfere with an order under this rule.<sup>4</sup>

3. ('88) 6 Mad 239 (243).

[See also ('14) AIR 1914 Bom 181 (184) : 88 Bom 272.]

4. ('18) AIR 1918 P C 49 (50) (P C).  
Note 10

1. ('28) AIR 1928 Lah 688 (689).

Order 1 Rule 2—Note 1

1. ('98) 1 Q B 771 (772), *Sandee v. Wildsmith*.

2. ('18) 18 Ind Cas 181 (182) (Low Bur). (Joint mortgage— One suit by all the mortgagors to redeem the mortgage.)

('04) 26 All 218 (220).

[But see ('14) AIR 1914 Cal 795 (795).]

3. ('28) AIR 1928 Cal 199 (202) : 55 Cal 164.

4. ('18) AIR 1918 Mad 1187 (1189).

('22) 16 Mad L W 175 (176).

O. 1 R. 3

**R. 3. [S. 28.] All persons<sup>3</sup> may be joined<sup>8</sup> as defendants**

**Who may be joined** against whom any right to relief<sup>3</sup> in respect of  
**as defendants.** or arising out of the same act or transaction<sup>6</sup>  
 or series of acts or transactions is alleged<sup>5</sup> to exist,<sup>6</sup> whether  
 jointly,<sup>7</sup> severally<sup>9</sup> or in the alternative,<sup>10</sup> where, if separate suits  
 were brought against such persons, any common question of law or  
 fact would arise.

[1877, S. 28; *Cf.* R. S. C., O. 16 R. 4. See O. 11 R. 3.]*Synopsis*

- |   |   |
|---|---|
| 1. Legislative changes.<br>2. Scope and object of the Rule.<br>3. "All persons may be joined as defendants against whom any right to relief . . . . exists."<br>4. The parties must be within the jurisdiction of the Court.<br>5. "Alleged."<br>6. In respect of the same act or transaction.<br>7. "Jointly." | 8. Joint tort-feasors.<br>9. "Severally."<br>10. "In the alternative."<br>11. Award of costs in claims of alternative reliefs. See S. 35 Note 9.<br>12. Ancillary reliefs.<br>13. Separate trials.<br>14. Appeal.<br>15. Classes of cases illustrating the above principles. See Notes to O. 1 R. 10. |
|---|---|

*Other Topics (miscellaneous)*

Joinder of defendants. See O. 1 R. 10.  
 O. 2 R. 3 compared. See Note 2.

Several kinds of suits—Joinder of defendants in.  
 See O. 1 R. 10.

**1. Legislative changes. —**

1. The words "in respect of the same matter" have been substituted by the words "in respect of or arising out of the same act or series of acts or transactions." Under the old Code there was a conflict of opinion as to the interpretation of the words "same matter." One view held that it was equivalent to "same cause of action."<sup>1</sup> According to another view, it was used in a more comprehensive sense than the words "cause of action" and was intended to allow a joinder of defendants even where relief was sought in respect of *separate* causes of action against the different defendants so long as they all arose "in respect of the same matter."<sup>2</sup> This conflict has now been removed by giving legislative recognition to the latter view.

2. The words "where if separate suits were brought against such persons any common question of law or fact would arise" are new. This alteration lays down a condition for the applicability of the rule.

3. The words "*the* right to any relief" have been changed into "*any* right to relief," thus giving the rule a wider scope.<sup>3</sup>

**2. Scope and object of the Rule. —** This is the main rule governing the joinder of defendants. The object of this rule and of O. 1 R. 1 is to avoid

**Order 1 Rule 3 — Note 1**

1. ('88) 5 All 163 (168) (FB).  
 ('08) 27 Mad 80 (83).  
 2. ('03) 35 Mad 786 (745, 746, 747).  
 ('88) 5 All 163 (175) (FB). (Per Mahmood J.)  
 ('88) 9 Cal 763 (765). (Defendants with one common defence.)

- ('11) 9 Ind Cas 565 (566) (Mad).  
 ('08) 81 Mad 252 (256, 257).

3. (1899) 1 Ch 55 (59, 60), *The Universities of Oxford and Cambridge v. George Gill and Sons*. (These words which occur in Rules of Supreme Court, O. 16 R. 1, were so construed.)  
 (1898) 2 Q B 44 (50, 52), *Stroud v. Lowson*. (Do.)

multiplicity of suits and needless expense, if it could be done without embarrassment to the parties and the Court.<sup>1</sup> All persons may therefore be joined as defendants against whom any right to relief is alleged to exist, provided that —

**O. 1 R. 3  
Note 2**

- (1) such right arises in respect of the same act or transaction or series of acts or transactions, and,
- (2) the case is one where if separate suits were instituted against the defendants *any common question of law or fact would arise*.

It is not necessary that all the defendants should be interested in *all* the reliefs and transactions comprised in the suit or that the liability of all the defendants should be the same.<sup>2</sup> Nor is it necessary that the *evidence* as regards each of the defendants should be the same<sup>3</sup> or that the *cause of action* against each of the defendants should be the same.<sup>4</sup> But it is necessary that *both* the conditions set forth above should exist<sup>5</sup> though in order to satisfy the second condition, it is enough if there is *one* question common to all the defendants which is of sufficient importance in proportion to the rest of the action.<sup>6</sup>

The provisions of this rule, like those of O. 1 R. 1 *ante*, are not *imperative* and *obligatory*;<sup>7</sup> nor are they *exhaustive* of all cases of joinder of defendants. Additional power to make certain persons defendants is expressly given by Rules 6, 7 and 10 *infra*, although no right to any relief is alleged or can be alleged against them.<sup>8</sup>

As has already been observed in Note 1 to Order 1, this Order though headed "Parties to Suits" deals also to some extent with joinder of causes of action<sup>9</sup> inasmuch as when a plaintiff frames his suit he joins persons as defendants because he claims to have a cause of action against them. O. 2 R. 3 deals exclusively with the joinder of causes of action. Order 1 Rules 1 and 3 and O. 2 R. 3 really deal with the same problem from two different standpoints. The former two rules are based upon the fundamental principle that needless multiplicity of suits should be avoided, while the latter aims at

('18) AIR 1918 Cal 858 (862) : 45 Cal 111.

**Note 2**

1. ('28) AIR 1928 Cal 92 (98).

('18) AIR 1918 Cal 858 (862) : 45 Cal 111.

('86) AIR 1986 Mad 449 (453).

2. ('23) AIR 1923 Mad 831 (832).

('86) AIR 1986 Mad 449 (454).

('88) AIR 1988 Nag 461 (463) : ILR (1939) Nag 29.

See Rule 5, *infra*.

[See also ('83) 5 All 163 (177).]

3. ('28) AIR 1928 Bom 91 (94).

('18) AIR 1918 Cal 858 (864) : 45 Cal 111.

4. ('28) AIR 1928 Cal 199 (200) : 55 Cal 164.

('07) 31 Bom 516 (522). (Case under the old Code.)

('88) 5 All 163 (170) (FB).

('88) AIR 1988 Rang 420 (421, 422) : 1988 Rang L R 397.

[But see ('18) 21 Ind Cas 488 (441) (Cal). (The dissentient judgment of Coxe, J.)]

5. ('18) AIR 1918 Cal 858 (859) : 45 Cal 111.

('88) AIR 1988 Mad 632 (633).

('88) AIR 1988 Pat 653 (658). (Condition relating to common question alone was present in this case.)

('84) AIR 1984 Sind 176 (176). (Suit against certain managing agents of mills for infringement of trade-marks— Subsequently plaintiff applied to have owners of the mills added as defendants — Held, both the conditions were satisfied and

joinder proper.)

('90) AIR 1930 All 180 (185).

('11) 12 Ind Cas 813 (822) (Bom).

('09) 3 Ind Cas 165 (168) : 34 Bom 358.

('21) AIR 1921 Cal 653 (655).

('26) AIR 1926 Mad 911 (912) : 49 Mad 836.

('26) AIR 1926 Sind 66 (68) : 19 Sind L R 395.

(1898) 2 Q B 44 (52, 54), Stroud v. Lowson.

('84) AIR 1934 Sind 176 (176).

[See also ('84) AIR 1934 Cal 405 (405). (The right to relief arose out of the same act and at least two common questions of fact were likely to arise if separate suits were filed— O. 1 R. 3 held applied.)]

('38) AIR 1938 Rang 420 (422) : 1938 Rang L R 397.]

6. (1921) 2 K B 1 (11, 16), Payne v. British Time Recorder Co.

('32) AIR 1932 Bom 1 (2).

('28) AIR 1928 Cal 199 (201) : 55 Cal 164.

('21) 59 Ind Cas 522 (522) (Lah).

7. See Note 3, *infra*.

8. See Rules 6, 7 and 10.

9. ('84) AIR 1934 Mad 367 (368) : 57 Mad 1031.

(Order 1 R. 3 applies to joinder of causes of action as well as to joinder of parties—AIR 1926 Mad 911 (FB), Followed.)

[See ('88) AIR 1988 Rang 185 (188) : 1988 Rang L R 303 (SB).]

**O. 1 R. 3**  
**Notes 2-3**

the principle that the trial of the suit should not be embarrassed. O. 2 R. 3 must therefore be read so as not to clash with this rule.<sup>10</sup> This rule will enable the joinder as defendants in the same suit, of a person against whom damages are claimed on the basis of a breach of contract and another against whom damages are claimed on the basis of a tort where both the causes of action arise out of the same transaction or series of transactions.<sup>11</sup>

**3. "All persons may be joined as defendants against whom any right to relief . . . exists." —**

**"Persons."** — The word "persons" includes corporations whether incorporated or not.<sup>1</sup> For the purpose of Admiralty proceedings a ship has been held to be a "person".<sup>2</sup>

**"May be joined."** — The rule is not imperative.<sup>3</sup> A plaintiff is not bound to sue every possible adverse claimant in the same suit. He is "*dominus litis*" and may choose to implead only those persons as defendants against whom he wishes to proceed and may leave the questions as against others to be decided on a future occasion or allow them to be barred at his own risk.<sup>4</sup> In cases of *joint tort-feasors* it is open to the plaintiff to sue any or all of the tort-feasors in one suit though by suing some persons only his remedy against others might become barred.<sup>5</sup> The same principle applies in the case of joint contractors also. See Order 1 Rule 6.

**"Right to relief."** — Whether a person can have relief, against a particular person or persons, is a matter that is governed by the substantive law. As a general rule only those persons can be joined as parties to a suit against whom any right to relief is alleged to exist.<sup>6</sup> But in certain cases,<sup>7</sup> as for example where the right to relief exists in the plaintiff *jointly* with others and such others refuse to join him as plaintiffs, it will be necessary to add them as defendants though no right to relief is alleged to exist against them. See Order 1 Rule 10, *infra*.

10. ('31) AIR 1931 Bom 330 (330).

('32) AIR 1932 Bom 1 (2).

('18) AIR 1918 Cal 858 (859, 862, 863): 45 Cal 111.

('11) 12 Ind Cas 357 (358, 359): 4 Nag L R 180.

('10) 2 K B 344 (365, 367), *Compagnia Sausinena v. Houlder Bros*.

('34) AIR 1934 Mad 367 (368): 57 Mad 1031.

11. ('38) AIR 1938 Rang 185 (188): 1938 Rang LR 303 (SB). (AIR 1938 P O 84 (PC) Followed.)

**Note 3**

1. Act 10 of 1897, Section 8 (39).

2. ('88) 12 Bom 287 (241).

3. ('82) 8 Cal 288 (245).

('85) AIR 1935 Mad 750 (752).

4. ('08) 27 Bom 81 (41).

('88) AIR 1938 Mad 726 (728).

('15) AIR 1915 All 817 (817, 818).

5. ('07) 6 Cal L Jour 888 (890, 891).

(1900) 2 Bom L R 288 (285).

('90) 14 Bom 408 (416). (Per Scott, J.—A decree obtained against joint tort-feasors bars a suit against the others on the same cause of action.)

('86) AIR 1935 Mad 750 (752).

6. See the following cases:

('98) 8 Mad L Jour 8 (4).

('68) 3 Agra 131 (131). (Principal sued for acts of agent—Agent not a necessary party to the suit.)

('73) 5 N W P H O R 25 (28).

('80) 5 Bom 208 (215).

('28) AIR 1928 Cal 23 (24).

('26) AIR 1926 Cal 1201 (1201).

('26) AIR 1926 Cal 462 (463).

('24) AIR 1924 Cal 1050 (1050).

('24) AIR 1924 Cal 869 (869).

('15) AIR 1915 Cal 403 (403, 404).

('70) 25 Suth W R 17 (18).

('71) 15 Suth W R 6 (6).

('69) 11 Suth W R 137 (137).

('68) 9 Suth W R 9 (10): 100 Ind App 468 (PC).

('89) 1889 Pun Re No. 108, p. 378.

('88) 1888 Pun Re No. 41, p. 107.

('26) AIR 1926 Mad 1110 (1117). (Administration action—Debtors to the estate are not necessary parties.)

('86) 6 Mad L Jour 186 (187).

('24) AIR 1924 Pat 172 (173).

('28) AIR 1928 Pat 65 (70): 2 Pat 110.

('11) 10 Ind Cas 779 (779) (Low Bur). (A person admittedly a benamidar is not a necessary party.) [See also ('30) AIR 1930 Lah 45 (46).]

7. ('18) AIR 1918 Mad 1187 (1139). (Suit for recovery of property.)

**5. The parties must be within the jurisdiction of the Court.** — In a suit against *A* and *B* in which the Court had jurisdiction against *A* but none against *B*, Mr. Justice Woodroffe observed as follows :

**O. 1 R. 3  
Notes 4-6**

"In my opinion O. 1 R. 3 has no bearing on the case. That Rule of the Order is a provision which relates to a joinder of parties; and it assumes the existence of a suit in a proper *forum*, the Court having jurisdiction to try the suit. If the Court has such jurisdiction, O. 1 R. 3 may come into play."<sup>1</sup>

**5. "Alleged."** — The question of misjoinder of defendants in any particular case must be judged from the fact whether it is *alleged* in the plaint that there is against the defendants any right to relief arising out of the same act or transaction.<sup>1</sup> Whether that allegation is right or wrong is not a question to be considered; the question is whether upon the facts as *alleged* in the plaint and having regard to the relief asked for, there is any misjoinder.<sup>2</sup> It does not depend upon the defence set up<sup>3</sup> or on the evidence<sup>4</sup> or on the decree awarded to the plaintiff.<sup>5</sup> It is submitted that the undermentioned case,<sup>6</sup> so far as it held that the Court could go into the evidence and then hold that there was misjoinder in spite of the fact that all the necessary allegations were made in the plaint, cannot be accepted as correct.

**6. In respect of the same act or transaction.** — The word "same" preceding the words "act or transaction" applies also to the words "series of acts or transactions."<sup>1</sup>

The simplest instance of cases where any right to relief arises out of the same act or transaction occurs in suits in which the plaintiff challenges, for instance, an order or act of a Court or of an executive authority, joining several persons as defendants who claim rights under the said act or order as against the plaintiff, whether jointly, severally or in the alternative.<sup>2</sup> A right to relief cannot be said to arise out of the same act or transaction if the case against each defendant is *entirely distinct and separate* in its subject-matter from that of the other defendants.<sup>3</sup> In a

#### Note 4

1. ('22) AIR 1922 Cal 500 (501) : 49 Cal 895.  
[See also ('67) 1867 Pun Re No. 72.]

#### Note 5

1. ('05) 27 All 564 (566).
2. ('32) AIR 1932 Bom 1 (2).
3. ('19) AIR 1919 Sind 55 (56) : 13 Sind L R 133.
4. ('05) 27 All 564 (566).
5. [See ('38) AIR 1938 Mad 829 (330). (The allegations in the plaint alone should have been looked into in order to come to a finding whether a certain defendant is or is not a necessary party.)
6. ('18) AIR 1918 Cal 586 (587).]
7. ('79) 4 Cal L Rep 455 (457).
8. ('29) AIR 1929 Cal 667 (668).
9. ('78) 19 Suth W R 208 (208).
10. ('19) AIR 1919 Sind 55 (56) : 13 Sind L R 133.
11. ('87) 14 Cal 681 (686).

#### Note 6

1. ('09) 3 Ind Cas 165 (168) : 34 Bom 858.
2. ('26) AIR 1926 Sind 66 (68) : 19 Sind L R 395.
3. ('98) 23 Bom 266 (271). (Several creditors attaching property in execution of several decrees — Claim suit impleading all — Relief is in respect of same matter.)
4. (1900) 10 Mad L Jour 284 (285, 286). (Do.)
5. (1900) 27 Cal 493 (497, 499).

(('09) 2 Ind Cas 3 (4) (All)).

(('98) 1898 Bom P J 198.

(('01) 28 Cal 769 (782, 783).

(('88) 9 Cal 763 (765). (Execution sale in favour of several purchasers — Suit against, for setting aside sale.)

(('25) AIR 1925 Mad 1237 (1238).

(('04) 27 Mad 94 (97, 98).

(('25) AIR 1925 Pat 228 (232).

[See also ('34) AIR 1934 Mad 867 (870) : 57 Mad 1081. (Suit against fraudulent trustee for embezzlement of money — His several agents who had connived at breach of trust impleaded — There is no misjoinder.)]

3. ('84) 6 All 106 (108). (This case has been dis-sented from in 32 All 14 on the ground that in a suit for pre-emption the vendor is not a necessary party.)

(('30) AIR 1930 All 180 (185, 186).

(('75) 7 N W P H O R 188 (190).

(('73) 5 N W P H O R 72 (74).

(('11) 12 Ind Cas 813 (822) (Bom).

(('09) 3 Ind Cas 165 (171) : 34 Bom 858.

(('80) 5 Bom 177 (179).

(('24) AIR 1924 Cal 511 (511).

(('09) 1 Ind Cas 361 (362) (Cal).

(('74) 22 Suth W R 334 (335).

(('02) 1892 Pun Re No. 127, page. 426.



**O. 1 R. 3**  
**Note 6**

suit against *A, B, C, D* and *E*, the plaintiff alleged that certain goods belonged to him, that *A* obtained the documents of title relating thereto from the plaintiff by fraud and made them over to *B*, that *B* knowing that *A* had no title either to the document or the goods, wrongfully dealt with them and sold the goods to *C* and *D*, that *C* and *D* wrongfully claimed to retain the goods and the documents of title, that *A* pledged one of the documents of title with *E* and that the goods were in the possession of *C*. He claimed recovery of the documents of title and the goods covered thereby, or in the alternative, damages. It was held that the alleged fraud of *A* was the foundation of the case on which the rest of it depended, that it concerned all the parties and that therefore there was no misjoinder of parties.<sup>4</sup>

Where a plaintiff alleges a right against a person and sues to enforce it, other persons who claim or seek to exercise the same right in opposition to the plaintiff may be joined as defendants, because the infringement of the plaintiff's right is the transaction out of which the whole claim arises.<sup>5</sup>

In a suit for recovery of property by an owner against several persons who are alleged to have unlawfully got into possession of various parcels of land and combined to resist the right and title of the plaintiff, all such persons may be joined in one suit. The cause of the plaintiff is one and entire and cannot be affected by the title under which the defendants profess to hold. The plaintiff is entitled to claim possession of his lands as a whole and not in fragments and all persons who oppose him in the enforcement of that right are concerned in his cause of action and therefore there cannot be any misjoinder of defendants.<sup>6</sup> But if no connexion or conspiracy is alleged to exist between the various persons joined as defendants, or if it is not alleged that they acted in concert or under a common title, it cannot be said that the plaintiff's right to relief arises out of the same transaction or series of transactions and the suit will be bad for misjoinder of defendants.<sup>7</sup>

('88) 1888 Pun Re No. 189, page 487.

('04) 27 Mad 80 (82, 83).

('24) 81 Ind Cas 648 (648) (Pat).

('37) AIR 1987 Nag 99 (100) : 1 L R (1987) Nag 349. (Where the same property is mortgaged by two persons separately, the mortgagee cannot bring one suit in respect of both the mortgages against the mortgagors, inasmuch as the right to relief arises out of different acts.)

('39) AIR 1989 Lah 129 (185). (Where a suit is instituted by a vendee from a mortgagor for redemption of two properties which are the subject-matter of the mortgage, it is not possible in the redemption suit, to grant a decree for redemption to the plaintiff against the mortgagees on payment of a certain sum, and to give him a decree against his vendor for another sum charged on one of the properties of the mortgage. The two claims cannot be combined.)

[See (1900) 4 Cal W N 590 (592).]

4. ('18) AIR 1918 Cal 858 (859, 860); 45 Cal 111.

5. ('06) 29 Mad 87 (89).

('09) 24 All 858 (860).

('89) 11 All 33 (85).

('21) AIR 1921 Cal 653 (655).

('84) 10 Cal 1061 (1068, 1069).

('08) 18 Mad L Jour 265 (265, 266).

('95) 18 Mad 415 (417).

('88) AIR 1988 All 957 (958). (Suit for accounts — Defendant raising plea that accounts were

settled with plaintiff's brothers — Plaintiff's application to join brothers rejected on ground of multifariousness — Held plaintiff's application should be allowed.)

6. ('86) 18 Cal 147 (153, 154.)

('02) 29 Cal 871 (880, 881).

('79) 4 Cal L Rep 455 (458).

('78) 19 Suth W R 203 (203).

('24) AIR 1924 Nag 55 (56) : 19 Nag L R 178.

('09) 1 Ind Cas 120 (121) : 83 Bom 293.

7. ('02) 5 Cal W N 585 (588).

('18) AIR 1918 All 425 (426); 40 All 7.

('18) AIR 1918 Cal 586 (587).

('87) 14 Cal 485 (489).

('14) AIR 1914 Mad 67 (67).

('19) AIR 1919 Low Bur 121 (122).

[See also ('88) AIR 1988 Rang 420 (421, 422) : 1988 Rang L R 397. (Where a landlord sued several defendants on the ground of either breaches of tenancy agreements or trespass, it was held that the separate lettings to each tenant and separate squatting by each squatter did not constitute the same act or the same series of acts or transactions.)

('85) AIR 1985 Mad 750 (753). (Mere coincidence of number of persons doing series of acts does not amount to their acting in combination or conspiracy — They must be shown to have acted concurrently.)]



Where in a suit against a fraudulent trustee for breach of trust and embezzlement of money, all his agents who had connived at the breach of trust are also impleaded, it cannot be said that there is misjoinder.<sup>8</sup> See also the undermentioned cases<sup>9</sup> for other illustrations as to what will or will not amount to a "same" transaction or series of transactions within the meaning of this rule.

**O. 1 R. 3**  
**Notes 6-9.**

**7. "Jointly."** — In all cases of a joint liability or a joint and several liability all the persons liable may be joined as defendants.<sup>1</sup> Thus, where A and his *benamidar* B jointly execute a sale deed to C containing a joint covenant for quiet possession, and the covenant is broken, C can sue A and B for damages.<sup>2</sup>

**8. Joint tort-feasors.** — In suits on joint torts, each tort-feasor is responsible for the injury sustained by the common act and they can all be sued together.<sup>1</sup> Thus in a suit for damages for assault against A and B where the act was done simultaneously in pursuance of a conspiracy, there is no misjoinder; for, in such a case the assault is a single act or transaction.<sup>2</sup>

**9. "Severally."** — Where the plaintiff's right to relief against several persons arises out of the same act or transaction and where if separate suits were brought against them any common question of law or fact would arise, such persons may be joined in one suit as defendants though they are severally liable. Thus, in suits for contribution arising out of the same matter, all persons liable to contribute may be joined and the liability of each may be determined in proportion to his interest and provided for separately.<sup>1</sup> Similarly, a suit to set aside a revenue sale for arrears of rent against several persons each of whom had purchased different separate items of property is not bad for misjoinder, the proceeding complained of being one, and the ground upon which it is impugned being also the same.<sup>2</sup>

Where a Hindu reversionary heir sues after the death of the widow for recovery of possession of immovable property belonging to the last male owner alleged to have

8. ('84) AIR 1934 Mad 367 (870) : 57 Mad 1031.

9. ('87) AIR 1937 Rang 197 (198). (The execution of a promissory note and the subsequent guarantee of the debt on that promissory note are a series of transactions within the meaning of O. 1 R. 3, O. P. C. Hence in a suit on a promissory note the subsequent surety can be joined with the co-executants of the promissory note.)

('87) AIR 1937 Mad 192 (198). (Application by Official Assignee to set aside number of alienations made by insolvent—Alienations alleged to be outcome of one scheme of fraud and conspiracy between insolvent and alienees—Alienations held could be attacked in one application and proceeding.)

('86) AIR 1936 Cal 534 (535). (Suit to declare easement right over pathway—Every owner of servient tenement denying plaintiff's right or obstructing the pathway is necessary party—Decree obtained in the absence of any such person is infructuous.)

('88) AIR 1938 Nag 461 (468) : I L R (1939) Nag 229. (Several alienations made by Hindu father constitute the same series of acts or transactions where they are all vitiated by the same circumstance viz., that they were made for immoral purposes.)

('88) AIR 1938 Cal 405 (408, 409). (Where a

surety under a mortgage deed has paid in excess of his share, he is entitled to bring a suit for the amount paid against the principal debtor and the co-surety inasmuch as the plaintiff's right to relief against both the defendants arises from the same transaction, viz., the mortgage deed.)

#### NOTE 7

1. ('95) 19 Mad 60 (61).

('69) 12 Suth W R 354 (355). (Combining to oppose plaintiff's possession.)

('88) 11 Mad 77 (81).

('06) 9 Oudh Cas 142 (148).

2. ('96) 19 Mad 60 (61).

#### NOTE 8

1. ('11) 11 Ind Cas 504 (506) (Cal).

('07) 6 Cal L Jour 383 (390, 391).

('73) 19 Suth W R 218 (218, 219).

2. ('02) 26 Bom 259 (264).

('70) 14 Suth W R 419 (419).

#### NOTE 9

1. ('90) 12 All 110 (118, 114).

('77) 1 All 455 (456).

('78) 5 N W P H O R 215 (216, 217).

('68) 10 Beng L R 259n (261n).

('66) 8 Mad H O R 187 (188).

2. ('04) 27 Mad 94 (97, 98).

**O.1 R.3**  
**Notes 9-10**

been improperly alienated, there was a conflict of decisions under the old Code as to whether he is entitled to join all the alienees in one suit as defendants.<sup>3</sup>

In *Rup Narain v. Gopal Devi*,<sup>4</sup> a case under the old Code, their Lordships of the Privy Council doubted whether in such a case there would be any misjoinder. Under the present rule which is wider than the corresponding Section of the old Code, it is clear that such joinder is permissible.<sup>5</sup> The abovementioned principle is applicable not only to suits for possession but also to suits for mere declaration.<sup>6</sup> The cases above referred to are cases of suits by *reversioners*. But the principle will apply to suits by *junior members* of a Hindu undivided family or by members of a Malabar *tarwad* to set aside alienations, and to suits by heirs or successors-in-interest to set aside alienations by the predecessors-in-interest.<sup>7</sup> In a suit for partition of properties belonging to a joint Hindu family by a junior member against the father, it was held that the vendees and mortgagees and others who had obtained decrees against the father which were alleged to be collusive and fraudulent, were properly joined as parties.<sup>8</sup>

**10. "In the alternative."** — A suit by the transferee of a mortgage for sale against the mortgagor in which is also included a claim in the alternative for damages against the transferor, if it should appear that any portion of the debt had been discharged by the mortgagor before the transfer and so was not recoverable from the mortgagor, is not bad for misjoinder. For the right to relief arises out of the same transaction though in the *alternative*.<sup>1</sup> Similarly, in suits for rent against tenants, an *alternative* claim against the plaintiff's co-sharers or vendors can be joined, if it is alleged by the tenants that the co-sharers have received the whole or a portion of it from the tenants.<sup>2</sup> Where the plaintiff purchased certain land from A and was subsequently dispossessed by B, it was held that in a suit against B, for a declaration of

3. ('83) 7 Bom 289 (290) (No.)  
(94) 16 All 279 (281, 282). (No.)  
(09) 1 Ind Cas 120 (121) : 88 Bom 298. (Yes.)  
(10) 6 Ind Cas 577 (578) (Cal). (Yes.)  
(10) 6 Ind Cas 248 (248, 249) (Cal). (Yes.)  
(97) 24 Cal 881 (882). (Yes.)  
(99) 1899 Pun Re No. 24, page 184. (Yes.)  
(78) 7 Mad H O R 260 (462). (Yes—"Suit by a person to set aside alienations made by his father's widows during his minority.")  
(1900) 13 C P L R 9 (17). (Yes.)  
[See also ('74) 7 Mad H O R 290 (291). (Yes—"Suit against alienees from a deceased member of a Hindu joint family.")]  
(08) 80 All 560 (564). (Yes—Mahomedan daughter filing suit, as heiress of her deceased father against her brother for her share in the property—All transferees from brother also made defendants—Suit held not bad for misjoinder.)  
4. ('09) 8 Ind Cas 882 (885) : 86 Ind App 108 : 86 Cal 780 (P O). (Reversing 1905 Pun Re No. 1.)  
5. ('26) AIR 1926 Nag 816 (817).  
(14) AIR 1914 All 898 (894) : 86 All 406.  
6. ('09) 8 Ind Cas 882 (885) : 86 Ind App 108 : 86 Cal 780 (P O).  
(20) AIR 1920 Lah 19 (20) : 1 Lah 295.  
(21) 59 Ind Cas 522 (522) (Lah).  
7. ('20) AIR 1920 Lah 19 (20) : 1 Lah 295. (Joint Hindu family.)  
(92) 16 Mad 19 (22). (Malabar tarwad.)  
(89) 12 Mad 284 (285). (Do.)

- (88) 11 Mad 106 (111). (Do.)  
(07) 29 All 267 (271, 272). (Heir.)  
(16) AIR 1916 Bom 810 (311) : 40 Bom 851. (Do.)  
(18) AIR 1918 Lah 184 (185) : 1918 Pun Re No. 59.  
(11) 10 Ind Cas 48 (48) (Lah).  
(11) 9 Ind Cas 588 (588) (Lah).  
(28) AIR 1928 Mad 820 (820). (Suit by adopted son to set aside alienations of adoptive mother.)  
(26) AIR 1926 Mad 911 (912, 918) : 49 Mad 836 (FB). (Suit by receiver of temple properties to set aside alienations of prior trustee.)  
(88) AIR 1938 Nag 401 (468) : I L R (1938) Nag 229. (Suit by sons against father and his creditors for declaration that debts incurred by father are immoral and hence not binding on them.)  
[See however ('81) 1881 All W N 172 (172).]  
8. ('22) AIR 1922 Mad 382 (388) : 45 Mad 194.

#### Notes 10

1. ('08) 81 Mad 252 (254, 256, 257).  
(10) 7 Ind Cas 69 (69) (All).  
[See also ('11) 12 Ind Cas 857 (858, 859) : 7 Nag L R 130. (Mortgage in favour of A and B—A bringing suit against mortgagor and B—Claim against B in the alternative—There is no misjoinder.)]  
(10) 8 Ind Cas 1087 (1087, 1088) : 85 Mad 89.]  
2. ('19) AIR 1919 Cal 908 (904).  
(18) AIR 1918 Cal 818 (818, 814).  
(17) AIR 1917 Cal 867 (868).  
(07) 6 Cal L Jour 190 (196).

his title, the plaintiff could also join *A* as defendant praying for the refund of purchase money if it be found that *B* is the owner.<sup>3</sup> Where the plaintiff filed a suit for recovery of money against two defendants alleging that one of them was his agent and had lent the other the suit amount and prayed for a decree against the other if the loan was true or, in the alternative, against the agent if he did not advance the loan, it was held that the suit was not bad for misjoinder of defendants.<sup>4</sup> See also the undermentioned cases.<sup>5</sup> In cases where it is doubtful which of the two defendants is liable to the plaintiff, both of them may be joined in one suit with a claim for alternative relief.<sup>6</sup> See Rule 7, *infra*.

O. 1 R. 3  
Notes 10-13

**11. Award of costs in claims of alternative reliefs.** — See Section 35, Note 9, *supra*.

**12. Ancillary reliefs.** — Where there is one cause of action against some defendants and the relief claimed against the other defendants is only *ancillary* to the relief to be given to the plaintiff and not in respect of a distinct and separate cause of action, the suit is not bad for misjoinder.<sup>1</sup> For example, where *A* and *B* are co-sharers of certain lands in the possession of *C* and *D* and *A* sues *B*, *C* and *D* claiming to eject *C* and *D* from his share, and for partition of his share as against *B*, the claim against *B* is merely *ancillary* to the relief claimed as against *C* and *D* which cannot be properly worked out without a partition of *A*'s share. For this purpose *B* may be properly joined as a party to the suit.<sup>2</sup>

**13. Separate trials.** — It has been already seen in Note 2 above that a plaintiff is entitled under this rule to join several defendants in respect of several causes of action arising out of the same act or transaction or series of acts or transactions. Though O. 1 R. 2 applies in terms only to the joinder of plaintiffs and there is no corresponding rule in regard to the joinder of defendants, it has been held both in England and India that the principle of that rule is applicable to the case of the joinder of defendants also.<sup>1</sup> If the trial of the suit is likely to be embarrassing owing to a

(‘86) 12 Cal 555 (557).

(‘09) 4 Ind Cas 34 (34) (Mad).

3. (‘02) 29 Cal 257 (259).

(‘82) 8 Cal 963 (965, 966).

4. (‘06) 29 Mad 50 (51).

[See also (1877) 5 Ch D 695 (701, 702), *Child v. Stenning*. (Plaintiff taking land on lease from *W* — *S* already in possession of lease-hold as *W*'s tenant—Plaintiff suing *S* and *W* claiming possession from *S* and also making alternative claim against *W* for damages—Joinder of *S* and *W* held not bad.)]

5. (‘71) 7 Mad H C R 123 (127). (Suit against *A* for a sum of money—*A* pleading payment of part to *B*—Joinder of *B* as a defendant is not improper.)

(‘88) AIR 1938 All 147 (149). (Suit against agent for premium collected from lessee—Plea that part of premium was paid by lessee direct to lessor—Joinder of lessee claiming sum in the alternative.)

(‘26) AIR 1926 Mad 185 (186). (Suit against debtor—Liability of his transferee can be tried in the suit.)

(‘81) AIR 1981 Nag 20 (23) : 26 Nag L R 359. (Suit against *B* on mortgage—*B* denying plaintiff's title and also pleading discharge by pay-

ment to *A*—*A* may be impleaded and claim of alternative relief against *A* is in proper form.)

(‘07) 81 Bom 516 (522). (Suit by owner of godown against two sets of defendants claiming rent from either of them.)

(‘84) AIR 1934 Cal 405 (405). (Suit against pleader for wrongful act of substitution of plaintiff as defendant in another suit—Pleader pleading authority of plaintiff's naib and patwari—Common question arising if suits brought separately against pleader, naib and patwari—Naib and patwari should be impleaded in a suit against pleader.)

6. (‘82) 8 Cal 170 (173).

(‘28) AIR 1928 Bom 91 (94, 95).

(‘09) 4 Ind Cas 312 (313) (Mad).

#### Note 12

1. (‘88) AIR 1938 Rang 420 (422) : 1938 Rang L R 397.

2. (‘06) 29 Mad 29 (31, 32).

#### Note 13

1. (‘28) AIR 1928 Cal 199 (201, 202) : 55 Cal 164. (1921) 2 K B 1 (15), *Payne v. British Time Recorder Co.*

[See (‘26) AIR 1926 Sind 66 (68) : 19 Sind L R 359.]

3CPC. 80.



**O. 1 R. 3** variety of defences the Court may order separate trials or make such other order as may be expedient.<sup>2</sup>  
**Notes 13-15**

**14. Appeal.** — If in any suit the Court holds that it is bad for misjoinder of defendants and orders the plaintiff to elect to proceed against some only, the order is a 'judgment' within the meaning of Clause 15 of the Letters Patent and an appeal lies therefrom. For, the order is in substance a decision that the suit as framed does not lie and the suit will have to be dismissed if the plaintiff does not comply with the order.<sup>1</sup>

**15. Classes of cases illustrating the above principles.** — See Notes to Order 1 Rule 10.

**O. 1 R. 4** Court may give judgment for or against one or more of joint parties.

**R. 4.** [Ss. 26, 28.] Judgment may be given without any amendment —

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

[1877, Ss. 26, 28.]

**1. Scope of the Rule.** — Clause (a) of this rule must be read with O. 1 R. 1. Where several persons *in whom any right to relief is alleged to exist* join together as plaintiffs in a suit, but it is found that only some of them are entitled to relief, a judgment may, under this rule, be given for such relief in favour of such persons.<sup>1</sup> Thus, where four members of an undivided family sued the widow of a deceased coparcener for possession of certain properties, but the Court found that only *one* of these was entitled to relief, it was held that judgment was properly given in his favour without any amendment.<sup>2</sup> But where *no right to relief is alleged to exist in one of several plaintiffs* and one plaintiff alone is found, as a matter of fact, to be entitled to relief, this rule will not apply, and judgment cannot be given in his favour without amendment. Thus, where *A* and *B* sue *C* on the allegation that *A* alone is entitled to relief and that *B* is added merely as a *pro forma* party, but *B* alone is found to be entitled to relief, judgment cannot be given in his favour without amendment.<sup>3</sup>

Clause (b) of this rule must, similarly, be read with O. 1 R. 3. Where several defendants have been impleaded under O. 1 R. 3 but some of them alone are really

[See also ('84) AIR 1984 Mad 867 (372) : 57 Mad 1081. (When a Court is of the opinion that a suit is bad for multifariousness it ought to give the plaintiff an opportunity to amend his plaint and to elect—The suit ought not to be dismissed.)]

2. ('09) 1 Ind Cas 120 (121) : 38 Bom 298. (Difficulty arising from variety of defences held could be cured by the successive trial of issues separately affecting different defendants.)

('18) AIR 1918 Lah 184 (185) : 1918 Pun Re No. 59. (Do.)

('11) 10 Ind Cas 48 (48) (Lah). (Do.)

('28) AIR 1928 Cal 199 (202) : 55 Cal 164.

('88) AIR 1988 Nag 461 (463) : I L R (1989) Nag 229.

Notes 14

1. ('18) AIR 1918 Cal 858 (861) : 45 Cal 111.

Order 1 Rule 4 — Note 1

1. ('27) AIR 1927 Oudh 484 (485) : 8 Luck 241.

2. ('05) 28 Mad 500 (508).

[But see ('85) 7 All 860 (862). (*A* and *B* claiming joint right against *O—B* having no right at all—*Held, A* cannot be given relief without amendment.)]

3. ('29) AIR 1929 Bom 51 (58).

found to be liable, judgment may, under this rule, be given against them without any amendment, according to their respective liabilities.<sup>4</sup>

O. 1 R. 4  
Note 1

An unsuccessful defendant, at whose instance another defendant is added as a party, may be made liable to pay the costs of the successful defendant.<sup>5</sup>

Defendant need not be interested in all the relief claimed.

**R. 5. [New.]** It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

O. 1 R. 5

[R. S. C., O. 16 R. 5.]

**1. Scope of the Rule.** — A suit which is otherwise properly constituted shall not be bad for misjoinder merely because the defendants are not *equally* interested in the relief claimed in the suit.<sup>1</sup> Thus, a suit for accounts against *A* and *B* as agents is not necessarily bad for misjoinder merely because the plaintiff may ask for accounts as against *A* from 1265 to 1283 *fasli* and as against *B* from 1281 to 1283.<sup>2</sup> Similarly, a suit is not bad for misjoinder merely because the relief claimed as against some of the defendants is only *ancillary* to the main relief claimed in the suit.<sup>3</sup>

**R. 6. [S. 29.]** The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract.

O. 1 R. 6

[1877, S. 29; R. S. C., O. 16 R. 6.]

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. Joint liability.</li> <li>3. Several liability.</li> <li>4. Joint and several liability.</li> <li>5. Suit against one of several partners.</li> </ol> | <ol style="list-style-type: none"> <li>6. Where decree against one co-contractor precludes suit against other co-contractors.</li> <li>7. "Any one contract."</li> <li>8. Suits on bills of exchange, hundis and promissory notes.</li> </ol> |
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### Other Topics (miscellaneous)

"At his option." See Notes 3 and 4.

Parties in partnership suits. See Note 4 and O. 1 R. 10 Note 15.

4. ('95) 1895 All W N 28 (24).

('79) 4 Cal 949 (953).

[See ('17) AIR 1917 Sind 98 (95) ; 10 Sind L R 29.]

[See also ('89) AIR 1989 Pat 196(198):12 Pat 216.]

5. ('79) 11 Ch D 82 (86), Child v. Stenning. (Cited in 10 Cal 445.)

#### Order 1 Rule 5 — Note 1

1. ('07) 81 Bom 516 (522).

('09) 84 Bom 858 (868).

('11) 10 Ind Cas 515 (520) : 1911 Pun Re No. 46.

('24) AIR 1924 Nag 55 (56) : 19 Nag L R 178.

(Suit for possession against several defendants asserting titles to different portions of the land is not bad.)

('38) AIR 1938 Nag 461 (463). (Order 1 R. 5 is to be read with O. 1 R. 3.)

2. ('81) 7 Cal 654 (658).

3. ('06) 29 Mad 29 (31).

See also Note 12 to Order 1 Rule 8 above.

**Q. 1 R. 6**  
**Notes 1-4**

**1. Scope of the Rule.** — This rule is applicable only to suits on *contracts* including bills of exchange, hundis and promissory notes. The liability on a contract may be a *joint* one or a *joint and several* one or a *several* one. Where *A* becomes liable under a promise and after his death the liability survives to his heirs *B*, *C* and *D*, the liability of the latter is a *joint and single* one.<sup>1</sup> Where *A* and *B* *jointly* make a promise to pay a certain amount to *C*, each of them also *severally* undertaking to pay that amount, it is a case of a *joint and several liability*. Where *A* and *B*, each for himself, agree to pay a certain amount to *C*, it is the case of *several liability*. This rule deals with cases of *several liability* and cases of *joint and several liability*, the legal consequences of both kinds of liability, so far as this rule is concerned, being the same.

**2. Joint liability.** — As has been seen in Note 1 above, a liability is joint if on the death of one of the joint promisors the liability becomes the liability of the surviving promisors and no liability devolves upon the heirs or legal representatives of the deceased promisor; *survivorship* is the distinguishing mark of a joint contract; where therefore there is no *survivorship* and the liability extends beyond the surviving debtors to the estate of a deceased debtor, the liability is presumably joint and several.<sup>1</sup> Judged by this test the liability of *A* and *B* under a *joint* promise to pay *C* a certain sum of money is a *joint and several* one inasmuch as under Section 42 of the Indian Contract Act, 1872, it is provided that where two or more persons have made a *joint* promise, then unless a contrary intention appears by the contract, all such persons during their joint lives and after the death of any one of them *his representative*, jointly with the survivor or survivors must fulfil the promise. There has, however, been a conflict of views on the point. It was held in the undermentioned cases<sup>2</sup> that a *joint* promise by *A* and *B* creates under Section 43 of the Contract Act, a *joint and several liability*. A contrary view has been expressed in the two cases noted below.<sup>3</sup> It is submitted that the former view seems to be the correct one.

**3. Several liability.** — The rule provides that the plaintiff may at his option join in one suit all or any of the persons severally liable under a contract. Thus, where, by one contract *each* of two persons *A* and *B* agrees to pay a certain sum of money to *C*, *A* and *B* are severally liable under the contract and *C* can, under this rule, either sue *A* and *B* jointly or can bring separate and successive suits against them.

**4. Joint and several liability.** — It has been seen in Note 2 above how a *joint* liability is different from a *joint and several liability*. Where under this rule the plaintiff sues one or some of the persons jointly and severally liable, the latter have no right to insist on the joinder of the other promisors so liable as parties to the suit.<sup>1</sup> But this rule is confined to liability arising out of *contracts*. As will be more fully discussed

**Order 1 Rule 6 — Note 1**

1. ('02) 25 Mad 26 (32 to 35).
- (21) AIR 1921 Cal 534 (535). (Representatives of a tenant constitute one body, liable for the whole rent.)
- [But see ('26) AIR 1925 Cal 1056 (1058) : 53 Cal 197 (FB).]

**Note 2**

1. ('18) AIR 1918 Cal 512 (516).
2. ('98) 17 Bom 6 (11).
- (1900) 22 All 807 (816, 819).
- ('18) AIR 1918 Cal 512 (518).
- ('10) 6 Ind Cas 887 (887) (Cal).
- ('10) 5 Ind Cas 785 (786) : 38 Mad 817.

[See also ('06) 88 Cal 580 (582). (22 All 480 distinguished.)]

('83) AIR 1933 Bom 407 (408).]

3. ('78) 3 Cal 853 (359, 360).
- ('17) AIR 1917 Bom 268 (273).

**Note 4**

1. ('92) 1892 Pnn Re No. 11, p. 39.
- ('38) AIR 1938 Nag 324 (326).
- ('34) AIR 1934 Pesh 94 (95).
- (1900) 22 All 807 (815, 816).
- ('01) 25 Bom 378 (386).
- ('96) 28 Cal 554n (555n). (Defendants promised to pay the amount separately and defendant 1 actually paid his share.)

under Rule 10 *infra*, where the liability is a *joint* one but is not *contractual*, it cannot be enforced without joining as defendants all the persons jointly liable.

In England the defendants can insist, even in cases of contracts, on the joinder of the other joint promisors as parties to the suit.<sup>2</sup>

**O. 1 R. 6**  
**Notes 4-6**

**5. Suit against one of several partners.** — Section 43 of the Contract Act applies to contracts entered into with firms or partnerships. Hence, by virtue of O. 1, R. 6 a plaintiff in enforcing such a contract is not bound to implead all the members of a firm as defendants, but is entitled to sue, as he chooses, one or more of them, for the performance of the entire contract.<sup>1</sup>

**6. Where decree against one co-contractor precludes suit against other co-contractors.** — *A* and *B* jointly promise to pay *C* a certain sum of money. *C* sues *A* separately and obtains a decree. He then executes the decree against *A* and the decree is satisfied. He cannot subsequently sue *B* on the same contract; because, having realized what was due to him under the contract, he has no longer any rights under it. But supposing the decree against *A* remains *unsatisfied* or is only *partially satisfied*, can *C* bring a separate suit against *B* for the amount remaining due to him under the contract? On this question there is a conflict of decisions. It has been held by the High Courts of Calcutta<sup>1</sup> and Madras<sup>2</sup> that such a suit is barred. These decisions are based on the view that the contract gives rise to but one *cause of action* and when once that cause of action is sued on and a judgment is obtained on it, the cause of action merges in the judgment and the plaintiff has no longer any cause of action against the other co-promisor. As regards the argument based on Section 43 of the Contract Act, *viz.*, that the plaintiff can under that Section sue, as he chooses, one or more of the joint promisors, it was said that the Section merely deprives a defendant of the right of being sued along with his joint promisors but does not operate to convert a *single* cause of action into several causes of action, so as to enable the plaintiff to file separate actions against both. On the other hand, it has been held by the Allahabad High Court<sup>3</sup> that a fresh suit against *B* is not barred under such circumstances, on the ground that Section 43 of the Contract Act makes the joint liability of a co-promisor *joint and several*, and also on the ground that, inasmuch as the present rule deprives the defendants of their right to insist on their co-promisors being joined as parties, the plaintiff gets a larger right of bringing separate suits against the promisors. The High Court of Bombay has also recently held that a fresh suit is not barred.<sup>4</sup>

It is submitted that neither of the grounds relied on can be accepted as leading to the conclusion arrived at by the Allahabad High Court. That the liability under a joint promise by *A* and *B* is joint and several does not affect the *singleness of the cause of action*. Nor can the deprivation of certain rights of the *defendants* give the *plaintiff* any additional right. The same observations will apply to the decision in the undermentioned case of the Calcutta High Court in which it was held that when the

(‘78) 3 Cal 353 (360).

2. (1918) 2 K B 369 (376), *Norbury Notzlo v. Griffiths*. (It is sufficient that the defendant makes out a reasonable and probable case of joint contract.)

(1879) 4 App Cas 504 (515, 516), *Kendall v. Hamilton*.

[See also (‘18) AIR 1918 Cal 512 (513).]

**Note 5**

1. (‘82) 6 Bom 700 (702).

(‘92) 17 Bom 6 (11).

(‘02) 1902 Pun Re No. 37, p. 139.

(‘98) 21 Mad 256 (257).

(‘02) 15 O P L R 51 (52).

**Note 6**

1. (‘78) 3 Cal 353 (359, 360).

2. (‘82) 5 Mad 87 (44).

(‘85) 8 Mad 376 (378). (S. 43, Contract Act, not considered.)

3. (1900) 22 All 307 (315, 316, 317).

4. (‘88) AIR 1938 Bom 407 (408). (Dissenting from A I R 1917 Bom 268 and 24 Bom 77.)



**O. 1 R. 6**  
**Notes 6-8**

obligation is *joint and several* an unsatisfied decree against one of the promisors is not a bar to an action against the others.<sup>5</sup>

Suppose *O* sues *both A and B* (joint promisors), but *A* consents to a judgment against him, can *O* thereafter prosecute the suit against *B* alone. It has been held by the Bombay High Court that *O* can do so,<sup>6</sup> on the ground that the doctrine in *King v. Hoare*<sup>7</sup> "which laid down that judgment recovered against a joint promisor was a bar for a further action in respect of the same liability against the other joint promisors" ought not to be applied to the prosecution of an action *already instituted*.

**7. "Any one contract."** — The rule only applies where the defendants are liable on the *same* contract. It does not apply where the defendants are liable on *different* contracts.<sup>1</sup>

**8. Suits on bills of exchange, hundis and promissory notes.** — The drawer and the acceptor of a bill of exchange can be joined as co-defendants in a suit brought by the holder of the bill.<sup>1</sup> But suppose *A* draws a bill of exchange payable at sight on *B* and the latter, on presentation, refuses to accept it. In such a case, the holder of the bill has no cause of action against *B* and cannot add *B* as a co-defendant with *A*.<sup>2</sup>

This rule does not say that any party *must* be joined as a co-defendant to a suit on a bill or *hundi*. But this does not obviate the need for joining a person who may, in the circumstances of the case, be a *necessary* party.

Thus, where the endorsee sues the endorser for renewal of a lost cheque, the drawer also must be impleaded as the cheque cannot be renewed without his co-operation.<sup>3</sup>

It must be remembered that the rule is only one of *procedure*. It merely enables the holder of a bill to sue all the parties in one action. It does not in any way affect the liabilities of the parties. Hence, where the holder of a bill of exchange sues the drawer, the acceptor and the endorser, the decree cannot provide that the endorser should be exempt from liability until the plaintiff has exhausted his remedies against the drawer and the acceptor.<sup>4</sup>

**O. 1 R. 7****R. 7. [New.]** Where the plaintiff is in doubt as to the

When plaintiff in doubt  
from whom redress is to  
be sought.

person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

[R. S. C., O. 16 R. 7.]

5. ('80) 5 Ca. 291 (293, 294).  
6. ('17) AIR 1917 Bom 268 (278).  
(‘01) 25 Bom 378 (386).  
7. (1844) 14 L J Ex 29.

Note 7  
1. ('28) AIR 1928 Cal 490 (491).

Note 8  
1. ('78) 3 Cal 541 (541).  
(‘78) 1 All 892 (895).

(‘67) 3 Agra 268 (268). (Endorser alone may be sued.)

(‘14) AIR 1914 Lah 405 (406). (Hundi dishonoured—Suit against endorser — Drawer was added as co-defendant.)

(1880) 6 App Cas 1 (11), *Duncan Fox and Co. v. N. and S. W. Bank*.

2. ('78) 3 Bom 182 (183).

3. ('80) 2 All 754 (755).

4. ('89) 16 Cal 804 (805, 806).



## Synopsis

**O. 1 R. 7**  
**Notes 1-2**

1. Scope of the Rule.
2. Costs of suit where relief is claimed against defendants in the alternative. See Note 9 to Section 85.

**1. Scope of the Rule.** — This rule enables the plaintiff to bring one suit against a number of persons in the alternative where he is in *doubt* as to which of them is liable to him.<sup>1</sup> The following are instances of cases in which a plaintiff may sue several defendants in the alternative under this rule —

(1) A plaintiff can sue two persons as defendants to recover from either the one or the other, a sum of money by way of rent for a godown when he is in doubt as to which of the two owes the rent.<sup>2</sup>

(2) A sues B for a sum of money lent to B by C, A's agent. B denies the loan but C maintains he made the loan. A, in such a case, may join C as a co-defendant in the suit praying for relief against him in the alternative.<sup>3</sup>

(3) Plaintiff alleged that both the first and second defendants claimed a charge for the use of certain water and prayed that the Court should determine which of the defendants was entitled to the charge, and that the other should be restrained from interfering with the plaintiff, and compelled to refund the charges he had already collected. *Held*, there was no misjoinder.<sup>4</sup>

It should be noted that *ex hypothesi* where a plaintiff sues different persons in the alternative, *all* of them cannot be made liable. Where therefore judgment is obtained for part of a debt against one of the two defendants sued alternatively, the plaintiff cannot, it is submitted, proceed against the other for the balance of the debt.<sup>5</sup>

**2. Costs of suit where relief is claimed against defendants in the alternative.** — See Note 9 to Section 35.

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**•R. 8. [Ss. 30, 32.]** (1) Where there are numerous persons<sup>3</sup>

**O. 1 R. 8**

One person may sue or defend on behalf of all in same interest.

having the same interest<sup>8</sup> in one suit, one or more of such persons may, with the permission of the Court,<sup>10</sup> sue or be sued,<sup>14</sup>

or may defend,<sup>15</sup> in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit<sup>16</sup> to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

### Order 1 Rule 7 — Note 1

1. (1888) 21 Q B D 830 (838), *Massey v. Hegnes*.  
(1908) 2 K B 538 (541), *Sanderson v. Blyth Theatre Co.*  
(1877) 2 Ex D 801 (808), *Honduras, etc., Co. v. Lefevere and Tucker*.  
(196) 19 Mad 211 (218).  
(196) 29 Mad 50 (51).  
2. (1907) 81 Bom 516 (522, 523).

- (1877) 5 Ch D 695 (701, 702), *Child v. Stenning*.  
(192) 8 Cal 170 (178).  
[See also (193) 20 Cal 285 (291).]  
3. (1906) 29 Mad 50 (51).  
(1928) AIR 1928 Bom 91 (94, 95).  
4. (1909) 4 Ind Cas 312 (318) (Mad).  
5. (1904) 1904 App Cas 11 (14), *Morel Brothers v. Wesmoreland*.  
(1908) 2 K B 674 (676), *French v. Hourie*.

**O. 1 R. 8**  
**Notes 1-2**

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party<sup>18</sup> to such suit.

[1877, Ss. 30, 32. *Cf.* R. S. C., O. 16 R. 9.]

a. This rule has no application to suits concerning the Tirumalai-Tirupati Devasthanams : see the Tirumalai Tirupati Devasthanams Act (Madras Act 19 of 1938), Section 44 (2).

### Local Amendment

#### CALCUTTA

In sub-rule (1) for the first sentence commencing with the words "where there are" and ending with "persons so interested," *substitute* the following —

"Where there are numerous persons having the same interest in one suit, the Court may direct that one or more such persons may sue or be sued, or may defend, in such suit, on behalf of, or for the benefit of, all persons so interested."

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and object of the Rule.</li> <li>3. Numerous persons.</li> <li>4. Clubs and other associations.</li> <li>5. Suit to set aside fraudulent transfers.</li> <li>6. Suit by a member of a community in his own right.</li> <li>7. Suit to establish or negative a public right.</li> <li>8. Having the same interest.</li> <li>8a. Matters in respect of which representative suit can be brought.</li> <li>9. Representative suit for damages not maintainable.</li> <li>10. With the permission of the Court.</li> <li>11. At what stage of suit permission is to be granted.</li> <li>12. Form of permission.</li> </ol> | <ol style="list-style-type: none"> <li>13. Who may apply for permission.</li> <li>14. May be sued.</li> <li>15. "May defend."</li> <li>16. Notice of the institution of the suit.</li> <li>17. Title of suit.</li> <li>18. Addition of parties.</li> <li>19. Suit in the name of wrong plaintiff.</li> <li>20. Addition of parties after decree.</li> <li>21. Decree in a representative suit.</li> <li>22. Costs in representative suit.</li> <li>23. Compromise of representative suit.</li> <li>23a. Withdrawal of representative suit. See O. 23 R. 1 Note 19a.</li> <li>24. Abatement of suits and appeals.</li> <li>25. Applicability of rule to arbitration proceedings.</li> <li>26. Revision.</li> </ol> |
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### Other Topics (miscellaneous)

Binding effect of decree in representative suits. See Note 21.

Object of notice. See Note 16.

Permission to be given to definitely named persons. See Note 12.

Permission whether should be express. See Note 12.

**1. Legislative changes.** — The first paragraph of this rule corresponds to Section 30 of the Code of 1882 and the second paragraph corresponds to the fourth paragraph of Section 32 of that Code. The alterations effected are not very material.

**2. Scope and object of the Rule.** — The general rule is that all persons interested in a suit ought to be joined as parties to it, so that the matters involved may be finally adjudicated upon and fresh litigation over the same matters may be avoided.<sup>1</sup> The present rule forms an exception to this general rule. It provides that where a number of persons are similarly interested in a suit one or more of them can, with the permission of the Court, sue or be sued on behalf of themselves and such others. The rule is one of convenience based upon reason and good policy and saves the trouble

#### Order 1 Rule 8 — Note 2

1. (1900) 1 Low Bur Rul 252 (254).  
(1909) 4 Ind Cas 286 (240) : 5 Nag L R 152.

(197) AIR 1937 Bom 288 (289) : I L R (1937) Bom 826.

(1984) AIR 1984 Rang 847 (848).

and expense which would otherwise have to be incurred in such cases.<sup>3</sup>

The conditions for the applicability of this rule are —

- (1) the parties must be *numerous*,
- (2) they must have the *same interest* in the suit,
- (3) the *Court's permission* under the rule must be obtained, and
- (4) *notice* must be given to the parties whom it is proposed to represent in the suit.

The rule is taken from O. 16 R. 9 of the Rules of the Supreme Court which runs as follows:

"Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested."

It will be seen that the chief distinction between the Indian rule and the English rule is that under the latter permission is necessary only for *defending* a suit on behalf of others and not for suing or being sued.<sup>3</sup>

Under this rule, the same suit may be a representative one both as regards the plaintiffs and as regards the defendants.<sup>4</sup>

Where, under the *substantive law* itself a person is entitled to represent a body of persons having the same interest in a certain matter and sue on behalf of such body, he can do so without following the procedure laid down in this rule.<sup>5</sup> See Note 21, *infra*.

It has been held by the Bombay High Court that the rule can be applied to *applications* which are in the nature of suits.<sup>6</sup>

The rule does not apply when a special procedure is prescribed by any local or special enactment.<sup>7</sup>

**3. Numerous persons.** — The first essential for the application of this rule is that *numerous* persons should be interested in the suit. The rule does not fix any limit to the number.<sup>1</sup> In one case, it was held that the rule contemplates the case of parties too numerous to be conveniently made parties to the suit.<sup>2</sup> In another case, a hundred persons were held to be "numerous" within the rule.<sup>3</sup> And in an English case<sup>4</sup> it was held that thirty defendants were "numerous."

It is not necessary that the number should be *capable of ascertainment*.<sup>5</sup> A suit is therefore maintainable on behalf of a fluctuating body, *e. g.*, the inhabitants of

2. ('83) 5 All 602 (605).

('82) AIR 1982 Bom 65 (68).

('04) 28 Bom 209 (213, 214).

('97) 24 Cal 385 (390).

('82) AIR 1982 Mad 163 (164).

('23) AIR 1923 Mad 276 (277).

(1900) 23 Mad 28 (31, 32).

('66) 8 Mad H C R 226 (229).

('16) AIR 1916 Pat 26 (27).

('85) AIR 1985 Cal 418 (416).

('87) AIR 1987 Bom 238 (240) : I L R (1987) Bom 826.

('86) AIR 1986 Bom 250 (255) : 60 Bom 645.

3. ('88) 9 Cal 604 (606, 607).

4. ('85) AIR 1985 Mad 542 (543).

5. ('89) AIR 1989 Mad 751 (753). (Karnavan of Malabar tarwad need not obtain leave of Court to sue on behalf of tarwad.)

6. ('36) AIR 1936 Bom 250 (255) : 60 Bom 645. (Application to set aside award under S. 14, Arbitration Act, is such application.)

7. ('88) AIR 1988 Lah 369 (389) (F B). (Per Bhide, J.—Punjab Sikh Gurdwaras Act of 1925, S. 5 — Petition under — O. 1 R. 8 not applicable—Per Din Mohammad, J.—Special Tribunal under Act is not exempt from O. 1 R. 8.)

#### Notes 3

1. ('87) AIR 1987 Bom 238 (241) : I L R (1987) Bom 826. (Whether persons interested are numerous or not is a question of fact.)

2. ('80) 2 Mad 328 (332).

3. ('29) AIR 1929 Mad 44 (45).

4. (1888) 1888 W N 102 (103), *Andrews v. Salmon*.

5. ('88) AIR 1988 Lah 749 (751) : 15 Lah 123.

**O. 1 R. 8**  
**Notes 3-5**

a town<sup>6</sup> or village;<sup>7</sup> the members of a defined<sup>8</sup> sect<sup>9</sup> or caste<sup>10</sup> or class<sup>11</sup> or the followers of a particular religion, like the Mahomedan community<sup>12</sup> or the Hindu community.<sup>13</sup> In this connexion it may be pointed out that a fluctuating body like a village community can own property<sup>14</sup> or even be a promisee under a contract.<sup>15</sup>

But a suit is not maintainable on behalf of the *public in general*.<sup>16</sup> This is not because the number of persons forming the public is not capable of ascertainment but because of the principle that there can be no private actions for public wrongs.

A suit on behalf of the whole Hindu community is not impeachable on the ground of the number being incapable of ascertainment. The contrary view of the Calcutta High Court in the undermentioned case<sup>17</sup> has been dissented from in later decisions of the same High Court.<sup>18</sup> But such a suit may be open to attack on another ground, namely, that the parties cannot have the "same interest" in such a case. See Note 8 below.

**4. Clubs and other associations.** — Bodies of persons may be registered under the Companies Act and may be authorised under the law to sue and be sued through one of their members or officers. But in the case of unincorporated associations like clubs, etc., the secretary or other officers of the club cannot sue or be sued except by obtaining permission under this rule,<sup>1</sup> even though he or they may have been authorised by a resolution of the association to sue or to defend a suit.<sup>2</sup>

**5. Suit to set aside fraudulent transfers.** — A suit to set aside a transfer of immovable property on the ground that it is in fraud of the creditors of the transferor

6. ('27) AIR 1927 Lah 196 (197).

7. ('21) AIR 1921 Cal 405 (406).

('13) 18 Ind Cas 67 (68, 69) (Cal).

('02) 29 Cal 100 (103, 104).

('94) 21 Cal 181*n* (181*n*).

('99) AIR 1929 Mad 44 (45). (100 Villagers were interested in this case.)

8. ('06) 33 Cal 905 (912).

9. (1900) 22 All 269 (269). (Sect known as Niranjini Akhara.)

('04) 31 Cal 899 (845). (Digambari sect of Jains.)

('94) 21 Cal 180 (182). (Jain Sitambari sect.)

(1900) 23 Mad 28 (30, 31). (Thengalai sect at Triplicane.)

10. ('06) 33 Cal 905 (911, 912, 913). (Satchasi community.)

('92) AIR 1932 Bom 122 (125) : 56 Bom 242 (FB).

11. ('95) 19 Bom 391 (398, 399). (Raiyats of a village.)

('83) AIR 1933 Lah 749 (751) : 15 Lah 123. (Suit on behalf of Zamindar Sabha, Lahore.)

12. ('82) 8 Cal 32 (41). (Worshippers at a mosque.)

('13) 18 Ind Cas 797 (798) : 35 All 197.

13. ('06) 33 Cal 905 (911).

14. ('20) AIR 1920 Mad 246 (248).

('88) 12 Mad 241 (248) : 16 Ind App 48 (P O).

('04) 28 Bom 276 (283, 284).

('04) 28 Bom 20 (49, 50).

('90) 14 Bom 218 (221). (Right of pasturage belonging to a village community.)

('20) AIR 1920 Cal 245 (248). (Dhobi community of Narinda.)

('28) AIR 1928 Mad 434 (434). (Vysia community of Mogarale.)

15. ('23) AIR 1923 Mad 434 (434). (Vysia community.)

('18) AIR 1918 P O 154 (156) : 1919 Pun Re No. 82 (P O).

16. ('86) 9 Mad 463 (466).

('81) AIR 1931 Pat 418 (419) : 10 Pat 568.

[See however the observations in ('34) AIR 1934 Cal 845 (847, 848).]

17. ('93) 20 Cal 897 (407, 408).

18. ('06) 33 Cal 905 (911).

[See also ('20) AIR 1920 Cal 245 (248).]

**Note 4**

1. ('17) AIR 1917 Low Bur 36 (37). (Office of unregistered company.)

('07) 4 All L Jour 541 (543). (Manager of unregistered religious society.)

('84) 6 All 284 (285). (Secretary of Mahomedan Association of Meerut.)

('29) AIR 1929 Cal 445 (447). (Secretary of Brahma Samaj.)

('10) 7 Ind Cas 868 (869) (Mad). (Suit by trustee — Many others interested in suit — O. 1 R. 8 should be followed.)

('78) 2 Mad 200 (201). (In a suit brought for the dismissal of a Dharmakarta, all the members of the District committee should join as parties.)

[See also ('25) AIR 1925 Sind 244 (245) : 18 Sind L R 93 (O. 1 R. 8 held not applicable).]

2. ('22) AIR 1922 Bom 109 (110) : 46 Bom 182. (Suit to eject tenants from caste property — Plaintiff authorised by resolution of caste.)

('98) 22 Bom 729 (730).

('91) 14 Mad 863 (863).

[See also ('87) AIR 1937 Bom 288 (241) : I L R (1937) Bom 396. (In case of unregistered association ordinary rule is to sue the members

must be brought by or on behalf of all the creditors. Such a suit cannot be brought by some only of the creditors for their benefit alone.<sup>1</sup> But where the defendant does not raise any objection in the trial Court to the frame of the suit and elects to allow the suit to be heard on the merits, he cannot afterwards raise the objection at the appellate stage.<sup>2</sup>

**6. Suit by a member of a community in his own right.** — This rule is only an enabling provision. It does not debar any member of a community from maintaining a suit in his own right although the act complained of injures other members of the community as well.<sup>1</sup>

#### Illustrations

1. Where every member of the community had an *individual* right to perform religious rites on a certain platform and the defendants raised a masonry structure on the platform, it was held that any member of the community could sue for the removal of the structure.<sup>2</sup>

2. The worshippers at a *dharmasala* can challenge the alienation of property attached to the *dharmasala*, as persons interested in the preservation of the property.<sup>3</sup>

3. It has been held that individual tax-payers can sue for an injunction restraining a municipality from misapplying its funds.<sup>4</sup>

4. A, a creditor of B, obtains a decree against B and attaches certain property as belonging to B. The attachment is set aside at the instance of C, who claims to be the transferee of the property from B. Then A sues for a declaration on behalf of himself and on behalf of other creditors of B that the alienation is fraudulent and does not affect his right to attach the property under his decree. The suit is maintainable.<sup>5</sup>

5. Plaintiffs as members of a certain caste claimed for themselves and their fellow castemen, the exclusive right of entry and worship in the sanctuary of a temple. The defendants who belonged to some other caste entered the sanctuary and worshipped there, thus infringing the rights of plaintiffs' caste. It was held that individual members of the plaintiffs' caste could sue for the personal injury suffered by them due to the pollution of their sanctuary.<sup>6</sup>

Individually — But there is no reason why one or some of them cannot sue or be sued for themselves and on behalf of other members.))

#### Note 5

1. ('05) 82 Cal 198 (217) : 32 Ind App 1 (P C).
- ('32) AIR 1932 Bom 498 (504) : 56 Bom 595.
- ('88) AIR 1933 Nag 169 (170) : 29 Nag L R 246.
- ('84) AIR 1984 Rang 332 (332) : 12 Rang 670.
- (Suit by attaching creditor under O. 21 R. 63 and to set aside fraudulent transfer—Suit must be representative and O. 1 R. 8 will be applicable.)
- ('08) 27 Bom 146 (150).
- ('92) 16 Bom 1 (20).
- ('07) 84 Cal 999 (1006).
- ('82) 4 Mad 404 (408). (Decision before the Transfer of Property Act, 1882, came into force.)
- ('31) AIR 1921 Pat 58 (58) : 6 Pat L Jour 48.
- ('86) AIR 1986 Cal 783 (784).

See also the present S. 53 of the T. P. Act.

2. ('85) AIR 1985 Rang 275 (275).

#### Note 6

1. ('21) AIR 1921 Lah 76 (77).
- ('82) AIR 1982 Lah 894 (896). (Every Mahomedan is entitled to maintain a suit against a trespasser to recover possession of the property attached to the mosque.)
- ('21) 68 Ind Cas 171 (178) (All). (Mutwalli of a wakf in respect of a mosque need not obtain the permission of the Court to maintain a suit on behalf of the trust.)
- ('84) AIR 1984 Cal 845 (848).

- ('11) 11 Ind Cas 86 (37) : 33 All 660.

- ('10) 82 All 284 (286).

- ('26) AIR 1926 Lah 502 (502) : 7 Lah 451.

- ('01) 1901 Pun Re No. 105, p. 367. (One or some of many co-sharers may sue trespasser.)

- (1900) 28 Mad 28 (32).

- ('27) AIR 1927 Pat 221 (222).

- ('20) AIR 1920 Low Bur 151 (155).

- ('37) AIR 1937 Pat 481 (482) : 16 Pat 190. (Where the user of certain well, which is enjoyed by the plaintiff as one of the limited members is disturbed by the action of the defendant, an action for injunction against the defendant is maintainable at the instance of the plaintiff alone without proof of any special damage.)

- ('39) AIR 1939 All 586 (588).

- ('88) AIR 1988 Lah 369 (421) (F B). (Per *Din Mohamad, J.* — The right of a Muslim to use a mosque is an individual right and can be exercised whenever he chooses so to do, so long as the mosque exists, and a suit instituted by a beneficiary for the exercise of his right of devotion in a mosque is a suit for the enforcement of an individual right and is not covered by the provisions of O. 1 R. 8.)

2. ('97) 24 Cal 385 (390).

3. ('92) 1892 Pun Re No. 66, page 243.

4. ('98) 22 Bom 646 (649, 650, 651).

5. ('09) 26 Bom 577 (581, 582). (See however the recent amendment to S. 53 of the Transfer of Property Act.)

6. ('88) 7 Bom 823 (828).

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**Notes 6-8**

6. Every Mahomedan worshipper in a mosque has an individual right to sue any one who interferes with his right.<sup>7</sup> Hence individual Mahomedan worshippers can sue to set aside an alienation of endowed property,<sup>8</sup> or for declaration that certain property is *wakf* property.<sup>9</sup>

Although, where a number of persons have similar but distinct rights any one of them may sue in his own right, yet, the Court may, on grounds of convenience, require the plaint to be amended and converted into a representative action.<sup>10</sup> Where the suit is not brought in a representative capacity but in an individual capacity the decree in the suit does not bind members of the class who are not actually parties on record.<sup>11</sup> The fact that the suit is against a defendant in his individual capacity does not preclude him from raising a question of general custom, although the adjudication cannot bind members of the community who are not on the record as parties. If the plaintiff wishes to have the question of common right tried out he should amend his plaint and allege that the suit is brought against the defendant personally and as representing others claiming the same rights.<sup>12</sup>

7. **Suit to establish or negative a public right.** — It has been seen in Section 91 Note 1 that a private person cannot maintain a suit in respect of a *public* right except under the provisions of Section 91, unless he is able to show that he has suffered *special damage*. Where numerous persons, not being the general public (*e. g.*, a particular community), suffer *special injury* in respect of a public right, any one of such persons may, under this rule, bring a representative suit on behalf of all such persons.<sup>1</sup> Where there is no question of a *public* right at all, no special injury need be proved. Thus, suits may be brought by village communities to establish their rights in connection with village pathways,<sup>2</sup> village wells<sup>3</sup> or *ghats* or banks of rivers.<sup>4</sup>

A person may sue for a declaration that he is the owner of certain land free from any right of the public to use it as a highway. In such a case the plaintiff may implead any one who formally claims to use the land as a public highway. He need not proceed under O. 1 R. 8 against all persons who may deny his right. But the decree in such a case will only bind the actual defendants.<sup>5</sup>

8. **Having the same interest.** — The persons on whose behalf a suit is brought must have the *same* interest in the suit. The interest need not be a *proprietary* one. Thus, the disciples of a *mutt* can sue for setting aside an improper alienation of the *mutt* properties and for restoration thereof to the head of the *mutt*.<sup>1</sup> Similarly, the worshippers at a temple can sue for setting aside an alienation of temple property<sup>2</sup> and, where there is no trustee or manager, even for the recovery of the

7. ('10) 82 All 681 (684).

('18) 18 Ind Cas 797 (798, 799) : 85 All 197.

('85) 7 All 178 (182) (F B).

('85) 1885 All W N 219 (220).

(1900) 24 Bom 170 (176).

('28) AIR 1928 Pat 475 (477) : 2 Pat 891.

('22) AIR 1922 Oudh 1 (2) : 26 Oudh Cas 82.

8. ('28) AIR 1928 Pat 475 (477) : 2 Pat 891.

('88) 5 All 497 (500).

9. ('08) 1908 Pun L R No. 78.

('88) AIR 1928 Oudh 261 (268) : 8 Luck 482.

('22) AIR 1922 Oudh 1 (2) : 26 Oudh Cas 82.

10. (1900) 28 Mad 28 (82).

11. (1900) 23 Mad 38 (32).

12. ('07) 6 Cal L Jour 218 (221).

**Note 7**

1. ('16) AIR 1916 Mad 598 (594, 595).

[See ('86) 168 Ind Cas 109 (113) : 62 Cal 692. (The observations in this case suggest that a suit in

respect of an obstruction to a public road can be brought under this rule even where no special damage is alleged—Submitted that the view is not correct—See Note 8 to S. 91 ante.)]

2. ('18) 18 Ind Cas 67 (69) (Cal).

('21) AIR 1921 Cal 405 (406).

3. ('21) AIR 1921 Lah 76 (77).

4. ('25) AIR 1925 Cal 1288 (1283).

5. ('19) AIR 1919 Pat 280 (281).

('88) 15 Cal 460 (467).

**Note 8**

1. ('18) AIR 1918 Mad 464 (464) : 41 Mad 124.

2. ('20) AIR 1920 Mad 665 (665, 666) : 48 Mad 410.

('19) AIR 1919 Cal 179 (180, 181).

('16) AIR 1916 Pat 404 (405). (Suit for declaration that suit property is trust property is maintainable.)

[See also (1900) 28 Mad 99 (100).

temple property.<sup>3</sup> The expression "same interest" is not confined to *joint* or *concurrent* interest.<sup>4</sup> It applies also to cases where the interest is *similar* though *distinct*.<sup>5</sup> But an interest merely *as a member of the public* is not a sufficient interest for the purposes of this rule.<sup>6</sup> As has been observed in *Adamson v. Arumugam*,<sup>7</sup> the rule "is rather designed to allow one or more persons to represent a *class having special interests* than to allow such persons to sue on behalf of the general public." For examples of cases where several persons were held to have the same interest in the suit, see the undermentioned cases.<sup>8</sup> It has been held by the High Court of Lahore that the defendants in a partition suit may, in certain circumstances, have the same interest in the suit and that O. 1 R. 8 may apply to such a case.<sup>9</sup>

Where the parties do not have the same interest in the suit, they must all be on the record.<sup>10</sup> Thus, in a suit for diverting Government water for non-riparian purposes, where each plaintiff had a distinct cause of action and also had to prove damage, it was doubted if a representative suit could be brought on behalf of all the persons claiming to be riparian owners.<sup>11</sup> Similarly, in a suit for contribution all the co-promisors must be before the Court.<sup>12</sup> For examples of suit, in which several persons were held not to have the same interest in the suit, see the undermentioned cases.<sup>13</sup>

The rule does not require that the whole body on whose behalf the proceedings are taken should be of the *same opinion*. The true principle underlying the rule is that the suit should, in form, be constituted into a representative one in order to prevent the defendant from being vexed by similar suits by others. "If a substantial majority of the members of a body are of one opinion an order may be made by the Court giving permission under this rule, though there is a small or negligible minority holding a different opinion." This is the view of the Madras and Rangoon High

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**Note 8**

- (‘37) AIR 1937 Mad 819 (820). (Suit by worshippers at mosque in respect of mosque property.) [See however (‘89) 11 All 18 (26).]
3. (‘28) AIR 1928 Mad 276 (277).
- (‘37) AIR 1937 Mad 819 (820). (Trustee disabling himself from suing—Suit by worshippers maintainable.)
4. (‘12) 15 Ind Cas 399 (400) (Mad).
- (‘32) AIR 1932 Cal 275 (282); 59 Cal 961. (Owners of taluk and of subordinate tenures having same interest in suit.)
5. (‘12) 15 Ind Cas 399 (400) (Mad).
- (‘16) AIR 1916 Pat 26 (27).
6. (‘17) AIR 1917 Cal 678 (678).
7. (‘86) 9 Mad 463 (466).
- (‘81) AIR 1931 Pat 418 (419) : 10 Pat 568.
8. (‘91) 15 Bom 809 (815). (Suit by a class of priests for declaration of their rights.)
- (‘29) AIR 1929 All 439 (440). (One co-sharer can sue on behalf of all.)
- (‘02) 26 Bom 577 (581, 582). (Person having numerous creditors — One can sue on behalf of all.)
- (‘98) 22 Bom 646 (648). (Suit by a tax-payer to restrain municipality from misapplying its funds.)
- (‘88) 12 Bom 221 (225). (The fishermen of a village can sue to establish their exclusive right of fishery in a creek.)
- (‘85) 11 Cal 218 (218). (A representative suit can be brought on behalf of all the legatees under a will for administration of testator's estate.)
- (‘88) 9 Cal 604 (608). (Person dying leaving numerous creditors — One can sue on behalf of all.)
- (‘05) 15 Mad L Jour 458 (460). (Suit by kattalakkars of a temple for their exclusive right of performing certain festival.)
- (‘98) 21 Mad 10 (18). (Choultry for feeding Brahmins—Any Brahmin in the locality may sue.)
- (‘85) 8 Mad 484 (488) (FB). (Suit by members of Malabar tarwad.)
- (‘82) 5 Mad 201 (206). (Do.)
- (‘16) AIR 1916 Pat 404 (405). (Communal temple — Any member of the community may sue.)
- (‘14) AIR 1914 Oudh 286 (288); 17 Oudh Cas 354. (Suit on behalf of Sunni Muslims of Bilgram against Hindus of Bilgram to establish the formers' right to kill cows.)
- 1 atk 282, Mayor of York v. Pilkington. (Suit by fishermen to establish a right to fishery.)
9. (‘28) AIR 1928 Lah 698 (694). (Distinguishing 17 Cal 906 and 16 Bom 608.)
10. (‘69) 12 Suth W R 256 (259).
- (‘88) 15 Cal 329 (340). (Suit for determining extent of trusts.)
11. (‘09) 32 Mad 141 (155).
12. (‘90) 12 All 110 (114).
13. (‘88) 5 All 602 (606).
- (‘88) AIR 1938 Bom 175 (176) : 57 Bom 270.



**O. 1 R. 8**  
**Note 3**

Courts.<sup>14</sup> It has been held by the Bombay High Court that where a community is divided into two clear factions, one faction favouring and the other opposing the suit, it cannot be said that the community has the same interest in the suit and a suit cannot be brought under O. 1 R. 8.<sup>15</sup>

It is not a condition precedent to a suit under O. 1 R. 8 that the consent of the community should be obtained *beforehand for the suit*.<sup>16</sup> Nor is it necessary to hold a meeting of the caste or community.<sup>17</sup> But if a meeting is convened and the meeting is irregularly held, the consent expressed at such a meeting is vitiated and O. 1 R. 8 will not apply.<sup>18</sup> In such a case, the consent of the various members expressed subsequently cannot help the plaintiff because it cannot be taken to represent the real sense of the community.<sup>19</sup> Where a meeting is properly held and certain persons are duly appointed to sue on behalf of the whole body, the fact that some members of the body subsequently side with the defendants does not take away the representative character of the suit.<sup>20</sup>

Under this rule, a suit can be brought on behalf of a body against some of its own members.<sup>21</sup>

A suit between two rival groups of the *same* caste or body is within the rule.<sup>22</sup>

The rule says that where numerous persons have the same interest in one suit, one or more of *such persons* may sue on behalf of all. Hence, the plaintiff must have himself the same interest as the persons he seeks to represent.<sup>23</sup> Thus, a suit to establish the rights of the sweepers and chamars could be filed only by persons belonging to those two castes and not by outsiders.<sup>24</sup> Where, however, a representing a body has a certain interest in the suit in common with all the other members of the body and has also a *special right peculiar to himself* in respect of the same matter, the two interests may be combined in the same suit under Order 1, Rule 1.<sup>25</sup>

The rule is regulative and not constitutive. It only deals with procedure and does not create any right to sue. It presupposes the existence of the right of suit in the community. Hence, where there is no right to sue at all in the community, the rule does not apply.<sup>26</sup> Thus, where the property of a trust is vested in a trustee it has been held that the trustee alone can sue for recovery of possession of the property and not the worshippers in the temple.<sup>27</sup> Similarly, where a suit is barred under the provisions

14. ('25) AIR 1925 Mad 985 (985, 986).

('29) AIR 1929 Mad 688 (684).

('29) AIR 1929 Mad 44 (45).

('19) AIR 1919 Mad 1148 (1144).

('84) AIR 1984 Rang 847 (848). (Under such circumstances the dissentient members should be made *pro forma* defendants.)

15. ('16) AIR 1916 Bom 261 (262) : 40 Bom 158. [See also ('94) 18 Bom 699 (701).]

16. ('21) 64 Ind Cas 618 (620, 621) (Mad).

17. ('29) AIR 1929 Mad 44 (46).

('21) AIR 1921 Mad 682 (683, 684).

18. ('16) AIR 1916 Bom 261 (262) : 40 Bom 158.

19. ('16) AIR 1916 Bom 261 (262) : 40 Bom 158.

20. ('28) AIR 1928 Cal 741 (742).

21. ('29) AIR 1929 Mad 688 (684).

('21) AIR 1921 Mad 682 (683, 684).

22. ('85) AIR 1985 Mad 542 (543).

23. ('91) 14 Mad 57 (61).

('04) 81 Cal 899 (845).

('11) 9 Ind Cas 886 (886) (Mad).

24. ('27) AIR 1927 All 96 (97).

25. ('19) AIR 1919 Mad 1148 (1144).

('39) AIR 1939 Mad 751 (754). (The fact that a plaintiff who has otherwise the same interest in the suit with those whom he claims to represent has a preferential right of management does not affect the question.)

26. ('88) 7 Bom 328 (328).

('18) AIR 1918 Mad 628 (631, 632).

('10) 5 Ind Cas 515 (516) (Mad). (Suit for pure declaration held not maintainable by the worshippers at temple.)

('09) 1 Ind Cas 995 (997) : 32 Mad 181.

(1900) 28 Mad 28 (32).

('19) AIR 1919 Pat 146 (159) : 4 Pat L Jour 550.

('17) AIR 1917 Pat 640 (642) : 2 Pat L Jour 323.

('39) AIR 1939 Rang 21 (24). (Suit for possession of sanghika property on behalf of a limited body of Burmese Buddhist sanghas not maintainable.)

27. ('28) AIR 1928 Mad 276 (277).

('11) 11 Ind Cas 86 (87) : 33 All 660.

('15) AIR 1915 Mad 667 (667).



of any law, it cannot be maintained merely because it is on behalf of numerous persons within O. 1 R. 8. Thus, Section 92 (2) forbids suits in relation to public, charitable and religious trusts otherwise than under the Section, where the relief claimed is covered by the Section.<sup>29</sup> Where, however, Section 92 does not cover the case, the suit may be brought under O. 1 R. 8 although it relates to a public trust.<sup>29</sup>

**O. 1 R. 8**  
**Notes 8-10**

**8a. Matters in respect of which representative suit can be brought. —**

It has been held that the procedure pertaining to representative suits is not applicable to actions of debt, to money claims or to liabilities in contract or in tort.<sup>1</sup> Applying this principle, it has been held that in a representative suit against several persons each of whom is in possession of a different parcel of land, a decree for mesne profits for a consolidated sum cannot be passed.<sup>2</sup> But a representative suit can be brought for declaration, injunction or possession.<sup>3</sup>

**9. Representative suit for damages not maintainable. —** No representative action can lie where the sole relief sought is damages because they have to be proved separately in the case of each plaintiff.<sup>1</sup> In such a case the plaintiffs cannot be deemed to have the "same interest" in the suit. Hence, O. 1 R. 8 does not enable a representative action for damages in respect of defamation to be brought on behalf of a number of persons.<sup>2</sup>

**10. With the permission of the Court. —** The obtaining of judicial permission is an essential condition for binding persons other than those actually parties to the suit and their privies; if this essential condition is not fulfilled, the suit is not a representative one.<sup>1</sup> As a matter of *procedure*, the Court ought to insist on the permission prescribed by Rule 8 being obtained before a matter is allowed to be fought out in a representative capacity.<sup>2</sup> A representative suit, if brought without the requisite leave under this rule, is liable to be dismissed.<sup>3</sup> But an objection on the ground of want of permission cannot be raised for the first time in appeal.<sup>4</sup> At any rate, when objection is taken before the

(23) AIR 1923 Pat 475 (477) : 2 Pat 391. (If the mutwalli himself is the offender or if he is unwilling to act, the beneficiary must have the power to recover the property.)

[See also ('99) 9 Mad L Jour 93 (97).]

23. ('28) AIR 1928 Mad 614 (620). (Suit for appointment of proper trustee.)

(25) AIR 1925 Mad 1070 (1071, 1072).

(16) AIR 1916 Pat 404 (405). (Suit for removal of trustees.)

[See also ('05) 9 Cal W N 594 (596).]

29. ('19) AIR 1919 Cal 179 (180).

(32) AIR 1932 Bom 305 (308).

(29) AIR 1929 Bom 153 (155, 156).

**Note 8a**

1. ('38) AIR 1938 Mad 755 (755, 756) : I L R (1938) Mad 1094. (Hardie and Lane Ltd. v. Chiltern, (1928) 1 K B 668 on appeal from (1927) 96 L J K B 773. Followed.)

[See also ('37) AIR 1937 Bom 238 (241) : I L R (1937) Bom 326. (When suit is based on something personal to the parties representative suit not possible.)]

2. ('38) AIR 1938 Mad 755 (756) : I L R (1938) Mad 1094.

3. ('38) AIR 1938 Mad 755 (756) : I L R (1938) Mad 1094.

**Note 9**

1. (1910) The Times, April 20th, Jenkins v. John

Bull Ltd. (Per Fletcher Moulton, L. J.)

2. ('30) AIR 1930 Rang 177 (181) : 8 Rang 250.

**Note 10**

1. ('94) AIR 1934 Lah 366 (368) : 15 Lah 307.

(94) 21 Cal 181n (181n).

(85) 8 Mad 496 (497). (If no permission is obtained under S. 30, the decree is not *res judicata* against other persons claiming the same right subsequently.)

(28) AIR 1928 Pat 205 (208) : 7 Pat 197.

(19) AIR 1919 Pat 380 (381). (Plaintiff seeking to bind others similarly interested by the decision in his suit must get leave under S. 30.)

(36) AIR 1936 Bom 423 (431).

[See also ('91) 14 Mad 57 (60).]

2. ('39) AIR 1939 All 806 (807).

(18) AIR 1918 Cal 487 (488).

(1900) 3 Oudh Cas 351 (356).

[See also ('27) AIR 1927 Mad 666 (666).]

3. ('94) 21 Cal 181n (181n).

(85) 11 Cal 213 (218).

(83) 9 Cal 604 (608).

(82) 8 Cal 82 (41).

4. ('21) AIR 1921 Lah 76 (77).

(90) 14 Bom 213 (218). (No objection taken even in appeal.)

(27) AIR 1927 Mad 666 (666). (Objection first raised in second appeal.)

(81) AIR 1981 Oudh 875 (877).

**O. 1 R. 8** Appellate Court, the suit should not be dismissed but should be remanded for the procedure provided by this rule being followed.<sup>5</sup>

**Notes 10-14**

Permission under the rule, obtained in the trial Court enures for the Appellate Court also and no fresh permission is necessary in respect of the Appellate Court.<sup>6</sup>

The Court should exercise a judicial discretion in granting permission to a person to sue in a representative capacity under the rule.<sup>7</sup>

**11. At what stage of suit permission is to be granted.** — The proper course is to obtain permission before the suit is instituted. But the permission may be granted even *after* the institution of the suit,<sup>1</sup> and even though it had been refused on a previous occasion.<sup>2</sup> There can be no hard and fast rule as to *how many* persons should represent the class of the persons of the same interest: it cannot be said that three or eight persons are not enough to act in a representative capacity.<sup>3</sup>

**12. Form of permission.** — The permission under the rule need not be *express*. It may be gathered from the proceedings of the Court in which the suit was instituted.<sup>1</sup> The *dictum* of Stuart, C. J., to the contrary in the undermentioned case<sup>2</sup> is not good law. See the undermentioned case<sup>3</sup> where it was held on the language of the Court's order that permission was not given. Permission under the rule must be to definitely named persons.<sup>4</sup>

**13. Who may apply for permission.** — Where a suit is brought *by* certain persons —

(1) on behalf of themselves and as representing others, or

(2) *against* certain persons on behalf of themselves and as representing others, the application for permission should be made by the plaintiff.<sup>1</sup> But where a suit against a number of persons is sought to be *defended* by one of them, the application should generally be made by the defendant who seeks to defend on behalf of all. The persons to whom permission has been granted under the rule *must act together*. If permission is granted to a certain number of persons and some of them do not join in the suit, the remaining persons alone cannot avail themselves of the permission and sue.<sup>2</sup>

**14. May be sued.** — Where the inhabitants of a village claim a right of way over plaintiff's land, the plaintiff, with the Court's permission, may sue one or more of

5. ('88) 5 All 602 (604). (Per Stuart, C. J.)

6. ('19) AIR 1919 Lah 273 (274) : 1919 Pun Re No. 46.

('27) AIR 1927 Cal 608 (610).

7. ('17) AIR 1917 Bom 141 (148) : 42 Bom 556.

('92) AIR 1932 Bom 65 (66). (Permission granted by predecessor cannot be revoked by succeeding Judge in final judgment.)

('90) 17 Cal 906 (910).

#### Note 11

1. (1900) 22 All 269 (270).

('23) AIR 1923 Bom 805 (819) : 47 Bom 809.

('97) 21 Bom 784 (785, 786) (FB).

('17) AIR 1917 Cal 809 (810, 811) : 44 Cal 258.

('16) AIR 1916 Mad 598 (595).

('02) 25 Mad 899 (401).

('97) AIR 1927 Rang 184 (184).

2. ('02) 25 Mad 899 (401).

3. ('88) AIR 1988 Pat 802 (802).

#### Note 12

1. ('08) 85 Cal 1021 (1023)

('88) AIR 1933 Lah 749 (751) : 15 Lah 123.

('27) AIR 1927 Cal 608 (611).

('24) AIR 1924 Cal 998 (1001).

('10) 6 Ind Cas 46 (47) (Cal).

('02) 29 Cal 100 (108).

('94) 21 Cal 180 (188).

('29) AIR 1929 Mad 451 (452). (Publication of notice—Permission should be inferred.)

2. ('88) 5 All 602 (604).

3. ('91) 14 Mad 57 (60, 61).

4. ('90) 17 Cal 906 (911).

[See also ('88) AIR 1933 Mad 114 (116, 117) : 56 Mad 846. (Application for probate by executor—He was regarded as representing beneficiaries—Executor died—Beneficiaries could continue proceedings.)]

#### Note 13

1. ('82) 33 Pun L R 221 (222). (Court acting under O. 1 R. 8 without application—Procedure irregular.)

2. ('25) AIR 1925 Cal 547 (548, 551).

them on behalf of all, to negative the right.<sup>1</sup> The consent of the defendant on the record is not necessary to enable the Court to permit the plaintiff to sue the defendant as representing the whole community.<sup>2</sup>

**O. 7 R. 8**  
**Notes 14-18**

**15. "May defend."** — This clause comes into operation when the plaintiff has impleaded all the persons interested as defendants, and one of them wishes to defend on behalf of all the defendants.<sup>1</sup> In such a case the Court may permit him to so defend the suit on behalf of all.

**16. Notice of the institution of the suit.** — The provision as to the issue of notice of the institution of the suit is a peremptory one.<sup>1</sup> But it is the duty of the Court to issue such notice<sup>2</sup> and a suit cannot therefore be dismissed for failure of the party to move the Court to perform the duties imposed on it by the Section.<sup>3</sup> The notice may be given whenever the defect is pointed out. If the defect is noticed by the Appellate Court, the suit may be remanded for the notice being given.<sup>4</sup>

Where notice is not given as required by this rule, the suit is not a representative one and the decree will bind only the parties actually on the record.<sup>5</sup>

A notice under the rule should specify the names of the persons to whom permission is to be given, so that the persons interested may have an opportunity of knowing who have been selected to represent them.<sup>6</sup> But the non-specification of the names is not necessarily fatal to the suit.<sup>7</sup> At any rate, the decree in the suit will always bind the persons who actually take part in the suit.<sup>8</sup>

See also the undermentioned decision.<sup>9</sup>

**17. Title of suit.** — Where a suit is brought by or against persons in a representative capacity, the fact should be stated not only in the plaint (see O. 7 R. 4) but also in the title of the suit.<sup>1</sup> See also Appendix A, Forms 1 and 2. But the suit may be a representative one though the cause title may not show it. In India the *substance* and not the form of pleadings should be considered.<sup>2</sup>

**18. Addition of parties.** — The effect of an order under the rule is that the parties who have obtained permission to sue as representatives have the conduct of the suit on behalf of all those they purport to represent. In fact they are the *only* parties

#### Note 14

1. ('88) 15 Cal 460 (465, 466) (FB).
2. ('12) 13 Ind Cas 599 (602) : 36 Mad 418.
3. ('27) AIR 1927 Cal 608 (610). (Permission may be granted though defendant on record objects.)
4. (1888) 1888 W N 102 (103), *Andrews v. Salomen*.
5. (1898) 1 Q B 775 (777), *Wood v. McCarthy*.

#### Note 15

1. [See ('93) AIR 1933 Lah 682 (684).]

#### Note 16

1. ('28) AIR 1928 Bom 305 (319) : 47 Bom 809.
2. ('33) AIR 1933 Lah 749 (751).
3. ('22) AIR 1922 All 16 (17) : 44 All 291.
4. ('25) AIR 1925 Cal 547 (551).
5. ('37) AIR 1937 Pat 54 (55).
6. ('08) 85 Cal 1021 (1022).
7. ('38) AIR 1938 P C 183 (190) : 60 Ind App 278 : 56 Mad 657 (PC).
8. ('26) AIR 1926 Cal 547 (551).
9. See the cases cited in foot-note (2) above and also the following cases:—
1. ('22) AIR 1922 All 16 (17) : 44 All 291.
2. ('33) AIR 1933 Lah 749 (752) : 15 Lah 123.

4. ('22) AIR 1922 All 16 (17) : 44 All 291.

5. ('88) AIR 1933 P C 183 (188, 189) : 60 Ind App 278 : 56 Mad 657 (PC). (Reversing 51 Mad 128 : AIR 1928 Mad 77 (FB).)

6. ('28) AIR 1928 Pat 205 (208) : 7 Pat 197.

7. ('27) AIR 1927 Cal 608 (611). (17 Cal 906, Followed.)

8. ('90) 17 Cal 906 (911).

9. ('10) 6 Ind Cas 46 (47) (Cal).

10. ('27) AIR 1927 Cal 608 (611).

11. ('37) AIR 1937 Cal 245 (250) : I L R (1937) 2 Cal 86. (Representative suit against numerous persons—Notice under this rule given just before hearing of the suit—Defendants not prejudiced and having ample opportunity to defend—Suit not remanded.)

#### Note 17

1. (1896) 1 Ch 628 (629), *Re Tottenham*.  
[See ('19) AIR 1919 Cal 245 (247) : 46 Cal 877. (It is necessary that the cause title should show that the suit is representative though it is a convenient place for stating the fact.)]
2. ('28) AIR 1928 Mad 77 (87) : 51 Mad 128 (FB).

**O. 1 R. 8**  
**Notes 18-21**

to the suit.<sup>1</sup> Sub-rule 2 provides that any person on whose behalf a suit is instituted or defended under sub-rule 1 may apply to the Court to be added as a party to the suit.<sup>2</sup> Such a person must show that the conduct of the suit is not in proper hands and that his interests will be seriously affected to his prejudice if he is not joined as a party. The reason is that there is considerable delay caused by a fresh party coming in and the costs of other parties are consequently increased.<sup>3</sup> The application must also be made without unnecessary delay.<sup>4</sup> Where no such application is made, such person cannot, *as a party*, prefer an appeal against any decree that might be passed in the suit.<sup>5</sup>

**19. Suit in the name of wrong plaintiff.** — Under O. 1 R. 10, sub-rule 1, where, through a *bona fide* mistake, a suit has been instituted in the name of a wrong person as plaintiff, the Court can allow any other person to be substituted as plaintiff. Suppose, *A* describing himself as a creditor of *B* sues on behalf of himself and the other creditors of *B* and it turns out that *A* is not a creditor of *B*. *A* cannot continue the suit, as O. 1 R. 8 presupposes a community of interest between the plaintiff and the other persons he is allowed to represent. But can *C*, who is an admitted creditor of *B*, be substituted for *A* under O. 1 R. 10, sub-rule 1, in such circumstances? It is conceived that he can.<sup>1</sup> There is nothing in O. 1 R. 10 or Rule 8 to exclude the application of Rule 10 to cases arising under Rule 8.

**20. Addition of parties after decree.** — Where in a suit under this rule the plaintiffs on the record neglect to execute the decree in their favour, the Court may add other persons as parties to enable them to execute the decree.<sup>1</sup>

**21. Decree in a representative suit.** — Where a person sues or is sued on behalf of himself and as representing others, the suit is called a representative suit. To such a suit Explanation VI to Section 11 applies and a decree passed in such a suit enures to the benefit of, or binds, all the persons so represented in the suit, although they are not *actually* parties on the record.<sup>1</sup> A representative suit is not confined to suits brought under O. 1 R. 8.<sup>2</sup> It includes cases where, under the *substantive* law, certain persons are entitled by virtue of their position to sue on behalf of themselves and others, *e. g.*, the manager of a joint Hindu family<sup>3</sup> and the karnavan of a Malabar tarwad.<sup>4</sup>

**Note 18**

1. ('85) AIR 1985 Lah 88 (84).
2. ('99) 1 Bom L R 743 (746).
- (82) AIR 1982 Bom 65 (66).
3. ('09) 4 Ind Cas 180 (180) : 84 Bom 420.
- [See also ('86) AIR 1986 Bom 428 (481). (The Court will not compel the plaintiff to add the persons on whose behalf he sues as co-plaintiffs.)
4. ('1888) 48 L T 527, Conybeare v. Lewis.
5. ('85) AIR 1985 Lah 88 (84).

**Note 19**

1. ('24) AIR 1924 Mad 883 (884). (It was however held in this case that no bona fides were proved and the substitution was, therefore, refused.)

**Note 20**

1. ('28) AIR 1928 Mad 472 (478).
- [See also ('05) 28 Mad 819 (824, 825).]

**Note 21**

1. (1900) 28 Mad 28 (81, 82).
- (96) AIR 1926 Bom 179 (188).
- (88) 7 Bom 328 (328).
- (27) AIR 1927 Cal 608 (610). (Defendant may be sued in a representative capacity, though he

does not state in his written statement that he is appearing in a representative capacity.)

- (85) AIR 1985 Oudh 369 (371) : 11 Luck 150.
- (85) AIR 1985 Cal 418 (416).
- [See also ('18) AIR 1918 Mad 166 (167).
- (28) AIR 1928 Mad 77 (87) : 51 Mad 128 (FB).]
2. ('17) AIR 1917 Mad 457 (460).
- (26) AIR 1926 Bom 179 (188).
- (37) AIR 1937 Bom 238 (240): I L R (1937) Bom 326. (The observations in this decision suggest that where both the plaintiff and the defendant and the Court treat a suit as a representative one, the parties on the record may be held to be entitled to represent other persons interested in the matter so that the decree in the suit will operate as res judicata in respect of such persons also, although the provisions of O. 1 R. 8, are not complied with — It is submitted that the view is not sound.)
3. ('11) 10 Ind Cas 874 (878): 85 Mad 685.
- (94) 17 Mad 122 (126).
4. ('97) 20 Mad 129 (139) (F B).
- (10) 8 Ind Cas 485 (486) (Mad).
- (01) 24 Mad 658 (659).

A decision in a representative suit under this rule, as in any other case, operates as *res judicata* only when it is given on the *merits*<sup>5</sup> and only so far as the rights litigated are *common* to the person suing or being sued and those whom he represents.<sup>6</sup> Further, it can bind the persons represented only with respect to their *property* which the person suing or sued against represented, although the parties on *record* may be personally liable. Hence, a decree for injunction which can only be enforced through the personal obedience of the defendant is not binding on the persons who were not parties actually on the record but against whom a representative suit was filed.<sup>7</sup>

If the alleged common right in a representative suit under this rule is negatived, the suit should be dismissed; the Court cannot, in such a suit, declare the rights of individuals as distinguished from the rights of the class of persons on whose behalf the suit is brought,<sup>8</sup> though it is open to the Court to pass a decree in favour of persons forming a smaller number out of a larger class.<sup>9</sup>

Where a suit is not a representative one, Explanation VI to Section 11 does not apply and the decree cannot bind anyone who is not a party to it.<sup>10</sup>

Even where a plaintiff *purports* to sue in a representative capacity, the decision in the suit will not operate as *res judicata* against the other members of the group which the plaintiff professes to represent, unless the requirements of this rule are complied with.<sup>11</sup> See also Note 59a to Section 11.

**22. Costs in representative suit.** — Under Section 35 of the Code, the costs of all suits are within the discretion of the Court and the Court can determine by whom or out of what property the costs are to be paid. As a general rule, only parties on the record are liable to pay costs. (See Section 35, Note 9.) This rule applies also to representative suits. Hence, in such suits, as a general rule, costs should be awarded only against parties on the record but not against other persons whom the parties on the record may represent.<sup>1</sup> But this is not an inflexible rule. In exceptional cases, costs may be ordered to be paid even by persons who are not parties on the record but on whose behalf, or for whose benefit, the suit has been brought or defended. The Court may also, in a fit case, direct the costs to be paid out of any property which may belong to the community represented in the action. In any case, great caution is necessary in making an order as to costs in a representative suit.<sup>2</sup> In the undermentioned

(‘04) 27 Mad 375 (377).

*The following cases hold that where a karnavan is not sued as such or there is nothing on the face of the record to show that it was intended to implead him in his representative character, the decree does not bind the tarwad :*

(‘87) 10 Mad 322 (329, 330).

(‘89) 12 Mad 434 (437).

(‘87) 10 Mad 79 (84).

(‘80) 2 Mad 328 (331, 333).

(‘82) 5 Mad 201 (206).

[See (‘94) 17 Mad 214 (215).

(‘83) 6 Mad 121 (125).]

[See also (‘84) 7 Mad 87 (89).]

[Compare (‘85) 8 Mad 484 (487).]

5. (‘09) 2 Ind Cas 622 (623) (All).

6. (‘26) AIR 1926 Pat 321 (324) : 5 Pat 589.

7. (‘11) 12 Ind Cas 1006 (1007) : 36 Mad 414.

(‘06) 88 Mad 488 (484).

(‘89) 12 Mad 856 (865).

8. (‘18) AIR 1918 Mad 628 (631).

9. (‘89) 9 Mad L Jour 355 (361).

(‘18) AIR 1918 Mad 628 (631).

10. (‘28) AIR 1928 P C 16 (20) : 55 Ind App 96 : 55 Cal 619 (P C).

(‘10) 8 Ind Cas 129 (130) (Mad). (Plaintiff expressly refusing to recognise certain persons as members of the class he professes to represent — Latter are not bound by decree against plaintiff.)

(‘38) AIR 1938 All 523 (524). (The mere fact that a number of persons have filed a suit as belonging to a particular community and have described themselves as Panchas of the community will not make the suit a representative suit, when the claim is put forward on behalf of these specific plaintiffs and is based on a right personal to them.)

11. (‘38) AIR 1938 All 523 (524).

#### Note 22

1. (‘96) 1 Cal W N 65 (67).

(‘85) AIR 1935 Oudh 369 (370) : 11 Luck 150.

2. (‘17) AIR 1917 Bom 141 (148) : 42 Bom 556.

**O. 1 R. 8** case<sup>3</sup> the next friend of a minor plaintiff in a representative suit was ordered to pay the costs.  
**Notes 22-24**

**23. Compromise of representative suit.** — It was held in the undermentioned case<sup>1</sup> following the English case of *Jenkins v. Robertson*<sup>2</sup> that persons instituting a suit on behalf of the public (e. g., a suit under Section 92, Civil Procedure Code) have no right to bind the public by a compromise decree. In a recent case decided by the Privy Council, however, their Lordships left it open whether the law in India under Section 11, Civil Procedure Code, is the same as that stated above.<sup>3</sup> They have, however, indicated that *Jenkins v. Robertson* was based on Scotch law and had been explained in *In Re South American and Mexican Co.*, [(1895) 1 Ch. 37]. But in a representative suit under O. 1 R. 8, the representative is *dominus litis* until judgment and he can therefore discontinue or compromise the suit.<sup>4</sup>

**23a. Withdrawal of representative suit.** — See O. 23 R. 1 Note 19a.

**24. Abatement of suits and appeals.** — A sues on behalf of himself and numerous other persons under O. 1 R. 8. A dies pending the suit. Does the suit abate? No.<sup>1</sup> The reason is twofold: *firstly* the persons represented are not the "legal representatives" of the deceased plaintiff within the meaning of Section 2 (11) of the Code and O. 22 R. 3 does not apply to such case;<sup>2</sup> *secondly* the persons represented are *already parties to the suit constructively* though the conduct of the suit is in the hands of a particular person to whom leave has been given, and any one of such persons can continue the suit after the plaintiff's death.<sup>3</sup> The application to continue the suit should be made under O. 1 R. 8, sub-rule 2<sup>4</sup> or O. 1 R. 10, sub-rule 2.<sup>5</sup> No period is fixed within which such application should be made, but the High Court of Madras expressed an opinion in the undermentioned cases<sup>6</sup> that such an application will be governed by Article 181 of the Limitation Act. See also the following decisions which are based on the principle that in a representative suit under this rule, the death of any of the parties does not necessitate the substitution of his legal representatives and that the suit or defence can be continued by any of the other persons who have the same interest in the suit.<sup>7</sup> Suppose now that A sues B on behalf of himself and numerous other persons and

3. ('85) 11 Cal 213 (219).

**Note 23**

1. ('15) AIR 1915 Mad 561 (568) : 38 Mad 850.

2. (1908) 2 Ch 652 (659).

3. ('28) AIR 1928 P C 16 (20) : 55 Ind App 96:55 Cal 519 (P C).

4. ('13) 18 Ind Cas 369 (370) (Mad).

('12) 15 Ind Cas 399 (401) (Mad).

**Note 24**

1. ('12) 15 Ind Cas 399 (401, 402) (Mad).

('21) AIR 1921 P C 123 (124) : 48 Cal 493 : 17 Nag L R 37 : 40 Ind App 12 (P C). (Suit under S. 92 of the Code.)

('15) AIR 1915 P C 124 (125, 126) : 38 Mad 406 : 42 Ind App 125 (P C). (Suit by Hindu reversioner—Decision rested on O. 1 R. 1, C. P. C.)

('80) AIR 1980 Lah 282 (283).

('81) AIR 1981 Mad 590 (591) : 54 Mad 770.

('81) AIR 1981 Mad 452 (454) : 54 Mad 527.

(Death of representative appellant.)

('29) AIR 1929 Mad 451 (453).

('19) AIR 1919 Mad 479 (480). (Suit by Hindu reversioner.)

('17) AIR 1917 Mad 889 (890) : 40 Mad 110. (Suit under S. 92, C. P. C.)

('12) 17 Ind Cas 101 (105, 106) : 8 Nag L R 113. (Suit by Hindu reversioner.)

But see the following case which seems to assume the contrary : —

('25) AIR 1925 Lah 598 (598). (O. 22 R. 8 is not rendered inapplicable by the fact that the suit is brought on behalf of the whole village.)

2. ('29) AIR 1929 Mad 451 (451, 452).

('17) AIR 1917 Mad 889 (890) : 40 Mad 110. (Suit under S. 92, C. P. C.)

('12) 15 Ind Cas 399 (401) (Mad).

3. ('17) AIR 1917 Mad 889 (890) : 40 Mad 110.

('15) AIR 1915 P C 124 (125, 126) : 38 Mad 406 : 42 Ind App 125 (P C).

('19) AIR 1919 Mad 479 (480).

4. ('19) AIR 1919 Mad 479 (480).

5. ('17) AIR 1917 Mad 889 (890) : 40 Mad 110.

6. ('19) AIR 1919 Mad 479 (480).

('81) AIR 1981 Mad 590 (591) : 54 Mad 770.

7. ('85) AIR 1985 Cal 418 (418). (Where a representative suit is brought by a plaintiff with leave of Court, on his death, no substitution is necessary and others who have been granted authority to represent the class can go on.)

a decree is passed in favour of *A*. *B* appeals and, during the pendency of the appeal, one of the persons represented by *A* dies, and his legal representatives are not brought on the record. Does the appeal abate? No.<sup>8</sup> The reason is, that the principle of the abatement of a suit by the death of a party has no application where the deceased was not a party to the suit *eo nomine*. Where the *suit as brought* is not a representative one, there is a difference of opinion in the Lahore High Court as to whether the fact that, in appeal, some respondents are allowed to represent others will not prevent abatement on the death of the persons so represented. One set of cases holds that it will not.<sup>9</sup> The other set holds that it will.<sup>10</sup> In the case below,<sup>11</sup> forty persons instituted a suit against *A*. All the forty persons joined as plaintiffs and the suit was not brought in a representative capacity. A decree was passed in favour of the plaintiffs. *A* appealed from the decree, but obtained permission from the Court that the appeal should be defended by four out of the forty decree-holders in the lower Court. Pending the appeal, some of the decree-holders, other than the four selected to defend the appeal, died. *A* failed to bring on record their legal representatives within the period of limitation. It was held that the appeal abated under such circumstances, on the ground that all the forty persons being actually on the record as plaintiffs in the lower Court, the suit was not a *representative* suit, and that although some of the respondents may be allowed by the Court to *defend* the appeal on behalf of themselves and others, the appellant *must* join as parties to the appeal all the persons who were actually plaintiffs on the record in the lower Court and in whose favour a decree had been passed. *A fortiori*, where, in such a case, one of the respondents selected to represent the others dies, and his legal representatives are not brought on the record within the prescribed period of limitation, the appeal abates.<sup>12</sup>

A suit was brought against *B* as a trustee representing a temple and *C* as representing a certain community. Pending the suit *B* died and another trustee was appointed. It was held that the new trustee should be brought on the record, so that the idol and the temple properties might be represented in the suit.<sup>13</sup> As to the procedure to be adopted in cases where parties sue or are sued in a representative capacity with the permission of the Court under this rule and one or more of them die pending the suit or appeal, see the cases noted below.<sup>14</sup>

The karnavan of a Malabar tarwad may sue on behalf of the tarwad without obtaining the leave of the Court under this rule. Where he unnecessarily obtains the

(‘87) AIR 1937 Pat 149 (150). (Death of the sole or one or more of the several plaintiffs or defendants, suing or being sued in a representative character does not lead to the abatement of the suit, if his or their legal representatives are not brought on record—The same principle *mutatis mutandis* applies to appeals.)

(‘86) AIR 1936 Lah 361 (361). (Where an appeal is filed in a representative suit and one of the plaintiffs dies during the pendency of the appeal, it was held that surviving plaintiffs are competent to prosecute the appeal.)

8. (‘19) AIR 1919 Lah 278 (274) : 1919 Pun Re No. 46.

(‘80) AIR 1930 Lah 18 (19).

(‘20) AIR 1920 Lah 838 (340) : 1 Lah 582.

9. (‘26) AIR 1926 Lah 81 (82).

(‘82) AIR 1932 Lah 884 (887) : 13 Lah 92. (AIR 1920 Lah 838, Foll.; AIR 1925 Lah 124, Disting.)

—Question left open but delay in petition to bring on record legal representatives was excused.)

(‘26) AIR 1926 Lah 216 (216, 217).

(‘25) AIR 1925 Lah 124 (125) : 5 Lah 429. (In appeal permission under O. 1 R. 8 was obtained against people who were parties in the lower Court—Hence it was held that the legal representatives of such parties must be impleaded.)

(‘19) AIR 1919 Lah 147 (148) : 1919 Pun Re No. 20. (Question left open but delay in petition to bring on record legal representatives was excused.)

10. (‘31) AIR 1931 Lah 610 (612) : 13 Lah 195. (The fact that there was no order under O. 1 R. 8 (1) in trial Court makes no difference.)

[See also (‘82) AIR 1932 Cal 275 (282) : 59 Cal 961.]

11. (‘26) AIR 1926 Lah 31 (32).

12. (‘01) 1901 Pun L R No. 160.

(‘11) 12 Ind Cas 871 (871) : 1911 Pun Re No. 60.

13. (‘27) AIR 1927 Mad 1105 (1105).

14. (‘81) AIR 1931 Mad 452 (454) : 54 Mad 527. (Per Ramaswami, J.)



**O. 1 R. 8**  
**Notes 24-26**

leave of the Court under this rule and sues on behalf of the tarwad and then dies pending the suit, the succeeding karnavan is entitled, as of right, to continue the suit and the junior members are not entitled to do so in the absence of very special circumstances.<sup>15</sup>

**25. Applicability of Rule to arbitration proceedings.** — Order 1 Rule 8 has no application to private arbitration proceedings. Hence, a reference to arbitration by persons professing to represent a certain community will not be binding on the other members of the community in the absence of any *authorization* by the latter.<sup>1</sup>

It has been held by the Bombay High Court that this rule applies to a petition under Section 14 of the Arbitration Act (1899) to set aside an award, the reason given being that such petition is analogous to, and can be tried, as an ordinary *suit*.<sup>2</sup>

**26. Revision.** — A refusal to entertain an application under this rule without proceeding in accordance with the law is revisable under Section 115 of the Code.<sup>1</sup>

**O. 1 R. 9**

**R. 9. [S. 31]** No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it.

[1877, S. 31; R. S. C., O. 16 R. 11. See S. 92; O. 1 R. 13; O. 2 R. 7.]

### Synopsis

1. Legislative changes.
2. Scope of the Rule.
3. Misjoinder of parties.
4. Misjoinder of parties and causes of action — Multifariousness.

5. Nonjoinder of parties.
6. Nonjoinder in mortgage suits. See O. 34, Rule 1.
7. Limitation. See Order 1 Rule 10.
8. Arbitration proceedings, misjoinder and nonjoinder in.

**1. Legislative changes.** — The corresponding provision of the former Code (Section 31) did not contain the expression "nonjoinder." Hence there was some doubt whether the Section applied to cases of nonjoinder also or was confined to cases of misjoinder alone. See the undermentioned cases.<sup>1</sup> These cases can be only of academic interest under the present Code, as the new rule makes it clear that it applies to cases of nonjoinder of parties as well as of misjoinder.

**2. Scope of the Rule.** — This rule provides that no suit shall be defeated *by reason of the misjoinder or nonjoinder of parties*, but that the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of

('84) AIR 1984 Mad 202 (208).

('88) AIR 1988 Lah 682 (684).

15. ('89) AIR 1989 Mad 751 (753). (Succeeding karnavan failing to bring himself on record within limitation and suit being in peril of abating—This is special ground which would entitle the junior members to prosecute the suit.)

**Note 25**

1. ('27) AIR 1927 All 128 (130).

2. ('86) AIR 1986 Bom 250 (255); 60 Bom 645.

**Note 26**

1. ('88) AIR 1938 All 154 (155).

('88) AIR 1938 Pat 302 (303).

**Order 1 Rule 9 — Note 1**

1. ('98) 21 Mad 378 (382). (Applies to nonjoinder also.)

(1882) 19 Ch D 246 (251), *Wedderman v. Societe Generale*. (Do.)

('94) 17 Mad 122 (127). (Yes).

('14) AIR 1914 Cal 215 (216). (Does not apply.)



the parties actually before it.<sup>1</sup> There are, however, cases in which the Court cannot, under the substantive law, deal with the rights and interests of the parties *actually* before it in the absence of certain other persons. Thus, the Court cannot, in a suit by a co-trustee for possession of the trust property, grant any relief to the plaintiff in the absence of all the other co-trustees on the record.<sup>2</sup> The reason is that all the co-trustees together represent a *single and indivisible right* which cannot be adjudicated upon and no effective decree can be passed by the Court in their absence. In such a case, the necessary parties may be added under O. 1 R. 10.<sup>3</sup> Where they are not so added, the suit will be dismissed, not *by reason of the nonjoinder of parties* but by reason of the fact that the Court *cannot, under the substantive law, grant any relief to the parties* actually on the record. O. 1 R. 9 does not affect such cases, and cannot be relied upon to dispense with the joinder of such necessary parties.<sup>4</sup>

This rule does not apply to cases where there is a misjoinder of *causes of action as well as of parties*.<sup>5</sup>

**3. Misjoinder of parties.**—Order 1 Rule 1 deals with the question “who may be joined as *plaintiffs* in a suit.” O. 1 R. 3 deals with the question “who may be joined as *defendants* in a suit.” If persons are joined as plaintiffs in the same suit in any case not covered by O. 1 R. 1, there is *misjoinder of plaintiffs*. Similarly, if persons are joined as defendants to the same suit in any case not covered by O. 1 R. 3, there is a *misjoinder of defendants*.

A misjoinder of parties is not fatal to a suit.<sup>1</sup> Where there is a misjoinder of parties the Court has power under O. 1 R. 10 (2) to strike out the names of the persons improperly joined, and to allow the suit to be proceeded with. There is no misjoinder of plaintiffs where one of the plaintiffs is entitled to all the estate sued for and the name of another person is added as a co-plaintiff merely as a matter of extra caution.<sup>2</sup>

**4. Misjoinder of parties and causes of action — Multifariousness.** — O. 2, Rr. 3, 4 and 5 deal with joinder of causes of action. Where in the same suit several causes of action are joined in contravention of these provisions, there is a *misjoinder of causes of action*. A misjoinder of causes of action may be coupled with a misjoinder of plaintiffs or of defendants. In such a case there is *multifariousness or a misjoinder of*

O. 1 R. 9  
Notes 2-4

#### Note 2

1. ('86) AIR 1986 P C 51 (54) (P C).
2. See Note 8 to Order 1 Rule 6 and also Note 5, *infra*.
3. ('18) AIR 1918 Mad 1187 (1189). (Rules 9 and 10 of Order 1 should be construed together.)
4. ('25) AIR 1925 Oudh 608 (607).  
(12) 18 Ind Cas 197 (200) (All).  
(80) AIR 1980 Mad 714 (718). (Shares were distinct.)
5. ('97) 24 Cal 540 (548).  
(94) 16 All 279 (282, 283).

#### Note 3

1. ('21) 59 Ind Cas 522 (523) (Lah).
- (88) AIR 1988 Cal 477 (479).
- (80) AIR 1980 All 180 (188).
- (10) 8 Ind Cas 889 (889) (All). (Section 99, C. P. Code made applicable.)
- (05) 2 All L Jour 91 (94).
- (98) 15 All 380 (381).
- (18) AIR 1918 Cal 870 (872).
- (14) AIR 1914 Cal 795 (796).

- (81) 6 Cal 815 (825).
- (79) 4 Cal 949 (953).
- (69) 11 Suth W R 507 (507).
- (11) 10 Ind Cas 212 (214) (Lah).
- (08) 1908 Pun Re No. 38, page 120.
- (99) 1899 Pun Re No. 24, page 184.
- (94) 1894 Pun Re No. 67, page 221.
- (93) 1893 Pun Re No. 88, page 388.
- (81) 1881 Pun Re No. 3, page 9.
- (10) 5 Ind Cas 466 (467) (Mad).
- (91) 14 Mad 103 (108). (Mistakenly imputed to the defendants consisted of acts alleged to have been done on behalf of the minor faction and in pursuance of its common policy.)
- (98) 1 Oudh Cas 308 (312). (Pre-emption suit — One having no right of pre-emption joined as co-plaintiff.)
- (11) 12 Ind Cas 206 (207) (Low Bur).
- (87) AIR 1987 Lah 116 (117). (The fact that there is a surplussage of plaintiffs will not make a suit incompetent.)
2. ('85) 9 Bom 536 (548).
- (96) 1 Oudh Cas 308 (312).

**O. 1 R. 9**  
**Notes 4-8**

*parties and of causes of action.* As has been seen already in Note 2 above, this rule does not apply to such a case. But even in such cases the suit should not be dismissed; the plaintiff should be given an opportunity to amend the plaint and to make his election and confine the suit to one set of defendants.<sup>1</sup>

**5. Nonjoinder of parties.** — The rule applies to nonjoinder of parties as well as misjoinder. Hence, the failure to join any parties does not *per se* entail the dismissal of a suit.<sup>1</sup> But there is a distinction between the nonjoinder of *necessary* parties and nonjoinder of *proper* parties. Necessary parties are those in whose absence the Court cannot pass an effective decree at all. Proper parties are those whose presence is necessary in order to enable the Court to completely and adequately adjudicate on all the matters involved in the suit. (See Notes under O. 1 R. 10.) If the nonjoinder is only of *proper* (as contrasted with necessary) parties, it can never be in itself fatal to the suit.<sup>3</sup> In such a case the Court can, under this rule, deal with the matters in controversy in so far as the parties actually before the Court are concerned<sup>3</sup> or it may order the addition of the parties under O. 1 R. 10, sub-rule 2. But in the case of *necessary* parties, the Court cannot, as has already been seen in Note 2 above, decide

**Note 4**

1. ('84) AIR 1984 Mad 867 (372) : 57 Mad 1031.  
( '88) 142 Ind Cas 542 (544) (Nag).

**Note 5**

1. ('29) AIR 1929 All 489 (440).  
( '22) AIR 1922 All 404 (405).  
( '12) 14 Ind Cas 85 (88) (All).  
( '91) 1891 All W N 175 (176).  
( '81) 1881 All W N 140 (140).  
( '84) 7 Mad 401 (404). (Reversioner's suit—Nonjoinder of reversioner of equal degree—No bar.)  
( '82) 1882 All W N 80 (80).  
( '82) 1882 All W N 67 (67).  
( '66) 1 Agra 147 (148).  
( '10) 84 Bom 13 (20, 21).  
( '82) AIR 1932 Cal 34 (86). (Order 1 Rule 9 applies to mortgage suits also.)  
( '09) 8 Ind Cas 291 (293) (Cal).  
( '14) AIR 1914 Lah 187 (192) : 1915 Pun Re No. 8.  
( '21) AIR 1921 Mad 557 (558) : 44 Mad 43.  
( '16) AIR 1916 Mad 674 (674).  
( '10) 5 Ind Cas 455 (456) (Mad).  
( '25) AIR 1925 Pat 568 (575).  
( '25) AIR 1925 Pat 59 (61) : 3 Pat 829.  
( '20) AIR 1920 Pat 781 (783).  
( '15) 81 Ind Cas 456 (457) (U P B R).  
( '21) AIR 1921 Oudh 148 (149).  
( '37) AIR 1937 All 502 (508, 504). (Partnership—Suit for accounts—All partners not impleaded as parties—Suit need not be dismissed.)  
( '39) AIR 1939 All 295 (285, 286).  
( '37) AIR 1937 Pesh 17 (17, 18). (Reference under Cantonments House Accommodation Act—Mortgages not in possession of lease property is not necessary party—His nonjoinder does not defeat reference—Still mortgages should be added as a party to effectually and completely settle all questions in suit.)  
( '37) AIR 1937 Mad 520 (521). (Addition of party—Right of plaintiff to add at late stage—Duty of Court—Considerations.)  
[See also ('37) AIR 1937 Mad 169 (171). (Case

under Madras Survey and Boundaries Act, Section 14.]

2. ('22) AIR 1922 Pat 96 (96) : 1 Pat 361. (Suit for partition by sons—Grandsons proper parties.)  
( '30) AIR 1930 All 762 (764).  
( '22) AIR 1922 Bom 354 (355) : 46 Bom 1022. (A suit on rent deed—Junior members of the plaintiff's family not made a party.)  
( '24) AIR 1924 Cal 1050 (1051). (All the persons interested in the right of easement are not necessary parties.)  
( '20) AIR 1920 Lah 314 (315).  
( '16) AIR 1916 Mad 208 (209).  
( '80) AIR 1930 Sind 147 (148).  
( '39) AIR 1939 Oudh 145 (148). (Suit against idol—Sarbarahkar managing property belonging to idol impleaded as defendant—It is not necessary to join trustees, if any, as parties—Case is covered by O. 1 R. 9.)  
( '37) AIR 1937 Cal 355 (358). (Suit by plaintiff, one of dominant owners for removal of alleged obstruction to right of easement—Other dominant owners not aggrieved by such obstruction need not join with plaintiff in his suit as they are not necessary parties to it—Nonjoinder of servient owners not obstructing easement is not fatal to suit.)  
[See ('09) 1 Ind Cas 150 (151) (Cal). (Nonjoinder of parties does not affect the jurisdiction of the Court.)]  
[See also ('22) AIR 1922 All 404 (405).  
( '22) AIR 1922 Pat 352 (354).]  
3. ('12) 18 Ind Cas 123 (124) (Cal).  
( '18) 20 Ind Cas 658 (659) (All).  
( '24) AIR 1924 Pat 308 (304).  
( '22) AIR 1922 Pat 447 (447).  
( '37) AIR 1937 Mad 140 (141). (Question remains open against nonimpleaded persons only.)  
( '37) AIR 1937 All 502 (504).  
( '85) AIR 1936 All 110 (115, 116) : 57 All 445. (Interest of person not made party distinct from interest of persons who are parties—Rights and interest of parties actually before Court can be dealt with.)

the suit at all in their absence.<sup>4</sup> But even in such a case the Court cannot immediately proceed to dismiss the suit without giving an opportunity to the plaintiff to amend the plaint by adding the absent parties.<sup>5</sup> If, however, on being required to add a necessary party the plaintiff refuses to do so, the suit is liable to be dismissed.<sup>6</sup> See also Note 2 above.

A mortgage was executed in favour of *A* and *B*. *A* alone brought a suit on the mortgage. Pending the suit, *B* died and his right under the mortgage also devolved on *A*. It was held by the Nagpur High Court that although *A* alone had no right to sue on the day on which he instituted the suit, as he acquired the full and exclusive right before the date on which the decree was passed, the nonjoinder of *B* did not affect the validity of the decree.<sup>7</sup> The decision proceeds on the ground that the object of joining necessary parties is to enable the Court to pass an effective decree and where this object is served in spite of the nonjoinder of such parties, as in the above case, such nonjoinder is immaterial.

4. ('19) AIR 1919 All 322 (328).
- ('82) 8 Cal 42 (50); 8 Ind App 135 (PC).
- ('18) 20 Ind Cas 41 (48); 85 All 441. (The property had been divided and portions held separately—No cause of action against them jointly.)
- ('14) AIR 1914 Nag 81 (31); 10 Nag L R 72.
- ('01) 25 Bom 433 (440).
- ('97) 21 Bom 154 (158, 159).
- ('83) 7 Bom 217 (220).
- ('77) 2 Bom 140 (141).
- ('27) AIR 1927 Cal 238 (238).
- ('21) AIR 1921 Cal 622 (622). (Suit for declaration of a right of way—A person interested in the servient tenement is not made a party.)
- ('08) 35 Cal 182 (184). (Persons liable to pay rent as mutawallis stand in the position of trustees—All of them are not made parties.)
- ('08) 30 Cal 811 (821); 80 Ind App 159 (PC).
- (1900) 27 Cal 493 (500).
- ('28) AIR 1928 Lah 375 (376); 9 Lah 588. (O. 1 R. 9 does not apply to a case where there is no party on the one side present in the Court at all.)
- ('30) AIR 1930 Mad 714 (718). (Suit for accounts—Every partner is a necessary party.)
- ('28) AIR 1928 Mad 837 (837).
- ('14) AIR 1914 Mad 841 (849).
- ('22) AIR 1922 Pat 651 (653); 2 Pat 175. (Necessary party is a proper party but a proper party is not always a necessary party.)
- ('16) AIR 1916 Pat 267 (268); 1 Pat L Jour 573 (FB).
- ('86) AIR 1986 Cal 198 (194); 62 Cal 824.
- ('85) AIR 1985 All 110 (115); 57 All 445. (In this case, the Allahabad High Court has remarked that the nonjoinder of a necessary party cannot by itself be a ground for dismissing a suit but that there is an exception to the above rule viz., that where in the absence of a certain party the Court cannot pass an effective decree in the suit it will refuse to pass any decree in the absence of such party.)
- [See also ('99) 26 Cal 349 (354).
- ('87) AIR 1987 All 502 (504). (There may be cases in which it is impossible to pass a decree of any kind in favour of the plaintiff against a defendant without affecting adversely the interests of others who are not parties and it

- may in such cases be that the only possible course is to refuse to pass a decree—But every case must be considered on its own merits.)]
5. ('10) 8 Ind Cas 1047 (1047) (Lah).
- ('14) AIR 1914 Cal 53 (54); 41 Cal 581.
- ('10) 5 Ind Cas 455 (456) (Mad). (Opportunity given in appeal.)
- ('98) 21 Mad 373 (382).
- ('11) 10 Ind Cas 737 (738); 7 Nag L R 43.
- ('13) 21 Ind Cas 182 (182) (Oudh).
- ('30) AIR 1930 Rang 295 (296).
- ('86) AIR 1936 Cal 193 (194); 62 Cal 324.
- [See also ('37) AIR 1937 Mad 520 (521, 522). (Rule can be applied at any stage of proceeding—Equitable relief in favour of plaintiff should be refused only when plaintiff's conduct disentitles him to it and adding of party would unduly prejudice defendant.)]
6. ('21) AIR 1921 All 411 (413).
- ('31) AIR 1931 P C 229 (231) (PC). (This rule has no application to an appeal before Privy Council in a case where the defect had been brought to notice of the party from the very outset of proceedings.)
- ('29) AIR 1929 Cal 591 (592). (Omission to add within limitation.)
- ('18) 20 Ind Cas 262 (263) (Cal). (Do.)
- ('13) 19 Ind Cas 963 (968, 964) (Cal). (Do.)
- ('87) 14 Cal 435 (439).
- ('81) 6 Cal 815 (823).
- ('14) AIR 1914 Lah 187 (192); 1915 Pun Re No. 3.
- ('06) 1906 Pun Re No. 69, p. 251. (Minor sons—Father refused to join them as plaintiffs.)
- ('05) 1905 Pun Re No. 12, p. 65.
- ('01) 1901 Pun Re No. 56, p. 178.
- ('91) 1891 Pun Re No. 86, p. 422 (FB).
- ('22) AIR 1922 Mad 817 (818, 820).
- ('18) AIR 1918 Mad 1187 (1189).
- ('88) AIR 1988 Mad 664 (667). (Nonjoinder of necessary party in spite of objection taken from start—Suit should be dismissed.)
- ('36) AIR 1936 Cal 193 (194); 62 Cal 324. (Suit on promissory note—Widow of deceased executant governed by the Bengal School of Hindu Law is necessary party.)
7. ('89) AIR 1989 Nag 242 (244); ILR (1989) Nag 515.

**O. 1 R. 9**  
**Notes 6-8**

**6. Nonjoinder in mortgage suits.** — See Order 34 Rule 1.

**7. Limitation.** — See Order 1 Rule 10.

**8. Arbitration proceedings, misjoinder and nonjoinder in.** — Misjoinder of parties and of causes of action in arbitration proceedings is not an objection involving a question of jurisdiction. But it has been held by the Sind Court that if objection is taken on the ground of misjoinder and the arbitrators ignore it, the objection may be made the basis of a charge of misconduct against the arbitrators.<sup>1</sup>

**O. 1 R. 10**

**R. 10.** [Ss. 27, 32, 33.] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit,<sup>2</sup> if satisfied that the suit has been instituted through a *bona fide* mistake,<sup>3</sup> and that it is necessary for the determination of the real matter in dispute<sup>4</sup> so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.<sup>5</sup>

(2) The Court may at any stage of the proceedings,<sup>32</sup> either upon or without the application of either party,<sup>12</sup> and on such terms as may appear to the Court to be just, order that the name of any party improperly joined,<sup>31</sup> whether as plaintiff or defendant, be struck out,<sup>33</sup> and that the name of any person who ought to have been joined,<sup>13</sup> whether as plaintiff or defendant, or whose presence before the Court may be necessary<sup>14</sup> in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit,<sup>30</sup> be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.<sup>38</sup>

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

**Note 3**

1. ('11) 11 Ind Cas 274 (276) (Sind).

(5) Subject to the provisions of the Indian Limitation Act, XV of 1877,<sup>41</sup> section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

[ 1877, Ss. 27, 32, 33; R. S. C., O. 16 Rr. 2, 11, 39. ]

a. See now the Indian Limitation Act, 1908 (IX of 1908), S. 22.

O. 1 R. 10  
Notes 1-2

### Synopsis

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2. Scope of the sub-rule.
3. Bona fide mistake.
4. "Necessary for the determination of the real matter in dispute."
5. "Upon such terms as the Court thinks just."
6. "At any stage of the suit."
7. Consent. See Note 88.
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#### II. SUB-RULES (2) to (5).

9. Legislative changes.
10. Scope and applicability of sub-rule (2).
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21. Suits on tort.
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23. Suits on negotiable instruments.
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28. Addition introducing new cause of action.
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30. "Questions involved in the suit."
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33. Striking out name of party improperly joined.
34. Transposition of parties.
  35. Transposing of defendant as plaintiff.
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37. Misdescription of parties.
38. Consent of added party. Sub-rule 3.
39. Amendment of plaint. Sub-rule 4.
40. Suit by or against a dead person.
41. Limitation Act, Section 22.
42. Appeal.
43. Revision.

#### Other Topics (miscellaneous)

New party deemed added on service of summons. See Note 41.

Substitution of plaintiff. See Note 2.

Suit by members of a Hindu family. See Note 18.

"When it is doubtful." See Note 8.

#### I. SUB-RULE (1)

##### 1. Legislative changes. —

- (1) The words "with his or their consent" in Section 27 of the old Code corresponding to sub-rule (1) of this Order have been omitted.
- (2) The words "at any stage of the suit" are new. See Note 6 below.

**2. Scope of the sub-rule. —** This sub-rule deals with the substitution or addition of plaintiffs after an action is brought. It contemplates cases in which a suit is brought by a plaintiff, who subsequently discovers that he cannot get the full relief he seeks without the joinder of some other person as co-plaintiff, and cases where it is found that some other person, and not the original plaintiff is entitled to the relief

**O. 1 R. 10**  
**Note 2**

claimed.<sup>1</sup> In the former contingency, a new party has to be *added* and in the latter, a new party has to be *substituted* as plaintiff.<sup>2</sup> To bring a case within this sub-rule it must be shown that —

- (1) the action was commenced in the name of the original plaintiff by a *bona fide* mistake, and
- (2) the substitution or addition is necessary for the determination of the real matter in dispute.

The words "if the suit is brought in the name of the wrong person as plaintiff" do not exclude altogether persons who may institute the suit without any right to do so<sup>3</sup> but the case must fall within the provisions of the sub-rule. Unless, therefore, the two conditions of the sub-rule are satisfied a defendant is entitled to the dismissal of a suit brought by an unauthorised person and the defect cannot be cured by the addition or substitution of persons who might have brought the suit.<sup>4</sup> The right of the plaintiff to be added must be *same as the right in suit*; in other words, a substitute can be added only to enforce *the right pleaded*.<sup>5</sup> A Court has, therefore, no power to import into the case as co-plaintiff a person who has a *different cause of action inconsistent with that of the original plaintiff*.<sup>6</sup> This sub-rule does not apply to cases of nonjoinder of *necessary* parties,<sup>7</sup> or to cases in which a suit has been instituted against a wrong person as defendant.<sup>8</sup> It applies to Revenue Courts also.<sup>9</sup> As to its applicability to appeals, see Section 107 Note 16, *ante*. The rule applies to suits on mortgages.<sup>10</sup>

Although, where the person originally suing as plaintiff is not entitled by himself to maintain the suit, the proper course under this rule is to add the other persons as *plaintiffs*, yet, where they are actually added as *defendants* there is nothing to prevent the Court from passing a decree in such suit in favour of any of the parties that may be found entitled to it. The principle is that when once all the parties are before the Court, the Court can make the appropriate order and should give judgment in favour of all the persons who may be entitled to relief, whether they be joined as plaintiffs or defendants.<sup>11</sup>

**Order 1 Rule 10 — Note 2**

1. [See ('89) AIR 1939 PC 170 (178): ILR (1939) Bom 503.]
2. ('10) 8 Ind Cas 87 (89) (Cal).  
(('84) AIR 1934 Nag 159 (160): 31 Nag L R 9.  
(('12) 18 Ind Cas 350 (351) (All).  
(('08) 27 Bom 157 (161).  
(1889) 41 Ch D 841 (846), *Ayscough v. Bullar*.  
(Cons. in 25 Bom 433.)  
[See ('87) AIR 1937 Nag 178 (174): ILR (1937) Nag 514. (Plaintiff wrongly described as 'mandir' in plaint — Plaint held could be amended by striking out word 'mandir' and substituting word 'deity' for it.)]
3. ('07) 30 Mad 419 (420).  
(('23) AIR 1923 Mad 180 (180).  
(('19) AIR 1919 Mad 30 (30). (Administration suit — Finding as to "bona fide mistake" need not be express.)  
(('08) 2 Low Bur Rul 245 (247).  
(('21) AIR 1921 Sind 59 (60): 16 Sind L R 71.  
[See also ('74) 22 Suth W R 278 (278). (Plaintiff's alleged acquisition of title from third parties not established — The third parties to be impleaded.)]
4. ('04) 7 Oudh Cas 78 (81).  
(('89) 11 All 104 (107, 108). (A relation of defamed

- person cannot sue for defamation.)  
(('96) 20 Bom 537 (539).  
(('81) 6 Cal 827 (831).  
(('75) 12 Bom H O R 17 (22).  
(('05) 2 Cal L Jour 431 (436, 441). (Contingent heir to a trustee — No right of suit.)  
(('77) 1 Mad 383 (384).  
(('92-'96) 2 Upp Bur Rul 244.  
[But see ('99) 23 Bom 375 (380). (Suit to cancel void or voidable instrument.)]
- 5. ('80) AIR 1930 Sind 73 (74).  
(('01) 25 Bom 433 (463, 466).  
(('87) 14 Cal 400 (401). (The change of parties as plaintiffs does not affect the question of limitation.)
- 6. ('16) AIR 1915 Low Bur 45 (46): 8 Low Bur Rul 302.  
[See also ('19) AIR 1919 Nag 150 (152): 15 Nag L R 21. (Application under O. 22 R. 8.)]
- 7. ('07) 1 Sind L R 191 (196).  
8. ('04) 27 Mad 815 (825).  
[See also ('08) 1908 Pun W R No. 59.]
- 9. ('21) 3 U P L R 60 (61) (B R).
- 10. ('39) AIR 1939 PC 170 (178): I L R (1939) Bom 503 (P O).
- 11. ('39) AIR 1939 PC 170 (178): I L R (1939) Bom 503 (P O).

**3. Bona fide mistake.** — The first condition for the applicability of this sub-rule is, as has been seen already in Note 2 above, that the action was commenced in the name of the original plaintiff by a *bona fide* mistake.<sup>1</sup> The mistake may be one of fact or of law.<sup>2</sup> A mistake has been held to be *bona fide* where —

- (1) it is not *deliberate* but one *honestly* made,<sup>3</sup>
- (2) the point is doubtful,<sup>4</sup>
- (3) the Court of first instance and the Appellate Court take different views on a point on which the plaintiff's right of action depends.<sup>5</sup>

On the other hand, there can be no room for any *bona fide* mistake where it is *persisted in* after objection<sup>6</sup> or where, to *his own knowledge*, the original plaintiff has no right to sue on the date of the plaint.<sup>7</sup>

#### Illustrations

1. *A*, the agent of *B*, files a suit in his own name by a *bona fide* mistake. The Court can, under this sub-rule, substitute the name of the principal *B* for that of the original plaintiff *A*.<sup>8</sup>

2. *A*, the administratrix of the estate of *B*, *sued* on a mortgage bond in favour of *B*. She was unaware of the fact that her powers as administratrix had come to an end before the date of suit and was honestly under the impression that she had such powers. It was held that the person entitled to sue may be substituted for *A* under this sub-rule.<sup>9</sup>

3. *A* claiming title under a *tamliknama* executed in his favour by *B* sues for possession of certain properties under a *bona fide* mistake that the *tamliknama* covered that property; it was held that on discovery of the mistake, *B*, the real owner, could be added as a co-plaintiff under this sub-rule.<sup>10</sup>

4. *A*, the Official Assignee of Bombay, was constituted the attorney of *B*, the Official Assignee of Madras, to institute a suit on the latter's behalf in Bombay. Instead of suing as "*A*, attorney of *B*" he sued as "*A*, Official Assignee of Bombay" owing to a *bona fide* mistake; it was held that the plaint could be amended by substituting "*A*, attorney of *B*" for "*A*, Official Assignee of Bombay."<sup>11</sup>

5. *A* instituted a suit against *B* for the recovery of moneys due to an estate. At the date of the suit he had already been declared to be a trespasser in regard to that estate. It was held that *A* could

#### Note 3

1. ('06) 88 Cal 657 (660).
- ('07) 1907 Pun Re No 149, p. 692.
- ('24) AIR 1924 Mad 883 (884).
- ('18) AIR 1918 Mad 916 (917) : 40 Mad 743 (744). (Major wrongly described as a minor — Plaintiff can be amended to show that the plaintiff is a major.)
- ('08) 2 Low Bur Rul 245 (254).
- ('36) AIR 1936 Mad 960 (960). (Plaintiff impleading certain persons entitled to redeem as defendants — Defendants not praying to be made plaintiffs but remaining *ex parte* — Suit dismissed on ground that plaintiff has no cause of action — Defendants cannot claim that decree should be passed in their favour — O. 1 R. 10 does not apply as there is no *bona fide* mistake in the name of the plaintiff.)
- [See ('34) AIR 1934 Bom 385 (386) : 58 Bom 586. (Substitution can only be made if right to sue is not barred.)
- ('37) AIR 1937 Sind 92 (93) : 81 Sind L R 406. (Plaint instituted by living person in name of and verified on behalf of dead person — Substitution of name of living person — Permissibility — Gross neglect — Substitution not permitted.)]
- [See also ('70) 2 N W P H O R 179 (180). (Recognized agent of an Official Assignee cannot sue as a plaintiff.)]

2. (1902) 2 K B 485 (487), Hughes v. Pump House Hotel Co. (Cited in 12 Cal L Jour 597.) ('10) 8 Ind Cas 87 (89) (Cal).
- ('06) 88 Cal 657 (660).
- ('21) AIR 1921 Sind 59 (61) : 16 Sind L R 71.
- (1877) 6 Ch D 82 (86), Duckett v. Gover. (Cited in 88 Cal 657.)
3. ('16) AIR 1916 Cal 337 (338).
- ('32) AIR 1932 Nag 20 (20, 21) : 27 Nag L R 335.
- ('09) 4 Ind Cas 495 (496) (Cal). (Mistake of pleader's clerk.)
4. ('20) AIR 1920 Lah 488 (489).
- ('98) 22 Bom 672 (676). (Suit filed by benamidar.)
- ('19) AIR 1919 Lah 263 (264). (In the case of benami transfer, it is possible to have doubts as to the person entitled to sue.)
5. (1902) 2 K B 485 (486), Hughes v. Pump House Hotel Co. (Cited in 12 Cal L Jour 597.) ('23) AIR 1923 Mad 180 (180).
6. ('98) 16 Mad 296 (299).
7. See ('87) 1887 Pun Re No. 91, page 198.
8. ('27) AIR 1927 Bom 424 (426).
- ('87) 14 Cal 400 (400).
- ('10) 4 Low Bur Rul 95 (97).
9. ('16) AIR 1916 Cal 337 (338, 339).
10. ('04) 7 Oudh Cas 193 (197, 198).
11. ('97) 21 Bom 205 (210).



**O. 1 R. 10**  
**Notes 3-9**

not be treated as having instituted the suit by a *bona fide* mistake and that the true owner could not be substituted under this sub-rule.<sup>13</sup>

6. *A* sued *B* for possession of certain lands. *B* contested the suit on the ground that *A* had transferred the whole of his interest in the lands to *C* and that, therefore, he had no title to sue. *A* maintained his right stating that the transfer never became operative. This was found to be false. Thereupon *A* applied for adding *C* as a co-plaintiff; it was held that the falsity of his plea negated any *bona fides* on his part, and that the amendment could not be allowed.<sup>13</sup>

See also the undermentioned cases.<sup>14</sup>

**4. "Necessary for the determination of the real matter in dispute." —**

Under this rule it is essential that, in addition to the existence of a *bona fide* mistake, the substitution or addition should be necessary for the determination of the real matter in dispute.<sup>1</sup>

5. "Upon such terms as the Court thinks just." — The terms will be such as the Court thinks just under the particular circumstances of the case. Thus, the Court may order the payment of costs up to the time of amendment.<sup>1</sup> In the undermentioned case,<sup>2</sup> where a defendant was added under sub-rule 2, the Court made the order that the defendant should consent to be bound by all the previous proceedings in the suit and by any order that the Court might make as to the costs of those proceedings.

6. "At any stage of the suit." — The Court may allow the amendment at any stage of the suit. Thus, it can add a party before the decree is actually drawn up<sup>1</sup> or after the matter has been referred to arbitration,<sup>2</sup> or even in second appeal.<sup>3</sup> Where the Appellate Court substitutes a new plaintiff for the wrong one, and remands the case to the original Court, there must be a *de novo* trial.<sup>4</sup>

7. **Consent.** — See Note 38, *infra*.

8. **Limitation Act, Section 22.** — See Note 41, *infra*.

## II. SUB-RULES (2) to (6).

### 9. Legislative changes. —

1. Under Section 32 of the old Code corresponding to this sub-rule, the Court could add parties at any time and even without any application therefor. But it could not strike out parties except on the application of a party made on or before the first hearing. Under this sub-rule the Court has power to strike out or add parties at any stage of the proceedings with or without any application.

2. The first portion of Section 32 of the old Code empowering the Court to transpose a plaintiff as a defendant or a defendant as a plaintiff, has been omitted as unnecessary

12. ('17) AIR 1917 Pat 181 (182) : 2 Pat L Jour 199.

13. ('12) 15 Ind Cas 89 (41) (Cal).

14. ('86) AIR 1936 Oudh 275 (276) : 12 Luck 150. (A suit instituted by an assignee of a bond under an assignment which is void under S. 136, T. P. Act, can be said to have been instituted in the name of a wrong person, and where the assignee has acted under a bona fide mistake, the Court can remove the name of the assignee and order substitution of the name of the assignor as plaintiff under O. 1 R. 10.)

('86) AIR 1936 Mad 960 (960). (Redemption of mortgage—Suit by grandson of mortgagor impleading sons as defendants—Allegation that latter having also right to redeem refused to join in suit—Finding that plaintiff had no right to sue and that the sons alone were entitled to

redeem—Held that there was no bona fide mistake and that the Court could neither transpose them as plaintiffs nor pass a decree in their favour.)

#### Note 4

1. ('01) 25 Bom 433 (464).

('11) 11 Ind Cas 223 (225) (All).

#### Note 5

1. ('28) AIR 1928 Bom 191 (193).

('05) 1905 All W N 85 (86).

2. ('84) 8 Bom 328 (338).

#### Note 6

1. ('21) 61 Ind Cas 378 (379) (Pat). (Partition suit.)

2. ('26) AIR 1926 Cal 722 (726).

3. ('97) 20 Mad 467 (469).

4. ('11) 9 Ind Cas 254 (254) (Mad).



in view of the fact that the power to add or strike out parties includes the power to transpose them as well.<sup>1</sup>

3. Under Section 33 of the old Code corresponding to sub-rule 4, amended copies of the summons as well as of the plaint had to be served on the *original defendant*. Under sub-rule 4, such service is necessary only *if the Court thinks fit*.

**10. Scope and applicability of sub-rule (2).** — This sub-rule corresponds to the second sentence of O. XVI R. 11 of the English Rules.<sup>1</sup> The object of the rule is to bring before the Court, at the same time, all the persons who are parties to disputes relating to one subject-matter so that the disputes may all be determined at the same time without the delay, inconvenience, and expense of separate actions and trials,<sup>2</sup> and the principle underlying the rule is, that the Court puts itself in the position of being able to effectually and completely adjudicate upon, and settle all the questions involved in the suit.<sup>3</sup>

The sub-rule gives a wide discretion to the Court to meet every case of defect of parties<sup>4</sup> but is subject to two limitations —

- (1) The Court has no power to join a person as a party if he could not have been originally impleaded under O. 1 R. 1 or R. 3.<sup>5</sup>
- (2) The presence of the person added *must be necessary to effectually and completely adjudicate upon* and settle all points involved in the suit.<sup>6</sup>

The discretion also should be exercised in a reasonable manner so as not to cause inconvenience or embarrassment.<sup>7</sup>

The sub-rule does not deal with the deletion of *reliefs*,<sup>8</sup> or with the *substitution* of parties<sup>9</sup> but only with *striking out* or *addition* of parties. It provides for the addition of any person who *ought to have been joined* and of any person whose presence is *necessary to enable the Court to give a complete and effectual adjudication*. The former is called a *necessary party* and the latter, a *proper party*. The distinction between this sub-rule and O. 1 R. 3 is, that while the latter refers to the action of the plaintiff at the time of the presentation of the plaint in joining, as defendants, parties

#### Note 9

1. ('27) AIR 1927 Lah 485 (488) : 8 Lah 241.
- ('16) AIR 1916 Cal 80 (82).
- ('20) AIR 1920 Mad 732 (735).

#### Note 10

1. ('09) 4 Ind Cas 236 (237) : 5 Nag L R 152.
2. (1895) 2 Q B 821 (824), *Montgomery v. Foy, Morgan & Co.* (Cited in 11 Cal L Jour 426—Per Lord Esher, M. R.)
- ('71) 15 Suth W R 432 (432, 438).
- ('20) AIR 1920 Mad 732 (735).
- ('82) 5 Mad 52 (54).
- (1928) 1928 P 41 (46), *The W. H. Randall*.
- (1889) 22 Q B D 657 (666, 667), *Bryne v. Brown*. (Per Lord Esher, M. R.)
3. ('27) 1927 Mad W N 801 (802).
- ('37) AIR 1927 Bom 49 (50, 51) : 51 Bom 16.
4. ('37) 24 Cal 34 (37).
- ('84) AIR 1934 Pat 425 (426).
- ('05) 2 All L Jour 516 (518).
- ('79) 2 All 264 (266).
- ('70) 18 Suth W R 448 (445).
- ('69) 11 Suth W R 361 (364).
- ('27) 1927 Mad W N 801 (802).
- [See ('84) 8 Bom 616 (619).]

5. ('20) 57 Ind Cas 784 (785) (Nag).

('27) AIR 1927 Mad 834 (835).

6. ('11) 11 Ind Cas 223 (225) (All).

('80) 2 All 738 (744).

('27) AIR 1927 Bom 49 (50) : 51 Bom 16.

('25) AIR 1925 Cal 26 (29).

('12) 16 Ind Cas 908 (909) : 40 Cal 323.

('90) 1890 Pun Re No. 118, p. 879.

7. ('81) 7 Cal 148 (149).

('84) AIR 1934 Pat 425 (426).

('19) AIR 1919 Cal 189 (189) : 46 Cal 48 (51).

(Third party against whom defendant claimed indemnity added as a defendant — See S. 128

(2) (e), C. P. C.—Sufficient safe-guard provided

against delay and inconvenience to plaintiff.)

('69) 11 Suth W R 361 (364, 365).

('39) AIR 1939 Bom 188 (193) : I L R (1939) Bom

232. (Although the powers of the Court under

O. 1 R. 10 are wide enough to add parties to a

suit or proceedings, merely because a person

claims to be interested in a suit and wants to be

added as a party, the Court would not ordinarily,

without the concurrence of the plaintiff, make

him a party.)

8. ('19) AIR 1919 Mad 871 (878) : 42 Mad 219.

9. ('09) 25 Bom 438 (463).

**O. 1 R. 10**  
**Notes 10-11**

against whom the right to relief is alleged to exist, the former refers to the action of the Court, at a stage subsequent to the presentation of the plaint in adding parties.<sup>10</sup>

The sub-rule applies also to proceedings under the Land Acquisition Act, 1894.<sup>11</sup> to suits under Section 92 of the Code<sup>12</sup> and to suits under Order 34 of the Code.<sup>13</sup> It will also cover the case of an application to implead as parties, the legal representatives of a deceased defendant *in their individual capacity*.<sup>14</sup> It has been held not to apply to proceedings under the Divorce Act<sup>15</sup> nor to enable a Court to adjudicate in a suit a general question which is of interest to a whole community, by adopting the expedient of joining a member of that community to the suit as a co-plaintiff.<sup>16</sup>

**11. Addition of parties — General.** — As has been observed in Note 10 above, this sub-rule provides for the addition of only two classes of persons, namely *necessary* parties, *i. e.*, persons who ought to have been joined as parties, and *proper* parties, *i. e.*, persons without whose presence the questions in the suit cannot be completely and effectually adjudicated upon. Where a person is neither a *necessary* nor a *proper* party, the Court has no jurisdiction to add him as a party under this sub-rule.<sup>1</sup>

No person can bring himself or anyone else on the record of a suit except with the cognizance or leave of the Court.<sup>2</sup> Further, it is conceived, that an *order* of the Court is necessary before a person is validly added as a party; the mere fact that the decree includes his name would not amount to an order for joinder of parties under O. 1 R. 10, sub-rule 2.<sup>3</sup>

The question of the joinder of necessary or proper parties is not a matter of *substantive right* but is merely one of *procedure*<sup>4</sup> and does not confer on the persons so joined any *new* rights or rights adverse to those of the others.<sup>5</sup> As has been seen in Note 10 above, the Court has a wide discretion in the matter of the joinder of a necessary or proper party.<sup>6</sup> It will ordinarily be exercised in favour of a person who applies in proper time.<sup>7</sup> Even in the absence of an application the Court should not, as a rule, dismiss a suit for nonjoinder of a necessary or proper party but should add him as a party of its own motion or direct the plaintiff to apply for that purpose.<sup>8</sup> The discretion will not, however, be exercised in favour of an applicant who applies to be added as a party, where the application is made at a late stage of the case<sup>9</sup> or where

10. ('99) 4 Cal W N 462 (464).

11. ('08) 25 All 133 (134).

12. ('18) AIR 1918 Mad 1071 (1072).

13. ('86) AIR 1936 Pat 153 (154). (Failure to make a person interested in the equity of redemption a party to the mortgage suit is not fatal, as the Court may exercise its powers of joining parties under O. 1 R. 10, C. P. C.)

('89) AIR 1939 P C 170 (173); I L R (1939) Bom 503 (P C).

14. ('17) AIR 1917 Mad 849 (849).

15. ('08) 30 Cal 499 (497).

16. ('30) AIR 1930 Sind 73 (74).

**Note 11**

1. (1902) 1 Ch 911 (917), *McCleane v. Gyles*. (Cited in 11 Cal L Jour 426.)

('99) AIR 1929 Cal 477 (477, 478); 55 Cal 447. (Joining party merely "for watching proceedings" is a mistake.)

2. ('92) 1892 All W N 189 (189).

3. ('27) AIR 1927 All 465 (466); 49 All 664.

4. ('09) 3 Ind Cas 837 (841, 842); 34 Bom 13.

5. ('69) 1 N W P H O R 44 (45).

6. ('89) 1889 Pun Re No. 156, page 518 (F B).

7. ('82) 8 Cal 170 (173).

8. ('21) AIR 1921 Oudh 148 (149).

('05) 27 All 75 (78). (Nonjoinder of necessary party though fatal, defect is cured by the Court acting under O. 1 R. 10 (2).)

('21) AIR 1921 Mad 557 (558); 44 Mad 43.

('10) 6 Ind Cas 977 (978); 13 Oudh Cas 109.

('30) AIR 1930 Rang 295 (296).

9. ('34) AIR 1934 Lah 38 (36). (Gross negligence of party in not applying to implead a party—Application not allowed at a late stage.)

[See also ('38) AIR 1938 Mad 982 (990). (Suit by trustee on behalf of trust property — Co-trustees not joined either as plaintiffs or defendants for 17 years in spite of objection regarding the same—Exercise of discretion of joining them as defendants after 17 years held not proper.)]

the person sought to be added is only a *proper* party and the plaintiff opposes such application,<sup>10</sup> or where the addition involves a trial *de novo*.<sup>11</sup>

**O. 1 R. 10**  
**Note 11**

The trial Court cannot add parties after the suit has been carried out of it into the Court of Appeal.<sup>12</sup> The Court of Appeal has, however, the same powers as the original Court in the matter of addition of parties to the suit, or respondents to the appeal.<sup>13</sup> In fact, the Appellate Court should see, before deciding the appeal, that all the necessary parties are brought on the record.<sup>14</sup> Where, therefore, it finds it necessary to have certain persons before it, the proper course is not to return the plaint for amendment, but to add them as parties and remand the case for trial<sup>15</sup> or to remand the case to the lower Court directing it to add such persons as parties, and then try the case.<sup>16</sup> But the discretionary power should be exercised with caution.<sup>17</sup> Where a person applies to be added as a party appellant, the test is whether he can urge any of the grounds upon which the validity of the Court's order is called in question by the appellant already on record; if he cannot, he ought not to be added.<sup>18</sup> Nor will the Court's discretion be exercised in favour of a party who has resisted the objection as to nonjoinder in the lower Court.<sup>19</sup>

The High Court has, in second appeal, no power to add parties after it has remanded the case to the lower Court.<sup>20</sup> There is a conflict of views as to whether the High Court can, in second appeal, add a person as a party if he was not a party to the appeal before the lower Appellate Court. According to the High Court of Allahabad it cannot.<sup>21</sup> According to the High Courts of Calcutta,<sup>22</sup> Madras<sup>23</sup> and Patna<sup>24</sup> it can. The Allahabad High Court rested its view solely on Section 559 of the Code of 1882 corresponding to O. 41 R. 20 of the Code, and did not advert to Sections 27, 32 and 582 of that Code corresponding to O. 1 R. 10 and Section 107 of the present Code which give ample power to the Court to add parties. It is submitted that the Allahabad

10. ('26) AIR 1926 Mad 886 (887) : 50 Mad 34.

11. ('31) AIR 1931 P C 229 (231) (P C).

12. ('73) 20 Suth W R 123 (124).

13. ('11) 12 Ind Cas 69 (69) (Mad). (Appeal admitted by Privy Council — High Court cannot add parties.)

14. ('86) 8 Mad 300 (302, 303).

15. ('34) AIR 1934 Bom 356 (359). (Court allowed appellant to be added where his name was omitted through mistake of advocate.)

16. ('08) 12 Cal W N 946 (957) : 31 Mad 236 : 35 Ind App 176 (P C). (Beneficiaries were joined as co-plaintiffs on appeal.)

17. ('13) 21 Ind Cas 928 (930) (P C).

18. ('29) AIR 1929 Mad 343 (344).

19. ('21) AIR 1921 Mad 172 (174) : 44 Mad 605 (F B).

20. ('02) 12 Mad L Jour 355 (359). (Beneficiaries were joined as co-plaintiffs on appeal.)

21. ('38) AIR 1938 Mad 329 (331).

[See ('83) 1888 All W N 201 (201).]

22. ('16) AIR 1916 Mad 828 (829).

23. ('84) 7 Mad 428 (429).

24. ('04) 26 All 528 (531).

25. ('01) 23 All 167 (178).

26. (1865) 2 Bom H C R 310 (318).

27. ('16) AIR 1916 Cal 288 (284) : 43 Cal 938.

28. ('16) AIR 1916 Mad 957 (958).

29. ('92) 15 Mad 54 (56).

30. ('90) 13 Mad 82 (83).

31. ('18) AIR 1918 Pat 625 (526) : 3 Pat L Jour 409.

32. ('96) 18 All 332 (333).

33. ('90) 14 Bom 299 (305). (While remanding the case, the Appellate Court directed the lower Court to consider question of adding necessary parties.)

34. ('31) AIR 1931 Bom 408 (409).

35. ('03) 2 Low Bur Rul 277 (278).

[See also ('32) AIR 1932 P C 146 (150, 151) (P C). (Appellate Court should not however indicate the order to be passed by the lower Court.)]

36. ('10) 6 Ind Cas 912 (919) (Cal).

37. ('07) 5 Cal L Jour 434 (437).

38. ('18) AIR 1918 Cal 608 (609).

[See also ('34) AIR 1934 Bom 356 (359). (Where no appeal was filed by the original plaintiff due to pure error and oversight of his pleader, he should be allowed to be added as a party appellant, though this extraordinary remedy should seldom be applied.)]

39. ('91) 1891 Pun Re No. 86, page 422 (F B).

40. ('31) AIR 1931 P C 229 (231) (P C). (Order 1 R. 9 is not applicable in such a case.)

41. ('82) 8 Cal 277 (278).

42. ('23) AIR 1923 Mad 337 (337).

43. ('26) AIR 1926 Rang 9 (10) : 3 Rang 474.

44. ('94) 16 All 5 (8).

45. ('14) AIR 1914 All 293 (293) : 37 All 57. (Following 16 All 5.)

46. ('18) AIR 1918 Cal 179 (175).

47. ('96) 19 Mad 151 (152).

48. ('24) AIR 1924 Pat 773 (774).

**Q. 1 R. 10**  
**Notes 11-12**

view is not correct. See also O. 41 R. 20, Notes 2 and 12. There is also a conflict of opinion as to whether a Court of Appeal can add a person who was not a party to the original suit itself. The Allahabad,<sup>25</sup> Bombay<sup>26</sup> and Lahore<sup>27</sup> High Courts hold that it cannot, while the Calcutta High Court holds that it can.<sup>28</sup> It is submitted with respect that the latter view is correct. If, in order to prevent multiplicity of suits, the first Court has power to add new parties to the suit, there is no reason why the powers of the Appellate Court in that respect should be restricted. It has been held by the Lower Burma Chief Court<sup>29</sup> that a Court of second appeal has no power to substitute one defendant for another in the plaint or record of the original suit, nor one appellant for another in the record of the first appeal.

Even when this rule is in terms inapplicable, the Court has power to add parties on general principles where such addition is necessary.<sup>30</sup>

Although it might be more satisfactory to add certain persons as *plaintiffs* and not as defendants, yet, where all the necessary parties are before the Court, whether as plaintiffs or defendants, the Court can grant the appropriate relief.<sup>31</sup>

It has been held by the Privy Council that where a suit on behalf of a Hindu widow for recovery of certain properties is sought to be withdrawn, the next reversioner has a right *ex debito justitiae* to be added as a plaintiff and given an opportunity of continuing the suit.<sup>32</sup>

Where persons who have been joined as defendants to a suit have not raised any objection but submitted to the jurisdiction of the trial Court, they ought not to be allowed to raise the objection for the first time in appeal.<sup>33</sup> See also Note 42.

**12. "Either upon or without the application of either party."** — It is not generally the province of the Court to force the plaintiff in a case to implead particular persons as parties.<sup>1</sup> Accordingly the Court will not, as a rule, act except on the application of the *parties*<sup>2</sup> and unless such application contains definite allegations of fact upon which a liability is imputed to the person sought to be impleaded.<sup>3</sup> In proper cases, however, this sub-rule empowers the Court to act *suo motu*<sup>4</sup> on the application of the person seeking to be made a party<sup>5</sup> or even without it.<sup>6</sup> A Court

25. ('25) AIR 1925 All 768 (768) : 47 All 858.

26. ('29) AIR 1929 Bom 353 (354) : 53 Bom 598.

27. ('28) AIR 1928 Lah 490 (491).

('15) AIR 1915 Lah 176 (177).

28. ('04) 8 Cal W N 404 (406).

('32) AIR 1932 Cal 448 (449, 450) : 59 Cal 329.  
(Can be added only in exceptional circumstances.)

29. ('02) 1 Low Bur Rul 350 (351).

30. ('84) AIR 1984 All 4 (7) : 55 All 825.

31. ('89) AIR 1989 P O 170 (178) : I L R (1989) Bom 503 (P O).

32. ('85) AIR 1985 P O 185 (187) : 57 All 678 : 62 Ind App 257 (P O).

33. ('85) AIR 1985 Rang 28 (28).

**Note 12**

1. ('81) 8 Ind App 185 (141) : 8 Cal 42 (49) (P O).  
[See ('08) 27 Bom 31 (41).]

2. See the following cases :

('05) 1905 All W N 35 (36).

('18) 20 Ind Cas 262 (263) (Cal).

('18) 19 Ind Cas 963 (964) (Cal).

('16) AIR 1916 Pat 411 (414).

('37) AIR 1937 Rang 175 (178). (A written statement which *inter alia* requests the Court to add certain persons as parties is an application under O. 1 R. 10.)

3. ('12) 16 Ind Cas 592 (593, 594) : 15 Oudh Cas 804.

4. ('05) 1905 All W N 85 (86).

5. ('86) 12 Cal 642 (652).

('84) 8 Bom 616 (618).

('86) 13 Cal 90 (94).

('82) 5 Mad 52 (53).

('37) AIR 1937 Oudh 229 (232) : 13 Luck 255.  
(Addition of party in scheme suit.)

('86) 40 Cal W N 677 (679). (Such occasions are infrequent.)

('87) AIR 1937 Nag 121 (122) : I L R (1937) Nag 866. (Mortgage by Hindu father — Son is not necessary party to suit on mortgage.—But when he himself applies to be made a defendant contesting the binding nature of the mortgage, he should be joined as a proper party to the suit.)

6. ('80) 5 Cal 882 (886).

('85) AIR 1935 Nag 182 (188) : 31 Nag L B 233.  
(Persons interested in result of appeal can be added by Court even in absence of application.)

cannot, however, of its own motion add a receiver as a defendant when the leave of the Court appointing the receiver has not been obtained.<sup>7</sup>

**O. 1 R. 10**  
**Notes 12-13**

Where a person applies to be made a party, what the Court ought to see is whether the suit cannot be determined owing to his absence, or whether a third person will be prejudiced by his not being joined as a party.<sup>8</sup> The position of a person who is made a defendant on his own application is different from that of a person who is impleaded without any such application, in that the former has to make out a *prima facie* case before the plaintiff can be asked to meet it<sup>9</sup> while, so far as the latter is concerned, he can claim to have his pleas fully heard and determined.<sup>10</sup>

Where a person is added under this sub-rule, the evidence already on the record cannot be used against him without his consent.<sup>11</sup>

The addition of a party will not shift the burden of proof from the plaintiffs who are bound to prove their own case as against the original defendant.<sup>12</sup>

An application of a person to be added as a co-plaintiff cannot be treated as an application under O. 22 R. 10 of the Code.<sup>13</sup>

**13. "Who ought to have been joined."** — Persons who *ought* to be joined as parties are called *necessary* parties. They are persons necessary to the constitution of the suit, *i. e.*, persons *in whose absence no effective decree at all can be passed*.<sup>1</sup> Thus, where several persons have a *joint right of action*,<sup>2</sup> such as

7. ('10) 6 Ind Cas 214 (216) (Cal).  
[See ('20) AIR 1920 Sind 58 (58): 14 Sind L R 171.  
(As to the tests to be adopted to see if a receiver is a necessary party.)]

8. ('29) AIR 1929 Mad 291 (298).  
(70) 13 Suth W R 362 (363). (Interveners likely to be prejudiced—Rightly impleaded.)  
(71) 16 Suth W R 19 (21). (Do.)  
(68) 10 Suth W R 368 (369). (Interveners not likely to be affected—Not to be impleaded.)

9. ('20) AIR 1920 Nag 216 (218).  
(80) 7 Cal L Rep 560 (561, 562).  
(68) 10 Suth W R 52 (53).

10. ('71) 15 Suth W R 97 (98).  
(15) 28 Ind Cas 440 (441) (Oudh).

11. ('74) 22 Suth W R 35 (36). (Person made party at appellate stage.)  
[See also ('81) AIR 1931 Cal 580 (580): 58 Cal 801. (A party may, however, be added on condition that he could only intervene at particular stages and that he could not question orders passed before he applied to Court.)]

12. ('70) 13 Suth W R 362 (363).  
(71) 16 Suth W R 235 (237, 238).

13. ('17) AIR 1917 Cal 627 (628).

#### Notes 13

1. (1900) 27 Cal 493 (497, 499). (Two tests have been laid down to determine who is a necessary party.)  
(13) 17 Ind Cas 921 (924) (Cal).  
(29) AIR 1929 Mad 291 (293). (Note the tests laid down for determining who is a necessary party.)

The following cases illustrate who are necessary parties:

(11) 9 Ind Cas 739 (741): 33 All 272: 38 Ind App 45 (P O). (Suit by managing members of

joint family business—Other members not necessary parties.)

(84) AIR 1934 Pat 106 (107).

(01) 1901 All W N 14 (14). (Suit under O. 21, R. 63 — Judgment-debtor is a necessary party.)

(74) 6 N W P H C R 208 (210).

(78) 2 Bom 140 (141).

(12) 15 Ind Cas 176 (176): 39 Cal 881. (Transferee of property sold in execution is a necessary party in setting aside the sale.)

(10) 6 Ind Cas 554 (558) (Cal).

(71) 15 Suth W R 97 (98).

(17) AIR 1917 Lah 402 (403). (Parties to marriage, necessary parties in suit for declaration of invalidity of marriage.)

(82) 1882 Pun Re No. 188, page 553.

(26) AIR 1926 Mad 991 (992). (If interests of defendants on record are inseparable from those of necessary parties not brought on record, the decree will be wholly void.)

(23) AIR 1923 Mad 81 (82). (In a suit to enforce registration, even minor executants should be brought on record.)

(25) AIR 1925 Nag 293 (288, 289). (Creditor of manager of joint Hindu family suing after his death — All members must be impleaded.)

(32) AIR 1932 Cal 337 (338): 58 Cal 77. (In an administration suit, executor is the only necessary party — Other legatees are not necessary parties.)

(84) AIR 1934 Pat 106 (107). (If necessary parties are not joined, the action cannot proceed.)

[See ('83) 9 Cal 704 (710, 711) (P C). (The Nawab Nazim's Debts Act of 1873.)]

(83) AIR 1933 Pat 715 (716). (Suit for resumption of village by grantor — Minor sons of joint family are not necessary parties when represented by father.)]

2. ('22) AIR 1922 Mad 317 (318).

**O. 1 R. 10**  
**Note 13**

co-trustees,<sup>3</sup> all must join in suing. In a suit to set aside an order for rateable distribution, all persons interested in the distribution are necessary parties.<sup>4</sup> A receiver appointed after the institution of the suit is a necessary party,<sup>5</sup> although he is not a necessary party where no attempt is made to interfere with his rights in respect of the property entrusted to his care.<sup>6</sup> An Official Assignee is not a necessary party in a suit to recover a money debt from an insolvent.<sup>7</sup> In a suit for a declaration that certain *pottahs* were forgeries, all persons who claim under those *pottahs* must be made parties.<sup>8</sup> In a suit to obtain a declaration that the plaintiffs possess some rights in the *shamilat*, all the proprietors are necessary parties.<sup>9</sup> Where *A* sued *B* for arrears of rent of a house but did not implead *G* who had already purchased the house and had got his title declared against *A* in a Civil Court, it was held that *G* was a necessary party.<sup>10</sup> Where in a suit to eject the defendant from a site, the latter pleaded that the site belonged to the Municipal Council and that he was in occupation with its permission, it was held that a person having a right to defend is a necessary party and that therefore the Municipal Council was a necessary party.<sup>11</sup> See also the undermentioned decisions.<sup>12</sup>

But a person who is only *indirectly* or *remotely* interested is not a necessary party.<sup>13</sup> Thus, all persons interested in the right of easement are not necessary parties

(‘99) 9 Mad L Jour 312 (312). (If co-trustees refuse to join as plaintiffs they should be made defendants.)

(‘16) AIR 1916 Pat 44 (45) : 1 Pat L Jour 437. (All members of Endowment Committee should sue for removal of trustee.)

(‘16) AIR 1916 Pat 310 (311) : 1 Pat L Jour 468. (In a mortgage suit all persons interested in the mortgage security shall be joined as plaintiffs.)

3. (‘22) AIR 1922 Mad 317 (318).

(‘89) 9 Mad L Jour 312 (312).

(‘81) 8 Cal 42 (50) : 8 Ind App 135 (P O). (Suit by joint shebaita to recover debutter property transferred by one of them.)

(‘01) 24 Mad 296 (299). (Co-uralaus.)

(1900) 23 Mad 82 (84). (Co-shebaita.)

See also Order 31 Rule 2.

4. (‘86) 18 Cal 159 (162).

[See however (‘20) AIR 1920 Cal 525 (526). (Receiver in insolvency represents all creditors — Latter not necessary parties.)]

5. (‘10) 8 Ind Cas 214 (216, 217) (Cal).

(‘10) 8 Ind Cas 1 (2) (Cal). (Receiver is necessary party only in suits affecting property in his hands.)

(‘09) 2 Ind Cas 958 (958) (Cal). (Do.)

The following are cases of receivers in insolvency :

(‘32) AIR 1932 All 382 (383) : 54 All 532. (Official receiver.)

(‘21) AIR 1921 All 89 (90) : 43 All 452. (Wrongful seizure of property by official receiver at the instance of creditor — Suit against creditor for damages by real owner — Receiver not necessary party.)

(‘26) AIR 1926 Lah 696 (696). (Sale by receiver of property as belonging to insolvent — Claim by third party dismissed — In appeal receiver necessary party.)

6. (‘85) AIR 1935 Cal 15 (16).

7. (‘85) 22 Cal 259 (267).

(‘14) AIR 1914 Sind 114 (115) : 8 Sind L R 325. (Adjudication after suit.)

(‘35) AIR 1935 Rang 439 (445). (Because the suit is not one relating to the property of the insolvent.)

8. (‘69) 12 Suth W R 247 (247).

[See also (‘25) AIR 1925 Pat 228 (232). (Persons recorded as in possession are necessary parties in a suit to declare entry in land register incorrect.)]

9. (‘34) AIR 1934 Lah 366 (368) : 15 Lah 307.

10. (‘29) AIR 1929 Oudh 148 (148).

11. (‘33) AIR 1933 Mad 664 (667).

12. (‘35) AIR 1935 Sind 131 (139). (Where a property is sold in execution of a decree and the decree-holder is paid the amount and subsequently another person files a suit claiming relief on the ground of his alleged equitable mortgage over the property but the auction-purchaser is not impleaded, the suit is not maintainable for nonjoinder of the auction-purchaser nor is the decree-creditor liable to pay any money to the plaintiff.)

(‘36) AIR 1936 Lah 619 (621). (Suit against Municipality indirectly challenging action of Government in renewing term of office of Executive Officer — Secretary of State held necessary party.)

13. (‘12) 17 Ind Cas 921 (924) (Cal).

(‘13) 20 Ind Cas 658 (658) (All). (Suit by one of the heirs of deceased Mussalman for her share alone — Other heirs not necessary parties.)

(‘29) AIR 1929 Cal 237 (238). (Suit for mutual adjustment of rights of worship — Deity not necessary party.)

(‘10) 7 Ind Cas 691 (692) (Cal). (Non-opposing creditor in lower Court not necessary party in appeal by insolvent.)

(‘98) 1898 Pun Re No. 61, p. 203. (Childless widow in Kangra District — Alienation — Village community — No right to contest.)

(‘77) 2 Cal 472 (473, 474). (Person, although likely to be affected by the result, is not liable to be joined as a party, unless he claims or is entitled to some interest in the subject-matter of the suit.)

to the suit where the cause of action on the pleadings is against those persons only who are alleged to have interfered with the plaintiff's right.<sup>14</sup> But where a plaintiff sues for a declaration of his right of easement in respect of a certain pathway, every owner of the servient tenement who denies the plaintiff's right or is concerned in the obstruction of the pathway is a necessary party and any decree obtained in the absence of any such person is infructuous.<sup>15</sup>

A married Englishwoman having an English domicile can sue in India in respect of a mortgage due to her, without joining her husband as a party even though the statutes in England which have freed married women from disability have not been extended to this country.<sup>16</sup>

**14. "Whose presence before the Court may be necessary."** — A person is a *proper* party if his presence before the Court is necessary to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit.<sup>1</sup> In other words, the expression "proper party" means the party who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in

('68) 10 Suth W R 368 (369).

('67) 7 Suth W R (C R) 201 (202, 203). (Persons claiming by adverse title—Not necessary parties.)

('22) AIR 1922 Pat 243 (248) : 1 Pat 475.

('20) AIR 1920 Pat 781 (783).

('27) AIR 1927 Mad 82 (83). (Compromise with some defendants — They cease to be necessary parties.)

('26) AIR 1926 Mad 1110 (1117). (Debtors of the estate are not necessary parties to administration suit.)

('23) AIR 1923 Mad 58 (59). (Decree-holder not a necessary party to a claim suit after sale of properties.)

('28) AIR 1928 Nag 65 (66). (Do.)

('11) 10 Ind Cas 779 (779) (Rang). (Benamidar or agent for another—Not necessary party.)

('20) AIR 1920 Sind 58 (58) : 14 Sind L R 171. (Suit against partnership — Receiver appointed in dissolution suit, not necessary party unless receiver's appointment or possession is in question.)

[See ('18) AIR 1918 P C 49 (50) (P C). (Suit for possession as reversioners—Practice of joining parties remotely connected condemned.)]

**14.** ('24) AIR 1924 Cal 1050 (1050, 1051).

('28) AIR 1928 Cal 23 (24).

('26) AIR 1926 Cal 1201 (1201). (Confirming AIR 1926 Cal 462.)

('26) AIR 1926 Cal 92 (94).

('25) AIR 1925 Cal 1198 (1198, 1199).

('15) AIR 1915 Cal 403 (403, 404).

('24) AIR 1924 Pat 803 (804). (Suit by some servient owners alone *held* not bad.)

[See however ('10) 5 Ind Cas 23 (23) (Cal). (A decree based on easement cannot be passed when all the servient owners are not made parties.)]

**15.** ('86) AIR 1986 Cal 534 (535).

**16.** ('88) 15 Cal 35 (39).

#### Note 14

**1.** ('05) 30 Bom 156 (161).

('27) AIR 1927 All 315 (315). (Persons having no interest in suit property but whose names appear in the record of rights are proper parties.)

('80) 2 All 738 (744).

('27) AIR 1927 Bom 470 (473) : 51 Bom 800. (Administration suit — Claim for accounts of partnership carried on by the deceased with the executor and other partners combined — Other partners are neither necessary nor proper parties.)

('84) 8 Bom 323 (336). (Assignee *pendente lite*.)

('68) 5 Bom H C R (O C) 83 (93). (In a suit to set aside a sale by the owner of the property against the purchaser of the property, wrongfully attached and sold in execution of a decree, the execution-creditor is liable to be made a party.)

('12) 17 Ind Cas 917 (917) (Cal). (Plaintiff suing for declaration that he was not a tenure-holder but a raiyat—Other persons recorded as raiyats of plaintiff were held proper parties.)

('11) 11 Ind Cas 183 (184) (Cal). (Rent suit — Defendant pleading *jus tertii*—Such third party is a proper party.)

('08) 1908 Pun W R No. 59.

('84) AIR 1934 Cal 795 (795). (Pre-emption — Landlords petitioning under S. 26-F, Bengal Tenancy Act, are proper parties to proceedings for setting aside sale.)

('37) AIR 1937 Oudh 229 (232) : 13 Luck 255. (Suit under S. 92 for framing of scheme—Close relation of creator of trust claiming voice in management of trust property applying to be impleaded must be added as defendant.)

('37) AIR 1937 Mad 200 (207). (The underlying principle regarding the addition of parties is that there must be finality to litigation and to secure that purpose it would be incumbent upon the Court to add a party whose presence would be necessary to put an end to all the controversy in the litigation finally.)

('37) AIR 1937 Posh 17 (18). (Reference under Cantonments House Accommodation Act—Mortgagee not in possession of lease property is not necessary party—His non-joinder does not defeat reference—Still mortgagee should be added as a party to effectually and completely settle all questions in suit.)



**O. 1 R. 10**  
**Note 14**

coming to a decision on the point in issue.<sup>3</sup> It is not necessary that any *relief* should be asked against him,<sup>3</sup> the object of adding him being to avoid needless multiplicity of suits,<sup>4</sup> and to protect his interests or the interests of a party already on record.<sup>5</sup> It is also not necessary to justify the addition of a defendant that he should be interested in all the reliefs claimed in the suit or in all the questions arising between the plaintiff and the other defendants.<sup>6</sup>

*Illustrations*

1. *X* executes a mortgage in favour of *A*, who is a *benamidar* for *B*. *A* institutes a suit against *X* on the mortgage. *B*, the real owner, may be added as a party.<sup>7</sup>

2. *A*, one of the relations of a deceased person, brings an administration suit against the other relations. The status of such relations as heirs is not denied. *B* applies to be added as a party alleging that he is an adopted son of the deceased. He can be added as a party in order to avoid multiplicity of suits.<sup>8</sup>

3. *A*, an administrator of the estate of a deceased person, sues *B*, one of the heirs of the deceased, for profits, on the ground that he acted as executor *de son tort*. In such a suit the other heirs of the deceased may be added in order to avoid needless litigation.<sup>9</sup>

4. *A*, alleging that he is the adopted son of *B*, deceased, sues *C*, the widow for possession of certain properties of the deceased. In such a suit, the reversioners to the estate of *B*, who dispute such adoption may be added as parties in order to protect their interests.<sup>10</sup>

5. *A*, a legatee under a will, sues *B*, the executor, for a legacy. The estate is not sufficient to pay all the legacies in full. Other legatees under the same will may be added as parties for the protection of the executor, and so that if any rateable abatement is to be made, it may be done in a manner binding on all the legatees.<sup>11</sup>

6. In a suit against the owners of a ship, the plaint was allowed to be amended by adding the ship as a party defendant.<sup>12</sup>

7. *A* institutes an interpleader suit against *B* and *C*. *D* applies to be added as a party alleging that he has a right to the amount in suit. He may be added even though both the plaintiff and the defendants oppose such joinder.<sup>13</sup>

8. A promissory note executed in favour of *B*, a bank, is endorsed by it in favour of *C* who institutes a suit thereon. *B* is a proper party to such a suit.<sup>14</sup>

See also the undermentioned decisions.<sup>15</sup>

[See ('17) AIR 1917 Cal 390 (343). (Bengal Tenancy Act—Suit for declaration of status as tenant—Under-ryats may be proper parties.)

('85) AIR 1935 Sind 194 (195).]

2. ('25) AIR 1925 Cal 1257 (1258).

[See also ('98) 1898 Pun Re No. 75, page 257.]

3. ('34) AIR 1934 Lah 828 (828).

('94) 18 Mad 58 (58).

('90) 18 Mad 82 (83).

[See ('14) AIR 1914 Lah 187 (192) : 1915 Pun Re No. 8.]

4. ('10) 6 Ind Cas 570 (571) (Cal).

('87) 11 Bom 425 (428).

[See also ('27) AIR 1927 Cal 352 (353). (Reference under S. 18, Land Acquisition Act, for determining valuation of wakf property—Mutwallis can be added as parties.)

('97) 21 Bom 229 (233).]

5. See Illustrations (4) and (5) above and footnotes (8) and (9) below.

('08) 31 Mad 286 (250) : 35 Ind App 176 (PC).

(Worshippers added as proper parties where trustee did not conduct litigation in the interest of the trust).

('89) 18 Bom 22 (24).

('06) 29 Mad 106 (110).

6. ('86) AIR 1936 Mad 449 (454). (The rules relating to joinder of parties are based on the principles of avoiding multiplicity of suits not merely

as involving waste of time and money but also possible conflict of decisions.)

7. ('29) AIR 1929 Mad 268 (270).

('97) 24 Cal 34 (36, 37). (Assignee of real owner was added.)

8. ('27) AIR 1927 Rang 192 (192) : 5 Rang 159.

[See ('38) AIR 1938 Mad 74 (79) : 56 Mad 273.]

9. ('29) AIR 1929 Lah 753 (759) : 11 Lah 325.

[See ('22) AIR 1922 Mad 457 (474) : 46 Mad 190 (FB).]

10. ('23) AIR 1923 Mad 521 (522).

[But see ('71) 15 Suth W R (C R) 6 (6).]

11. ('02) 26 Bom 301 (304).

12. ('88) 12 Bom 237 (238).

13. ('86) 13 Cal 90 (93).

14. ('34) AIR 1934 Lah 328 (328).

15. ('37) AIR 1937 Nag 121 (122) : I L R (1937) Nag 366. (A son is not a necessary party to a suit against his father on a mortgage of joint family property as he can bring a suit for declaration that the mortgage decree is not binding on his share. But when he himself applies to be made a defendant contending the binding nature of the mortgage, he should be joined as a proper party to the suit under O. 1 R. 10, C. P. O., to effectually and completely settle the questions involved in the suit and to avoid multiplicity of proceedings.)



But in exercising their powers under this rule, Courts ought to see that they do not load the record with parties who are shown to have no interest in the suit<sup>16</sup> and that the trial of the suit is not embarrassed by the simultaneous investigation of totally unconnected controversies.<sup>17</sup> Thus, in a suit by *A* against *B* for damages on the ground that goods sold by *B* to *A* did not correspond to sample, it is not necessary to add the person who sold the same goods to *B* before the latter sold them to *A*.<sup>18</sup> In a suit by *A* against *B* to compel the registration of a document, third parties cannot be added and permitted to plead that the document ought not to be registered.<sup>19</sup> Similarly, a person claiming under a title quite distinct from that under which any of the parties to the suit claim, is not a proper party.<sup>20</sup> So also in a suit between parties each contending that he is the judgment-creditor, in respect of a particular decree, the judgment-debtor is not a proper party.<sup>21</sup> Where *A* sues *B* for damages for tort, it is not necessary to add all persons injured by the same tort.<sup>22</sup> See also the cases cited below.<sup>23</sup>

Where parties are unnecessarily impleaded at the instance of a person other than the plaintiff, the Court may direct that the costs of the added parties should be paid by the person who moved for their joinder.<sup>24</sup>

**15. Partnership suits.**—In a suit for *dissolution of partnership* and accounts it is essential that all the parties should be on the record.<sup>1</sup> Where one of the partners

(‘37) AIR 1937 Cal 172 (173). (A vendor brings a suit against the vendees for recovery of unpaid purchase money. Subsequent mortgages from the vendee though not parties to the original contract of sale can be joined as proper parties to the suit.)

(‘35) AIR 1935 Mad 353 (353). (Suit for possession by purchaser against vendor—Third party alleging that vendor is not entitled to whole property and wanting to be impleaded—*Held* he should be made party.)

(‘37) AIR 1937 Mad 641 (642). (In cases where a plea of *jus tertii* is set up, it is generally desirable to make the person whose title is set up a party to the suit to avoid multiplicity of litigation.)

(‘37) AIR 1937 Mad 338 (339). (A attaching joint family property of two minors in execution of money decree—Suit by grand-mother of minors for maintenance claiming charge on same property—Pending suit, sale by guardian of minors of some property to *A* for avoiding court sale—Application by *A* to be joined as party to maintenance suit—*A held* to be proper party to suit.)

16. (‘12) 17 Ind Cas 603 (604) (Cal).

[See (‘25) AIR 1925 Lah 65 (66).]

(‘37) AIR 1937 Mad 200 (208). (Application by third party claiming to have acquired rights under compromise between parties to suit — Parties impeaching compromise and not seeking to enforce it— Such persons should not be added as parties.)]

17. (‘75) 24 Suth W R (C R) 349 (349, 350). (Rent suit —Real owner alleging plaintiff to be a benamidar for him—Not to be added.)

(‘69) 11 Suth W R (C R) 23 (24) (FB). (Suit for arrears of rent at enhanced rate — Defendants alleged transfer of holding — Transferee from defendant not to be added.)

18. (‘79) 4 Cal 355 (359).

19. (‘29) AIR 1929 Bom 353 (354) : 53 Bom 598.

20. (‘32) AIR 1932 Mad 688 (689). (Suit for ejectment on basis of lease deed — Government setting up adverse right to plaintiff not to be added.)

21. (‘69) 12 Suth W R (C R) 436 (438).

22. (‘07) 6 Cal L Jour 383 (392). (Plaintiff can recover to the extent of his interest—Other persons injured can maintain subsequently an action in respect of their interest.)

23. (‘36) AIR 1936 Pat 161 (162) : 14 Pat 855. (There is no provision of law under which it is necessary to make the arbitrators parties to a suit requesting the Court to pass a decree in terms of an award.)

(‘89) AIR 1939 Pat 32 (33). (Where a suit is to set aside the summary decision of a certificate officer, in respect of the plaintiff’s claim to the attached property, the Registrar of the Co-operative Societies, who made the award as a result of which the certificate proceedings started is not a proper party.)

(‘37) AIR 1937 Cal 338 (341) : 1 I L R (1937) 2 Cal 105. (Suit to settle scheme for private debutter —Deity not always necessary party to suit.)

(‘85) AIR 1935 Mad 394 (396). (A person cannot be added as a plaintiff merely because he is in some way financially interested in the suit or will be affected in some way by its success or failure.)

(‘86) AIR 1936 Rang 241(241). (Where in a suit for recovery of possession of land, the defendant claims to be in possession of the land as a tenant of another person, such person may be a proper party to the suit but his predecessor-in-title can never be a proper party to the suit.)

24. (‘30) AIR 1930 Mad 913 (913)

#### Note 15

1. (‘18) 19 Ind Cas 963 (963) (Cal).

(‘08) 7 Cal L Jour 266 (267).

**O. 1 R. 10**  
**Note 15**

is dead, his representatives are necessary parties.<sup>3</sup> Similarly, the receiver of a deceased partner's estate will be a necessary party.<sup>3</sup> But a sub-partner<sup>4</sup> or a person who is not in the partnership as a member of the firm but is a member of a superior partnership in which he is on one side and the whole firm as a unit on the other, is not a necessary party to a suit for dissolution of the firm.<sup>5</sup>

In a suit for the *recovery of a debt* due to the partnership, all the partners are necessary parties inasmuch as, under Section 45 of the Indian Contract Act the right to claim performance of the contract of loan rests jointly with all the promisees.<sup>6</sup> The said Section also provides that on the death of one of the promisees, the right to claim performance rests with the surviving promisees *and the legal representatives of the deceased promisee*. The latter will also be necessary parties therefore to a suit for a debt due to the partnership and this is what the High Court of Calcutta holds.<sup>7</sup> The Allahabad,<sup>8</sup> Bombay<sup>9</sup> and Madras<sup>10</sup> High Courts have, however, held a contrary view based on the inconvenience and difficulties that might arise in insisting upon the joinder of the legal representatives of a deceased partner. It is submitted with respect that this latter view is not correct. It is unnecessary to consider this question under the present Code, for the newly introduced provisions of Order 30 provide an exception, as it were, to Section 45 of the Contract Act in that they allow *one* partner alone to sue, provided

('02) 1902 Pun Re No. 69, page 250.

('84) 1884 Pun Re No. 65, page 179.

('90) AIR 1930 Mad 714 (716). (Master and a number of servants agreeing by one contract to divide the profits of a business between them in certain proportions—One servant cannot maintain a suit for his share without impleading others.)

('38) AIR 1938 Mad 151 (153). (It may not be necessary to implead all the partners in a case where the liability of the defendants is joint as well as several.)

('85) AIR 1935 Pat 456 (457).

*See the following cases in regard to suits connected with partnership :*

('25) AIR 1925 Mad 347 (347). (Defendant died after preliminary decree—Sons brought on record as legal representatives though they applied two days after the prescribed time.)

('03) 25 All 878 (883, 884). (It is not necessary to join all members of the Hindu family if only individual members of the family and strangers compose the partnership.)

('87) 1887 Bom P J 219.

('87) 14 Cal 791 (794). (Three persons agreeing to share the profits of a fund—All of them must be parties to a suit for ascertaining the assets of the fund.)

('72) 18 Suth W R 408 (410). (Defunct firm—Accounts not adjusted—Suit against co-sharer for contribution for a debt paid by partners—All partners are necessary parties to the suit.)

('17) AIR 1917 Mad 197 (198). (One alone of the representatives of a deceased partner cannot maintain a suit for accounts.)

('12) 15 Ind Cas 380 (381) (Mad). (Promissory note in favour of a firm—All partners to be parties to the suit on the promissory note.)

('95) 18 Mad 33 (35, 36). (As a general rule all partners ought to be plaintiffs in a suit brought in respect of partnership transactions.)

('24) AIR 1924 Pat 65 (65, 67). (Suit for partnership accounts—Joinder of a person whom the defendant alleged and the plaintiff denied to be a partner is not bad.)

('22) AIR 1922 Sind 13 (14) : 15 Sind L R 152. (Suit by firm—All partners must be joined.)

('10) 7 Ind Cas 584 (587, 588) : 4 Sind L R 2. (Suit for partnership account by some members of a firm—Sons of the plaintiffs who form a coparcenary with them are not necessary parties.)

('14) AIR 1914 Low Bur 191 (192). (Business agent of firm cannot sue for dissolution—Partner must be substituted as plaintiff.)

2. (1841-46) 3 Moo Ind App 175 (197) (PC).

('91) 18 Cal 86 (89, 90).

(1861) 1 Bom H C R 1 App li (lviii). (The representative of the deceased must be joined unless surviving partners have right to bind by their acts the interest of the deceased.)

('27) AIR 1927 Mad 491 (493).

[See ('82) 4 All 437 (450). (Mortgages from one of the partners who bought the partnership properties in execution of his decree on the mortgage, is a proper party to a suit for dissolution of partnership.)]

3. ('10) 7 Ind Cas 75 (76) (Cal).

4. ('17) AIR 1917 Mad 267 (268).

5. ('27) AIR 1927 P C 70 (71) (P C).

6. ('92) 14 All 524 (527).

('23) AIR 1923 Mad 85 (85).

('10) 6 Ind Cas 438 (438) (Mad).

('95) 18 Mad 33 (36).

[See ('84) 1884 Pun Re No. 98, page 265. (Suit against firm.)]

7. ('91) 18 Cal 86 (90).

[See also ('72-92) 1872-92 Low Bur Rul 651.]

8. ('87) 9 All 486 (491).

('98) 20 All 365 (366).

9. ('98) 17 Bom 6 (13, 14).

10. ('98) 17 Mad 108 (116, 117).

the suit is *in the name of the firm*.<sup>11</sup> It follows that where such a suit is brought, the legal representatives of a deceased partner are not necessary parties.<sup>12</sup>

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**Notes 15-16**

A dormant partner is not a necessary party in an action on a contract entered into with the firm or with one of its members.<sup>13</sup> Where in a suit by the owner of a firm who is also a member of a joint Hindu family, the other members of the family are proved to be partners in the firm, the Court ought to allow the other members to come on record and have the plaint amended accordingly.<sup>14</sup> The same rule will hold good where a suit is brought by the plaintiff as the sole partner and it is found that there are other partners.<sup>15</sup>

See also the undermentioned case.<sup>16</sup>

**16. Partition suits.** — All persons interested in the properties are necessary parties to a suit for partition.<sup>1</sup> The reason is that the share to which a person is entitled can be determined only in the presence of all the persons interested in the properties inasmuch as the partition which is made in favour of the plaintiff against his co-sharers gives him a portion of the property and takes away all rights which the others have in it. But the interest of the person, in order to make him a necessary party, must be of the *same degree* as that of the plaintiff. Persons having an inferior degree of interest to that of the plaintiff are not necessary parties.<sup>2</sup> Thus, in a suit for partition of the *melwaram* rights in certain properties, the *kudiwaramdars* are not necessary parties.<sup>3</sup> Similarly, in a suit for partition by sons against the father, grandsons are not necessary though proper parties.<sup>4</sup> Similarly, mortgagees of the family properties<sup>5</sup> and creditors of

11. ('17) AIR 1917 Pat 246 (246).

12. ('21) AIR 1921 Cal 722 (724, 725).

13. ('16) AIR 1916 Mad 926 (926).

14. ('03) 27 Bom 157 (161).

('06) 1906 Pun Re No. 69, page 251.

[**But see** ('99) 26 Cal 849 (856). (Infant members—Not admitted to partnership—Not necessary parties.)

('12) 17 Ind Cas 193 (194, 195) : 37 Bom 340. (Infant sons—Born after suit—Represented by father in business—Not necessary parties.)]

15. ('08) 27 Bom 157 (161).

16. ('86) 40 Cal W N 677 (679). (Suit against firm under O. 30—Person interested in firm but not served with summons has no right to intervene and defend on merits unless he admits that he is a partner — When such person is interested in some way or other in the assets of the firm, and denies that he is a partner in the firm, he can apply to the Court under O. 1 R. 10, C. P. C., and it will be proper for the Court to add him as a party defendant to the suit even in opposition to the wishes of the plaintiff.)

**Note 16**

1. ('04) 28 Bom 209 (213, 214).

('90) 1890 Bom P J 196 (196).

('25) AIR 1925 Cal 764 (768).

('96) 18 All 476 (477). (Usufructuary mortgagees from co-owners of their respective shares cannot sue one another for partition without their mortgagors on record.)

('19) AIR 1919 Bom 185 (186) : 43 Bom 575. (*Obiter*).

('11) 11 Ind Cas 559 (560) : 35 Bom 393.

('92) 16 Bom 608 (611).

('26) AIR 1926 Cal 741 (742). (Also in appeal.)

('10) 6 Ind Cas 244 (245) (Cal). (Partition suit—

One of the co-owners not to be found — Such co-owner to be made a party under the description of unknown owner.)

('90) 17 Cal 906 (910).

('81) 7 Cal 577 (581).

('79) 4 Cal 756 (757).

('77) 2 Cal 149 (151). (Suit by one co-parcener for his share—All the co-parceners are necessary parties to the suit.)

('69) 12 Suth W R 256 (259, 260).

('27) AIR 1927 Lah 189 (189). (Also in appeal.)

('83) 6 Mad 284 (286).

('20) AIR 1920 Oudh 173 (175) : 23 Oudh Cas 62.

('07) 10 Oudh Cas 33 (35, 36).

('03) 6 Oudh Cas 379 (380, 381).

('98) 1 Oudh Cas 215 (219). (Suit for settlement of accounts—All co-sharers are necessary parties.)

('35) AIR 1935 Oudh 36 (36) : 10 Luck 387. (Every co-sharer is a necessary party to partition suit.)

('35) AIR 1935 Cal 478 (481).

('85) AIR 1935 Pat 241 (242). (No decree can be passed for partition in a suit therefor in the absence of even a single co-sharer.)

2. ('08) 7 Cal L Jour 449 (452). (Durputnidar is not a necessary party in a suit for partition by putnidars.)

3. ('08) 18 Mad L Jour 85 (87).

4. ('22) AIR 1922 Pat 96 (96) : 1 Pat 361.

('33) AIR 1933 Lah 465 (466).

('32) AIR 1932 Lah 641 (642) : 13 Lah 488. (Suit for partition between two branches only and not as between all co-parceners—Heads of branches alone made parties — Other co-parceners not necessary parties.)

5. ('17) AIR 1917 Cal 184 (185) : 44 Cal 28.

('34) AIR 1934 Mad 485 (488, 491). (A mortgagee

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the defendants<sup>6</sup> as also alienees of the family properties<sup>7</sup> are not *necessary* parties to a suit for partition. They may all be *proper* parties if their presence is necessary to enable the Court to adjudicate upon and settle all matters in dispute effectually and completely.<sup>8</sup> The High Court of Bombay has, however, held in the undermentioned case<sup>9</sup> that a purchaser or mortgagee of a coparcener's share in joint property is a *necessary* party to the suit for partition.

Persons not claiming any kind of interest in the properties are not to be added as parties in a partition suit.<sup>10</sup>

**17. Pre-emption suits.** — In a suit for pre-emption in respect of a joint purchase by several co-vendees, all of them<sup>1</sup> or in the case of the death of one of them, his legal representatives<sup>2</sup> are necessary parties. But if the plaintiff who is entitled to pre-empt joins along with him a stranger who has no right to pre-empt, the plaintiff forfeits his right of pre-emption and it is not a mere defect of parties which can be cured by striking off the name of the stranger.<sup>3</sup> A second vendee is also a necessary party.<sup>4</sup> But the vendor<sup>5</sup> or a mortgagee from the vendee<sup>6</sup> is not a necessary party. Where the suit for pre-emption is against the *benami* vendee, the real purchaser may be added as a proper party, as such addition will not change the character of the suit.<sup>7</sup> Where a purchaser sues for rent accruing due between the date of his purchase and the date of his surrender to the pre-emptor, the latter must be impleaded as a party.<sup>8</sup>

**18. Suits by co-owners.** — All co-owners are necessary parties to a suit to recover property belonging to them jointly.<sup>1</sup> Thus, one member of a joint Hindu family

after suit is neither a necessary nor proper party as his presence cannot affect the adjudication of shares.)

('80) 5 Cal 882 (886).

('91) AIR 1921 Lah 83 (84).

6. ('22) AIR 1922 Mad 332 (338) : 45 Mad 194.

(Though their joinder is not improper, when the plaintiffs question the binding nature of the debts.)

('85) AIR 1935 Mad 419 (420) : 58 Mad 821.

(Creditors are proper parties to a partition suit. But in their absence the adjudication regarding the debts is binding only upon the parties to the partition suit.)

('35) AIR 1935 Mad 112 (118). (Creditors are proper parties but decree for payment of their debts cannot be passed.)

7. ('30) AIR 1930 Mad 913 (913).

8. See the cases cited in footnotes (5), (6) and (7) above.

('10) 7 Ind Cas 382 (384) (Cal).

('31) AIR 1931 Cal 594 (596). (Mortgagee.)

('01) 98 Cal 769 (788). (Common manager appointed for a period—Suit for partition and accounts during that period impleading manager — No misjoinder.)

('31) AIR 1931 Mad 357 (359, 361). (Hindu joint family — Suit for partition — Worshipers of temple claiming a sum of joint family money in trust for temple added after preliminary decree.)

('38) AIR 1923 Pat 162 (162). (A co-sharer whose interests have been transferred may be a proper party to a suit for partition by the transferee.)

[See ('07) 10 Oudh Cas 38 (35, 36). (Persons in possession in collusion with some sharers—Joinder—Not misjoinder.)]

[See also ('33) 6 Mad 331 (333, 334). (Plaintiff

transported for life — His sons can be made plaintiffs.)]

9. ('92) 16 Bom 608 (612).

10. ('18) AIR 1918 Mad 1137 (1139).

('23) AIR 1923 Cal 221 (223) : 49 Cal 1043.

('74) 21 Suth W R 190 (191).

**Note 17**

1. ('82) 4 All 145 (146).

2. ('89) 1889 Pun Re No. 149, page 505.

3. ('25) AIR 1925 All 355 (356) : 47 All 450.

('23) AIR 1923 All 187 (188).

[See ('85) 7 All 860 (862).]

4. ('18) 30 Ind Cas 424 (425) : 35 All 385.

('07) 1907 Pun Re No. 106, page 498.

[See also ('07) 4 All L Jour 756 (759). (Transfer by way of exchange.)]

5. ('84) 6 All 57 (58). (Pre-emptor suing the mortgagee claiming the right to take the mortgage himself—Mortgagor not a necessary party.)

('04) 26 All 549 (553).

('08) 1903 All W N 289 (289).

'89) 1889 Pun Re No. 134, page 464.

09) 8 Ind Cas 785 (786) : 32 All 14.

'07) 10 Oudh Cas 49 (52, 53).

6. ('12) 18 Ind Cas 647 (647, 648) (Lah).

[See also ('17) AIR 1917 Oudh 383 (385) : 19 Oudh Cas 153. (Suit for possession between pre-emptors—Vendor's mortgagee, who foreclosed his mortgage thus giving a right of pre-emption to the pre-emptors, is not a necessary party.)]

7. ('09) 4 Ind Cas 433 (439) (All).

8. ('66) 1 Agra (Rev) 30 (30).

**Note 18**

1. ('66) 1866 Pun Re No. 39, p. 55. (Suit for possession — All common owners of land necessary parties.)

cannot sue for recovery of property belonging to the family without impleading the other members as parties to the suit.<sup>2</sup> Where, however, he sues or is sued as a *manager* of the family, it is not necessary to add the other members as parties.<sup>3</sup> Similarly, where a bond or a contract is entered into *in the name of a member*, such member can sue thereon without adding the other members as parties.<sup>4</sup>

There is an exception to the rule that all the co-owners are necessary parties to a suit for recovery of joint property. One of several co-owners can maintain an action in ejectment against a trespasser without impleading the other co-owners as parties thereto,<sup>5</sup> though it may be desirable to add them as proper parties.<sup>6</sup> The persons

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- (‘88) 1888 All W N 156 (157).  
 (‘14) AIR 1914 Cal 215 (216).  
 (‘97) 24 Cal 384 (387). (Suit by auction-purchaser under a revenue sale to annul incumbrances.)  
 (‘74) 22 Suth W R 71 (78).  
 (‘82) 1882 Pun Re No. 2, page 3. (Per Plowden, J.)  
 (‘81) 1881 Pun Re No. 92, page 202.  
 (‘66) 1866 Pun Re No. 103, page 156. (Suit for possession — All common owners of land necessary parties.)  
 (1900) 23 Mad 239 (254, 255). (All the beneficiaries under a trust are to be parties.)  
 (‘15) AIR 1915 Oudh 224 (226). (Suit for declaration by one co-owner — The mortgagee in possession of the other—Co-owner made defendant—Suit held not to be defective in parties.)  
 [See however (‘09) 2 Ind Cas 77 (79) (Cal). (Patni sale—Suit to set aside by one co-sharer.)]  
 2. (‘86) 8 All 264 (265). (Money lent by a Hindu joint family firm.)  
 (‘06) 30 Bom 477 (486).  
 (‘13) 20 Ind Cas 262 (263) (Cal).  
 (‘78) 1 Cal L Rep 481 (482, 483).  
 (‘73) 20 Suth W R 138 (138).  
 (‘71) 15 Suth W R 436 (437).  
 (‘69) 12 Suth W R 478 (482).  
 (‘82) 1882 Pun Re No. 58.  
 (‘86) 10 Bom 648 (656). (Mortgage of joint family property—Suit for redemption — All co-parceners are necessary parties.)  
 [See also (‘14) AIR 1914 All 125 (126, 127). (Suit to enforce mortgage on joint family property— Only mortgagor co-parcener made defendant— Suit bad for nonjoinder of other co-parceners.)  
 (‘88) 12 Bom 158 (160). (Plaintiff suing as manager — Yet defendant entitled to have the other members on record.)  
 [But see (‘96) 20 Bom 435 (437). (Bond in favour of one co-parcener— That co-parcener can sue alone for recovery of money due under the bond.)]  
 3. (‘11) 9 Ind Cas 739 (741) : 33 All 272 : 38 Ind App 45 (PC).  
 (‘12) 15 Ind Cas 876 (877) (All). (Mortgage suit by manager.)  
 (‘12) 15 Ind Cas 138 (139, 140) : 34 All 572 (FB). (Do.)  
 (‘12) 15 Ind Cas 126 (129, 131, 135) : 34 All 549 (FB). (Mortgage suit against the manager of a joint family.)  
 (‘04) 26 All 528 (531). (Confirmed on appeal in 6 Ind Cas 981 (PC).)  
 (‘84) 18 Bom 141 (143).  
 (‘88) 7 Bom 467 (471, 472).  
 (‘12) 13 Ind Cas 206 (208) (Cal).  
 (‘90) 26 Cal 849 (856).  
 (‘81) AIR 1931 Lah 559 (560) : 12 Lah 428.  
 (‘22) AIR 1922 Mad 407 (407).  
 (‘18) AIR 1918 Mad 1044 (1044). (Obiter— Mortgage suit by manager.)  
 (‘11) 10 Ind Cas 874 (877, 879) : 35 Mad 685.  
 (‘92) 15 Mad 19 (22). (Karnavan represents Malabar tarwad.)  
 (‘87) 10 Mad 223 (225). (Do.)  
 (‘83) 6 Mad 27 (28).  
 (‘29) AIR 1929 Pat 741 (742) : 8 Pat 788.  
 (‘11) 10 Ind Cas 200 (201) (Oudh).  
 [See also (‘12) 17 Ind Cas 193 (194) : 37 Bom 340.]  
 [But see (‘99) 23 Mad 190 (194). (The contrary view taken in this case is no longer law in view of the Privy Council decision in 9 Ind Cas 739.)]  
 4. (‘96) 20 Bom 435 (437).  
 (‘10) 5 Ind Cas 767 (768) : 32 All 133 (136).  
 (‘05) 27 All 361 (362).  
 (‘22) AIR 1922 Bom 354 (355) : 46 Bom 1022. (Rent note executed in favour of jaghirdar—Suit upon—Junior members not necessary parties.)  
 (‘85) 9 Bom 311 (315). (Contract by a member of a family in his individual capacity.)  
 (‘81) 7 Cal 739 (745, 746).  
 (‘27) AIR 1927 Lah 129 (129).  
 (‘12) 13 Ind Cas 305 (308) (Lah).  
 (‘99) 22 Mad 326 (327).  
 5. (‘30) AIR 1930 Cal 113 (125) : 57 Cal 170.  
 (‘82) AIR 1932 Sind 220 (221) : 26 Sind L R 362.  
 (‘27) AIR 1927 Bom 192 (194) : 51 Bom 149.  
 (‘33) AIR 1933 Lah 999 (999).  
 (‘73) 5 N W P H C R 182 (184). (Joint-tenants.)  
 (‘09) 1 Ind Cas 530 (532, 533, 534) (Cal). (Claim suit and for injunction.)  
 (‘26) AIR 1926 Lah 545 (545).  
 (‘01) 1901 Pun Re No. 105, page 867.  
 (‘26) AIR 1926 Mad 809 (809, 810).  
 (‘25) AIR 1925 Mad 63 (64). (Provided the co-owner plaintiff does not deny other co-owner’s right.)  
 (‘17) AIR 1917 Mad 373 (373). (In this case plaintiff was in sole possession.)  
 (‘15) AIR 1915 Mad 1214 (1214) : 39 Mad 501.  
 (‘16) AIR 1916 Pat 26 (27). (A number of persons held a joint unspecified interest in cause of action — Any one of the persons can maintain a suit.)  
 (‘87) 11 Bom 644 (648).  
 (‘85) AIR 1935 Mad 125 (136).  
 [See also (‘88) 15 Cal 40 (46).]  
 [But see (‘74) 22 Suth W R 74 (76).]  
 6. (‘29) AIR 1929 Bom 244 (244).

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in possession of the property are all, however, necessary parties.<sup>7</sup> An action in ejectment against a *tenant*, however, must be brought by all the co-sharers.<sup>8</sup>

An assignee *pendente lite* of the property is not a necessary party to a suit for possession inasmuch as he will be bound under Section 52 of the Transfer of Property Act by the decree in the suit.<sup>9</sup> But he may be added as a proper party.<sup>10</sup> In an ejectment suit by a landlord against his tenant the Court should not bring on the record the person from whom the plaintiff holds the land nor persons claiming to hold it from a third party nor such third party.<sup>11</sup> Where *A* sues his lessor *B* for possession of land and *C* intervenes claiming it to be his, he can be added as a proper party if he does not claim adversely both to the plaintiff and the defendant.<sup>12</sup> In a suit for ejectment of a sub-tenant's sub-tenant, the sub-tenant is a necessary party.<sup>13</sup> In a suit for possession of attached property under Section 146, Criminal Procedure Code, the Government is not a necessary party.<sup>14</sup> Nor is a Hindu reversioner a necessary or proper party to a suit by the adopted son for possession against the widow where the validity of the adoption could not be questioned.<sup>15</sup> Where *B* is made a co-plaintiff with *A* in a suit for possession, on the ground that under an agreement between them, *B* is entitled to share in the property in the event of success in the litigation, and subsequently *A* compromises the suit with the defendant, *B* cannot claim to continue the suit, as he has no present subsisting interest in the property.<sup>16</sup>

See also the undermentioned decisions.<sup>17</sup>

7. ('29) AIR 1929 Cal 669 (670). (Co-trespassers must be impleaded.)

('07) 31 Bom 250 (253).

('28) AIR 1928 Cal 138 (141).

('24) AIR 1924 Pat 172 (173).

[See ('20) AIR 1920 Cal 706 (708) : 60 Ind Cas 969 (971) : 47 Cal 907. (Action for possession based upon forfeiture of term should be brought against all persons in possession.)]

8. ('69) 12 Suth W R 452 (453).

('09) 2 Ind Cas 306 (307) (All). (Unwilling co-sharers to be made defendants.)

('70) 2 N W P H C R 260 (261).

('75) 12 Bom H C R 85 (87).

('08) 35 Cal 807 (811).

('86) 13 Cal 75 (78). (Withdrawal of one of the co-sharer plaintiffs after suit immaterial.)

('81) 7 Cal 470 (473).

('81) 7 Cal 414 (417).

('75) 24 Suth W R 110 (111).

('73) 20 Suth W R 126 (127).

('71) 16 Suth W R 138 (139, 140).

('70) 13 Suth W R 337 (337, 338).

('79) 1879 Pun Re No. 17, page 209.

('81) 3 Mad 234 (236). (Suit by some of several co-owners — Objecting parties should be made defendants.)

[But see ('87) 11 Bom 644 (648, 649). (One of two co-owners conveyed his share to plaintiff subsequent to lease—*Held*, plaintiff could sue alone for ejectment—Joint tenancy and tenancy-in-common contrasted.)]

9. ('09) 1 Ind Cas 626 (629, 630) : 36 Cal 675. (Here the assignee was held to be unnecessary party and his name was struck out from the record.)

('99) 21 All 149 (151). (Mortgagee *pendente lite*.)

('74) 11 Bom H C R 64 (67).

('67) 7 Suth W R 225 (226).

[See (1900) 22 All 243 (245, 247.) (Pending suit on a mortgage, the mortgagor executed a second mortgage—Second mortgagee sued the first mortgagee and sought to prove that the latter's mortgage decree was satisfied—Second mortgagee not entitled to do so.)]

10. ('87) 1887 Pun Re No. 29, page 62.

('09) 1 Ind Cas 626 (630) : 36 Cal 675.

11. ('97) 20 Mad 375 (378).

('75) 7 N W P H C R 58 (60). (Plaintiff co-sharer in exclusive possession by agreement can sue alone.)

('97) 21 Bom 229 (233).

('12) 17 Ind Cas 603 (604) (Cal).

[See ('73) 21 Suth W R 51 (51).]

[See also ('73) 10 Bom H C R 429 (430).]

12. ('71) 16 Suth W R 101 (101). (Distinguishing 7 W R 201.)

13. ('16) 30 Ind Cas 795 (796) (U P B R).

14. ('97) 20 All 120 (121).

15. ('26) AIR 1926 Nag 354 (355).

16. ('13) 19 Ind Cas 340 (343) : 35 All 273 : 40 Ind App 86 : 16 Oudh Cas 136 (PC).

17. ('85) AIR 1935 Cal 93 (94). (Two proprietors having share in separate account in taluk—Lease by them and sale by lessee to one of them.—Suit for khas possession by other—Other proprietors are not necessary parties and he is entitled to khas possession.)

('38) AIR 1938 All 55 (56) : I L R (1938) All 148. (Suit by co-sharer to recover excess and settlement of accounts — All co-sharers interested should be made parties — If not, Court should implead them under O. 1, R. 10, C. P. C.)

**19. Suits by joint promisees.** — All co-promisees are necessary parties to a suit to enforce the promise.<sup>1</sup> The same principle will apply where a sole obligee dies leaving several co-heirs. In such a case, one of them alone cannot maintain a suit without impleading the others as parties.<sup>2</sup> Where several persons are jointly and severally liable for a single liability, all of them are not necessary parties to a suit against some of them only; but they may be added as proper parties in order to prevent multiplicity of suits.<sup>3</sup>

**20. Suits for rent.** — It has been already observed in Note 7 to O. 1 R. 1, that where a right to enforce a liability is jointly vested in several persons, all of them are necessary parties to a suit to enforce such liability.<sup>1</sup> In rent suits only those persons who are liable to pay rent should be impleaded as "defendants".<sup>2</sup> The general principle governing the joinder of necessary parties does not enable persons who are not likely to be affected by the result, to come in and raise altogether new questions which do not properly arise. Therefore, a tenant cannot ordinarily insist on impleading a third party in a rent suit, so as to raise questions of title and thus convert a simple rent suit into a complicated title suit; nor can such party be allowed to come in on his own application.<sup>3</sup>

#### Note 19

1. ('81) 6 Cal 815 (826).
- ('89) 1889 Pun Re No. 156, page 518 (FB).
- ('27) AIR 1927 Mad 84 (85).
- ('18) 19 Ind Cas 12 (16) : 36 Mad 544 (FB).
- ('98-1900) 1898-1900 Low Bur Rul 555.
- ('28) AIR 1928 Sind 16 (16).
2. ('84) 7 All 318 (315) (FB).
- ('68) 10 Suth W R 108 (109).
- [See ('73) 19 Suth W R 315 (320). (PC).
- ('39) AIR 1939 Sind 173 (176) : ILR (1939) Kar 602. (Where the right of a person to recover certain debt has devolved upon his sons jointly, they can only file one suit against their debtors for recovery of the whole amount. Some of them cannot split the cause of action and sue for their share only on the ground that others did not join with them as co-plaintiffs. In that case it would be incumbent upon such of them as are filing the suit to claim the whole amount on behalf of themselves and their brothers on payment of the full court-fees and making their brothers, who had refused to join, as co-defendants.)]
3. ('14) AIR 1914 Lah 500 (501) : 1914 Pun Re No. 107.
- ('96) 23 Cal 554n (556n).
- (1894) 2 Q B 685 (688). Robinson v. Geisel. (Cited in AIR 1920 Cal 428.)
- [See ('26) AIR 1926 Mad 135 (136). (Transferee from joint debtor was made a party.)]
- [But see (1879) 4 App Cas 504 (515), Kendall v. Hamilton. (The rule that all joint-debtors should be sued together is not applicable in India where co-promisors are not necessary but proper parties.)]

#### Note 20

1. See also the following cases :
- ('83) 7 Bom 217 (219, 220).
- ('02) 30 Cal 207 (210).
- ('82) 8 Cal 277 (278).
- ('82) 8 Cal 358 (356).

- ('17) AIR 1917 Mad 698 (699). (Suit by two out of five trustees for rent making the others defendants—Held not bad.)
- ('14) AIR 1914 Mad 119 (119).
- ('16) AIR 1916 Pat 267 (268) : 1 Pat L Jour 578. (FB).
- ('22) AIR 1922 Nag 164 (165) : 18 Nag L R 39.
- ('99) 26 Cal 409 (412, 413) (FB). (A suit by one contractee adding his co-contractee as a defendant ought not to be dismissed merely because plaintiff fails to prove that the other refused to join him as co-plaintiff—17 Cal 160, Explained.)
- ('35) AIR 1935 Bom 262 (263). (Where the landlord's rights belong jointly to several persons, a suit to recover rent on a new basis or to eject the tenant can only be brought by all the co-sharers suing jointly as plaintiffs. It makes no difference whether the suit be technically one for enhancement of rent or to recover rent on a new basis of calculation.)
- [But see ('24) AIR 1924 Rang 201 (202). (Suit by one co-trustee for rent due to trust is not bad.)]
2. ('92) 16 Bom 568 (576). (A taking lease on behalf of partnership consisting of himself, B and C—B and C are not liable to be sued for rent.)
- [See ('35) AIR 1935 Pat 206 (207). (It is sufficient for a landlord, in a suit between landlord and tenant, to proceed against the recorded tenant; and when such tenant happens to be the karta of a joint Hindu family, he may be proceeded against even without expressly describing him as the karta, so as to bind the entire family.)]
3. ('67) 9 Suth W R 158 (161).
- ('95) 21 Bom 229 (238). (In a suit for ejectment against a person in possession, Government through whom the tenant alleges to hold the land, is not a necessary party.)
- ('27) AIR 1927 Cal 340 (342).
- ('19) AIR 1919 Cal 589 (590).
- ('16) AIR 1916 Cal 484 (485).
- ('82) 8 Cal 238 (246).



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Note 20

Where, however, the third party claims a share of the rent sued for,<sup>4</sup> or where the defendant in a suit for rent by the lessee against the sub-lessee pleads payment to the third party with the owner's consent,<sup>5</sup> or where the third party is alleged to be a transferee from the tenant with the landlord's consent,<sup>6</sup> he may be impleaded as a proper party to the suit. Where, during the pendency of a rent suit, a receiver is appointed in respect of the property of the defendants, he must be impleaded as a necessary party to the suit.<sup>7</sup> It has been held by a Full Bench of the Calcutta High Court that the heirs of a tenant do not take the tenancy as an entire body, but take as tenants-in-common each being liable jointly and severally for the whole rent to the landlord and that therefore a suit against some of the heirs alone for rent without impleading the others is not bad,<sup>8</sup> though of course they may be added as proper parties.<sup>9</sup>

It may here be observed that apart from the question of the joinder of parties one of several joint lessors cannot sue for recovery of *his share* of the rent<sup>10</sup> or for enhancement of his share of the rent,<sup>11</sup> unless a special arrangement to the contrary is

('78) 4 Cal L Rep 168 (171).

('75) 24 Suth W R 349 (349, 350).

('75) 24 Suth W R 261 (261, 262).

('75) 24 Suth W R 151 (151).

('75) 23 Suth W R 166 (169).

('73) 20 Suth W R 398 (384).

('73) 19 Suth W R 248 (248).

('72) 17 Suth W R 219 (219).

('71) 16 Suth W R 132 (132).

('68) 10 Suth W R 283 (288).

('86) 1886 Pun Re No. 66, page 141.

('92) 20 Mad 375 (378).

[See also ('73) 21 Suth W R 88 (88).]

('74) 22 Suth W R 526 (528).]

[But see ('74) 22 Suth W R 440 (442).]

4. ('75) 24 Suth W R 350 (350).

('92) 20 Cal 285 (291).

('76) 25 Suth W R 29 (30).

[See ('72) 18 Suth W R 16 (17). (Suit for rent by receiver — Discharge of receiver — Owner properly impleaded.)]

[See also ('94) 1894 Pun Re No. 67, page 221.

(Lessors jointly interested in a lease may sue for its breach, though the lease is taken in the name of only one of them.)]

5. ('18) 19 Ind Cas 478 (474) (Lah).

6. ('30) AIR 1930 Pat 323 (324): 10 Pat 90.

('30) AIR 1930 Pat 592 (592).

7. ('10) 6 Ind Cas 214 (216) (Cal).

8. ('25) AIR 1925 Cal 1056 (1058, 1059): 53 Cal 197 (FB).

('28) AIR 1928 Cal 397 (398). (AIR 1925 Cal 1056 (FB), Followed.)

('23) AIR 1923 Cal 615 (618). (Suit for whole rent against heirs of one co-tenant — Other tenants not necessary parties.)

('21) AIR 1921 Cal 81 (81): 48 Cal 518.

[See however ('08) 35 Cal 182 (183). (Decided before the Full Bench case in AIR 1925 Cal 1056 (FB).)]

('21) AIR 1921 Cal 584 (585). (Do.)]

9. ('18) AIR 1918 Cal 438 (438, 434).

10. ('66) 5 Suth W R Act X Rule 68 (68).

('82) 5 All 40 (41). (Making other lessors as party defendants does not cure defect.)

('02) 6 Cal W N 326 (328).

('96) 1 Cal W N cxxlv (ccxlv). (Notwithstanding the fact of one of them having got his name alone registered under the Land Registration Act.)

('81) 7 Cal 150 (152).

('79) 4 Cal 89 (90).

('71) 16 Suth W R 281 (281).

('71) 15 Suth W R 395 (396).

('69) 11 Suth W R 398 (398).

('68) 10 Suth W R 411 (411, 412).

('76) 1876 Pun Re No. 110, page 231.

[See also ('10) 8 Ind Cas 742 (743) (Oudh).]

[But see ('29) AIR 1929 Cal 90 (90). (Where it was held all co-sharers are not necessary parties to a suit for assessment of rent.)]

*In the following cases it was held that if the whole rent is claimed one co-sharer may sue making the other co-sharers defendants if they refuse to join as plaintiffs:—*

('07) 35 Cal 381 (344).

('90) 19 Cal 735 (741).

('80) 7 Cal L Rep 138 (139).

11. ('79) 5 Cal 574 (577).

('10) 8 Ind Cas 842 (843): 38 Cal 270: 38 Ind App 1 (P C). (Acting together, under Bengal Tenancy Act means co-sharers should be co-plaintiffs in an action.)

('70) 2 N W P H O R 438 (439). (Even if other co-sharers are impleaded as defendants.)

('69) 1 N W P H C R 236 (236). (Suit by co-sharer to obtain a kabulyat at enhanced rent.)

('25) AIR 1925 Bom 542 (543).

('97) 25 Cal 917 (920).

('85) 11 Cal 615 (617, 618). (Suit to enhance a fractional share of rent brought by one of the co-sharers as plaintiff, though the other co-sharers are made defendants, is not maintainable.)

'72) 17 Suth W R 414 (414).

'72) 17 Suth W R 408 (408).

'83) 1883 Pun Re No. 77.

*In regard to the power of a co-sharer to enhance rent see (1878) 3 Bom 23 (25).*

[But see ('81) 7 Cal 751 (752). (The point that a single share-holder can raise the rent of a joint tenant is conceded but not actually decided — This case is dissented from in 11 Cal 615.)]



proved<sup>13</sup> or unless the other co-sharers are alleged to have been paid off their shares<sup>13</sup> or the other sharers do not contest the plaintiff's claim<sup>14</sup> or collude with the defendant.<sup>15</sup> A person who is a necessary party to a suit for rent is also a necessary party to the appeal against the decree in such suit.<sup>16</sup>

It has been held that where in a rent suit the intervener alleging purchase of the holding claims that he should be added as a party to the suit, the Court must add the intervener as a party even though the statutory recognition as transferee has taken place after the institution of the suit.<sup>17</sup>

**21. Suits on torts.** — See also O. 1 R. 3 under the heading "Joint tort-feasors." All persons jointly injured need not be impleaded as parties to a suit on tort.<sup>1</sup>

**22. Mortgage suits.** — See Order 34 Rule 1, *infra*.

**23. Suits on negotiable instruments.** — A suit on a negotiable instrument must be instituted in the name of a person who, on the face of the instrument, is entitled thereto or by a holder deriving title from him.<sup>1</sup> Where the suit is by a *benami-holder* upon a promissory note, the Court may add the real creditor as plaintiff.<sup>2</sup> In a suit on a lost cheque by the endorsee of the cheque against the endorser for a duplicate of the cheque or for refund of money paid, the drawer of the cheque must be made a party.<sup>3</sup> The mere fact that the drawer and acceptor of a bill are partners does not give rise to the presumption that they are partners in respect of the drawing of the bill. The fact that the acceptor of the bill is not liable, having been joined as a party after lapse of time does not discharge the drawer from his liability where the suit has been instituted against him in time.<sup>4</sup> Where in a suit on a promissory note by the endorsee, the endorser seeks to be joined as co-plaintiff

12. ('77) 2 Cal 474 (477). (Co-sharer in the habit of realizing separate rent can bring such a suit without his co-sharers.)

('74) 22 Suth W R 526 (528). (Separate receipt of rent.)

('08) 35 Cal 331 (334) : 35 Ind App 73 (P C).

('17) AIR 1917 Cal 30 (30). (Separate collection of rent.)

('11) 10 Ind Cas 891 (892) (Cal). (Conversely even if there is separate collection of rent, all the co-sharers may maintain action collectively.)

('08) 7 Cal L Jour 512 (513). (Separate collection of rent.)

('87) 15 Cal 47 (51). (Separate receipt for a number of years.)

('80) 5 Cal 941 (943).

('78) 4 Cal 96 (101) (F B).

('76) 25 Suth W R 221 (221). (Separate payment of rent.)

('78) 19 Suth W R 168 (168, 169).

('71) 15 Suth W R 243 (244). (Separate collection of rent necessary.)

('69) 3 Beng L R A C 280 (231). (Separate payment of rent or agreement to do so.)

('87) 11 Mad 11 (12). (Muchalika expressly in respect of plaintiff's share — Other sharers need not be joined.)

[See also (1900) 27 Cal 479 (483).

('85) 11 Cal 644 (647, 648). (Enhancement of rent of a specific plot.)]

13. ('76) 4 Cal 556 (559).

('84) 6 All 576 (577).

('72) 17 Suth W R 452 (453).

14. [See ('70) 13 Suth W R 126 (127).

('80) 5 Cal 915 (917).]

15. ('79) 4 Cal 556 (559).

('16) AIR 1916 Mad 208 (209).

('73) 21 Suth W R 46 (47) (F B).

('74) 12 Beng L R 289 (295) (F B).

16. ('22) AIR 1922 Pat 4 (4).

17. ('87) AIR 1937 Pat 49 (50).

#### Note 21

1. ('97) 25 Cal 285 (289).

('12) 14 Ind Cas 478 (479) (Cal).

('75) 23 Suth W R 386 (386). (Claim for mesne profits by one co-sharer.)

[See ('68) 9 Suth W R 279 (280). (Wrongful destruction of property — One member of joint family can sue for personal or special damage.)]

[See also ('28) AIR 1928 Mad 1215 (1219).]

#### Note 23

1. ('10) 5 Ind Cas 931 (931) : 33 Mad 115.

('32) AIR 1932 Nag 23 (24) : 27 Nag L R 327.

(Real owner of a pro-note cannot sue if his name is not mentioned in the note.)

('22) AIR 1922 Bom 281 (283); 46 Bom 358. (Promissory note in favour of manager — The other members of the joint Hindu family are not necessary parties.)

See also Note 18, foot-note 3.

2. ('97) 1 Oudh Cas 10 (13).

3. ('80) 2 All 754 (755).

4. ('02) 26 Mad 239 (242).

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alleging that he endorsed the pro-note to the plaintiff merely for collection, it was held that he was a proper party and might be added as a defendant.<sup>5</sup>

**24. Suits for specific performance.** — The general rule is that a person who is a stranger to the contract is not a proper party to a suit for specific performance of the said contract.<sup>1</sup> Where, however, the promisor defendant acts in concert with another person in order to defeat the plaintiff's rights under the contract, such person may be added as a proper party to the suit.<sup>2</sup> Thus, where *A* enters into a contract with *B* for sale of land, and subsequently sells the same land along with his son *C* to *D*, *C* will be a proper party in a suit by *B* against *A* for specific performance of the contract.<sup>3</sup> The transferee from the vendor after the contract of sale may also be added as a party.<sup>4</sup> Where *A* on behalf of himself and his minor brother *B* entered into an agreement to sell with *C*, and *C* sued for specific performance of such agreement, it was held that *B* was properly impleaded as a party even though a decree could not be given against him, as his presence was necessary to have the question of the binding character of the agreement decided in the suit.<sup>5</sup> Under a single contract to convey land to several persons it is not open to some of the joint contractees only to enforce specific performance thereof.<sup>6</sup>

**25. Government.** — Where any act of the Government is questioned or the proprietary right or right to revenue of the Government is likely to be affected, the Government is a necessary party to the suit.<sup>1</sup> See also Note 6 to Section 79 *ante*.

In some cases, the Government may have such an interest in the matter that the joinder, though not necessary, might be proper.<sup>2</sup> Where the Government has no

**5. ('34) AIR 1934 Sind 182 (183).**

**Note 24**

1. ('29) AIR 1929 Cal 667 (668).  
(1915) 1915 App Cas 318 (323), *Howard v. Miller*.  
(1887) 8 My & Cr 63 (68), *Taskar v. Small*.  
(11) 12 Ind Cas 818 (822) (Bom).  
(80) 5 Bom 177 (179).
- (18) AIR 1918 Mad 681 (687); 40 Mad 365 (FB).  
(Contract for sale of immovable property by a Hindu co-parcener—Suit for specific performance to sell and for possession against the other co-parceners as well is not maintainable.)
- (17) AIR 1917 Mad 583 (594). (Tenants in possession not proper parties unless contract stipulates for possession being given.)
2. ('84) 10 Cal 1061 (1069). (Per Mitter, J.)
3. ('29) AIR 1929 Cal 667 (669).
4. ('94) 18 Mad 415 (417).
- (96) 22 Bom 46 (49).
- (02) 1 Low Bur Rul 252 (254).  
[See also ('26) AIR 1926 Mad 597 (599). (Mortgages from the vendor prior to the sale.)]  
[But see ('75) 7 N W P H C R 103 (105).]
5. ('95) 19 Mad 211 (216).  
[See also ('28) AIR 1928 All 112 (113): 45 All 220. (Suit by son—Father found to be the promises under contract and not the son—Father to be made plaintiff.)]
6. ('97) 24 Cal 832 (833).

**Note 25**

1. ('67) 10 Suth W R P O 25 (29) (PC). (Act of State—Questioning an act of Government.)
- (69) 6 Bom H O R A C 265 (268). (Nature of the tenure of Gatkuli land in dispute.)

(07) 5 Cal L Jour 583 (596, 598): 34 Cal 753.  
(Suit for subsoil of Digwari tenure.)

(80) 5 Cal L Rep 154 (156). (Suit for recovery of land thrown up by a navigable river which defendant claimed as holding under a settlement with the Government.)

(74) 22 Suth W R 52 (53). (Suit for land settled with another party.)

(74) 21 Suth W R 327 (330). (Do.)

(18) AIR 1918 Mad 622 (623). (Suit for declaration by mirasaders that the right of fishery leased out by Government to 'gramattars' of the village belonged to them.)

(09) 4 Ind Cas 169 (170) (Mad). (Suit for declaration that plaintiff is entitled to revenue registry.)

(91) 15 Mad 350 (350, 351). (Suit to compel mutation of name in the revenue register.)

[See ('87) AIR 1937 Mad 641 (642). (Claim to vacant site against municipality—Municipality setting up title in Government—Government is proper party.)]

2. ('84) AIR 1934 Mad 293 (294).

(16) AIR 1916 Cal 825 (826). (Suit by ghatwall tenant against ghatwali.)

(95) 21 Bom 229 (233).

(82) 9 Cal 271 (276, 277). (Suit to set aside revenue sale—Government not necessary party—But may be impleaded on its application.)

(29) AIR 1929 Mad 443 (447). (Plaintiff suing District Board and its President for declaration that he was duly elected member—Government applying to be made defendant to which both plaintiff and defendant opposed—Government being proper party should be added.)

interest of any kind in the suit, it is neither a necessary nor a proper party.<sup>3</sup>

In a suit where a claim to property is asserted against a Municipality, the question whether the Government is a necessary party or not would depend on the facts of each case, and no general rule can be laid down.<sup>4</sup>

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**26. Suits by or against corporations.** — See Order 29 Rule 1.

**27. Miscellaneous.** — *Suits to obtain registration* — The Registering Officer is not a necessary party.<sup>1</sup>

*Official Assignee.* — In suits for money against an undischarged insolvent or in suits by his heirs in respect of property acquired by the insolvent after insolvency, the Official Assignee is not a necessary party.<sup>2</sup> Where a joint family which is carrying on a family trading business is adjudicated insolvent and a widow who has a right of maintenance sues the Official Assignee to enforce her right in the property in his hands by challenging the necessity for incurring the debts, it has been held that the creditors are necessary parties.<sup>3</sup> A sues B, his father and C, a judgment-creditor of B for a declaration that the decree obtained by C against B is not binding on A. A decree is passed in favour of A. Before that date, however, B is adjudicated insolvent; C appeals from the decree. The Official Assignee is a necessary party to such suit.<sup>4</sup>

*Suits under Section 92 of the Code.* — As to whether the alienee from the trustee is a necessary or a proper party, see Note 28 to Section 92 and the under-mentioned cases.<sup>5</sup>

A *benamidar* represents the real owner and can maintain an action in his own name.<sup>6</sup> But, as has been seen in Illustration 1 to Note 14 *ante*, the real owner may

(‘98) 25 Cal 839 (843, 844): 25 Ind App 151 (PC).  
[But see (‘15) AIR 1915 All 104 (105): 37 All 185. (Suit for declaration of title to mahantship — Court of Ward need not be made a party.)]

3. (‘26) AIR 1926 Mad 927 (932). (Suit for declaration that a certain act is *ultra vires*.)

(‘26) AIR 1926 Mad 836 (839, 840): 50 Mad 34.  
(The question with regard to the legality of statute is raised.)

*The following are cases where Government has been held to be not a necessary party:*

(‘10) 6 Ind Cas 419 (419) (Mad).

(‘91) 16 Bom 649 (652). (Suit for a declaration that plaintiff is *kadim naik* of a village.)

(‘69) 6 Bom H C R A O 265 (268). (Suit to redeem mortgage of *gatkali* land where, under the terms of a mortgage deed, the mortgagor gave up in a *razinama* to Government all claims to the land.)

(‘98) 7 Cal W N 377 (380). (Action to set aside revenue sale — Government is not a necessary party.)

(‘74) 22 Suth W R 245 (245). (Suit for partition where public revenue is not affected.)

(‘19) AIR 1919 Lah 119 (120). (Dispute about irrigation rights — Private water course — No relief against Government — Latter not necessary party.)

(‘91) 15 Mad 292 (298). (Suit against municipality for declaration of title to certain structure.)

(‘86) AIR 1936 Pesh 198 (199). (Suit for recovery of compensation under Land Acquisition Act alleged to have been paid to wrong person — Secretary of State is not necessary or proper

party.)

(‘36) AIR 1936 P O 150 (152): 60 Bom 634: 63 Ind App 248 (PC). (Admission by person in agreement with Government regarding his status — Suit for declaration of his status against other persons — Government neither necessary nor proper party.)

4. (‘37) AIR 1937 Mad 641 (641).

#### Note 27

1. (‘79) 5 Cal 445 (448). (Refusal to admit execution.)

(‘84) 8 Bom 269 (271).

2. (‘91) 16 Bom 452 (454). (Suit by heirs in respect of property acquired by insolvent after adjudication and before discharge.)

(‘94) 22 Cal 259 (263, 264). (Suit to recover a money debt against an undischarged insolvent.)

(‘90) 18 Cal 43 (44).

*See the following case in regard to the rights of the Official Assignee in suits on contracts pending at the date of vesting order:*

(1864) 1 Bom H C R 251 (257, 258).

3. (‘38) AIR 1938 Lah 901 (904): 15 Lah 9.

4. (‘32) AIR 1932 All 382 (383): 54 All 532.

5. (‘11) 12 Ind Cas 668 (669): 5 Sind L R 103.  
(Not a necessary party.)

(‘32) AIR 1932 Rang 132 (136): 10 Rang 342.

6. (‘18) AIR 1918 P O 140 (143): 46 Ind App 1: 46 Cal 566 (P C).

(‘32) AIR 1932 Bom 190 (190).

(‘84) 10 Cal 697 (705).

(‘25) AIR 1925 Mad 1005 (1007, 1008). (Except against the beneficial owner.)

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**Note 27**

properly be added as a party to the suit.<sup>7</sup> Where a document is executed to *A* in the name of *B*, for a fraudulent purpose, *A* may nevertheless enforce the rights under the document by a suit in his own name provided such fraudulent purpose has not been carried out.<sup>8</sup> See also Note 61 to Section 9 *ante*.

**Representative suits.** — A person who is represented by the plaintiff in a representative suit is not entitled to be added or substituted as a party to the suit unless the plaintiff is not acting *bona fide* in the interests of the persons represented; where, however, the plaintiff does not act *bona fide*, the persons represented may on their application be added as parties.<sup>9</sup>

**Other suits.** — In a suit by an alleged adopted son against the widow for declaration of title and possession, the mortgagee from the widow may be added as a proper party.<sup>10</sup> In a suit involving a question as to the validity of an adoption the adopted son is a necessary party.<sup>11</sup> Where subsequent to a suit for declaration of the plaintiff's right to attach a house in execution of a decree, the defendant had entered into an agreement of sale with *X* and had also undertaken to defend the suit, *X* can be impleaded as a party on the defendant's failure so to defend the suit.<sup>12</sup> The judgment-debtor is a proper party to a suit by an assignee of a decree for a declaration of the validity of the assignment.<sup>13</sup>

In a suit to set aside a rent sale the receiver at whose instance the sale is effected is not a necessary party.<sup>14</sup> In a suit by a remote reversioner to set aside a sale by a Hindu widow, the nearer reversioners may be impleaded as proper parties.<sup>15</sup> Where one member of joint Hindu family sues for a declaration against other members thereof, the nonjoinder of one of such other members is not necessarily fatal to the

('25) AIR 1925 Mad 22 (23) : 47 Mad 896 (F B).  
(Suit to eject trespasser.)

('19) AIR 1919 Mad 524 (525, 526) : 42 Mad 348  
(F B). (Benami assignee of a mortgage.)

('18) AIR 1918 Mad 407 (407, 408) : 41 Mad 435.  
(Benami mortgagee.)

('15) AIR 1915 All 10 (10) : 37 All 118. (Benami  
mortgages can sue.)

('05) 28 All 44 (46). (Following 21 All 880.)

('99) 21 All 880 (882, 884, 885). (Mortgage.)

('96) 18 All 69 (73, 77).

('20) AIR 1920 Bom 90 (91, 93) : 44 Bom 852.

('97) 22 Bom 820 (823).

('13) 20 Ind Cas 499 (500) (Cal).

('09) 1 Ind Cas 522 (523) (Cal). (Mortgage suit.)

('97) 24 Cal 644 (645). (Foreclosure suit.)

('04) 28 Mad 205 (207). (Suit on promissory note.)

('91) 15 Mad 267 (268).

('24) AIR 1924 Pat 458 (458) : 3 Pat 81. (Benami  
mortgagee.)

('16) AIR 1916 Oudh 228 (228) : 18 Oudh Cas 863.  
(Mortgage suit.)

('07) 10 Oudh Cas 263 (267).

('10) 7 Ind Cas 166 (170) (Cal).

('19) AIR 1919 Pat 234 (235).

The following cases which held that a benami-  
dar was not entitled to sue are no longer law in  
view of the decision of the Privy Council in  
AIR 1918 P C 140, referred to above :

('89) 16 Cal 864 (867).

('78) 20 Suth W R 72 (72).

('79) 19 Suth W R 434 (435).

('10) 7 Ind Cas 60 (63, 64) : 34 Mad 148. (Suit to

avoid a contract is maintainable by a benamidar.)  
(06) 30 Mad 245 (246).

('18) AIR 1918 Cal 897 (899) : 45 Cal 920 (925).

('16) AIR 1916 Cal 645 (647) : 43 Cal 504.

('02) 30 Cal 265 (272, 273).

('98) 25 Cal 874 (875, 876).

('97) 25 Cal 98 (99).

('18) AIR 1918 Pat 568 (564). (Reversed on appeal  
in AIR 1919 Pat 234.)

[See (1854) 6 Moo Ind App 53 (73) (P C).]

7. ('18) AIR 1918 P C 140 (143) : 44 Cal 566 : 46  
Ind App 1 (P C).

('96) 24 Cal 34 (37). (Assignee from real owner  
added as co-plaintiff.)

('29) AIR 1929 Mad 268 (270).

8. ('18) AIR 1918 Mad 148 (149).

9. ('32) AIR 1932 Mad 31 (32).

[See ('34) AIR 1934 Pat 531 (531). (Where the  
shebait sues in a representative capacity for  
recovery of possession of debutter properties, it  
is not necessary to have the idol as a party.)]

10. ('88) 2 O P L R 236 (238).

11. ('85) 39 Cal W N 1264 (1269).

12. ('84) 8 Bom 823 (835). (But a person in  
whose favour there is nothing more than an  
agreement to sell executed by the defendant is  
not a proper party.)

[See ('17) AIR 1917 Pat 585 (588)].

13. ('02) 26 Mad 264 (265).

14. ('14) AIR 1914 Mad 279 (273, 274) : 38 Mad 887.

15. ('94) 18 Mad 53 (58).

suit. He may be added under O. 1 R. 10 sub-clause 2 if the Court considers his presence necessary.<sup>16</sup> Where the question is whether the plaintiff or defendant is the real purchaser, a third party claiming adversely to both of them cannot be impleaded in the suit.<sup>17</sup> As to the necessity of impleading all the attaching creditors in a suit for declaration against one of them that the property is not liable to attachment, see the undermentioned cases.<sup>18</sup> See also the cases cited below.<sup>19</sup>

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**28. Addition introducing new cause of action.** — The Court will not give leave to add a party where the result would be to introduce a *new cause of action* with which the plaintiff has nothing to do.<sup>1</sup> Thus, where *A*, an importer and seller of watches, sues *B* for an injunction restraining him from importing and selling similar watches, the manufacturer cannot be allowed to be added as a party.<sup>2</sup> Similarly, where *A*, who purchased goods by sample from *B*, sued *B* for damages on the ground that the goods purchased were not according to sample and *B* applies to implead *C*, his vendor who sold the sample, so that the question between him (*B*) and *C* may also be decided, it was held that such joinder would introduce a new cause of action and should not be allowed.<sup>3</sup> In a suit for a decree in terms of an award to which the defendant consents, a creditor of the defendant who impugns the award as fraudulent should not be added as party.<sup>4</sup>

**29. Addition altering nature of suit.** — Parties should not be added so as to convert a suit of one character into a suit of a different character.<sup>1</sup> Thus, a simple suit

16. ('91) 1891 All W N 175 (176).

17. ('27) AIR 1927 Mad 834 (835).

18. ('99) 27 Cal 493 (498). (All the attaching creditors are necessary parties.)

('11) 12 Ind Cas 836 (867) (Low Bur).

19. ('37) AIR 1937 Rang 497 (498). (An administration suit is a suit for an account and the cause of action is entirely different from a suit for recovery of possession of land. Where therefore a person outside the family is in possession of a part of the estate, such person cannot be joined as a party to an administration suit. The proper course for the representative of the estate is to file a separate suit for the recovery of such part.)

('38) AIR 1938 Mad 178 (180). (Where a suit instituted properly by the nearest reversioners to the estate of a last Hindu male owner becomes, by virtue of legislation during the pendency of the suit, namely, the Hindu Law of Inheritance Amendment Act (II of 1929), a suit by remote reversioners, the Court has ample powers to allow the continuance of the suit by the plaintiffs by making the necessary amendments and impleading the necessary parties who have in virtue of the new legislation become the nearest reversioners.)

('36) AIR 1936 All 488 (489). (It is clearly in the interests of justice that a party who is named in a divorce plaint as being one of the persons with whom the respondent is alleged to have committed adultery should be allowed to intervene and defend his or her character against the aspersions which have been levelled against her — 30 Cal 489, Distinguished.)

('35) 39 Cal W N 1264 (1269). (In a suit which raises questions as to the right of succession to the shewaitship of idols, the idols are necessary parties or at any rate proper parties; and in the

absence of the idols the questions cannot be rightly agitated. The suit would be bad for defect of parties.)

('35) AIR 1935 Mad 353 (353). (In a suit for possession by the purchaser against his vendor, a third party claiming that he had no right to sell the whole property is a proper party.)

('37) AIR 1937 Lah 761 (763). (In an administration suit, the object of which always is to obtain an order for the administration of the estate of a deceased person under the supervision of the Court which must necessitate the payments of all the debts from the estate, and which is therefore essentially a representative suit, it is not necessary that all the creditors should be arrayed as parties. All that is necessary in such cases is to call upon all the creditors after the decree has been passed to prove their debts and to pay such debts as have been proved before distribution of the estate to the heirs.)

#### Note 28

1. ('80) 2 All 738 (743).

('96) 18 All 306 (308).

('75) 24 Suth WR 349 (349). (Intervener alleging that plaintiff in the suit for arrears of rent is his benamidar cannot be added.)

(1865) 2 Suth W R 280 (281).

[See ('36) AIR 1936 Mad 70 (73) : 59 Mad 312.

(There is no principle under which a stranger can be added as a party to a suit under a fresh cause of action after the suit has been decreed, in order to save court-fee expenses.)]

2. (1900) 25 Bom 433 (465).

3. ('78) 4 Cal 355 (359).

4. ('97) 22 Bom 727 (729).

#### Note 29

1. ('97) 20 Mad 375 (378).

('02) 24 All 553 (555).

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**Notes 29-32**

for rent cannot, by adding parties, be converted into a suit for title.<sup>1</sup> Similarly, a suit for plaintiff's share of the estate of a deceased person cannot be converted into an administration suit by addition of all the persons interested in the estate.<sup>2</sup>

**30. "Questions involved in the suit."** — The expression "questions involved in the suit" does not mean all claims which may possibly be put forward by anybody to the property involved in the suit.<sup>1</sup> It means questions as *between the parties* to the litigation, *i. e.*, questions with regard to the right set up and the relief claimed on one side and denied or withheld on the other,<sup>2</sup> and not questions which may arise between co-plaintiffs and co-defendants *inter se*.<sup>3</sup> The said words would, in the case of a suit for partition, include not only the questions arising out of the plaint, but those arising out of the plaint considered along with the statement of defence.<sup>4</sup>

**31. "Improper addition of plaintiff or defendant."** — It has been observed already in Note 10 above that sub-rule 2 of this rule is subject to the limitation that the Court has no power to join a person as a party if he could not have been originally impleaded under O. 1 R. 1 or R. 3. Nor does this sub-rule override the effect of O. 2, R. 3. Thus, a person claiming under a title quite distinct from that under which the parties to the suit claim is an improper party, as his joinder as party will result in a misjoinder of plaintiffs and causes of action, or a misjoinder of defendants and causes of action.<sup>1</sup>

Where a person whose right to join as a *co-plaintiff* is denied by the plaintiff on the record,<sup>2</sup> or where such person objects to be added as a plaintiff,<sup>3</sup> his joinder as co-plaintiff is improper, though he may be made a defendant.<sup>4</sup> A defendant already on record cannot take such objections as are available to the defendant newly added. Such objections are to be taken by the newly added defendant himself.

**32. Parties may be added at any stage of the proceedings.** — The power to add a party can be exercised at any stage of the suit.<sup>1</sup> Thus, a party can be added before the final decree is actually drawn up<sup>2</sup> or after a suit has been reinstated on an

(1900) 25 Bom 483 (464).

('95) 21 Bom 229 (234).

('75) 24 Suth W R 261 (261, 262).

('74) 22 Suth W R 97 (98).

('73) 20 Suth W R 383 (384).

('21) AIR 1921 Mad 98 (101, 102). (*Guardian ad litem* of minor partner in a dissolution suit—Minor's liability proving doubtful — Guardian cannot be converted into defendant in individual capacity.)

('85) AIR 1935 Sind 194 (195).

[See also ('10) 7 Ind Cas 161 (162) (Cal). (Description of plaintiffs as "executors under the will of the late mahant shebait of the idol" amended as "*de facto*" managers and persons interested in the endowment" — No change in the character of the suit.)]

2. See Note 20 above.

3. ('68) 10 Suth W R 86 (87).

**Note 30**

1. ('18) AIR 1918 Mad 1187 (1189).

2. ('26) AIR 1926 Mad 836 (838) : 50 Mad 34.

('09) 4 Ind Cas 488 (489) (All).

('80) 2 All 788 (743).

('85) AIR 1935 Mad 394 (395). (The mere fact that such a person (a person financing litigation) may be affected by the result of the suit, whe-

ther it is dismissed after real contest or by a collusive withdrawal is no reason for allowing him to be added as a party and an order to the effect is not only wrong but without jurisdiction.)

('35) AIR 1935 Sind 194 (195).

3. ('87) 9 All 447 (449).

('22) AIR 1922 Bom 454 (455).

('85) AIR 1935 Sind 194 (195).

4. ('09) 4 Ind Cas 236 (240) : 5 Nag L R 152.

**Note 31**

1. ('96) 18 All 306 (308).

2. ('81) 7 Cal 148 (149).

('70) 7 Bom H C R A C 10 (14).

3. ('81) 7 Cal 242 (244).

('25) AIR 1925 Lah 504 (505).

4. ('93) 17 Bom 466 (468).

**Note 32**

1. ('29) AIR 1929 Bom 337 (339). (Co-plaintiff joined at stage of decree.)

('05) 1905 All W N 35 (36).

('37) AIR 1937 Pat 49 (50).

('34) AIR 1934 Pat 370 (372). (Trial Court can add parties even at a late stage to do justice and prevent multiplication of suits.)

2. (1890) 15 Ch D 428 (425), *Attorney-General v. Birmingham Corporation*.

('11) 11 Ind Cas 559 (560) : 35 Bom 398.

application under O. 9 R. 13 of the Code.<sup>3</sup> The Court has, however, no jurisdiction to add a party in the following cases —

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- (1) Where a *final* decree has been passed and drawn up in the suit, and the matter, so far as regards that Court, becomes conclusive.<sup>4</sup>
- (2) Where an appeal has been filed against the preliminary decree passed by the Court, and the Appellate Court thus becomes seized of the matter.<sup>5</sup>
- (3) Where the suit has been remanded to the Court under O. 41 R. 25 of the Code.<sup>6</sup>
- (4) Where the suit has been terminated by the parties by a lawful compromise.<sup>7</sup>

There is a conflict of views as to whether, after a *preliminary* decree and before a final decree, a Court has power to act under this rule and add a party and thus re-open the proceedings. The High Courts of Madras,<sup>8</sup> Bombay,<sup>9</sup> Calcutta,<sup>10</sup> Allahabad<sup>11</sup> and Rangoon<sup>12</sup> hold that it has. So also do the Courts of the Judicial Commissioner of Sind<sup>13</sup> and Peshawar.<sup>14</sup> The Nagpur<sup>15</sup> and the Oudh<sup>16</sup> Judicial Commissioner's Courts, on the other hand, hold that it has no such power. The latter view seems to proceed upon the view that such addition involves the *setting aside* of the preliminary decree and that this cannot be done by the Court. Really, however, the proceedings are re-opened only *so far as the added party is concerned* and this is not affected by O. 20, R. 3. It is therefore submitted that the former view is the correct one.

When the suit is re-opened in appeal the *Appellate Court* has the same powers of adding a party as the first Court till a final decree is passed by it.<sup>17</sup> The same principle will apply to the Court of second appeal.<sup>18</sup>

Where the suit is a *representative one*, such as a suit contemplated by O. 1 R. 8 or by Section 14 of the Religious Endowments Act, the persons represented by the actual party are really parties to the suit and their being brought on the record *after the decree* in the place of the actual party does not affect the rule that a Court cannot implead a *new party* after decree.<sup>19</sup>

**33. Striking out name of party improperly joined.** — The impropriety in the joinder of a party lies in the fact that a party is introduced who has no connexion with the reliefs claimed in the plaint.<sup>1</sup> In the case of an improper joinder of plaintiffs the Court can ask them to elect one among themselves to proceed with the suit and to

('24) AIR 1924 Mad 648 (649).

('05) 32 Cal 488 (491, 492).

(1884) 25 Oh D 750 (751), Keith v. Butcher. (Cited in 32 Cal 488.)

3. ('98) 20 All 188 (189).

[See also ('37) AIR 1937 Pat 49 (49). (Where a suit is decreed *ex parte* and persons entitled to be added as parties to the suit make an application to add them as parties and to set aside the *ex parte* decree, the Court should add them as parties and give them an opportunity to set aside the *ex parte* decree.)]

4. ('14) AIR 1914 P O 129 (131) : 42 Cal 72 : 41 Ind App 251 (P O). (The Privy Council doubts if under Ss. 82 and 372, i. e., O. 1 R. 10 and O. 22 R. 10 a new party could be added after the final decree.)

('88) 10 All 97 (105).

[See also ('88) 6 Mad 227 (228).]

[But see ('38) AIR 1938 Bom 200 (202). (In the course of execution proceedings.)]

5. ('11) 12 Ind Cas 69 (69) (Mad).

6. ('99) 3 Oudh Cas 25 (27).

7. ('26) AIR 1926 Mad 341 (341).

8. ('24) AIR 1924 Mad 648 (649).

9. ('11) 11 Ind Cas 559 (560) : 35 Bom 393.

('71) 8 Bom H C R O C 96 (101, 102).

10. ('05) 32 Cal 488 (491, 492, 493.)

11. ('27) AIR 1927 All 465 (466) : 49 All 464. (Per Iqbal Ahmed, J.)

12. ('95) AIR 1995 Rang 23 (23, 24).

13. ('26) AIR 1926 Sind 26 (26, 27).

14. ('38) AIR 1938 Pesh 101 (103).

15. ('16) AIR 1916 Nag 120 (121) : 13 Nag LR 69. ('85) AIR 1985 Nag 64 (64).

[See however ('27) AIR 1927 Nag 299 (299).]

16. ('24) AIR 1924 Oudh 33 (33, 34) : 26 Oudh Cas 317.

17. ('01) 23 All 167 (172).

('05) 2 All L Jour 516 (518).

('22) AIR 1922 Mad 317 (319).

18. ('09) 4 Ind Cas 1192 (1192) (Mad).

19. ('28) AIR 1928 Mad 472 (472).

#### Note 33

1. ('19) AIR 1919 Mad 871 (878) : 42 Mad 219. (Per Seshagiri Iyer, J.)

('81) AIR 1931 Mad 284 (286) : 54 Mad 793.



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amend the plaint by striking off the others.<sup>2</sup> In the case of improper joinder of defendants the proper course is to strike out the names of such defendants and not to dismiss the suit as against them.<sup>3</sup> The parties whose names are thus struck out, cease to be parties to the suit, and must be treated as persons who have been dismissed from the suit and not as persons against whom the suit has been dismissed.<sup>4</sup>

The provision in this rule as to the striking out of the names of the parties who have been improperly joined refers to the suit *as framed*. Hence, where in a suit as framed, a certain person appears properly on the record as a plaintiff, the mere fact that after trial it is found that he is not entitled to maintain the suit does not justify his name being struck out under this rule. The proper course in such a case is to dismiss his claim.<sup>5</sup>

Where a defendant is brought on the record, the Court has no power to strike out his name merely because notice could not be served on him owing to the non-discovery of his whereabouts<sup>6</sup> or because he does not resist the plaintiff's claim.<sup>7</sup> Nor can such striking off be made after the first hearing.<sup>8</sup> Where the plaintiff states that he has no claim against some of the defendants, the proper course is to strike out the names of such defendants and not to dismiss the suit as against them.<sup>9</sup>

When a party's name is struck out, the suit comes to an end so far as he is concerned.<sup>10</sup> All the evidence produced by him should be removed from the record.<sup>11</sup> If, on the removal of his name the Court finds that it has no jurisdiction to try the case, the plaint should be returned to be presented to the proper Court.<sup>12</sup>

A Court of Appeal has a power of striking out parties similar to that of the first Court.<sup>13</sup> It has also power to direct the first Court to do so.<sup>14</sup> It is not competent for the lower Court, however, to strike out the name of a party added by the Appellate Court.<sup>15</sup> Where one Judge has ordered a party to be added leaving the issue of misjoinder to be decided later, the *successor* is competent to strike out the name of the party improperly joined.<sup>16</sup> Where the Appellate Court finds that a defendant has been

2. ('07) 34 Cal 662 (670, 671).

('93) 15 All 380 (382).

('02) 26 Bom 259 (266).

('69) 11 Suth W R 507 (508).

('94) 1894 Pun Re No 29, p. 81.

('81) 1881 Pun Re No. 3, p. 9.

('88) 11 Mad 42 (43).

[See ('87) AIR 1937 Lah 116 (117). (The fact that there is a surplusage of plaintiffs will not make a suit incompetent.)]

3. ('30) AIR 1930 Mad 817 (820) : 54 Mad 81 (F B).

('94) AIR 1934 Lah 737 (738).

('30) AIR 1930 Cal 388 (389, 390).

('87) AIR 1937 Lah 67 (68). (Costs can be awarded to such defendants.)

[See ('94) 17 Mad 168 (176).]

4. ('83) AIR 1933 Mad 435 (436).

[But see ('34) AIR 1934 Rang 154 (155). (Order striking out party's name from list of defendants is in effect dismissal of suit against him.)]

5. ('98) AIR 1938 Lah 799 (800).

6. ('96) 18 All 53 (55).

7. [See ('95) 18 Mad 53 (58).]

8. ('96) 18 All 53 (55).

9. ('18) AIR 1918 Mad 123 (125) : 41 Mad 418 (FB). (The reason being that by dismissal the defendant would be unreasonably brought under

the operation of Section 47.)

[But see ('70) 1870 Pun Re No. 19. (Case under the Code of 1859).]

10. ('26) AIR 1926 P C 88 (91) (P C).

11. ('71) 15 Suth W R 572 (573).

12. ('73) 10 Bom H C R 17 (18).

13. ('94) 16 All 279 (281, 288).

('83) 6 Mad 239 (245).

('86) 10 Bom 227 (229).

('82) 6 Bom 670 (671).

('09) 1 Ind Cas 626 (630) : 36 Cal 675.

('78) 13 Suth W R 73 (73). (Second appeal.)

('69) 11 Suth W R 137 (137).

('85) 8 Mad 361 (365).

[But see ('69) 12 Suth W R 334 (336). (Power of Appellate Court to strike out doubted, where suit had proceeded against interveners without objection and plaintiff intended that decree should affect them.)]

14. ('71) 15 Suth W R 6 (6).

('96) 18 All 432 (435).

('96) 18 All 131 (141).

('05) 2 Cal L Jour 602 (609).

('83) 1883 Pun Re No. 80.

('71) 15 Suth W R 572 (573).

15. ('80) AIR 1930 All 303 (304).

16. ('18) 21 Ind Cas 604 (604) (Mad).



improperly added by the lower Court, it should strike out his name and dismiss the *suit* against him with costs both in the lower Court and before itself and not merely dismiss the *appeal* preferred by such defendant.<sup>17</sup>

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Where a suit is dismissed against a defendant on the ground that he has been *improperly joined*, it will amount to a striking off of his name under this rule even though the striking out was not formally done, and he ceases to be a party to the suit.<sup>18</sup> But where the plaintiff gives up a defendant *properly* made a party, but his name is not formally struck out, he nevertheless continues to be a party to the suit within the meaning of Section 47 of the Code.<sup>19</sup>

A party who ought not to have been impleaded and who is not affected by the decree passed, is not competent to figure as an appellant and where he so figures, his name should be struck out.<sup>20</sup>

Where an order impleading a party is appealed from and the appeal is dismissed, the impropriety of the addition cannot again be questioned at the stage of the appeal from the decree itself.<sup>21</sup>

The rule expressly provides that an order adding or striking out the names of any parties may be made subject to such terms as may seem just to the Court. Where, on the application of the plaintiff, an order striking out the names of certain persons as defendants is made and no terms are inserted in the order, the effect is the same as if the suit were withdrawn against those defendants and a fresh suit against them would be barred under the provisions of Order 23 Rule 1.<sup>22</sup>

When the names of parties are struck off as improperly added, the Court can order the costs of such parties to be paid by the party at whose instance they were joined.<sup>23</sup>

See also the undermentioned case.<sup>24</sup>

**34. Transposition of parties.** — The power to add or strike out parties includes, as has been seen in Note 9 above, the power to transpose them as well and to order amendments consequent upon such transposition.<sup>1</sup> This power should be exercised wherever the ends of substantial justice require it and a transfer of parties from one side to the other should always be granted where the refusal to do so would prejudicially affect the applicant by driving him to another suit.<sup>2</sup> Thus, in a suit for partnership accounts where the plaintiff wishes to withdraw the suit, but defendants

17. ('19) AIR 1919 Cal 1019 (1019).

18. ('27) AIR 1927 Rang 137 (138) : 5 Rang 110.

('26) AIR 1926 Lah 202 (203).

19. ('18) AIR 1918 Mad 123 (125) : 41 Mad 418 (FB).

('27) AIR 1927 Mad 253 (254).

20. ('17) AIR 1917 Pat 585 (588).

21. ('14) AIR 1914 Oudh 52 (58).

22. ('89) AIR 1939 P C 110 (112) (PC).

23. ('87) AIR 1937 Lah 67 (68).

24. ('86) AIR 1936 Rang 313 (314). (Where a plaintiff's claim is either joint or in the alternative, one of the defendants should not be dismissed from the suit during the course of proceedings, except with the acquiescence of that plaintiff himself.)

#### Note 34

1. ('67) 7 Suth W R 89 (40).

('16) AIR 1916 Mad 810 (818). (Order 6 is held to entitle Courts to amend cause titles so as to

transpose defendant as a plaintiff.)

('89) AIR 1939 Rang 108 (109) : 1938 Rang L R 252. (Suit filed by many plaintiffs — Plaintiffs cannot appear and act separately — If any of them is indisposed to act with and appear by same counsel as others proper course is to strike him off as plaintiff and add him as defendant.)

2. ('31) AIR 1931 P C 162 (165) : 58 Ind App 228 : 59 Cal 80 (P C).

('25) AIR 1925 Cal 421 (422).

('39) AIR 1939 Pat 397 (398). (The power is discretionary and its use will depend upon the circumstances of the particular case—The purpose of it is to enable the Court to be in a position to determine the real questions in controversy between the parties and to avoid allowing a mere technical objection successfully to defeat a just claim.)

[See ('34) AIR 1934 Cal 136 (136, 137). (Suit by widow—Preliminary decree touching corpus of estate—On death of plaintiff reversioners defen-

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wish to continue the suit, the plaintiff should be transferred as defendant and the defendant as plaintiff and the suit continued.<sup>3</sup> Transpositions of parties are frequent in partnership suits,<sup>4</sup> partition suits<sup>5</sup> and in suits for administration.<sup>6</sup>

Under O. 1 R. 10 sub-rule 2 and Section 107 of the Code, the Appellate Court has the power to transpose a respondent as an appellant in order to further the ends of justice.<sup>7</sup> Even the High Court in second appeal has the power to permit a transposition of parties.<sup>8</sup>

It is no valid objection to an application for transposing a party that the pecuniary jurisdiction of the Court would be affected by such transfer; if it is exceeded, the Court can afterwards return the plaint to be presented to the proper Court.<sup>9</sup>

**35. Transposing of defendant as plaintiff.**—The transposition of a defendant as a co-plaintiff should always be allowed "where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings."<sup>1</sup> *A* sues *B*, the mortgagor, and *C*, the subsequent mortgagee for foreclosure. A preliminary decree is passed, and thereafter, *C* pays off the amount due thereunder before the passing of the final decree and applies to be transposed as a plaintiff. The Court has power to so transpose him and pass a final decree for foreclosure in his favour.<sup>2</sup> Similarly, where one of two co-trustees sues a third person for recovery of the trust property and impleads the other trustee as a defendant and pending suit the plaintiff dies, the other trustee defendant can be transposed as a plaintiff and the suit proceeded with.<sup>3</sup> So also where *A*, alleging that he was appointed trustee by *C*, a deceased person, sues *B* for moneys due by *B* to *C*, and makes *C*'s widow *D* also a defendant to the suit and it is found that *A* was not the trustee for that amount, it being *C*'s absolute property, the proper course is to transpose *D* as a plaintiff and proceed with the suit.<sup>4</sup>

So also, where *A* sues *B* and *C* on a promissory note executed by *B* to *C*, on the ground that *C* was really a *benamidar* for *A*, and finding that such a suit is not maintainable by *A* under the Negotiable Instruments Act, *C* applies to be transposed as a plaintiff, the application should be allowed. Such a transposition does not prejudice the debtor and does not affect limitation under Section 22 of the Limitation Act.<sup>5</sup> But a transposition of a defendant as a plaintiff should not be granted if it results in

dants can be substituted as plaintiffs but not the co-widow defendant without her consent.)]

3. ('26) AIR 1926 All 582 (583).  
 (1883) 11 Q B D 464 (469), *McGowan v. Middleton*.

('14) AIR 1914 Mad 369 (370).

('83) 7 Bom 167 (169).

('16) AIR 1916 Cal 80 (82).

4. ('83) 7 Bom 167 (169).

('16) AIR 1916 Cal 80 (82).

5. ('20) AIR 1920 Mad 546 (546).

('21) AIR 1921 Bom 455 (456) : 45 Bom 983.

('12) 14 Ind Cas 544 (549) (Mad). (Defendants transposed as legal representatives of deceased plaintiff.)

6. ('19) AIR 1919 Mad 80 (80).

7. ('30) AIR 1930 All 786 (787).

('27) AIR 1927 Cal 87 (87, 88).

8. ('89) AIR 1989 Pat 397 (398).

9. ('26) AIR 1926 Pat 28 (29).

**Note 35**

1. ('81) AIR 1931 P C 162 (165); 58 Ind App 228; 59 Cal 80 (P C).

('36) AIR 1936 Pat 107 (107).

2. ('28) AIR 1928 Nag 145 (146); 24 Nag L R 119.

('25) AIR 1925 Nag 15 (16, 17).

[See also ('14) AIR 1914 Cal 788 (789). (Mortgagees defendants in a suit by their co-mortgagees for enforcement of the mortgage security can if anything was due to them transpose themselves to the category of plaintiffs.)]

3. ('21) AIR 1921 Mad 124 (124).

4. ('27) AIR 1927 Oudh 484 (485) : 8 Luck 241.

5. ('82) AIR 1982 Pat 346 (348, 349); 11 Pat 616. (Dissenting from AIR 1928 Pat 24.)

[See also ('83) AIR 1983 Pat 289 (241).

('35) AIR 1935 Mad 95 (97). (Defendant made plaintiff—Question to be decided not changed—Order is proper even though suit by transposed defendant would have been barred by time on date of transposition.)

changing the *character of the suit*.<sup>6</sup> Nor can a transposition be made where it would deprive the plaintiff already on record of his power to sue and ask for a determination of the claim advanced by him. Thus, where *A* claims to have the sole right to a certain sum of money due from a defendant *B* and makes a third person *C*, who claims as against himself (*A*), a party to the suit, *C* cannot be transposed as a plaintiff in the place of *A*, as to do so would be to deprive *A* of his right to have his claim determined.<sup>7</sup>

Even in cases to which O. 1 R. 10 does not apply, the Court has inherent power to order the transposition of a defendant as a plaintiff.<sup>8</sup>

When a *pra forma* defendant becomes on his own application a co-plaintiff, he must be taken to adopt only those statements in the plaint which are essential to support the cause of action stated in the plaint and not any other statements.<sup>9</sup>

**36. Transposing of plaintiff as defendant.** — Under O. 1 R. 10 one of the plaintiffs can be transposed as a defendant, if his original joinder was improper.<sup>1</sup> The Court has also, apart from O. 1 R. 10, inherent power to transpose one of the plaintiffs as a defendant.<sup>2</sup> If the transposition is made at the instance of a co-plaintiff, the Court can make such co-plaintiff give security for the costs of the original defendants incurred up to the date of transposition.<sup>3</sup> But as regards future costs of the original defendants, the Courts cannot, merely because of the transposition of one of the plaintiffs as a defendant, order such co-plaintiff to furnish security for their future costs.<sup>4</sup> But it would seem that if apart from the transposition there are special circumstances, such as the plaintiff suing in the capacity of a "puppet" for another, the Courts may order security for future costs as well.<sup>5</sup>

**37. Misdescription of parties.**—Where it is clear who the person who intends to sue or who is intended to be sued is, but he is *described wrongly*, it is a case of misdescription of parties which can be corrected by the Court at any time.<sup>1</sup> Similarly,

(‘98) AIR 1938 Cal 481 (485). (In a suit under S. 106, Ben. Ten. Act, a co-sharer pro forma defendant can be transferred to the category of the plaintiff, although a period of four months has elapsed since the final publication of the record of rights and a decree can be passed in his favour. The Court clearly has jurisdiction to order the transfer under O. 1 R. 10, C. P. Code, and having regard to the provisions of S. 22 (2), Lim. Act, no question of limitation can arise.)]

6. (‘22) AIR 1922 Cal 459 (460, 461).

(‘35) AIR 1935 Mad 95 (96). (Suit for damages for use and occupation is suit of different character from suit for rent — But in this case it was held on a construction of the pleadings that the suit from beginning was one for damages for use and occupation and therefore there was no change of character of the suit.)

(‘39) AIR 1939 Mad 467 (468). (Mortgage— Suit to enforce, by assignee of mortgage right — Mortgagee impleaded as defendant—Assignment found invalid owing to registration being void —Application to transpose mortgagee as plaintiff in appeal and for decree on mortgage will not be allowed when the result is to change the character of the suit which has proceeded on the footing that the mortgagee has accepted the assignment as binding on him.)

[See also (‘31) AIR 1931 Cal 76 (78): 58 Cal 561. (Where the suit is bound to fail for want of title in original plaintiff, amendment should not be allowed and defendant seeking transposition can file separate suit.)]

7. (‘21) AIR 1921 All 184 (185).

8. (‘37) AIR 1937 Mad 563 (565). (Exercise of inherent power of Court to give effect to agreement of parties that a certain course should be followed in the suit.)

9. (‘37) 41 Cal W N 501 (502).

#### Note 36

1. (‘25) AIR 1925 Cal 928 (928, 929).

(‘39) 1939-2 Mad L Jour 551 (554). (Person impleaded as second plaintiff—Interest adverse to the first plaintiff — Presence of party on record necessary for effectual adjudication of all questions involved — Transposition as defendant ordered: In re, Mathews Oates v. Mooney, (1905) 2 Oh 460, Followed.)

2. (‘24) AIR 1924 Cal 251 (252) : 50 Cal 853.

3. (‘1905) 2 Oh 460 (463, 464), In re Mathews, Oates v. Mooney.

(‘24) AIR 1924 Cal 251 (254, 255, 256) : 50 Cal 853.

4. (‘24) AIR 1924 Cal 251 (254) : 50 Cal 853.

5. (‘24) AIR 1924 Cal 251 (254) : 50 Cal 853.

#### Note 37

1. (‘14) AIR 1914 Mad 686 (687).

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where relief is originally claimed by or against a party (such as an idol, a minor, or a corporation) who has to be represented by some person, the *proper* representation of that party is a question of the *description* of the party, and not one of addition of new parties.<sup>3</sup> But where one person sues or is sued, and *another* person is sought to be substituted in his place, the case is not one of misdescription of parties, and the amendment can be allowed only if there is no question of limitation.<sup>3</sup>

*Illustrations*

1. A sues "the Agent, East India Railway Co.," relief being asked for *against the Company* and not against the Agent personally. The title is sought to be amended into "East India Railway Co.," by striking out the word "Agent." Here the plaintiff's claim as originally made was clearly against the Company, though the title of the suit was worded as if the suit was against the Agent also. The case is therefore one of misdescription and can be corrected by the Court at any time.<sup>4</sup> But where the

('33) AIR 1933 Bom 304 (305). (In such a case the amendment may be allowed on terms.)

('96) 18 All 198 (202, 203) (FB).

('18) AIR 1918 Cal 188 (189). (Amendment may be made in appeal.)

('28) AIR 1928 Mad 367 (369).

('23) AIR 1923 Nag 96 (97). (Correction of misdescription only—No limitation.)

('31) AIR 1931 Sind 63 (63) : 24 Sind L R 478. (Mistake corrected in appeal.)

('24) AIR 1924 Sind 144 (146) : 19 Sind L R 262. (Defendant described as manager of a firm by mistake—Amendment describing defendant individually allowed.)

('35) AIR 1935 Rang 240 (243). (Suit wrongly brought in firm's name—*Held*, that the amendment of plaint by substituting the name of the proprietor for the name of the firm should be allowed as it was only a change in form and not in substance and that the Appellate Court could order such amendment in plaint, judgment and decree without ordering a remand to the original Court for rehearing.)

('37) AIR 1937 Pat 526 (527). (Suit instituted wrongly in name of firm by mistake—Provisions of Partnership Act should not be too rigidly enforced—Amendment of plaint should be allowed even at late stage.)

2. ('11) 11 Ind Cas 47 (48) : 33 All 785 (FB). (Suit against idol—Wrong description of person representing idol—Amendment can be allowed—19 All 336, Overruled.)

('05) 32 Cal 582 (598). (Relief claimed against debutter estate—None of the defendants impleaded as representing the estate—Subsequent description of one of the defendants as shebait of estate is no addition of new party.)

('16) AIR 1916 Cal 164 (166). (Plaintiff suing in a representative capacity but the fact not mentioned in the cause title—Amendment so as to mention it does not amount to addition or substitution of new plaintiffs.)

('69) 12 Suth W R 117 (118). (Suit by receiver in his own name by mistake—Amendment allowed.)

('26) AIR 1926 Cal 417 (419). (Omission to describe plaintiff as shebait in cause title allowed to be amended.)

('19) AIR 1919 Cal 245 (247) : 46 Cal 877. (Omission to describe the defendant as shebait was allowed to be amended.)

*In the following cases plaintiff was wrongly described as a minor and represented by next friend :*

('27) AIR 1927 Cal 477 (477, 478).

('18) AIR 1918 Mad 916 (917) : 40 Mad 743.

('31) AIR 1931 All 507 (512) : 54 All 57 (SB).

('94) 21 Cal 866 (868).

('02) 5 Oudh Cas 355 (357, 358).

('04) 7 Oudh Cas 234 (236).

('26) AIR 1926 Nag 40 (43, 44). (Appeal filed by next friend of minor who was really major on the date of Appeal.)

*In the following cases suit was brought by minor plaintiffs without next friend—Next friend was added later on :*

('24) AIR 1924 Lah 157 (158).

('76) 25 Suth W R 184 (185).

*For suits by or against an idol, see the following cases also :*

('25) AIR 1925 P C 139 (140) : 52 Ind App 245 : 52 Cal 809 (PC).

('23) AIR 1923 All 160 (160) : 45 All 319.

('23) AIR 1923 All 120 (121, 122) : 45 All 215.

('97) 1897 All W N 75 (76) : 19 All 330.

('07) 9 Bom L R 1301 (1304).

('17) AIR 1917 Cal 441 (442).

('13) 18 Ind Cas 969 (970) (Cal).

('11) 9 Ind Cas 132 (133) (Cal).

('92) 1892 Pun Re No. 66, p. 243.

[See ('28) AIR 1928 Mad 1057 (1059). (Final decree passed with wrong guardian—*Held* the suit guardian cannot be substituted.)]

3. ('14) Mad 686 (637).

4. ('25) AIR 1925 Lah 441 (442) : 6 Lah 252.

*See also the following cases :*

('96) 18 All 198 (202, 203) (FB). (Official Liquidator on behalf of a company—17 All 292, Overruled.)

('85) 7 All 284 (287). (Suit against company—Partners of company joined as defendants.)

('25) AIR 1925 Nag 155 (156). (Suit against "Agent, Bengal Nagpur Railway"—Amendment of plaint by striking out word 'Agent' allowed.)

('70) 2 N W P H O R 179 (180). (Suit by recognized agent of Official Assignee amended into suit by Official Assignee.)

('28) 112 Ind Cas 823 (824) (Pat). (Suit against "Agent, B. N. W. Ry."—Word 'Agent' was struck out by amendment.)

Agent is sued *personally*, the amendment of the title as abovementioned will really amount to a substitution of a *new party* which will not be allowed after the period of limitation.<sup>5</sup>

2. A suit is wrongly filed in the name of the Chairman, District Board, Dacca, instead of the District Board, Dacca. The case is one of misdescription and can be corrected by striking off the word "Chairman."<sup>6</sup> Similarly, where A sues the Municipal Committee of Gorakhpur through its Secretary instead of through its President as he ought to have done, and the relief claimed is against the Committee, the misdescription can be corrected at any time.<sup>7</sup>

3. A brought a suit against "Shivlal Ramprasad, a firm doing business as merchants at Ahmedabad." It was found subsequently that Shivlal Ramprasad was a joint Hindu family and that the provisions of Order 30 would not apply. The title of the plaint was sought to be amended by substituting the names of the members of the family for the firm's name "Shivlal Ramprasad." It was held that the amendment was only a correction of misdescription and did not amount to an addition of any new parties.<sup>8</sup>

4. A suit was instituted for damages by "H. Hogarth & Sons", it being alleged that they were the owners of the vessel "Baron Jedburgh". The real name of the plaintiff was, however, "Hogarth Shipping Co., Ltd.," and was not described as such owing to a *bona fide* mistake. It was held that the description could be corrected at any stage.<sup>9</sup>

The principle of the rule applies to miscellaneous applications also. Thus, where an application was made by "The Official Assignee of Bombay" instead of by the "Official Assignee of Bombay as an attorney of the Official Assignee of Madras" it was held that the misdescription could be corrected by the Court.<sup>10</sup>

Where a party is wrongly described and the Court orders amendment giving a correct description, and in spite of it the amendment is not carried out, the Court can strike out the name of such party.<sup>11</sup>

**38. Consent of added party, sub-rule 3.** — No person can be added as a *plaintiff* without his consent expressly given.<sup>1</sup> But a person can be made a *defendant*

(23) AIR 1923 Bom 452 (453) : 47 Bom 785. (Suit against "Agent, B. B. and C. I. Ry."—Amendment of plaint by striking out the word "Agent" allowed.)

(87) 9 All 188 (190, 191). (Plaint returned as it was signed and verified as "For the M. Bank, Ltd. G. H. Webb, manager"—Held, not a good ground for returning the plaint.)

(17) AIR 1917 Mad 471 (471). (Suit by A—Amendment into suit by A on behalf of a company.)

5. (16) AIR 1916 Cal 818 (819) : 43 Cal 441.

(25) AIR 1925 Cal 716 (718, 719) : 52 Cal 783.

(01) 6 Cal W N 218 (221). (Suit against an "Executive Engineer"—Addition of the Secretary of State as a party subsequently is an addition of a new party.)

(25) AIR 1925 Pat 87 (88, 89) : 8 Pat 230. (Difference between misdescription and suing a wrong party pointed out.)

(21) AIR 1921 Pat 485 (486).

[See (01) 4 Oudh Cas 188 (188). (State Railway as defendant — Secretary of State cannot be substituted in the absence of due notice.)

(71) 15 Suth W R 534 (536).]

6. (28) AIR 1928 Cal 485 (487).

[See also (24) AIR 1924 Oudh 309 (310).]

7. (78) 2 All 296 (298).

[See (98) 16 Mad 296 (298). (Suit against President of Taluk Board—Suit not maintainable as not being brought against Taluk Board.)]

8. (25) AIR 1925 Bom 527 (527).

See also the following cases :

(83) AIR 1933 Bom 304 (305).

(28) AIR 1928 Bom 191 (193). (Suit in firm's name—Court deciding that suit as framed not maintainable — Amendment to insert partners must be treated as one of substitution.)

(93) 17 Bom 413 (416). (Suit by a firm by its "manager" — On objection by defendants a partner was joined as co-plaintiff on the ground of misdescription.)

(31) AIR 1931 Cal 770 (771). (Sole proprietor of firm suing in name of firm and verifying as a partner — Defect amended.)

(29) AIR 1929 Mad 633 (634). (Plaintiff suing on behalf of Trading Committee — Amended as plaintiff suing on behalf of "members" of the Committee.)

(02) 1902 Pun L R No. 103 at p. 408.

9. (26) AIR 1926 Cal 722 (725). (Affirming AIR 1925 Cal 922.)

10. (97) 21 Bom 205 (210).

11. (24) AIR 1924 Oudh 428 (429). (Major suing as a minor.)

#### Note 38

1. (11) 10 Ind Cas 515 (520) : 1911 Pun Re No. 46.

(12) 14 Ind Cas 35 (37) (All).

(81) 7 Cal 242 (244).

(71) 6 Eng L R 526n (527n).

(1900) 3 Oudh Cas 347 (350).

(1896) 2 Ch 649 (655), Fricker v. Van Grutten.

(Cited in 9 Cal L Jour 831.)

(1920) 86 T L R 193, Wootton v. Joel.

[See (74) 22 Suth W R 394 (395).]

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**Notes 38-40**

against the plaintiff's consent<sup>3</sup> even though he may thereby be in a position to counter-claim against the plaintiff.<sup>3</sup>

Persons who are made parties to a suit in the appellate stage cannot be made liable for costs, simply because they encouraged the plaintiff to bring the suit.<sup>4</sup>

**39. Amendment of plaint, sub-rule 4.** — The amendment referred to in this sub-rule is such amendment as is necessitated by the addition of a defendant and not such an amendment as would add to or alter the nature of the suit as originally brought.<sup>1</sup> A case of misdescription is also one for amendment of the plaint.<sup>2</sup> Where the amendment as per the order of the Court is not made, the proper course is to reject the plaint.<sup>3</sup> But if the parties proceed with the trial without the amendment, and if they are not prejudiced, the trial is not bad.<sup>4</sup> In such a case, the petition may be treated as a part of the plaint.<sup>5</sup>

**40. Suit by or against a dead person.** — A suit instituted in the name of a sole plaintiff<sup>1</sup> or against a sole defendant<sup>2</sup> who is dead at the time of the institution of the suit is a nullity and the plaint cannot be amended by bringing his legal representatives on the record. The Nagpur High Court has recently held that even when a suit has been filed in the name of a dead person as a plaintiff the plaint can be amended under this rule by the substitution of the name of his legal representative where the mistake has been *bona fide*.<sup>3</sup> The decision is based on the view that there is really no difference between a suit instituted in the name of a wrong plaintiff and a suit instituted in the name of a dead plaintiff and that the applicability of this rule does not depend upon whether the "wrong person" referred to in it is alive or dead.

Where, however, there are several plaintiffs or several defendants and one of them dies, the suit cannot be said to be void *ab initio*.<sup>4</sup> The proper procedure in such a case is to strike out the dead person's name and proceed with the suit.<sup>5</sup> If the deceased person was a necessary party, the plaint can be amended by adding his legal representatives as parties.<sup>6</sup>

An appeal against a person who was dead at the date of the presentation of the appeal is incompetent, but as the Court is only acting in a *proceeding in a suit*, it has

2. ('10) 6 Ind Cas 977 (978) : 18 Oudh Cas 109.

('29) AIR 1929 Mad 443 (447).

3. ('29) AIR 1929 Mad 443 (447).

4. ('74) 22 Suth W R 85 (85, 86).

**Note 39**

1. ('02) 24 All 553 (555).

2. ('97) 21 Bom 205 (209, 210).

('72) 18 Suth W R 301 (303) (P C).

3. ('90) 1890 Pun Re No. 36, page 99.

('87) 14 Cal 435 (439).

4. ('15) AIR 1915 Mad 835 (835).

('11) 10 Ind Cas 503 (505) (Cal).

[See ('81) 6 Cal 626 (628).]

5. ('11) 10 Ind Cas 503 (504) (Cal).

**Note 40**

1. ('28) AIR 1928 Lah 552 (552). (Suit on behalf of minor who was dead.)

('29) AIR 1929 Nag 261 (262). (Appeal in name of dead person instead of in the name of his legal representative.)

('97) AIR 1927 Cal 880 (881). (One of two co-mortgagors dead — Other mortgagor including the deceased mortgagor as a co-plaintiff — Defect can be remedied by amendment to add

legal representatives of the deceased.)

('87) AIR 1937 Sind 92 (93): 31 Sind L R 406.

2. ('08) 31 Mad 86 (88).

('33) AIR 1933 Mad 454 (455).

('24) AIR 1924 Bom 109 (111, 112).

('76) 25 Suth W R 17 (17).

('69) 12 Suth W R 45 (46).

('18) AIR 1918 Mad 794 (794).

('16) AIR 1916 Mad 440 (440, 441).

('18) AIR 1918 Oudh 419 (420).

3. ('38) AIR 1938 Nag 458 (459).

4. ('27) AIR 1927 Cal 880 (881).

('84) AIR 1984 All 25 (26). (In such a case it cannot be said that there is no validly instituted suit against any one.)

5. ('26) AIR 1926 Lah 153 (154).

('28) AIR 1928 Lah 359 (360): 9 Lah 526.

[See also ('28) AIR 1928 Cal 152 (153). (Plaintiff in doubt if defendant alive or dead—Plaintiff both against defendant and his heirs—Defendant subsequently learnt to be dead—His name struck off.)]

6. ('27) AIR 1927 Cal 880 (881).

('28) AIR 1928 Lah 359 (360): 9 Lah 526.

('87) AIR 1937 Sind 47 (48).

full power to allow amendment of the appeal by adding the legal representatives of the deceased respondent as parties.<sup>7</sup> The Judicial Commissioner's Court of Nagpur has, however, held that where an appeal has been filed on behalf of a person who was dead at its institution the Court cannot add the legal representatives of the deceased person as appellants.<sup>8</sup> But this view has been dissented from in a later decision of the same Court.<sup>9</sup>

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**Notes 40-41**

**41. Limitation Act, Section 22.**—Section 22 of the Limitation Act (XV of 1877, now Act IX of 1908) provides that where a *new* plaintiff or defendant is added, or substituted, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.<sup>1</sup> Thus, when a new plaintiff is substituted for the plaintiff already on record after the period of limitation prescribed for that suit, it must be dismissed.<sup>2</sup> If on the addition of a new defendant the suit is barred against him it will have to be dismissed as against him.<sup>3</sup> But does the addition of a party after the period of limitation affect the suit as regards other parties who are already on the record? The answer to this depends upon the question whether the added party is a *necessary* party or is only a *proper* party or whether he was already *constructively* a party to the suit though not actually so. If he was a *necessary* party, *i. e.*, if the suit will not be a properly constituted one, unless he is made a party, his addition after the period of limitation will entail the dismissal of the whole suit, inasmuch as the suit becomes a properly constituted one only when he is made a party, and inasmuch as at that time the suit is barred against all.<sup>4</sup> Where the party added is only a *proper* party but not a necessary

7. ('25) AIR 1925 Mad 1210 (1210) : 49 Mad 18 (FB). (Overruling AIR 1924 Mad 56).

('30) AIR 1930 All 131 (131, 132.)

8. ('34) AIR 1934 Nag 55 (56).

9. ('38) AIR 1938 Nag 458 (459).

#### Note 41

1. ('27) AIR 1927 P C 252 (255) : 55 Ind App 7 : 6 Rang 29 (PC).

('34) AIR 1934 Bom 385 (386) : 58 Bom 536.

('85) 9 Bom 1 (9).

('30) AIR 1930 Cal 118 (127) : 57 Cal 170.

('66) 6 Suth W R 298 (293).

('30) AIR 1930 Lah 747 (748) : 11 Lah 688. (It is immaterial whether the Court acts *suo motu* or upon the application of a party.)

('25) AIR 1925 Mad 917 (918).

('10) 6 Ind Cas 680 (680) (Mad). (Subsequently added party may raise question of limitation.)

('10) 33 Mad 115 (117).

('87) AIR 1937 Rang 175 (177). (In the circumstances of this case, the parties were deemed as added on the date of the application for their addition—Principle of *nunc pro tunc* applied.)

('37) AIR 1937 Rang 124 (125).

('39) AIR 1939 Sind 172 (173) : I L R (1939) Kar 275. (Amendment seeking to substitute one legal entity for another cannot be allowed after limitation—Such a case is not one of misdescription.)

2. ('98) 25 Cal 409 (412). (Assignee of the interest of plaintiff, substituted for original plaintiff after limitation—Suit is barred.)

('07) 34 Cal 612 (615, 617) (FB). (Do.)

('34) AIR 1934 Bom 385 (386) : 58 Bom 536.

3. ('32) AIR 1932 Lah 314 (315). (Suit against wrong legal representative—Right legal represen-

tative impleaded after limitation—Suit is barred—No question of *bona fides* arises.)

('09) 4 Ind Cas 1160 (1163) : 3 Sind L R 191.

('32) 1932 Mad W N 330 (331).

('36) AIR 1936 All 94 (95) : 58 All 594.

4. ('04) 28 Bom 11 (18, 19).

('33) AIR 1933 Sind 121 (122). (Suit for accounts against one partner only—Other partners added as parties after period of limitation—Suit must be dismissed.)

('33) AIR 1933 Cal 621 (622) : 60 Cal 777. (All mortgagees or heirs of mortgagees, must be parties to suit—Necessary party joined after limitation—Whole suit fails.)

('12) 18 Ind Cas 197 (199, 200) (All). (Necessary parties not impleaded in mortgage suit till after limitation—Defect fatal to suit.)

('99) 21 All 346 (348). (Suit against unregistered company represented by its partner—Other partners sought to be added after limitation—Suit dismissed.)

('92) 14 All 524 (528). (Partnership debt—Suit for—All partners must join—Addition of a partner after limitation—Suit to be dismissed.)

('29) AIR 1929 Cal 591 (592).

('19) AIR 1919 Cal 510 (510). (Application to set aside execution sale—One auction-purchaser impleaded after limitation—Whole application is barred.)

('14) AIR 1914 Cal 455 (456) : 41 Cal 727.

('28) AIR 1928 Lah 33 (34).

('02) 1902 Pun Re No. 69, p. 250.

('82) 1882 Pun Re No. 104, p. 297. (Pre-emption suit—All representatives of deceased vendee not joined—Addition after limitation—Whole suit is barred.)



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**Note 41**

one, the suit as regards the other parties will not be barred.<sup>5</sup> Where the added party is already constructively a party to the suit, as in the case of representative suits, it is really not a case of adding or substituting *new* parties, and Section 22 does not apply to such a case.<sup>6</sup>

*Illustrations*

1. *A*, one of the two heirs of a deceased Khoja Mahomedan, institutes a suit to recover a debt due to the estate of the deceased. Here the suit is not a properly constituted one without adding the other heir as a party, and if the other heir is added after the period of limitation, the whole suit will be barred.<sup>7</sup>

2. *A*, *B* and *D* are partners carrying on business in partnership. *A* sues *B* for partnership accounts without impleading *D* as party. In this case also the suit is not a properly constituted one without impleading *D* as party, and if he is added after the period of limitation, the whole suit will become barred.<sup>8</sup> The same principle will apply to one of several joint promisees suing without impleading the other joint promisees as parties.<sup>9</sup>

3. *A*, the landlord, sues *C*, a sub-tenant of *B*, who is himself a sub-tenant of *A*, for ejectment without impleading *B* as a party; *B* is made a party after the period of limitation. The whole suit must be dismissed as barred.<sup>10</sup>

4. *A*, the manager of a joint Hindu family, sues *B* for rent due in respect of family property. After the period of limitation *C*, a member of the family, is added as a co-plaintiff for the purpose of protecting *A*'s interest and of removing any possible objections by the defendant. Here *C* is only a proper but not a necessary party and his addition after the period of limitation will not affect the suit by *A*, who in his own right as manager of the family was entitled to institute the suit.<sup>11</sup> The same result may also be arrived at on the principle that the manager represents the other members,

('25) AIR 1925 Mad 761 (761, 762). (Karnavan necessary party in a suit on Teer-deed.)

('14) AIR 1914 Mad 395 (395). (Suit instituted by insolvent after adjudication—Receiver seeking to be made a plaintiff after the period of limitation—Suit barred—Hence not made a party.)

('16) AIR 1916 Pat 411 (414).

('15) 30 Ind Cas 795 (796) (U P B R).

5. ('21) AIR 1921 Bom 152 (154) : 45 Bom 1009.

('04) 26 All 528 (535). (Affirmed on appeal to Privy Council in 32 All 241 (PC).)

('97) 1897 All W N 86 (86).

('25) AIR 1925 Bom 547 (560). (*Del credere* agent suing—Principal not a necessary but only a proper party—Addition after limitation—S. 22 does not apply.)

('19) AIR 1919 Bom 135 (137) : 43 Bom 575.

('15) AIR 1915 Bom 272 (272) : 39 Bom 729.

('10) 8 Ind Cas 890 (890) (Cal).

('04) 28 Bom 11 (18).

('98) 22 Bom 672 (679). (Benamidar suing—Real owner added.)

('09) 1 Ind Cas 626 (629, 630) : 36 Cal 675.

('07) 6 Cal L Jour 558 (565, 570). (Addition of *pro forma* defendants.)

('06) 33 Cal 1079 (1093). (Purchaser of small portion of mortgaged property added after limitation—Suit not barred wholly.)

('06) 33 Cal 618 (620, 621). (Do.)

('86) 12 Cal 642 (650).

('81) 7 Cal 284 (287). (Suit for possession—Some persons in possession impleaded after limitation—Suit dismissed against them.)

('07) 1907 Pun Re No. 3. (Assignee of vendee *pendente lite* added after limitation in a pre-emption suit.)

('16) AIR 1916 Mad 1029 (1034) : 40 Mad 722. (Where a suit is properly instituted and an

assignment is made pending suit by the plaintiffs, and the assignee is allowed to continue the suit S. 22 does not apply.)

('14) AIR 1914 Mad 272 (273, 275) : 39 Mad 837.

('12) 16 Ind Cas 420 (421) (Mad). (Suit for possession—Some persons in possession impleaded after limitation—Suit dismissed against them.)

('16) AIR 1916 Sind 53 (54) : 10 Sind L R 38.

[See ('87) AIR 1937 Mad 169 (171) : I L R (1937) Mad 600. (Where an application is made to add certain persons as parties after the period of limitation for the suit, this circumstance will not of itself justify either the dismissal of the application to implead them or the dismissal of the suit—28 Bom 11, Relied on.)]

6. See *Illustration 4 in the Note*.

7. ('97) 21 Bom 580 (583). (Chitty's SCOR 527.)

[But see ('32) AIR 1932 Lah 652 (653). (Suit by one legal representative of a creditor—Other joined as plaintiff after limitation—Decree for share of former is not bad.)]

8. ('87) 14 Cal 791 (794).

('13) 19 Ind Cas 968 (964) (Cal). (One of two heirs of a deceased partner joined after limitation—Whole suit is barred.)

9. ('88) 7 Bom 217 (219, 220). (One member of a joint family suing for joint debt—Assent by the others does not cure the defect.)

('06) 1906 Pun Re No. 79.

('09) 4 Ind Cas 38 (41, 42) : 32 Mad 284. (One member of a joint family suing for joint debt.)

('96) 6 Mad L Jour 27 (29).

('86) 1886 Pun Re No. 8.

('81) 6 Cal 815 (826).

10. ('15) 30 Ind Cas 795 (796) (U P B R).

11. ('11) 9 Ind Cas 739 (741) : 33 All 272.

('84) AIR 1934 Bom 178 (182, 183) : 58 Bom 249.

('14) AIR 1914 Cal 681 (681). (Observations in 14 Cal 400 as to applicability of S. 22, Limitation



that the latter are *constructively parties* to the suit and that therefore their subsequent addition is not an addition of any *new parties* within Section 22 of the Limitation Act.<sup>12</sup>

5. A, as executrix of B's will files a suit for recovery of possession of lands belonging to the deceased B. O and D, the beneficiaries under the will are substituted for A after the period of limitation. The suit is not barred by Section 22 of the Limitation Act. The reason is that an executor, trustee or administrator represents the persons beneficially interested and the addition of C and D in the above case is not the addition of any *new party*.<sup>13</sup>

The mere fact that the Court of *its own motion* orders the name of any person to be added as a party does not render the provisions of Section 22 of the Limitation Act inapplicable.<sup>14</sup>

Section 22 does not apply to a case of *transposition* of parties, as sub-section 2 of that Section itself shows.<sup>15</sup> Similarly, the Section does not apply to the correction of a *misdescription* of a party.<sup>16</sup> So also the Section does not apply where an amendment of the plaint merely alters the ground on which relief is claimed against a person who is already a defendant.<sup>17</sup>

Under sub-clause 5 of this rule, a person will be deemed to have been made a party, and proceedings begin against him only on the *service of summons on him*.<sup>18</sup>

Applying this sub-clause, some cases<sup>19</sup> have held that the suit as against such a person will be barred unless the service is within the period of limitation. But as the sub-clause is expressly made subject to Section 22 of the Indian Limitation Act, the suit as against a newly added defendant must be deemed to have been instituted when he is made a party so far as regards the question of limitation.<sup>20</sup> When a person is added as a party on an application made for the purpose, such addition must be deemed to have effect from the date of the *application* and not merely from the date of the *order* on the application.<sup>21</sup> The same principle applies even where the addition is made by the Appellate Court in appeal from an order by the lower Court refusing to make the addition.<sup>22</sup>

Act to substitutions under S. 27 of the old Code doubted.)

('06) 88 Cal 1079 (1098).

12. ('24) AIR 1924 All 908 (908) : 46 All 709.

[See also ('12) 14 Ind Cas 35 (37) (All).

('15) AIR 1915 Mad 424 (424). (Suit by plaintiff in private capacity—Amendment as manager of a company does not amount to addition of party—No limitation.)]

13. ('08) 7 Cal W N 817 (820).

[See also ('08) 12 Cal W N 8 (11). (Executors substituted for the legal representatives of the deceased.)]

('16) AIR 1916 Cal 337 (338, 339). (Widow suing as administratrix for benefit of her sons.)]

14. ('92) 14 All 524 (528).

('06) 8 Bom L R 942 (946).

('08) 85 Cal 519 (523) (FB). (Overruling 24 Cal 640 and 27 Cal 540.)

('30) AIR 1930 Lah 747 (748) : 11 Lah 688.

('25) AIR 1925 Sind 181 (182, 183) : 17 Sind L R 324.

15. ('27) AIR 1927 Mad 204 (204).

('32) AIR 1932 Pat 804 (805).

('82) AIR 1932 Pat 846 (849) : 11 Pat 616.

('09) 4 Ind Cas 249 (251) (Bom).

('15) AIR 1915 Cal 759 (759).

('10) 8 Ind Cas 887 (841) : 38 Cal 842. (Obiter.)

('08) 35 Cal 1065 (1068). (*Pro forma* defendant made plaintiff.)

('87) 14 Cal 400 (401).

('27) AIR 1927 Oudh 484 (485).

[See ('35) AIR 1935 Mad 240 (243). (Section 22 (2) can be availed of only where plaintiff and defendant have joint cause of action.)]

[But see ('95) 18 Mad 189 (192). (Which was a case under the old Limitation Act.)]

16. [See ('39) AIR 1939 Sind 172 (173) : I L R (1939) Kar 275. (*Held* in this case that it was a case of substitution, not of misdescription.)]

17. ('35) AIR 1935 Mad 160 (161).

18. ('15) 30 Ind Cas 795 (795, 796) (U P B R).

('14) AIR 1914 P O 129 (131) : 42 Cal 72 : 41 Ind App 251 (P C).

('25) AIR 1925 Pat 37 (37) : 3 Pat 230.

('87) 14 Cal 400 (401). (Obiter.)

19. ('15) 30 Ind Cas 795 (796) (U P B R).

('25) AIR 1925 Pat 37 (38) : 3 Pat 230.

20. ('11) 12 Ind Cas 586 (587) (Bom).

21. ('27) AIR 1927 Mad 468 (469) : 50 Mad 372. (Dissenting from AIR 1925 Mad 487.)

('30) AIR 1930 Sind 259 (260) : 25 Sind L R 107.

22. ('98) 17 Bom 29 (32).

[See also ('04) 1 All L Jour 188 (190).

('10) 5 Ind Cas 981 (981) : 38 Mad 115.]

**O. 1 R. 10**  
**Notes 41-43**

A party once discharged and subsequently reinstated is a party only from the date of reinstatement.<sup>23</sup> See also Notes to Section 22 in the Authors' Limitation Act.

**42. Appeal.** — An order under O. 1 R. 10 is not an appealable order and no appeal lies therefrom.<sup>1</sup> Thus, an order adding<sup>2</sup> or refusing to add a party<sup>3</sup> or an order striking out the name of a party as having been improperly or unnecessarily joined<sup>4</sup> or an order awarding costs under sub-rule 2<sup>5</sup> is not appealable. But if in *substance* the order amounts to a "decree" within the meaning of Section 2 (2), it will be appealable as a decree. Thus, where the defendant's name is struck out on the ground that the plaintiff has no *cause of action* against him, and the suit is dismissed as against him, the order, in substance, determines the rights of the plaintiff to bring the suit against the defendant and amounts to a decree and is therefore appealable as such.<sup>6</sup> Similarly, in a suit under Section 92 of the Code an order refusing to join persons as parties finally adjudicates or concludes the matter as against those persons inasmuch as such suit operates *in rem*. It is therefore appealable as a judgment within the meaning of Clause 13, Letters Patent (Rangoon).<sup>7</sup> Similarly, in a partition suit, where the name of one of the defendants is struck out leaving undecided the defendant's claim to a share in the partition, the order amounts to a decree and is appealable.<sup>8</sup>

But the mere fact that the order under this rule is drafted in the form of a decree will not make it really a decree, so as to confer a right of appeal.<sup>9</sup> See also the undermentioned case.<sup>10</sup>

Where the respondents did not raise any objections in the trial Court to their being joined as defendants, it was held that they should not be allowed to raise it for the first time on appeal.<sup>11</sup> See also Note 11 *ante*.

See also Notes 6 and 7 to Section 2 sub-section 2.

**43. Revision.** — An order passed in the exercise of the Court's discretion under this rule is not ordinarily revisable under Section 115 of the Code<sup>1</sup> even if it is

23. ('26) AIR 1926 P C 88 (91) (P C).

**Note 42**

1. ('18) AIR 1918 Pat 488 (488).

('28) AIR 1928 All 120 (128).

('24) AIR 1924 Oudh 428 (429).

*The following cases under the old Code are not of much importance in view of the changes in the new Code :*

('87) 9 All 447 (451).

('80) 2 All 904 (904).

('86) 18 Cal 100 (101).

('81) 7 Cal 148 (149).

('70) 14 Suth W R 90 (91, 92).

('07) 1907 Pun Re No. 71, p. 382.

('89) 12 Mad 489 (489).

('99) 12 C P L R 41 (42).

('89) AIR 1989 Oudh 102 (108) : 14 Luck 447.

2. ('17) AIR 1917 Cal 627 (628).

[But see ('96) 1896 Bom P J 129 (129). (A case under the old Code which was appealable under S. 588 (2) of that Code.)

('96) 1896 All W N 101 (101). (Under S. 588 (2) of the old Code order impleading a person was appealable—Subsequent order of transposition was also appealable.)

('90) 17 Cal 48 (51). (Order admitting a person as a caveator under Probate and Administration Act appealable under S. 588 (2) of the old Code.)]

3. ('94) 21 Cal 539 (541).

4. ('23) AIR 1923 Mad 690 (691). (Unnecessary joinder.)

('22) AIR 1922 Mad 332 (332) : 45 Mad 194. (Improper joinder.)

5. ('37) AIR 1937 Lah 67 (68).

6. ('19) AIR 1919 Mad 871 (872) : 42 Mad 219.

('31) AIR 1931 All 333 (336) : 53 All 466.

7. ('27) AIR 1927 Rang 180 (180) : 5 Rang 268.

8. ('25) AIR 1925 Pat 121 (122, 123) : 3 Pat 859.

9. ('26) AIR 1926 Nag 75 (75).

10. ('37) AIR 1937 Mad 200 (206). (Where an application is made under O. 1 R. 10 but it is dealt with by the Court also under O. 22 R. 10 an appeal lies against the order.)

11. ('85) AIR 1985 Rang 23 (23).

[See also ('85) AIR 1985 Pat 476 (478). (Objection as to nonjoinder of necessary party not allowed to be raised for first time in appeal).]

**Note 43**

1. ('94) AIR 1984 Pat 870 (872).

('84) AIR 1984 Pat 425 (425).

('12) 14 Ind Cas 263 (264) (All). (Striking out the name of a defendant.)

('85) 1885 All W N 259 (259). (Adding a defendant.)

('82) 1882 All W N 55 (55) : 4 All 380 (Refusal to make the applicant a party to the suit—Case under the Code of 1877.)

erroneous.<sup>3</sup> But where the order amounts to a failure to exercise jurisdiction, as where the Court considers it has *no power* to act under this rule,<sup>3</sup> or where it *fails to consider* whether the application should be granted or not,<sup>4</sup> a revision will lie. Similarly, where the order is such that the Court will be deemed to have acted illegally or with material irregularity in the exercise of jurisdiction, as where a necessary party is improperly refused to be added<sup>5</sup> or where a party is improperly added causing a misjoinder of parties<sup>6</sup> or resulting in a continuation of litigation,<sup>7</sup> or where the application for joinder is refused on the ground that the applicant has no *locus standi*, or that the plaintiff objects to such joinder<sup>8</sup> or where the order is manifestly unjust,<sup>9</sup> a revision will lie under Section 115.

Under Section 107 of the Government of India Act, 1915, the High Court could also interfere with orders passed under this rule in the exercise of its powers of superintendence where they amount to a denial of fair trial<sup>10</sup> or where irreparable injury or manifest injustice is likely to result thereby.<sup>11</sup> It may be noted that this power has been taken away by the Government of India Act, 1935. (See Section 224.)

As to whether an order under this rule is a "case" within the meaning of Section 115 of the Code, see the Notes to that Section and the undermentioned cases.<sup>12</sup>

O. 1 R. 10  
Note 43

Conduct of suit.

**R. 11. [S. 32.]** The Court may give the conduct of the suit to such person as it deems proper.

O. 1 R. 11

[1877, S. 32; R. S. C., O. 16 R. 39.]

- ('82) 1882 All WN 53 (53). (Case under the Code of 1877—Order adding the Secretary of State as a defendant set aside in appeal.)
- ('21) 64 Ind Cas 563 (564) (Cal). (Refusal to add a party.)
- ('27) 1927 Mad W N 301 (302).
- ('28) AIR 1923 Mad 690 (692, 693). (Striking out parties—High Court will interfere in revision only if the jurisdiction has been exercised perversely.)
- ('26) AIR 1926 Pat 207 (208) : 4 Pat 723. (Refusal to add a party—S. 107, Government of India Act might be invoked if there is a denial of fair trial.)
- ('84) AIR 1934 Pat 370 (372).
- ('39) AIR 1939 Oudh 102 (103) : 14 Luck 447. (It is merely an interlocutory order.)
- [See also ('26) AIR 1926 Nag 393 (396). (Order under O. 1 R. 10 is a discretionary order.)]
2. ('86) 18 Cal 90 (93). (Erroneous construction of a statute.)
- ('28) 111 Ind Cas 141 (141) (Nag).
3. ('16) AIR 1916 Cal 80 (82).
- ('34) AIR 1934 All 25 (27).
4. ('02) 5 Oudh Cas 91 (92, 93).
- ('10) 6 Ind Cas 977 (978, 979) : 18 Oudh Cas 109.
5. ('28) AIR 1928 Mad 144 (147) : 47 Mad 47. (Nonjoinder of necessary party.)
- ('10) 6 Ind Cas 546 (549) (Cal).
- ('85) AIR 1935 P C 185 (186) : 62 Ind App 257 : 57 All 678 (P O).
6. ('26) AIR 1926 Mad 185 (186).
- '20) 57 Ind Cas 784 (784) (Nag). (Rival claimant—Joinder.)
- ('28) AIR 1928 Pat 281 (282).
- [See ('35) AIR 1935 Mad 394 (396). (Person having no interest in suit improperly added—Order is without jurisdiction and open to revision.)]
- [See also ('26) AIR 1926 Pat 519 (520).]
7. ('19) AIR 1919 Nag 150 (152) : 15 Nag LR 21.
8. ('10) 7 Ind Cas 481 (482) (Cal). (The petitioner has no *locus standi*.)
- ('94) 21 Cal 539 (542).
9. ('12) 16 Ind Cas 592 (594) : 15 Oudh Cas 304.
- ('18) AIR 1918 Mad 1137 (1139).
- [See also ('37) AIR 1937 Mad 338 (339). (An order under O. 1 R. 10 can be revised under S. 115, C. P. C., when the Court fails to exercise a discretion vested in it and when its failure is due to error: AIR 1926 Mad 135, Dissent.)]
10. ('18) AIR 1918 Pat 488 (488).
- ('26) AIR 1926 Pat 207 (208) : 4 Pat 723.
11. ('18) AIR 1918 Cal 909 (909).
- ('10) 8 Ind Cas 87 (90) (Cal). (Section under which High Court interfered not clear.)
- ('29) AIR 1929 Mad 403 (403). (Section under which High Court interfered not clear—Interference to avoid conflicting decisions.)
- [See also ('10) 6 Ind Cas 570 (572) (Cal).
- ('10) 6 Ind Cas 549 (551, 552) (Cal).]
12. ('28) AIR 1928 All 97 (97, 98) : 50 All 276. (Not a "case.")
- ('29) AIR 1929 Oudh 148 (148). (Is a "case.")

**O. 1 R. 11**  
**Note 1**

**1. Scope of the Rule.**—The word "person" means a party to the suit, and the Court has no power to give the conduct of the suit to a stranger.<sup>1</sup>

Under the English Law, the Court has as much power to give the conduct of the defence to one of the defendants as the conduct of the suit to one of the plaintiffs.<sup>2</sup> The substitution of the word "person" for the word "plaintiff" in Section 32 of the last Code would seem to make it clear that the law is the same under the present rule.

Under this rule, read with O. 1 R. 10, the Court has power to transpose a defendant as plaintiff and give him the conduct of the suit.<sup>3</sup>

**O. 1 R. 12****R. 12. [S. 35.] (1)** Where there are more plaintiffs than

Appearance of one  
of several plaintiffs or  
defendants for others.

one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

[1877, S. 35; 1859, S. 115.]

**1. Scope.** — "The authorisation" under Rule 12 need not be by a general power of attorney. A special power of attorney is enough.<sup>1</sup>

**O. 1 R. 13****R. 13. [S. 34.]** All objections on the ground of nonjoinder

Objections as to non-  
joinder or misjoinder.

or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

[1877, S. 34. See O. 1 R. 9; O. 2 R. 7 and S. 99.]

*Synopsis*

1. Scope of the Rule.
2. Objection not taken at the earliest opportunity cannot be taken later on.
3. "Unless the ground of objection has subsequently arisen."

**Order 1 Rule 11 — Note 1**

1. ('28) AIR 1928 Cal 143 (146). (Wife not allowed to defend suit against husband.)
2. ('28) AIR 1928 Cal 143 (144). (Peak v. Ray, (1894) 3 Ch 282, Referred to.)
3. ('21) AIR 1921 Mad 124 (124).
- ('20) AIR 1920 Mad 782 (784). (Defendant trans-

posed as plaintiff even after withdrawal of suit by original plaintiff.)

**Order 1 Rule 12 — Note 1**

1. (1864) 2 Bom H O R 103 (105). (Authority not filed with the execution application but filed long before the decision rejecting application—Rejection held not proper.)

**1. Scope of the Rule.** — The rule provides that all objections on the ground of misjoinder or nonjoinder not taken at the earliest opportunity shall be deemed to have been waived. It is based on the principle that a technical objection, which, if taken at an earlier stage of the proceedings, might have been cured, and which has not been so taken, should not be allowed to be raised at a later stage, so as to defeat the rights of the parties.<sup>1</sup>

The rule applies to nonjoinder or misjoinder of parties to *appeals*, as well as to *suits*.<sup>2</sup> It also applies to references to arbitration.<sup>3</sup> But it does not apply to any objection on the ground of want of cause of action or right of suit in the plaintiff, which is disclosed only after evidence is taken.<sup>4</sup> The reason is that such an objection is not one on the ground of *misjoinder* or *nonjoinder*.

The rule, although it limits the right of a defendant to object, does not in any way affect the Court's power under O. 1 R. 10 to add or strike out parties; nor does it limit the right of the plaintiff to add parties.<sup>5</sup>

**2. Objection not taken at the earliest opportunity cannot be taken later on.** — It follows from what has been stated in Note 1 that objections as to misjoinder and nonjoinder of parties not raised in the lower Court should not be allowed to be raised for the first time in the Appellate Court.<sup>1</sup> It has, in fact, been held that such objection, if not taken in the written statement and before the first hearing, must be deemed to have been waived.<sup>2</sup> But where the objection is taken at

**O. 1 R. 13  
Notes 1-2**

#### Order 1 Rule 13 — Note 1

1. (1841-1846) 3 Moo Ind App 229 (242) (P O).
- (34) AIR 1934 Lah 459 (460). (Objection raised after settlement of issues not allowed.)  
[See also ('76) 1 Cal 226 (244, 245) : 3 Ind App 7 (P O).]
2. ('21) AIR 1921 Mad 243 (245) : 44 Mad 344. (Objection not taken in first Appellate Court cannot be allowed in second appeal.)
3. ('14) AIR 1914 Cal 497 (498).
4. (1900) 25 Bom 433 (467).
5. ('06) 3 All L Jour 474 (475). (Court's power not limited.)
- ('81) 5 Bom 609 (612). (Plaintiff's right to have parties added not limited.)  
[See ('86) AIR 1936 P C 51 (54). (Court in proper cases can deal with defect in necessary party at any stage.)]

#### Note 2

1. ('84) 6 All 632 (633). (Objection taken in first appeal in the High Court.)
- ('19) AIR 1919 Cal 814 (815). (Cannot be taken in second appeal.)
- ('02) 26 Bom 301 (304).
- ('92) 16 Bom 119 (122).
- ('27) AIR 1927 Cal 237 (238).
- ('84) 6 All 57 (58, 59). (Objection taken in second appeal in the High Court.)
- ('92) 1882 All W N 113 (113).
- ('19) AIR 1919 Cal 919 (920, 921). (Objection not to be raised in revision in High Court.)
- ('12) 18 Ind Cas 123 (124) (Cal).
- ('10) 6 Ind Cas 327 (331) (Cal). (Objection as to multifariousness.)
- ('09) 2 Ind Cas 848 (849) (All). (Parties were added by trial Court without objection.)
- ('09) 1 Ind Cas 580 (581, 583, 584) (Cal).

- ('81) 7 Cal 242 (244). (Objection must be taken in proper time.)
- ('12) 17 Ind Cas 97 (99) (Mad).
- ('03) 1903 Pun Re No. 69, page 295.
- ('91) 14 Mad 498 (500, 501).
- ('06) 2 Nag L R 45 (46, 47).
- ('12) 15 Ind Cas 744 (745) (Oudh).

*The following cases deal with objection as to parties taken in second appeal :*

- ('78) 3 Cal 26 (29). (Objection as to parties is not a ground of special appeal.)
- ('33) AIR 1933 Pat 270 (271).
- ('75) 24 Suth W R 286 (286). (Objection as to addition of parties cannot be taken in special appeal.)
- ('72) 18 Suth W R 112 (113). (Objection that intervenor was wrongly added cannot be taken in special appeal.)
- ('69) 12 Suth W R 504 (504). (Objection as to misjoinder of parties not to be taken in special appeal.)
- ('83) 1883 Pun Re No. 151.
- ('82) 1882 Pun Re No. 58, page 162.
- ('30) AIR 1930 Mad 683 (685).
- ('04) 28 Mad 229 (231).
- ('09) 4 Ind Cas 106 (106) (Mad).
- ('87) 10 Mad 322 (329).
- ('81) 3 Mad 359 (363). (Plea of misjoinder not allowed to prevail in the absence of prejudice.)
- ('25) AIR 1925 Oudh 369 (370).
- ('06) 9 Oudh Cas 233 (234).
- ('85) AIR 1935 Pat 476 (478).
2. ('81) 7 Cal 594 (603).
- ('11) 12 Ind Cas 818 (827, 828) (Bom).
- ('09) 2 Ind Cas 306 (307) (All).
- ('81) 1881 Pun Re No. 64, page 147.
- ('09) 2 Ind Cas 848 (849) (All).

**O. 1 R. 13**  
**Notes 2-3**

the proper time, the Court is bound to adjudicate upon it.<sup>5</sup> If after objection is taken by the defendant the plaintiff proceeds with the suit without adding the necessary parties, and the Court finds that the objection is well founded, the suit must be dismissed.<sup>4</sup> Where, however, the objection raised in the lower Court is not pressed, it cannot be allowed to be re-opened in the Appellate Court.<sup>5</sup> It is for the party who raises the objection to show which person is necessary to be joined.<sup>6</sup>

Where the defendant opposes the plaintiff's application for joinder of certain parties and the Court rejects the application, the defendant cannot subsequently raise the plea of *nonjoinder with respect* to such parties.<sup>7</sup> Where a suit was first heard *ex parte* and, on the defendant's application, the suit was ordered to be re-heard, and he was allowed to put in a plea of nonjoinder, it was held that the objection was taken in proper time.<sup>8</sup>

It has been held that where a guardian of a minor defendant neglects to raise the plea in his written statement, it will not be deemed a waiver against the minor so as to preclude him from raising it in his written statement after attaining majority.<sup>9</sup>

This rule does not apply to the nonjoinder of *necessary* parties.<sup>10</sup> (For full discussion of this question, see the Authors' Limitation Act, Section 22 Note 25.)

An objection on the ground of nonjoinder cannot be taken by a defendant who is found to have no interest in the subject-matter of the suit.<sup>11</sup>

**3. "Unless the ground of objection has subsequently arisen."** — These words did not occur in the old Section. But, even under the old Section, which required that the objection to nonjoinder or misjoinder of parties should be taken at the earliest possible opportunity, and in all cases before the first hearing, it was held that where the ground of objection came into existence after the first hearing, there was no bar to raising the objection after such hearing provided the objection was taken at the earliest possible opportunity after such ground came into existence.<sup>1</sup>

It has been held by the High Court of Madras that an objection as to nonjoinder of parties cannot be allowed to be raised after settlement of issues merely by reason of the fact that the ground of objection was *not known* to the defendant at or before the

(33) AIR 1933 Oudh 129 (130). (Objection taken after issues rightly rejected.)

[See ('09) 4 Ind Cas 488 (489) (All). (Object on allowed, though raised after first hearing as the objection did not exist before first hearing.)

('37) AIR 1937 All 251 (255). (Person impleaded as defendant not appearing or taking objection to his being impleaded as such — Person held waived his right to object.)]

3. ('87) 14 Cal 435 (438). (This avoids inconvenience and expense.)

4. ('81) 6 Cal 815 (823). (Nonjoinder of plaintiffs in an action on contract is always a plea in bar.) (1890) 62 L T (NS) 867, Richard v. Butcher. (Cited in 25 Bom 433.)

('38) AIR 1938 Lah 93 (94).

5. ('18) AIR 1918 Mad 1260 (1261).

6. ('34) AIR 1934 Pat 44 (45).

('86) AIR 1936 Mad 782 (783). (Parties — Nonjoinder — Defendant objecting to suit on such ground should state parties who ought to have been joined and their interest in suit.)

('37) AIR 1937 Pat 414 (415).

7. ('25) AIR 1925 Pat 57 (58) : 3 Pat 818.

('24) AIR 1924 Pat 168 (169).

8. (1900) 1900 Pun L R No. page 4.

[See also ('32) AIR 1932 Mad 583 (586). (Additional written statement filed with Court's permission by a minor after majority—Objection to misjoinder allowed.)]

9. ('32) AIR 1932 Mad 583 (586).

10. ('09) 1 Ind Cas 530 (531, 533) (Cal).

('91) 13 All 492 (465) (FB). (Although the decision relates to the joinder of parties to a mortgage suit under S. 85 of the T. P. Act which has now been repealed, the principle of the decision, it is submitted, will apply even now to the addition of necessary parties.)

[See also ('01) 25 Bom 433 (467). (Section 34 of the Code of 1882 (corresponding to O. 1 R. 13) applies to objections to want of parties or nonjoinder or misjoinder and not to objections on the ground of want of cause of action or the right of suit in the plaintiff.)]

[But see ('18) AIR 1918 Mad 535 (586).]

11. ('14) AIR 1914 Oudh 109 (111).

**Note 3**

1. ('82) 5 Bom 609 (613).

('09) 4 Ind Cas 488 (489) (All).

settlement of issues.<sup>2</sup> The High Court of Allahabad has, on the other hand, held that a defendant cannot be deemed to have waived the objection under this rule when he had no opportunity of taking the objection or when he was ignorant of the facts on which the objection depended.<sup>3</sup>

**O. 1 R. 13**  
**Notes 3**

## ORDER II.

### FRAME OF SUIT

**R. 1.** [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

**O. 2 R. 1**

Frame of suit.

[1877, S. 42. See O. 20 R. 12.]

### Synopsis

- |                        |                             |
|------------------------|-----------------------------|
| 1. Scope of the Order. | 3. Subjects in dispute.     |
| 2. Scope of the Rule.  | 4. "As far as practicable." |

**1. Scope of the Order.** — The provisions of this Order dealing with the *frame* of suits should be so construed as not to conflict with the provisions contained in O. 1, which deal with the joinder of parties to suits, on the well-known principle that a statute should be construed as a whole.<sup>1</sup>

**2. Scope of the Rule.** — The object of this rule is, that all matters in dispute between the parties and relating to the same transaction should as far as possible be disposed of in the same suit.<sup>1</sup> The penalty for non-compliance with the rule is provided partly by Section 11, Explanation IV and partly by O. 2 R. 2.<sup>2</sup>

Section 11, Explanation IV provides that any matter which might and ought to have been made a ground of attack or of defence in a former suit will be deemed to have been a matter directly and substantially in issue in such suit and will not be allowed to be re-opened in a subsequent suit between the same parties although it was not *actually* adjudicated upon in the former suit. O. 2 R. 2 provides that every suit should include *the whole of the claim* which the plaintiff is entitled to make in respect of the same cause of action, and that if he omits to include any portion of such claim he shall not be entitled to sue again in respect of it.

This rule has reference mainly, if not exclusively, to correct joinder of causes of action, adequate inclusion of reliefs claimed, and so forth, rather than to joinder of parties.<sup>3</sup>

**3. Subjects in dispute.** — The expression "subjects in dispute" has nowhere been defined in the Code and the decisions bearing on the question are not always reconcilable. But an examination of these decisions leads on the whole to the view that the expression "subjects in dispute" refers to the right claimed by one party against the

2. ('15) AIR 1915 Mad 819 (819).

3. ('92) 14 All 524 (526).

**Order 2 Rule 1 — Note 1**

1. ('11) 12 Ind Cas 357 (358) : 7 Nag L R 130.

**Note 2**

1. ('98) 25 Cal 371 (390).

('92) AIR 1992 Bom 175 (176).

(1900) 27 Cal 724 (761).

2. ('02) 26 Mad 760 (766, 767).

('81) AIR 1981 Bom 114 (116).

3. ('14) AIR 1914 Lah 187 (192) : 1915 Pun Re No. 8.

**O. 2 R. 1**  
**Note 3**

other with reference to a particular legal relation or transaction between the parties. In other words, the words mean "the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other, and demands the judgment of the Court upon."<sup>1</sup> Applying this construction, the present rule requires the plaintiff to bring forward his *whole case* as to the particular legal relation or transaction on which his suit is based but does not require him to raise in the same suit matters pertaining to a *different* legal relation or transaction, although such matters may have a bearing on the right claimed by the plaintiff.

Thus, where *A* sues *B* to recover certain property on the ground that he had acquired a title to the property by adverse possession and he fails to prove his claim, he cannot sue again to recover the same property on the ground of his *general title*.<sup>2</sup> The reason is that where a plaintiff sues as owner he should bring before the Court in the same suit all the grounds of attack available to him with reference to his claim for ownership.<sup>3</sup>

But suppose *X* sues *Y* to recover certain lands on the ground that *Y* held them as lessee under *X* and that the lease had expired. *X* fails to prove the lease and sues again for the recovery of the same lands on the strength of his general title. The second suit is *not* barred because the legal relationship between the parties in the second suit is different from that in the first.<sup>4</sup> Similarly, a person suing to redeem a specific mortgage of a certain property is not debarred, upon his failure to prove the mortgage from suing to redeem another specific mortgage on the same property, because the *transactions* between the parties on which the suits are based are different.<sup>5</sup>

The following are some more examples of cases bearing on this branch of the subject —

- (1) As a general rule, a suit for partition should embrace the whole partible property belonging to the parties.<sup>6</sup> (But this rule is subject to various

**\* Note 3**

1. ('03) 26 Mad 760 (766).
2. ('73) 18 Suth W R 163 (164, 165) (P C).
3. ('08) 31 Mad 885 (391, 396). (In first suit claim through *A* and in second suit claim through *B*.)
- ('01) 25 Bom 189 (192, 197). (First suit based on survivorship, second suit on heirship.)
- ('26) AIR 1926 Mad 234 (235). (In first suit claim as heir of *A*. In second suit claim as heir of *B*.)
- ('23) AIR 1923 Mad 257 (259): 46 Mad 135. (First suit based on right by purchase, second suit based on right by inheritance.)
- ('20) AIR 1920 Mad 900 (900). (Plaintiff suing for redemption as karnavan—On failure, suit as successor for same relief—Second suit is barred.)
- ('10) 6 Ind Cas 233 (238): 34 Mad 97.
4. ('99) 22 Mad 323 (325).
- ('84) 8 Bom 174 (181).
- (1900) 23 Mad 629 (632).
5. ('02) 26 Mad 760 (775, 776).
- [See also ('84) 6 All 616 (617). (Plaintiff's title to two houses resting on same title deed—Defendant ousting plaintiff from the two houses on different occasions—Plaintiff entitled to sue separately in respect of the two houses.)
- ('85) AIR 1985 Nag 226 (228): 31 Nag L R Sup 1 (FB). (A holder of two separate mortgages on the same property is not prevented from suing separately on each of such mortgages, as the two

separate mortgages give rise to two independent causes of action — This case relates to mortgages executed before 1st April 1930 to which S. 67A of the Transfer of Property Act as amended by Act 20 of 1929 does not apply—The law under S. 67A of the T. P. Act as amended is different.)]

6. ('20) AIR 1920 All 87 (88). (Portion of property omitted — Suit not to be dismissed forthwith but opportunity for amendment to be given.)
- ('33) AIR 1933 Lah 588 (589).
- ('97) 24 Bom 128 (130, 133, 134).
- ('83) 7 Bom 272 (277, 278).
- ('74) 11 Bom H C R 69 (71).
- ('70) 7 Bom H C R A C 46 (49).
- ('23) AIR 1923 Cal 501 (502, 504).
- ('16) AIR 1916 Pat 347 (348): 1 Pat L Jour 892.
- ('13) 18 Ind Cas 866 (866) (Cal).
- ('11) 10 Ind Cas 854 (355) (Cal).
- ('09) 8 Ind Cas 247 (250) (Cal).
- ('87) 14 Cal 122 (123).
- ('86) 12 Cal 566 (569).
- ('85) 11 Cal 396 (399).
- ('81) 7 Cal 577 (581).
- ('80) 5 Cal 474 (476).
- ('76) 25 Suth W R 358 (355).
- ('71) 15 Suth W R 111 (112).
- ('74) 22 Suth W R 338 (338).
- ('16) AIR 1916 Lah 25 (26).



exceptions.<sup>7</sup>) It has also been held that in such a suit all the disputes arising between the parties should be settled in one suit instead of leaving the parties to have their disputes determined piecemeal at different times by different Courts.<sup>8</sup>

(2) As a general rule, a partner cannot sue merely for his share of the profits of the firm, but must sue for taking the whole accounts of the firm.<sup>9</sup>

For exceptions to the general rule, see the cases noted below.<sup>10</sup>

(3) Every suit for pre-emption must include the whole of the property subject to the plaintiff's right of pre-emption.<sup>11</sup>

- (17) AIR 1917 Mad 620 (621).  
(22) 25 Mad 367 (379); 29 Ind App 76 (PC).  
(29) A I R 1929 Oudh 162 (164).  
(09) 4 Ind Cas 812 (814) (Upp Bur).  
[But see ('38) AIR 1933 Lah 465 (466). (Suit for partition of common properties as distinct from joint properties is not liable to be dismissed on the ground that some properties were not included.)]  
7. ('06) 28 All 39 (40, 41). (Purchaser of a portion of joint family property.)  
(14) AIR 1914 Cal 212 (214).  
(98) 22 Bom 922 (927). (Property situate in different jurisdictions.)  
(94) 18 Bom 389 (392). (Property partly within and partly without British India.)  
(68) 8 Mad H O R 376 (377).  
(04) 6 Beng L R 134 (140).  
(01) 23 All 216 (217, 218).  
(96) 20 Bom 467 (468, 469).  
(06) 28 All 50 (51).  
(99) 23 Bom 597 (600, 601).  
(19) AIR 1919 Cal 243 (243). (Dwelling house can be partitioned separately if not inconvenient.)  
(09) 3 Ind Cas 21 (21) (Cal).  
(92) 20 Cal 682 (686).  
(12) 16 Ind Cas 383 (384) (Cal). (Suit for partition of a part of joint property — Defendant not objecting—Suit is maintainable.)  
(32) AIR 1932 Nag 92 (93). (Property inadvertently omitted from partition suit — Subsequent suit for partition of such property is maintainable.)  
(08) 35 Cal 961 (968). (By mistake or consent part only of the properties partitioned—Subsequent partition of the remainder is not prohibited.)  
(08) 12 Cal W N 640 (641). (Case of co-owners — Rule against partial partition does not apply to co-owner.)  
(07) 34 Cal 1026 (1028). (Putnidar having right over fractional share of one of many mouzabs can maintain suit for partition of that share.)  
(87) 14 Cal 885 (898).  
(67) 4 Moo Ind App 137 (168) (PC). (Partition may be partial.)  
(24) AIR 1924 Mad 124 (124); 46 Mad 844. (Rule against partial partition does not apply to common property as distinguished from joint property.)  
(87) 10 Mad 884 (886).  
(12) 14 Ind Cas 524 (527, 528) (Mad).  
(11) 84 Mad 402 (404, 405); 5 Ind Cas 491 (493). (Transferee of a portion of joint tenancy can maintain a suit for his share.)  
(96) 19 Mad 267 (268).  
(82) 5 Mad 196 (197).  
(05) 28 Mad 216 (222, 228).  
(04) 27 Mad 361 (367).  
(1900) 23 Mad 608 (612).  
(81) AIR 1931 Sind 143 (144). (Property claimed adversely to the father and son by a stranger can be subsequently partitioned.)  
(95) 18 Mad 418 (419). (Assumed.)  
(80) 2 Mad 317 (324). (Partition may be partial either as regards persons or properties.)  
(70) 5 Mad H O R 419 (422).  
[See ('16) AIR 1916 Cal 891 (893).  
(67) 11 Moo Ind App 75 (89, 90) (P C).]  
[See also ('14) 22 Ind Cas 30 (31) (Cal). (Lands not belonging to all the co-sharers should not be included in the suit.)  
(05) 1 Cal L Jour 40 (42).  
(13) 21 Ind Cas 590 (591) (Nag).]  
8. ('29) AIR 1929 Bom 424 (429).  
9. ('71) 16 Suth W R 141 (142). (Partner cannot sue for profits up to a particular time only.)  
(87) 9 All 120 (121). (Suit in respect of certain losses only of a partnership does not lie.)  
(69) 2 N W P H O R 90 (92). (A particular item only of a partnership claim cannot be the subject of a suit.)  
(74) 21 Suth W R 300 (301).  
[See ('75) 12 Bom H O R 165 (167).]  
[See also ('32) AIR 1932 Pat 15 (18); 10 Fat 792.  
(31) 1931 Mad WN 467 (469). (One partner can sue another on an individual debt due by the latter.)  
(33) AIR 1933 Nag 127 (129); 29 Nag L R 10.]  
[But see ('31) AIR 1931 Mad 300 (302); 54 Mad 671.]  
10. ('95) 18 Mad 134 (135). (Suit for contribution lies as between partners.)  
(99) 26 Cal 262n (265n, 266n). (Some of the partners contracting debt — Such debt not being joint liability of entire partnership — One of the contracting partners paying the whole debt — Suit by him against other partners for contribution is maintainable.)  
(99) 26 Cal 254 (262). (Do.)  
(75) 12 Bom H O R 97 (112). (Do.)  
(01) 1901 Pun Re No. 110, p. 384. (Where equity requires, the rule that a partner cannot sue for his share only might be relaxed.)  
(09) 1 Ind Cas 884 (885); 32 Mad 76. (If partial accounting would not work injustice it might be allowed.)  
11. ('86) 6 All 428 (424, 426).

**O. 2 R. 1**  
**Notes 3-4**

- (4) In a suit for declaration of the right to maintenance, the plaint must be so framed as to enable ascertainment of the actual extent of the right, *i. e.*, of the amount of maintenance.<sup>13</sup>
- (5) A suit to enforce, or to redeem a mortgage partially is, as a rule, not maintainable.<sup>13</sup> In a suit by the vendee to recover possession of the property from the vendor, the equity in favour of the vendor arising on account of the non-payment of the whole or part of the purchase money may also be enforced.<sup>14</sup>
- (6) Although in a suit on the mortgage, full accounts should be taken between the mortgagor and the mortgagee, the mortgagor is not entitled to claim an account, of an entirely independent transaction.<sup>15</sup> Where in proceedings under Section 145 of the Criminal Procedure Code, the property is placed in the possession of a receiver, and a civil suit is brought for the determination of the rights of the rival claimants, the right of the successful claimant to obtain possession from the receiver is not a "subject in dispute" in the suit, and hence the suit need not include a prayer for possession.<sup>16</sup>

**4. "As far as practicable."** — If the plaintiff would be embarrassed in his suit, as for instance, where the evidence in support of one ground of his claim is destructive of the other ground, he is not bound to bring into the same suit, both the grounds of his claim.<sup>1</sup>

**O. 2 R. 2**

**R. 2. [S. 43.]** (1) Every suit shall include the whole of the claim<sup>4</sup> which the plaintiff is entitled to make

**Suit to include the whole claim.**

in respect of the cause of action;<sup>7</sup> but a plaintiff may relinquish<sup>12</sup> any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim,<sup>10</sup>

**Relinquishment of part of claim.**

he shall not afterwards sue<sup>27</sup> in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all<sup>13</sup> or any of such reliefs; but if he omits, except with the leave of the Court,<sup>20</sup> to sue for all such reliefs,<sup>14</sup> he

**Omission to sue for one of several reliefs.**

shall not afterwards sue<sup>27</sup> for any reliefs so omitted.

**Explanation.** — For the purposes of this rule an obligation and a collateral security<sup>8</sup> for its performance and successive claims

(81) AIR 1931 Oudh 52 (53).

12. ('26) AIR 1926 Sind 18 (19).

[See also ('31) AIR 1931 Cal 670 (671). (Will — Maintenance out of income — Suit need not be framed as on a charge.)]

13. ('99) 22 Mad 209 (211, 212).

[See also ('81) AIR 1931 Cal 806 (807).]

14. ('29) AIR 1929 Bom 60 (63).

15. ('30) AIR 1930 Cal 85 (85, 86).

16. ('25) AIR 1925 Mad 427 (428).

[See also (1900) 24 Mad 39 (42). (Suit for possession — Title not denied — No declaration need be asked.)]

**Note 4**

1. ('08) 31 Mad 885 (886).

arising under the same obligation<sup>9</sup> shall be deemed respectively to constitute but one cause of action.

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*Illustration.*

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

[1877, S. 43 ; 1859, S. 7.]

*Synopsis*

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- Addition of claims. See Note 6.  
 Advocate-General and trustees. See Note 21.  
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 Burmese Buddhist Law—Suits for partition or divorce. See Note 26.  
 "Cause of action"—Meaning of. See Note 7.  
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 Conversion and trespass. See Note 19.  
 Declaration and injunction. See Notes 26 and 19.  
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 Default clause—Waiver. See Note 10.  
 Different interests in same properties. See Note 26.  
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 Effect of withdrawal of suits. See Note 10.  
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 Formal possession and subsequent acts. See Note 26.  
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Notes 1-2**

- Possession of land and damages for crops. See Note 26.
- Promissory notes and original causes of action. See Note 26.
- Properties held by family and strangers — Partition suits. See Notes 10 and 21.
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- Sale of goods — Part delivery — Damages. See Note 10.
- Same transaction but different causes of action. See Note 28.
- Separate alienations of same person. See Notes 21 and 26.
- Separate contracts in same deed. See Notes 26 and 21.
- Simultaneous suits. See Note 27.
- Specific performance and injunction. See Note 16.
- Specific performance and refund. See Note 26.
- Subsequent excess collections. See Note 26.
- Suit by coparcener for declaration of non-binding nature of mortgage in respect of some alone of the hypotheca. See Note 10.
- Suit by reversioner for some of several properties alienated. See Note 10.
- Suit on compromises of previous suits. See Note 26.
- Suits on no cause of action and right cause of action. See Note 26.
- Suits on subsequent cause of action. See Note 26.
- Two or more bonds for a single debt. See Note 26.
- Wrongful seizure and detention. See Note 19.

**1. Legislative changes.** — The present rule differs from the corresponding Section of the Code of 1882, *viz.*, Section 43 in the following respects —

(1) The word "relief" in paragraph 3 has been substituted for the word "remedy" in the old Section.

(2) The words "obtained before the first hearing" which occurred in the old Section have been omitted.

(3) The expression "successive claims arising under the same obligation" has been added in the Explanation.

(4) The illustration has been redrafted so as to cover a case of rent due for a period subsequent to that for which the suit was instituted.

**2. Scope and object of the Rule.** — Order 2 Rule 2 is based on the principle that the defendant should not be *twice vexed* for one and the same cause.<sup>1</sup> This rule merely deprives the claimant of his remedy and does not vest any right in any of the defendants.<sup>2</sup> The rule is directed against two evils, the splitting of claims and the splitting of remedies.<sup>3</sup> It provides that if a plaintiff omits any portion of the claim which he is entitled to make or any of the remedies which he is entitled to claim in respect of the cause of action for his suit, he shall not thereafter sue for the portion of the claim or for the remedy so omitted.<sup>4</sup> It follows from this, that the rule does not preclude a second suit based on a distinct and *separate cause of action*.<sup>5</sup> (See Note 23 below.)

**Order 2 Rule 2 — Note 2**

1. ('15) AIR 1915 Cal 126 (126) : 41 Cal 825.
- ('81) AIR 1981 P C 229 (230) (PC).
- ('11) 10 Ind Cas 336 (337) (All).
- ('97) 19 All 879 (883) (FB).
- ('10) 6 Ind Cas 226 (227) (All).
- [See ('87) 10 Mad 347 (350, 351). (Suit which is virtually for same relief though in a different form is barred.)
- ('84) AIR 1984 Mad 99 (100). (Though this rule does not apply to village Courts, S. 18 of Madras Village Courts Act enacts a similar provision.)]
2. ('83) AIR 1983 All 228 (229).
3. ('01) 25 Bom 161 (167).
- ('15) AIR 1915 Cal 126 (126) : 41 Cal 825. (Rule

does not apply where there are several causes of action.)

- ('10) 6 Ind Cas 226 (227) (All).
- ('21) AIR 1921 Lah 309 (310). (Mortgagee failing in suit for possession cannot again sue for mortgage money.)

4. ('01) 25 Bom 161 (167).
- ('83) AIR 1983 Lah 412 (415).
- ('21) AIR 1921 Lah 309 (310).
- ('70) 2 N W P H C R, 90 (91, 92). (Disobedience of rule does not cause dismissal of present suit but only bars a second suit for the omitted portion.)

[See ('10) 6 Ind Cas 226 (227) (All).]

5. ('83) AIR 1983 Lah 542 (542).

The rule has reference to the *subject-matter* of the claim and *not to the persons* against whom it may be made.<sup>6</sup> Hence, an objection on the ground of *nonjoinder* of parties is not within the rule. (See Note 21 below.) It is not open to parties by agreement between themselves to override the rule laid down by the Legislature, as regards the splitting of causes of action.<sup>7</sup> The rule being penal in its nature should be construed strictly.<sup>8</sup>

It has been held that Section 141 *ante* does not apply to an application for restitution. This rule, therefore, does not apply to an application for restitution. Hence, an application for restoration of possession by way of restitution does not bar an application for mesne profits.<sup>9</sup> (See also Note 31, *infra*.)

**3. Distinction between this Rule and Explanation IV to Section 11.** — See Note 2 to Section 11, *ante*.

**4. Suit to include the whole of the claim in respect of the cause of action.** — Sub-rule 1 provides that every suit *shall* include the whole of the *claim* which the plaintiff is entitled to make in respect of the cause of action, on which the suit is based. But under sub-rule 3 where the plaintiff is entitled to several *reliefs*, he *may* sue for one or more of such reliefs, and reserve his right, with the leave of the Court, to sue later on for the other reliefs. *A* is entitled to recover from *B* Rs. 15,505 personally, as well as from out of *B*'s properties on which the amount is charged. *A* sues for Rs. 4,000 only out of the claim for Rs. 15,505, and subsequently sues for the balance. The subsequent suit is barred inasmuch as the *whole claim*, namely for the recovery of Rs. 15,505, cannot be split up.<sup>1</sup> Suppose now that *A* sues for the recovery of the whole of Rs. 15,505 *personally* from *B*, and later on brings a fresh suit for *sale of the properties charged*. This he can do, inasmuch as in this case there is no splitting of claim, but only of remedies, which a mortgagee is entitled to do.

See the undermentioned decision.<sup>2</sup>

**5. Plaintiff must have been aware of the claim.** — In order that the bar contained in O. 2 R. 2 may apply, the plaintiff must have been *aware*, at the time of his first suit, of his right to the portion omitted by him or of the facts which would have entitled him to sue for it.<sup>1</sup> If he was so aware of his right, the fact that omission

(70) 14 Moo Ind App 187 (197) (PC).

6. ('84) 10 Cal 924 (927).

7. ('10) 5 Ind Cas 821 (824): 1910 Pun ReNo. 19.

('14) AIR 1914 Lah 121 (122): 1914 Pun ReNo. 4.

8. ('86) 12 Cal 60 (68).

('15) AIR 1915 Cal 126 (126): 41 Cal 825.

('86) 12 Cal 339 (345).

9. ('85) AIR 1935 Cal 206 (208): 62 Cal 217. (Following AIR 1918 Pat 396.)

#### Note 4

1. ('01) 25 Bom 161 (164, 165, 166, 167, 168).

('09) 1 Ind Cas 819 (820) (Bom). (Breach of contract—Suit in respect of breach of one stipulation—Subsequent suit in respect of breaches of other stipulations is barred.)

('81) 5 Bom 463 (465). (Leave asked at the first hearing for reserving remedies under the mortgage, the plaintiff then taking only a money decree—Leave granted.)

('17) AIR 1917 Cal 841 (848, 844): 43 Cal 95. (Cause of action for minimum royalty and that for excess royalty same—Plaintiff suing for minimum royalty alone cannot bring a suit for

excess royalty subsequently.)

[See also ('06) 30 Bom 156 (163). (Mortgagee holding two mortgages over the same property—Suit in respect of later mortgage alone not maintainable.)]

2. ('86) AIR 1936 Lah 379 (380). (*A*, standing surety for *B*, a lessee under a lease, in respect of the rent payable by the latter—Lessor not realizing the rent for a year fully from *B*, suing *A* for the same—At that time, the rent for another year had fallen due—But the lessor's suit against *A* did not include a claim for this rent—*A* suit was subsequently brought against *A* for this rent—It was held that the suit was not barred under this rule because, if a claim for this rent had also been included in the previous suit, the lessor would have been in the position of having elected to sue one of two equally liable persons and his right of action against the lessee would have lapsed.)

#### Note 5

1. ('96) 19 Mad 145 (148). (Rule applies only to cases in which the plaintiff had knowledge of the claim he was entitled to make.)

**O. 2 R. 2**  
**Notes 5-6**

to include any portion of his claim in his former suit was *accidental* or due to mere *oversight* will not exempt him from the bar.<sup>3</sup>

**6. Court must have jurisdiction to try the claim.** — The bar of O. 2 R. 2 does not apply unless the Court which tried the former suit had *jurisdiction* to try the claim omitted by the plaintiff.<sup>1</sup> Thus, where the prior suit was in a Revenue Court, and the later suit was in a Civil Court in respect of a claim not triable by the Revenue Court, the later suit is not barred under this rule.<sup>2</sup> Similarly, where the addition of the claim would offend the provisions of O. 2 R. 4 or R. 5, it may be omitted, and subsequently sued on.<sup>3</sup> So also, where the sanction of the Government<sup>4</sup> or a certificate under the Pensions Act<sup>5</sup> was a necessary condition to the entertainment of the suit and such condition was wanting in the former case, a subsequent suit is not barred.

(‘28) AIR 1928 All 280 (280, 281). (Omission under a mistaken assumption — Subsequent suit in respect of it is not barred.)

*Plaintiff was not aware of the facts which gave him the right or the right itself in the following cases:*

(‘10) 32 All 625 (627).

(‘78) 1 All 543 (545). (Fraudulent concealment by defendant of an item of property—Subsequent suit in respect thereof not barred.)

(‘07) 9 Bom L R 1020 (1025). (Plaintiff not aware of the right.)

(‘19) AIR 1919 Cal 121 (122).

(‘11) 12 Ind Cas 684 (685) (Cal). (Suit for partition — Plaintiff not aware of existence of joint property—Subsequent suit for declaration to that property—Suit not barred.)

(‘88) 15 Cal 800 (808): 15 Ind App 106 (PC). (A right which a litigant possesses without knowing that he possesses it, cannot be regarded as a “portion of his claim”.)

(‘17) AIR 1917 Lah 19 (21): 1916 Pun Re No. 94. (Plaintiff had no knowledge of his right.)

(‘97) 1897 Pun Re No. 17, p. 63. (Do.)

(‘69) 1869 Pun Re No. 10. (Omission due to misapprehension—Subsequent suit not barred.)

(‘27) AIR 1927 Mad 791 (792). (Suit for rent—Payment of rent to be made to third party—Omission to sue for rent payment of which could not have come to the knowledge of plaintiff does not bar a second suit for the same.)

(‘27) AIR 1927 Mad 218 (214, 215). (Suit for partition of some properties—Other properties not known to plaintiff—Subsequent suit for partition of omitted properties not barred.)

(‘18) AIR 1918 Mad 78 (81).

(‘92) 15 Mad 296 (297).

(‘91) 14 Mad 23 (24, 25). (Auction sale—Suit to set aside sale decreed—Plaintiff not knowing that auction-purchaser had obtained possession—Subsequent suit for possession not barred.)

(‘88) 6 Mad 844 (850).

(‘18) AIR 1918 Nag 158 (159). (Actual knowledge as opposed to constructive knowledge is necessary to bar a subsequent suit.)

(‘19) AIR 1919 Oudh 262 (263): 21 Oudh Cas 807. (Ignorance of right.)

(‘81) AIR 1981 Sind 27 (27): 26 Sind L R 423.

(‘26) 98 Ind Cas 1 (2, 8) (Mad).

(‘86) AIR 1936 Mad 699 (700).

2. (‘67) 11 Moo Ind App 551 (605, 606) (PC). (Accidental or involuntary omissions as well as deliberate omissions are within the rule.)

(‘15) AIR 1915 All 67 (69). (Wrong description of extent of suit property and acquiescence in decree — Further suit barred.)

(‘72) 8 N W P H C R 27 (29).

(‘70) 2 N W P H C R 90 (91).

(‘70) 2 N W P H C R 29 (31).

(‘17) AIR 1917 Cal 841 (843): 43 Cal 95.

(‘05) 2 Cal L Jour 490 (492).

[See also (‘22) AIR 1922 Cal 101 (103): 49 Cal 1026. (Principle applies to proceedings in Revenue Court.)

(‘19) AIR 1919 Cal 904 (906): 45 Cal 305.]

[But see (‘16) AIR 1916 All 172 (174): 38 All 217. (Per Walsh J.)—“Omits to sue” means “intentionally omits to sue”—This view is not correct.)]

**Note 6**

1. (‘87) 9 All 23 (25).

(‘82) 4 All 318 (320). (4 All 180, Followed.)

(‘82) 4 All 180 (181).

*In the following cases it was held that where a portion of a decree becomes infructuous because of the Court which made the decree having no jurisdiction in respect to that part, a subsequent suit in regard to that part is not barred:*

(‘81) 7 Cal 789 (747).

(‘74) 22 Suth W R 308 (309).

(‘67) 8 Mad H C R 376 (377).

(‘98) 1898 Pun Re No. 30, p. 99.

(‘93) 16 Mad 481 (486).

[But see (‘12) 15 Ind Cas 296 (296) (Oudh). (Agreement to pay money and transfer share in house. Suit for money in Small Cause Court and separate suit in ordinary Court for house—Separate suit barred.)]

2. (‘87) 9 All 23 (25).

(‘82) 4 All 318 (320). (Following 4 All 180.)

(‘98) 1898 Pun Re No. 30, p. 99.

3. (‘02) 24 All 553 (554, 555). (Claim for possession of immovable property cannot be added to a suit to recover moveable property.)

4. (‘70) 5 Mad H C R 419 (422).

5. (‘29) AIR 1929 P C 166 (169): 56 Ind App 267: 51 All 489 (P C).

(‘82) 1882 Pun Re No. 64, page 181.

But the fact that the addition of a relief would have deprived the Court of jurisdiction to try the *suit* as distinguished from the *particular claim* omitted, does not affect the applicability of the rule.<sup>6</sup>

**7. "Same cause of action."** — For a full discussion as to the meaning of the expression "cause of action," see Section 20 Notes 14 to 30. See also the under-mentioned case.<sup>1</sup>

The expression "cause of action" in this rule means the cause of action for which the suit was brought.<sup>2</sup> A rough test, although not a conclusive one, as to whether the cause of action in a subsequent suit is the same as that in the former suit, is to see whether the same evidence will sustain both suits<sup>3</sup> and regard should be had to the allegations in the two suits and not the facts *found* by the Court in the former suit.<sup>4</sup> The question is, however, one of *substance* rather than of *form*<sup>5</sup> and the causes in the two suits may be the same though the facts alleged may not be exactly identical in the two cases.<sup>6</sup> It is not open to the plaintiff to split up the parts really constituting the same cause of action and file different suits in respect of them.<sup>7</sup>

Where a plaintiff's first suit is based on facts which entitle him to be the sole heir of a deceased person and his second suit is also based on such facts, the mere fact that in the first suit the plaintiff (erroneously) *claims* only the position of one of the heirs of the deceased and that in the later suit he claims to be the sole heir does not make the causes of action different.<sup>8</sup>

**8. Obligation and collateral security.** — Under the Explanation to O. 2 R. 2, an obligation and a collateral security for its performance constitute but one cause of

**O. 2 R. 2  
Notes 6-8**

6. ('16) AIR 1916 Low Bur 43 (44).

('31) AIR 1931 Mad 705 (706, 707).

[See also ('33) AIR 1933 Pat 715 (718).]

#### Note 7

1. ('96) 18 All 403 (405, 406).

('37) AIR 1937 Rang 324 (329). (Cause of action means the facts on which the plaintiff is entitled to base a claim in a suit with reference to the subject-matter of the suit.)

[See also ('71) 16 Suth W R App 16 (19).

('35) AIR 1935 All 81 (82). (Cause of action refers entirely to the grounds set forth in the plaint as the cause of action, i.e., to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour.)]

2. ('85) 8 Mad 520 (524) : 12 Ind App 116 (P C).

3. ('90) 23 Bom 597 (602).

('23) AIR 1923 All 311 (312) : 45 All 376.

('16) AIR 1916 Bom 810 (810, 811) : 40 Bom 351.

('25) AIR 1925 Oudh 524 (524, 525) : 28 Oudh Cas 82.

('05) 8 Oudh Cas 389 (393).

('86) 9 Mad 279 (281).

[See also ('11) 11 Ind Cas 497 (498) : 38 Cal 629 : 38 Ind App 140 : 6 Low Bur Rul 18 (P C).]

[But see ('93) 16 All 165 (173) (F B). (Test not accepted by Edge, C. J.)]

4. ('82) 8 Cal 819 (828, 824).

('24) AIR 1924 Bom 141 (142). (Plaint allegations to be looked into.)

('09) 8 Ind Cas 395 (396) (Cal).

('15) AIR 1915 Lah 127 (128).

('15) AIR 1915 Mad 888 (888) : 38 Mad 247.

('10) 6 Ind Cas 288 (286) : 34 Mad 97. (Issues in former suit can also be consulted.)

('17) AIR 1917 Low Bur 28 (29, 30) 9 Low Bur Rul 37.

[But see ('10) 8 Ind Cas 9 (12) (All).]

5. ('92) 19 Cal 372 (379) (F B).

6. ('15) AIR 1915 Mad 732 (734, 735). (Suits for two trespasses against same defendant — If both trespasses form one transaction and take place before first suit, latter suit is barred.)

[See ('37) 1937 Oudh W N 1146 (1148). (Where there have been repeated interferences with the ownership of the same property of a person at different times, they are not different causes of action entitling the owner to bring separate suits. In such a case the real cause of action is the interference with the ownership and every known interference should be pleaded in a plaintiff's suit and relief claimed in respect of all of them. If it is not so done fresh suits in respect of each of such interferences would be barred by O. 2 R. 2, C. P. C.)]

[See also ('88) 15 Cal 422 (431) : 15 Ind App 66 (P C). (Suit for redemption — Prior suit in under-proprietary right — Subsequent suit in superior proprietary right — Difference only a mode of relief — Same cause of action.)]

7. ('25) AIR 1925 Oudh 53 (54).

('33) AIR 1933 Pat 715 (717). (Grant of two villages by one document — Death of grantee — Grantor is entitled to resume both villages — If he applies for resumption of only one, subsequent suit for resumption of other is barred.)

[See however ('25) AIR 1925 Nag 366 (368). (Even one different fact makes causes of action different.)]

8. ('37) AIR 1937 Rang 324 (330).



**O. 2 R. 2**  
**Notes 8-10**

action.<sup>1</sup> Except for the Explanation the two would constitute distinct causes of action<sup>2</sup> as they are under the English Law.<sup>3</sup>

**9. Successive claims arising under the same obligation.** — Under the Explanation to the rule, successive claims arising under the same obligation constitute a single cause of action. Thus, in the case of suits on instalment bonds the plaintiff should claim the amount of all the instalments in arrears at the same time. Otherwise he will be barred from suing for the instalments omitted to be so claimed.<sup>1</sup> So also where rent for several successive years is in arrears, but the plaintiff sues only for the rent of some years, and omits to sue for the rents due and in arrears for the years previous to or subsequent to the year of his suit, he cannot subsequently sue for such omitted rents.<sup>2</sup> The same rule holds good in the case of suits for royalty,<sup>3</sup> profits,<sup>4</sup> annuity,<sup>5</sup> etc.

But where a lessee undertakes to pay a portion of the rent reserved, to the lessor's superior landlord, and fails to do so with the result that the lessor has to pay the superior landlord, the lessor may sue separately for that portion of the rent treating it as damages for breach of covenant by the lessee.<sup>6</sup> The reason is that in such a case the causes of action for the two suits are *different*. For other instances where the lessor can bring several suits, see the undermentioned cases.<sup>7</sup>

But though the rule bars a *fresh suit* in respect of one of several successive claims arising under the same obligation, not included in the former suit, it does not prevent the plaintiff from taking any other remedy which he may have for its recovery. Thus, where rent was due for the years 1905, 1906 and 1907 and the former suit was for the rent of 1905 only, the plaintiff cannot sue for the rents of the years 1906 and 1907 but can distrain for the rent due for those years, under the rent laws.<sup>8</sup>

**10. Omission to sue in respect of a portion of a claim.** — The penalty for the omission to sue for the whole claim is that the plaintiff shall not afterwards sue for

#### Note 8

1. ('80) 2 All 838 (839).
2. ('15) 26 Ind Cas 228 (230, 231) : 41 Ind App 142 (P C). (Ceylon C. P. Code S. 34, corresponds to O. 2 R. 2.)
3. ('22) AIR 1922 P C 412 (413) : 4 Lah 32 : 50 Ind App 115 (P C).

#### Note 9

1. ('73) 20 Suth W R 358 (361).
- (06) 8 Bom L R 547 (549).
- [See also ('10) 7 Ind Cas 505 (521) (Lah).
- (86) 9 Mad 279 (280, 281). (Defendant agreeing to pay part of the debt immediately and part after a fixed time—Suit brought after the time fixed should be for the whole debt.)]
2. ('81) 6 Cal 791 (793). (Omission of rent for subsequent period.)
- (25) AIR 1925 All 795 (796, 797). (Omission of rent for later years.)
- (22) AIR 1922 Bom 152 (158) : 46 Bom 229 (Do.)
- (84) 8 Bom 164 (167).
- (05) 2 Cal L Jour 490 (491, 492). (Though the claim for one year be taken to have been extinguished by satisfaction and subsequently revived by cancellation of such satisfaction.)
- (08) 1 Cal L Jour 114 (115). (Deposit of rent in Court—Suit by landlord for balance should include claim upto the date of suit and not merely upto the date of deposit.)
- (95) 22 Cal 680 (691).

- (85) 12 Cal 50 (51). (Omission of rent for later years.)
- (10) 5 Ind Cas 735 (735, 736) : 33 Mad 317. (Though prior suit was dismissed.)
- (04) 27 Mad 116 (117, 118). (Though there was a separate *muchilika* for each *faski*.)
- (98) 21 Mad 236 (237). (Though suit is barred other remedies are open such as distraint under the Rent Recovery Act.)
- (85) 8 Mad 147 (148).
- (95) 8 O P L R 9 (10). (Though the suits may relate to different fields in the same holding.)
3. ('17) AIR 1917 Cal 841 (843, 844) : 48 Cal 95.
4. ('88) 1888 All W N 142 (142).
- (85) 7 All 761 (762, 763).
5. ('22) AIR 1922 All 879 (880, 881) : 44 All 668. (Suit for one only of three instalments due—Subsequent suit for other two is barred.)
6. ('11) 10 Ind Cas 406 (410) (Cal).
7. ('18) 18 Ind Cas 288 (289) (All). (Realisation of rent for a certain year suspended by order of Collector—Separate suit after removal of suspension maintainable.)
- (19) AIR 1919 Mad 273 (274). (Plaintiff purchasing property and afterwards getting by separate assignment right to arrears of rent upto date of purchase—Separate suits for rent accrued after and before purchase, maintainable.)
8. ('98) 21 Mad 236 (237).



the portion so omitted.<sup>1</sup> The plaintiff cannot avoid the bar by expressly stating in his plaint in the previous suit that he reserves his right to sue for the omitted portion of the claim.<sup>2</sup> Nor can he avoid it by obtaining the *leave of the Court* to sue in respect of the portion of the claim omitted, inasmuch as the only leave that can be granted by the Court is to sue for one of several *reliefs* under sub-rule 3 of the rule.<sup>3</sup>

The rule refers to the cases where a suit has been filed and the plaintiff has omitted therein to sue for a portion of the claim.<sup>4</sup> It has no application where no suit is filed at all as where the plaint has been returned for presentation to the proper Court, or where the suit is filed and is *withdrawn* under O. 23 R. 1.<sup>5</sup>

The words 'any portion of his claim' refer not only to the physical *quantum* claimed by a plaintiff but also to the *interest* claimed by him; so that where a plaintiff who is entitled to a larger interest in the property claims only a smaller interest therein, the bar under this rule will apply.<sup>6</sup>

Suits were filed on different dates in the Civil Court for arrears of rent for different periods. The plaints in all the suits were returned for presentation to the Revenue Court. The plaints were re-presented to the Revenue Court on the same day. It was contended that as the date of presentation in the Revenue Court is the date of the institution of the suit in that Court, the plaint must comprise a claim for all arrears of rent up to the date of the presentation in the Revenue Court and as the plaintiff had not presented in the Revenue Court any plaint including all the arrears up to the date of presentation, one or the other of the suits must be held to be barred under this rule. It was held, overruling the contention, that in the circumstances of the case all the plaints must be taken together and treated as one document and that the fact that the Court numbered the suits separately or that the plaintiff omitted to ask the Court to treat them as one suit and give it one number did not amount to an omission to sue or a relinquishment of any portion of the claim within the meaning of this rule.<sup>7</sup>

As to the meaning of the words "he shall not afterwards sue," see Note 27 below.

*Suits for breaches of contract.* — Where the plaintiff in a suit for damages for breach of contract omits to claim a portion of the damages due to him, he cannot subsequently sue for such portion<sup>8</sup> although the omitted portion may relate to a different stipulation in the contract.<sup>9</sup> But where the covenants although contained in the same contract create *distinct obligations*, the breach of each of them will give rise

#### Note 10

1. ('05) 2 Cal L Jour 480 (484).
2. ('38) AIR 1938 Lah 412 (415).  
[See also ('31) AIR 1931 Bom 114 (116).  
(('68) 5 Bom H C R A C 173 (175).]
3. ('17) AIR 1917 Cal 568 (570).
4. ('70) 2 N W P H C R 90 (91).
5. ('93) 20 Cal 322 (323, 324, 325).
6. ('38) AIR 1938 Rang 76 (79) : 1937 Rang LR 447.
7. ('09) 1 Ind Cas 319 (320) (Bom).
8. ('19) AIR 1919 Cal 904 (907) : 45 Cal 305.
9. ('17) AIR 1917 Mad 948 (949) : 40 Mad 291.
10. ('95) 17 All 53 (54, 55). (10 Mad 160, Followed).
11. ('76) 1 All 324 (325).
12. ('11) 9 Ind Cas 956 (957) (Lah). (Portion of claim withdrawn—The rule does not bar a fresh suit in respect of the claim withdrawn.)
13. ('17) AIR 1917 Lah 414 (416, 417) : 1917 Pun Re No. 65.
14. ('87) 10 Mad 160 (164).
15. ('85) 7 All 624 (626). (Suit struck off for non-appearance of parties with leave to file a subsequent suit—Later suit not barred.)
16. ('25) AIR 1925 Rang 118 (119). (Relief omitted in the suit withdrawn can be added in the second suit.)
17. [See also ('08) 30 All 279 (281). (Withdrawal of suit without leave—Second suit barred.)
18. ('05) 10 Cal W N 8 (11, 12). (Withdrawal of suit with permission—Subsequent suit not barred.)]
19. 6. ('37) AIR 1937 Rang 324 (330). (Plaintiff entitled to property as sole heir claiming only the interest of co-heir.)
20. 7. ('39) AIR 1939 Mad 724 (729).
21. 8. ('83) 9 Cal 143 (146).
22. ('07) 3 Nag L R 80 (80). (Eviction by person with paramount title—Suit for damages for breach of covenant for quiet enjoyment — Only one such suit lies.)
23. 9. ('09) 1 Ind Cas 319 (320) (Bom).
24. ('14) AIR 1914 Lah 26 (28). (Sale of goods partly in exchange of other goods and partly for cash payable by instalments — Penalty provided for

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to a distinct cause of action.<sup>10</sup> A person enters into a contract of service with another for, say a year, but before the expiry of the year, wrongfully dismisses the servant. In such a case the servant's suit for damages for breach of contract should include the payment due to him for the whole year. It is not open to him to split his claim into twelve monthly instalments and sue for each of them separately.<sup>11</sup> Similarly, where the defendant commits breach of a contract of sale of goods by refusing to accept a portion of the goods contracted to be purchased by him, and also by refusing to pay for the goods accepted, there is only one cause of action. The plaintiff cannot split it up and sue separately for the price of the goods accepted by the defendant, and for damages for the non-acceptance of the other goods.<sup>12</sup>

A contrary view, however, was taken by Garth, C. J., in the undermentioned case.<sup>13</sup> According to the learned Chief Justice a claim for the price of goods sold is essentially a claim for *debt* and is therefore a cause of action of a different nature from a claim for compensation for not accepting goods which is essentially a claim for *damages*. But, Wilson, J., who sat with him in that case held that there was only one cause of action in such circumstances and his view was approved of in I. L. R. 19 Calcutta 372 (F. B.).

*Prima facie* each separate order and delivery of goods constitute a separate cause of action.<sup>14</sup> But if all the goods were to be delivered under a *single contract*, then it would be a case of successive claims arising under the same obligation within the Explanation to O. 2 R. 2 and there would be only one cause of action.<sup>15</sup> But where the parties expressly provide in the indent that each monthly shipment should be treated as a separate contract, there would be a separate cause of action in respect of each monthly shipment.<sup>16</sup>

*Suits relating to different properties.* — Where the facts complained of are the same, there is only one cause of action though the reliefs sought may relate to different properties or different portions of a property.<sup>17</sup>

default of cash payment — Default of both held to be one cause of action.)

(20) AIR 1920 Low Bur 50 (51) : 10 Low Bur Rul 111. (Contract with two covenants—Breach of both constitutes one cause of action.)

[But see ('06) 1908 All W N 199 (200). (*Quere.*)]

10. ('14) AIR 1914 Lah 26 (29). (Covenants secured in a different manner.)

('97) 21 Bom 267 (271). (Independent covenant for payment of interest in mortgage deed.)

('15) AIR 1915 Cal 126 (128) : 41 Cal 825. (Contract for supply of goods by monthly instalments providing that each instalment and item is to be treated as a separate contract—Separate suits for damages not barred.)

('28) AIR 1928 Cal 615 (619). (Breach of covenant to pay rent to landlord and also to pay certain cesses to the Government — Landlord being compelled to pay the cesses — Landlord has distinct causes of action in respect of the rent and the cesses.)

('20) AIR 1920 Nag 282 (233) : 16 Nag L R 186. (Separate covenants in same deed—Performance of each secured in a different way—Separate suits are not barred.)

11. ('68) 1868 Pun Re No. 86.

('80) 6 Cal L Rep 91 (92).

[But see ('82) 1882 Pun Re No. 70, p. 209.

(Lease for a season wrongfully terminated before expiry of period — Lessor can at his option sue for rent as it fell due or for damages at once.)

12. ('92) 19 Cal 872 (876, 880) (F B). (Approving the view taken by Wilson, J. in 12 Cal 839.)

13. ('86) 12 Cal 899 (841, 842).

14. ('24) AIR 1924 Rang 249 (252) : 2 Rang 66.

('24) AIR 1924 Rang 145 (146) : 1 Rang 694.

('16) AIR 1916 Mad 544 (545).

15. ('24) AIR 1924 Rang 249 (252) : 2 Rang 66.

('24) AIR 1924 Rang 145 (146) : 1 Rang 694.

16. ('96) 19 Mad 804 (806). (Followed in AIR 1915 Cal 126.)

('15) AIR 1915 Cal 126 (127) : 41 Cal 825.

17. (1865) 8 Suth W R 25 (27). (Suit for possession of ancestral property by father—Subsequent suit by son on the same cause of action though for different property—Suit is barred.)

('87) 1887 All W N 108 (108).

('67) 11 Moo Ind App 551 (605) (PC). (Defendant misappropriating jewels and Government papers.)

('16) AIR 1916 Cal 161 (168). (Suit for possession by purchaser of holding — Prior suit for possession of part of holding dismissed — Suit is not maintainable even in respect of portion not included in former suit.)

('28) AIR 1928 Lah 556 (557).

('09) 4 Ind Cas 410 (418) (Lah).

This is so even though the plaintiff<sup>18</sup> or the defendant<sup>19</sup> may claim the properties under different titles. Thus, a suit by a reversioner on the death of a Hindu widow to recover properties improperly alienated by her must include all the items alienated by the widow.<sup>20</sup> Similarly, a suit by a coparcener attacking the mortgage of certain coparcenary properties is a bar to a similar suit in respect of another property included in the same mortgage.<sup>21</sup>

*Suit for rent.* — A suit for rent must include the whole amount due to the plaintiff as rent.<sup>22</sup> Thus, though there may be separate muchilikas for each *fasli*, and the rent for a particular *fasli* is thus payable under the particular muchilika, yet, non-payment of rent by the tenant at a particular time is but one cause of action as far as the landlord is concerned.<sup>23</sup>

*Suit for damages for tort.* — A claim to damages arising out of assault cannot be split up into two suits, one for actual pecuniary loss and another for general damages, as for injury to feelings.<sup>24</sup> In a suit for damages for tort the *entire* amount of damages has to be recovered in one suit and several suits therefor should be discouraged.<sup>25</sup>

*Suit for demurrage.* — A plaintiff in a suit for demurrage, who omits to claim a portion of the relief, cannot subsequently sue in respect of it.<sup>26</sup>

*Suit for accounts.* — Where the plaintiff in a suit for accounts omits some items, he cannot sue again in respect of the items so omitted.<sup>27</sup> In the undermentioned case<sup>28</sup> accounts were stated between the parties, and the sum so found due was made payable in instalments, under a promissory note, executed in respect of such sum. The promissory note being insufficiently stamped was inadmissible in evidence, and

(‘08) 1908 Pun W R No. 58. (Suit by heir for property inherited should include the whole property forming the inheritance.)

(‘81) 1881 Pun Re No. 9, p. 17. (Dispossession of rights in three villages — Suit to recover one of the villages — Subsequent suit for other two not maintainable.)

(‘77) 1877 Pun Re No. 90, p. 238. (Though portion of land was on the date of first suit under water.)

(‘15) AIR 1915 Mad 732 (785).

(‘22) AIR 1922 Nag 246 (247) : 18 Nag L R 186. (Different items of property.)

(‘12) 15 Ind Cas 296 (296) (Oudh). (Do.)

(‘26) AIR 1926 Oudh 365 (366).

(‘11) 9 Ind Cas 460 (460) (Low Bur).

(‘81) AIR 1981 Bom 114 (116).

18. (‘82) 4 All 171 (173, 174).

(‘88) 15 Cal 422 (431): 15 Ind App 66 (PC). (Plaintiff asking for sub-proprietary right in the former suit and for superior proprietary right in the latter suit.)

(‘76) 2 Cal 152 (173) (FB). (Husband of plaintiff gifting property to daughter — Suit by plaintiff for recovery of property on the ground that deed of gift was forged dismissed — Second suit on the ground that plaintiff was heiress of her daughter is barred.)

[But see (‘90) 14 Bom 31 (55, 56). (Partition suit.)]

19. (‘73) 20 Suth W R 103 (108). (The cause of action is the same though defendant might plead different titles.)

(‘94) 16 All 165 (171) (FB). (Overruling 1886 All W N 113.)

(‘85) 1885 Pun Re No. 15, p. 29.

20. (‘24) AIR 1924 All 902 (904): 46 All 822.

[See also (‘81) AIR 1981 Bom 114 (116). (Suit by adopted son to set aside alienations by widow — Adoptive mother.)]

21. (‘26) AIR 1926 Oudh 77 (79) : 1 Luck 1.

22. (‘66) 5 Suth W R Act X 90 (91). (First suit for rent payable in Company's rupees — Second suit for recovering difference in value barred.)

(‘30) AIR 1930 All 527 (528).

(‘33) AIR 1933 Cal 831 (832). (Claim for arrears of monthly rent — Separate suits cannot be brought for different periods.)

23. (‘08) 27 Mad 116 (118).

24. (‘68) 1868 Pun Re No. 53.

[See (‘14) AIR 1914 Cal 396 (435) : 40 Cal 898 (S. R.)]

[See also (‘10) 5 Ind Cas 124 (125) (All). (Insult caused to a person owing to assault is not a separate cause of action from assault.)

(‘68) 9 Suth W R 121 (122). (Occurrence of further damage does not create fresh cause of action.)]

25. (‘81) AIR 1981 All 670 (672).

26. (‘70) 14 Suth W R 253 (253).

27. (‘17) AIR 1917 Cal 568 (570).

(‘69) 12 Suth W R 79 (80).

(‘85) AIR 1985 Lah 321 (322). (Suit for accounts filed — Subsequent suit for account is not maintainable where claim in it could have been included in prior suit.)

28. (‘81) 3 All 717 (720, 722).

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hence the payee sued on the original cause of action. But in so suing, he sued only for such of the instalments as were due on the date of the suit, and obtained a decree. He subsequently sued for the remaining instalments. This subsequent suit was held by Spankie, J., to be barred by Section 43 (O. 2 R. 2), while Oldfield, J., held it was not so barred.

Several transactions may give rise to one cause of action, if they form one *continuous course of dealing or form parts of one transaction*. Thus, even where there are different contracts, yet if they form part of one transaction a breach of all such contracts is only one cause of action.<sup>29</sup> This is because the expression "cause of action" might include claims upon several contracts provided they form part of a continuous course of dealing. When a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided.<sup>30</sup>

Where in a suit for accounts the defendant says that on a taking of accounts he will be found entitled to get some amount but does not specify such amount, or pay court-fee thereon, he cannot be deemed under O. 2 R. 2 to have waived his right for such amount.<sup>31</sup>

*Suits on mortgages.* — A mortgagor suing for redemption and failing to claim recovery of a portion of the property cannot sue again for it.<sup>32</sup> A puisne mortgagee who pays off a prior mortgage must include in the suit on his mortgage any further claim he may have by reason of such payment.<sup>33</sup> As to the question whether a person holding successive mortgages on the same property is bound under this rule to sue in respect of all the mortgages, see Note 40 to Section 11 *ante*. A mortgagee holding a separate money bond against the mortgagor is not bound to enforce the money bond, along with the mortgage.<sup>34</sup>

*First suit for interest on a mortgage, and second suit for the principal.* — Where there is a single obligation to pay the interest and the principal under a mortgage, a suit for interest alone when the principal also *has become* due will bar a subsequent suit for the principal.<sup>35</sup> But where there is an independent obligation to pay interest, a prior suit for interest on the basis of such obligation is no bar to a later suit on the mortgage although at the time of the prior suit the principal sum had

29. ('15) AIR 1915 Cal 126 (127) : 41 Cal 825.  
(This is so where there is nothing to show that the transactions were intended to be kept distinct.)

30. ('16) AIR 1916 Cal 580 (580, 581) : 42 Cal 1043. (1856) 18 C B 335, Followed.)

31. ('83) AIR 1933 Sind 247 (249).

32. ('05) 28 Mad 406 (407, 408).

('28) AIR 1928 Bom 63 (64).

[See ('98) 21 Mad 153 (156, 157).]

[But see ('86) 9 Mad 92 (95). (Purchaser of equity of redemption of portion of mortgaged property who obtains possession of that portion on payment of mortgage debt is not prohibited by Sec. 43 from instituting a subsequent suit to recover possession of the remaining portion of the mortgaged property from the mortgagees under a later purchase of the remaining portion of the equity of redemption.)]

33. ('10) 6 Ind Cas 159 (162) : 37 Cal 589.

('11) 10 Ind Cas 336 (337) (All).

[See also ('11) 10 Ind Cas 925 (926) (All).]

34. ('25) AIR 1925 Mad 991 (992).

35. ('29) AIR 1929 Rang 96 (96).

('22) AIR 1922 P C 412 (414) : 4 Lah 32 : 50 Ind App 115 (PC).

('22) AIR 1922 P C 23 (25, 26) : 49 Ind App 9 : 44 All 121 (PC).

('17) AIR 1917 All 17 (19) : 39 All 506.

('90) 12 All 203 (207).

('26) AIR 1926 Lah 661 (662).

('19) AIR 1919 Lah 439 (440) : 1918 Pun Re No. 88.

('10) 5 Ind Cas 821 (828) : 1910 Pun Re No. 19.

('20) AIR 1920 Low Bur 50 (51, 58) : 10 Low Bur Rul 111.

('85) AIR 1985 Peah 84 (91).

[See also ('89) 1889 Pun Re No. 70, page 222.  
(1898-1900) 1898-1900 Low Bur Rul 618. (Suit for interest will not lie if the suit for principal is barred.)]

become due.<sup>36</sup> Where, however, at the time of the prior suit the principal sum had not become due, a subsequent suit for the principal will not be barred.<sup>37</sup> See also Note 18 below.

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*Mortgage bonds providing that on default in paying interest or instalments of principal at the stipulated time, the whole amount should become payable at once — Default occurring — Maintainability of separate suits for unpaid interest or instalments, and for balance of mortgage money.*

(1) A mortgage bond provides that on default in paying the interest at the stipulated time, the mortgagee would be entitled to claim the mortgage money at once without waiting for the expiry of the term fixed for the redemption of the mortgage. The mortgagor next defaults in paying interest according to stipulation but the mortgagee thereafter sues only for the arrears of interest. Can he sue again for the principal money?

(2) A mortgage bond provides that the mortgage money should be paid in certain instalments but that if there is a default with regard to any instalment, the whole of the unpaid amount would be claimable at once. Default occurs, but the mortgagee sues only for the unpaid instalments. Can he sue again for the balance?

The question in both the above cases is the same, *viz.*, whether the mortgagee has in such a case the option of waiving the benefit of the default clause. On this question there was a conflict of judicial opinion. It was held by the High Court of Madras<sup>38</sup> and the Judicial Commissioner's Court of Nagpur<sup>39</sup> that in such a case the mortgagee had an option of waiving the privilege accorded to him by the default clause and that a suit by him for the interest or instalments in arrears, as the case may be, would not bar a subsequent suit for the mortgage money. But a contrary view was taken in Bombay,<sup>40</sup> Lahore<sup>41</sup> and Oudh.<sup>42</sup>

In this connection two decisions of the Judicial Committee have to be noticed.<sup>43</sup> In these two cases it was held that a second suit for the principal after the first suit for interest alone was barred under O. 2 R. 2. But these two cases were distinguished in the undermentioned Madras cases<sup>44</sup> on the ground that in both of them the first suit for interest was instituted after the expiry of the mortgage term.

36. ('25) AIR 1925 Mad 1120 (1122): 48 Mad 703.

('34) AIR 1934 Rang 159 (160). (Anomalous mortgage—Mortgage to be simple one in first instance and to be usufructuary one on non-payment of principal sum on fixed date—Separate covenant to pay interest yearly — Suit for interest alone held maintainable.)

('30) AIR 1930 All 286 (287): 51 All 974. (Suit for interest against the mortgagor personally does not bar a subsequent suit on the security for the principal.)

('28) AIR 1928 Lah 269 (270).

('97) 21 Bom 267 (271).

('17) AIR 1917 Lah 260 (260). (Mortgagor to remain in possession of the property as tenant of the mortgagee on payment of rent—Suit for rent does not bar a subsequent suit for mortgage amount.)

('81) 1881 Pun Re No. 123, p. 296.

('28) 110 Ind Cas 206 (207) (Lah).

[See ('22) AIR 1922 P C 412 (414): 4 Lah 32: 50 Ind App 115 (P C).]

('22) AIR 1922 P C 28 (36): 49 Ind App 9: 44 All 121 (P C).]

37. ('27) AIR 1927 Mad 580 (581, 582).

('28) 107 Ind Cas 591 (592) (All).

('29) AIR 1929 Rang 71 (72): 6 Rang 771.

('22) AIR 1922 Upp Bur 1 (2): 4 Upp Bur Rul 62.

38. ('27) AIR 1927 Mad 580 (581, 582).

('32) AIR 1932 Mad 245 (247).

('29) AIR 1929 Mad 371 (374, 375, 377).

('95) 18 Mad 257 (261).

[But see ('28) AIR 1928 Mad 705 (707, 708).]

39. ('24) AIR 1924 Nag 61 (62): 19 Nag L R 170. (Suit on bond.)

40. ('23) AIR 1923 Bom 201 (202).

[But see ('83) 7 Bom 446 (447, 448).]

41. ('12) 17 Ind Cas 581 (582) (Lah).

('10) 5 Ind Cas 821 (823): 1910 Pun Re No. 19.

[See ('32) AIR 1932 Lah 523 (524, 525).]

[But see ('33) AIR 1933 Lah 463 (464).]

42. ('80) AIR 1930 Oudh 41 (42): 5 Luck 431.

43. ('22) AIR 1922 P C 23 (26): 44 All 121: 49 Ind App 9 (P C).

('22) AIR 1922 P C 412 (414): 4 Lah 32: 50 Ind App 115 (P C).

44. ('27) AIR 1927 Mad 580 (581).

('29) AIR 1929 Mad 371 (372).

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An opinion has been expressed by Ramesam, J., that in cases where terms such as "when you require," "when required," "if you choose," etc., are used, the mortgagee may be held to have an option of the kind referred to above.<sup>45</sup> It was also held in the undermentioned case<sup>46</sup> that the use of the expression "when required by you," clearly made a *demand* necessary for the cause of action to arise to sue for the entire amount. But it was also held in that case that apart from this consideration, the mortgagee had an *option* to sue for the principal or interest alone in such a case. This view was adopted by Venkatasubba Rao, J., in a later case<sup>47</sup> who also held that the absence of such words in the mortgage bond did not affect the question. But if the prior suit was based on an obligation *independent* of that upon which the later suit is based, then the later suit will not be barred. This would be the case where, apart from the mortgage, there is an independent *personal* obligation to pay the debt<sup>48</sup> or the interest thereon<sup>49</sup> and the prior suit for interest is based on such *personal* obligation and the later suit on the mortgage.<sup>50</sup> In such a case, though there may be a default clause in the mortgage deed providing that on the default being made in payment of interest the whole mortgage amount should become due and though the default may have occurred at the time of the prior suit, the prior suit on the *personal* obligation will not bar the later suit on the mortgage.

The conflict above referred to has now been set at rest by the Privy Council in *Lasa Din v. Mt. Gulab Kunwar*, A. I. R. 1932 Privy Council 207. Referring to clauses in mortgage deeds providing for the mortgage amount becoming payable on default in payment of instalments, their Lordships say :

"There can be no doubt that as pointed out by Lord Blanesburgh (in A. I. R. 1926 Privy Council 85), a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees' and that it purports to give them *an option either to enforce their security at once, or if the security is ample to stand by their investment for the full term of the mortgage.*"

Thus, the Madras view is upheld and the money will "become due" on default only if the "mortgagee exercised the option reserved to him."

See also the undermentioned cases.<sup>51</sup>

If the default clause provides that on default in payment of interest at the due time the mortgagee should be entitled to *sell* the properties for principal and interest, out of Court, and default occurs, but the mortgagee sues for interest alone, a subsequent suit for the principal is not barred. The reason is that the default did not entitle the mortgagee to sue for the mortgage money but only to have the properties *sold* out of Court.<sup>52</sup>

*Instalment bonds with default clause in other cases — Default occurring — Suit for instalments in arrears alone, whether precludes fresh suit for balance.*

In the undermentioned case<sup>53</sup> the Allahabad High Court held that where a creditor has an option either to sue for the whole amount or to sue for the instalments

45. ('28) AIR 1928 Mad 705 (707, 708).

46. ('29) AIR 1929 Mad 871 (873).

47. ('27) AIR 1927 Mad 580 (581, 582).

48. ('29) AIR 1929 Mad 871 (878).

49. ('28) AIR 1928 Lah 269 (270).

50. ('81) 1881 Pun Re No. 128, p. 296.

51. ('17) AIR 1917 Lah 260 (260). (Mortgagor taking possession of the property as the tenant of the mortgagee and agreeing to pay rent—Suit for rent does not bar a subsequent suit for the mortgage amount.)

52. ('88) AIR 1938 Lah 468 (464).

53. ('87) AIR 1987 Lah 767 (769). (Default clause in

mortgage—Suit for interest alone—Second suit for interest accruing subsequent to first suit not barred.)

52. ('29) AIR 1929 Rang 71 (72) : 6 Rang 771.

53. ('35) AIR 1935 All 461 (462) : 57 All 888.

[See also ('87) AIR 1987 Sind 800 (802) : 32 Sind L R 80. (Clause in lease deed entitling lessor on default by lessee in payment of monthly rent, to eject lessee and to recover from lessee rent for unexpired period of lease—Default occurring—Lessor not terminating lease but only suing for instalments then in arrears—Second suit for arrears subsequently falling due not barred.)]

only, and he sues only for the instalments, a second suit by him when further instalments fall due will not be barred under this rule. The decision proceeds on the ground that in such a case, on the creditor exercising his option of suing for the arrears of instalments alone, he has no cause of action to sue for the balance and therefore, there is no omission by him of any portion of the claim which he is entitled to make in respect of the cause of action. But the Rangoon High Court held in the undermentioned case<sup>54</sup> that where an instalment bond provided that on default occurring, the creditor should be at liberty to sue for the whole, the provision was only intended for the benefit of the debtor and the creditor had no option, in case of default, of suing for the arrears of instalments alone and that if he failed to sue for the balance of the money, as he was entitled to do under the bond, he would be precluded from doing so subsequently under this rule.

*First suit for interest under a mortgage, second suit for possession.* — A mortgage deed provides that on default in the payment of interest on the due date, the mortgagee should be entitled to take possession of the mortgaged property. Default occurring, the mortgagee sues only for interest. On fresh default occurring he sues for possession. Is the suit maintainable? The answer to this question seems to depend on whether on the first default the mortgagee was entitled to sue both for interest and possession or whether he was entitled to sue either for interest or possession. In the former case the plaintiff is bound to claim both the reliefs on pain of his second suit for possession being barred.<sup>55</sup> In the latter case the second suit will not be barred.<sup>56</sup> See also the undermentioned case.<sup>57</sup>

*Lease to mortgagor by mortgagee with possession — First suit for rent, second suit for principal.* — A mortgages his land with possession to B and as part of the same transaction B leases the land to A. In such a case, the lease forms in reality only an arrangement for the payment of interest. Hence, where after the principal money has become due, the mortgagee sues for rent alone, he cannot sue again for the principal.<sup>58</sup> But separate suits will lie where the lease and the mortgage constitute distinct and separate transactions.<sup>59</sup>

*Partition suits.* — A suit for partition of joint property must include the whole of the properties jointly held by the parties.<sup>60</sup> Where the suit does not comply with this rule, the penalty is not the dismissal of the suit but the bar of a fresh suit for the

54. ('89) AIR 1939 Rang 251 (252) : 1939 Rang L R 180.

55. ('10) 8 Ind Cas 224 (225) (Lah).

('14) AIR 1914 Lah 121 (123) : 19 Ind Cas 981 (983, 984) : 1914 Pun Re No. 4.

[See also ('32) AIR 1932 Lah 523 (524). (Mortgagee entitled to possession of mortgaged property on default—Mortgagee's suit for possession on default dismissed for default—Subsequent suit for mortgage amount barred.)]

[See however ('16) AIR 1916 Lah 298 (298). (The above rule does not apply as, where the property was in the possession of a third party, the plaintiff could not have sued for possession at the time of his former suit.)]

[But see ('86) 1886 Pun Re No. 79, p. 165. (Where it was held that the second suit was not barred.)]

56. ('20) AIR 1920 Lah 1 (3, 4) : 1 Lah 457 (FB).

[But see ('12) 17 Ind Cas 581 (582) (Lah). (This is superseded by AIR 1920 Lah 1.)]

57. ('89) AIR 1939 Lah 112 (113). (Where a

mortgage has provided that it was for the duration of certain period and that at the end of this period, the mortgagee could either claim possession or recover the mortgage money with interest at the rate agreed upon, the mortgagee's failure, in a suit for possession, to claim the relief for the recovery of the money due on the mortgage does not preclude him from seeking that relief in a subsequent suit.)

58. ('18) AIR 1918 Lah 373 (374) : 1918 Pun Ro No. 69.

('26) AIR 1926 Lah 559 (560, 561).

('21) AIR 1921 Lah 225 (225).

[See also ('97) 19 All 496 (498).]

59. ('28) AIR 1928 Lah 732 (733).

('23) AIR 1923 Lah 203 (204) : 4 Lah 52.

('22) AIR 1922 Lah 111 (111, 112) : 3 Lah 1.

('17) AIR 1917 Lah 260 (260).

('16) AIR 1916 Lah 296 (296, 297).

('82) AIR 1932 Mad 466 (468, 469, 470).

('98) 16 Mad 335 (338).

60. ('38) AIR 1938 Lah 780 (781).



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partition of the omitted items.<sup>61</sup> For instances of cases where such a subsequent suit has been entertained, see the decisions cited below.<sup>62</sup> The following are the exceptions to the rule that such a suit would be barred —

- (1) Where at the time of the previous suit the omitted portion was *not available* for partition at that time,<sup>63</sup> as for instance where it was in possession of a usufructuary mortgagee.<sup>64</sup>
- (2) Where the omitted properties were in a different district.<sup>65</sup> The better view seems to be that even in such cases the bar of O. 2 R. 2 applies, as, under the present Code, there is no objection to the plaintiff bringing a single suit in such a case.<sup>66</sup>
- (3) Where the omission in the previous suit was due to *ignorance* of existence of the omitted items.<sup>67</sup>

A suit for partition of property held jointly by a Hindu family does not bar a suit for partition of property held by the family jointly with strangers, as the causes of action for the two suits are distinct.<sup>68</sup>

Where the alienee of a share of joint family property sues for partition, he must sue for general partition.<sup>69</sup> But in 14 Indian Cases 524 it was held that an alienee's suit for partial partition is not liable to be dismissed solely for that reason but that the defendant coparceners can claim that there should be a general partition. Further, the defendant can always in such a suit insist that the suit must be for general partition.<sup>70</sup>

Where the plaintiff acquired the shares of two out of five members of a joint family by two separate sale-deeds, it was held that his cause of action on both the sale-deeds was one, *i. e.*, the right to sue the coparceners for partition, and he cannot maintain two actions one on each sale-deed.<sup>71</sup> For examples of suits for partition

(31) 133 Ind Cas 440 (440, 441) (Lah). (Suit for partial partition not competent.)

(86) 12 Cal 566 (569).

(27) AIR 1927 Mad 218 (214). (For exceptions to the proposition, see the observations in this case.)  
[See also ('18) AIR 1918 Cal 159 (159).]

61. ('83) 7 Bom 182 (184).

(66) 1 Agra A C 55 (56).

(11) 9 Ind Cas 424 (425) (Oudh).

[See also ('18) AIR 1918 Mad 751 (754). (Cause of action for partition suit is one and the same as regards all partible properties.)]

62. ('71) 8 Bom H C R A C 205 (209). (Suit for partition of portion dismissed on the ground of non-maintainability of such suit — Second suit for partition of entire property not barred.)

(12) 16 Ind Cas 383 (383) (Cal). (The perpetual recurrence of the cause of action for partition is one of the incidents of joint property.)

(28) AIR 1928 Cal 459 (461). (Principles of maintainability of a subsequent suit indicated.)

(15) AIR 1915 Lah 416 (417) : 1915 Pun Re No. 87. (As long as joint ownership continues joint owners may demand partition.)

(28) AIR 1928 Rang 73 (75) : 5 Rang 785. (On the ground that if joint possession continues after first decree there is a fresh cause of action.)

(82) AIR 1932 Nag 92 (98). (Property inadvertently omitted in the previous suit—Subsequent suit lies.)  
[See also ('08) 35 Cal 961 (967, 968). (Omission by mistake or consent of all co-owners — Fresh suit not barred.)]

63. (1900) 23 Mad 608 (612).

64. ('75) 12 Bom H O R 148 (155).

65. ('16) AIR 1916 All 172 (173) : 38 All 217.

(84) 1884 Pun Re No. 162, p. 408.

(12) 14 Ind Cas 524 (528) (Mad).

(67) 3 Mad H C R 376 (377, 378).

66. ('23) AIR 1923 Mad 584 (584, 585).

See the following cases which were decided under the old Code:

(97-'01) 2 Upp Bur Rul 222.

(08) 30 All 279 (281).

(91) 1891 Pun Re No. 10, page 88.

67. ('27) AIR 1927 Mad 218 (215).

(32) AIR 1932 Nag 92 (98). (Omission due to inadvertence.)

(31) AIR 1931 Sind 27 (27).

68. ('99) 23 Bom 597 (598, 601, 602).

(24) AIR. 1924 Nag 89 (91) : 20 Nag L R 28. (First suit against a member of the family — Second suit against the same member and his transferee is not barred.)

(12) 15 Ind Cas 214 (217) : 15 Oudh Cas 81.

(31) AIR 1931 Sind 143 (144). (Second suit for partition of property in the hands of uncle claiming adversely.)

[See also ('80) AIR 1930 Sind 66 (70). (Alienation by one of the co-harers to stranger — Suit by the other to recover his share without claiming partition is competent.)]

69. ('99) 24 Bom 128 (184).

70. ('99) 24 Bom 128 (180, 184).

71. ('18) 21 Ind Cas 402 (403, 404) (Mad).



based on distinct causes of action, see the undermentioned cases.<sup>73</sup>

The rule against a suit for partial partition is not applicable to *tenants-in-common*, as in their case there is a separate cause of action in respect of each item of the properties.<sup>73</sup>

*A* was entitled to the whole estate of a deceased person as his sole heir. *B* was in possession of a certain property belonging to the deceased. *A* under the misimpression that *B* also was an heir to the estate, sued *B* for partition and possession of a half share of the property. The suit was dismissed on the ground that a suit for partial partition of one item of property did not lie. Then, *A* realizing that he was entitled to the whole estate as the sole heir, sued for possession of the whole property. It was held that the second suit was barred under this rule.<sup>74</sup>

For other instances, see the undermentioned cases.<sup>75</sup>

See also Notes 19 and 26 below.

**11. Minor.** — Suppose the next friend of a minor suing on behalf of the minor omits to include in the suit a portion of the claim which he was entitled to make in respect of the same cause of action. Can the minor sue again in respect of it on attaining majority? He cannot,<sup>1</sup> unless the omission in the previous suit was due to

72. ('90) 1890 Pun Re No. 127, p. 416. (Absent brother's share set apart at partition in previous suit—Second suit for dividing that share as the absent one did not return not barred.)

('30) AIR 1930 All 371 (372). (Suit to enforce partition as directed by a will no bar to suit for partition of inherited properties.)

('33) AIR 1933 P C 106 (108) (P C). (Property omitted from a deed of partition—Separate suit in respect of it is not barred.)

('13) 20 Ind Cas 22 (23) (Lah). (Previous suit based on proceedings in Revenue Court for partition of agricultural land is no bar to suit for partition of *abadi* land.)

('17) AIR 1917 Oudh 403 (404). (Two suits by a member of a Hindu joint family, one in respect of the property covered by an award dividing the main portion of the family property, and the other in respect of the property that was still joint, are separately maintainable.)

73. ('97) 7 Mad L Jour 73 (75).

('12) 16 Ind Cas 883 (384) (Cal). (1903 Pun Re No. 87, Followed.)

('08) 12 Cal W N 640 (641).

('24) AIR 1924 Mad 124 (124) : 46 Mad 844.

('98) 21 Mad 153 (158).

('29) AIR 1929 Bom 323 (325). (In this case it was held that the subsequent suit was not barred by *res judicata*.)

('29) AIR 1929 Oudh 1 (5).

74. ('87) AIR 1987 Rang 824 (333).

75. ('86) 9 Mad 279 (280, 281). (Settlement of accounts—Sum found due by defendant—Defendant giving as to a portion, an order on his agent to pay, and as to the balance promising to pay within a month—Cause of action same.)

('28) AIR 1928 All 331 (332) : 45 All 384. (Mahomedan widow suing only for portion of dower debt is barred from suing for balance.)

('81) 1881 All W N 72 (72). (Award directing payment of money and delivery of title-deeds—

Separate suits not maintainable in respect of the two items.)

('01) 25 Bom 161 (166, 168). (Settlement of accounts—Debtor promising to pay portion of the sum by a certain day, and on default to execute mortgage of certain properties for whole amount—Default made—Suit for the portion of the sum promised—Subsequent suit for sale of the properties barred.)

('88) 15 Cal 422 (431) : 15 Ind App 66 (P C). (Reliefs may be different though causes of action same.)

('19) AIR 1919 Mad 653 (654). (There can be only one suit for redemption against all co-mortgagees.)

('35) AIR 1935 Nag 137 (138) : 31 Nag L R 304. (The principles of O. 2 R. 2 cannot apply to a partition suit where the Court or the Commissioner has omitted to give the income of certain property to one of the parties in a final decree. Hence, a subsequent suit for such profits is not barred as there is no "omission" to claim anything.)

('37) AIR 1937 Cal 57 (58). (*A* executing two mortgages in favour of *B*—Subsequently *B* taking *kobala* from *A* for sale of mortgaged properties for consideration made up of mortgage loans and certain cash payment—Whole consideration agreed to be recoverable in case sale was cancelled—Sale cancelled—*B* recovering by suit only cash payment and not mortgage loans—Subsequent suit on one of the mortgages—Suit held barred by O. 2 R. 2 as the new contract was one and indivisible and superseded the mortgages.)

[See also ('82) 5 Mad 47 (50, 51). (There can be only one suit for partnership accounts.)]

#### Note 11

1. ('98) 1898 Pun Re No. 76, p. 322. (The Code contains no exceptive provision in favour of a minor suing by his next friend.)

('99) 22 Mad 309 (310).

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**Notes 11-14**

the gross negligence,<sup>2</sup> fraud,<sup>3</sup> glaring laches caused by physical incapacity<sup>4</sup> on the part of the next friend or the acts of the next friend were unreasonable or improper in the conduct of the suit,<sup>5</sup> or the minor's interests were not properly safeguarded.<sup>6</sup>

**12. Intentional relinquishment.** — Sub-rule 1 of this rule provides that a plaintiff may relinquish any portion of his claim in order to bring his suit within the jurisdiction of a particular Court. That means that in bringing the suit he can, *in his plaint*, relinquish any portion of his claim in order to bring it within the jurisdiction of a particular Court; if the suit is once instituted in a Court having no jurisdiction to grant the relief prayed for, the only order that the Court can pass is to *return the plaint* under the provisions of O. 7 R. 10, and not to allow the amendment of the plaint by relinquishment of reliefs, inasmuch as to allow such amendment will be to deal with a suit over which the Court has no jurisdiction.<sup>1</sup>

Where the plaintiff intentionally relinquishes any portion of his claim, he cannot subsequently bring a fresh suit in respect of it.<sup>2</sup>

See also the undermentioned case.<sup>3</sup>

**13. Suit to include all reliefs in respect of the same cause of action.** — Sub-rule 3 provides that where a plaintiff is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them reserving, with the leave of the Court, his right to sue for the rest.

As to the effect of the omission to sue for all the reliefs, see Note 14 below.

**14. Omission to sue for all reliefs.** — If a plaintiff omits, without the leave of the Court, to sue for any of the reliefs which he is entitled to claim in respect of the cause of action, he shall not *afterwards* sue for the relief so omitted by him.<sup>1</sup> The mere fact that reliefs are claimable in the alternative will not prevent the applicability of this rule.<sup>2</sup> There are, however, exceptions to this rule :

2. ('95) 22 Cal 18 (13, 14). (Ignorance or negligence of the guardian.)

3. ('12) 14 Ind Cas 95 (97) (Cal).

4. ('09) 1 Ind Cas 400 (402) (Lah).

5. ('99) 22 Mad 309 (310).

6. ('21) AIR 1921 Bom 434 (434) : 45 Bom 805.

#### Note 12

1. ('21) AIR 1921 Mad 696 (698, 700). (Per Sadasiva Aiyar, J., Coutts-Trotter, J. contra.)

(20) AIR 1920 Nag 47 (49). (Relinquishment refers to one made before institution of suit.)

See also the following cases in which the plaintiff was held entitled to relinquish at any stage. But the cases were not cases of relinquishment for the purpose of bringing the case within the jurisdiction of any Court :

(24) AIR 1924 Mad 224 (224).

(09) 8 Ind Cas 725 (729) : 32 All 33.

(27) AIR 1927 Lah 543 (543).

(29) AIR 1929 All 308 (309).

[But see ('19) AIR 1919 Low Bur 42 (43) : 9 Low Bur. Rul 275. (It is submitted that the view is not correct and is opposed to principle.)]

2. ('18) 20 Ind Cas 173 (174) (All). (No subsequent order of the Court can revive the right.)

3. ('88) AIR 1988 Sind 247 (249). (Suit for accounts — Defendant nominally valuing his relief in his

written statement and offering to pay additional court-fee on settlement of accounts—He cannot be deemed to have relinquished his remaining claim.)

#### Note 14

1. ('11) 11 Ind Cas 87 (88) (All).

(39) AIR 1938 Bom 437 (438) : 58 Bom 67. (Beneficiary entitled to charge on trustee's property—Beneficiary obtaining personal judgment against trustee without preserving charge, loses right to enforce charge.)

(31) AIR 1931 P C 229 (280) (P C). (Suit for declaration of invalidity of sale—Subsequent suit for rent and profits barred.)

(30) AIR 1930 All 527 (529). (Suits for rent.)

(24) AIR 1924 All 849 (850).

(15) AIR 1915 All 404 (405) : 37 All 646. (Deliberate omission to claim the right relief—Subsequent suit to claim that relief is barred.)

(81) AIR 1931 Mad 705 (706, 707). (Though first Court had no jurisdiction to grant the omitted relief.)

(28) AIR 1928 Mad 840 (842).

(25) AIR 1925 Cal 305 (306).

(37) 1937 Oudh W N 1146 (1149). (It cannot be restored to him by the exercise of the inherent powers of the Court.)

2. ('82) AIR 1932 Lah 523 (525).

(1) Where the right to relief in respect of which a further suit is brought *did not exist* at the date of the former suit.<sup>3</sup>

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(2) By virtue of the special provisions of O. 34 R. 14, where a mortgagee has asked for and obtained only a *personal* decree against the mortgagor for the mortgage amount, he may, notwithstanding O. 2 R. 2, subsequently institute a *suit for sale* in enforcement of the mortgage.<sup>4</sup>

(3) Under the special provisions of the Dekkhan Agriculturists' Relief Act, 1879, Section 15D, (inserted by Act XXII of 1882) the mortgagor can sue his mortgagee first for an *account* and subsequently for *redemption*.<sup>5</sup>

The rule only applies where the plaintiff is entitled to more than one relief in respect of the same cause of action, but omits to sue for all such reliefs. This implies that the first suit is one for a relief to which the plaintiff is entitled. Hence a plaintiff who sues for a relief to which he is not entitled is not debarred from suing for a relief to which he is entitled.<sup>6</sup>

**15. Suits for possession and rent.** — Where, under a contract of lease, *A*, the lessee, is bound to pay the rent at the stated periods, and on default, to deliver up possession to the lessor *B*, and on such default occurring, *B* sues *A* for possession first and then brings a subsequent suit for rent, is the latter suit barred? The answer to this depends upon the question whether the two suits are treated as being based on the *same*, or on *different* causes of action. It has been held by the High Court of Bombay that there is *one* cause of action for both the suits and that therefore the second suit is barred.<sup>1</sup> The High Courts of Allahabad,<sup>2</sup> Lahore,<sup>3</sup> Madras<sup>4</sup> and Rangoon<sup>5</sup>

3. ('81) 3 All 857 (858, 859).

('09) 1 Ind Cas 319 (319) (Bom).

('79) 5 Cal 597 (602).

('71) 16 Suth W R 5 (9) (P C). (Suing for a new accretion.)

('68) 1 Beng L R 97 (101) (F B).

('22) AIR 1922 Mad 413 (414, 415). (Religious endowment — Scheme of management made in previous suit—Later suit for scheme on new facts is not barred.)

('98) 8 Mad L Jour 273 (276).

('27) AIR 1927 Oudh 498 (499). (Suit on a subsequent cause of action not barred.)

('25) AIR 1925 Oudh 303 (304) : 28 Oudh Cas 2.

('88) AIR 1988 Rang 290 (291). (*Obiter*.)

('34) AIR 1934 Pat 515 (518). (Suit for declaration of title to certain share— Partition by Collector of parent estate into six estates —Execution and obtaining possession of shares decreed— Collector refusing to record plaintiff's name— Fresh suit for distribution of decreed share to newly formed estates—Suit is not barred.)

[See also ('05) 27 All 254 (257). (Suit dismissed as premature — Second suit after accrual of cause of action, not barred.)

('93) 1893 Pun Re No. 35, page 183. (First suit dismissed as premature — Second suit after accrual of cause of action, not barred.)

('25) AIR 1925 Sind 242 (243). (Proceedings to file or enforce award are not "suit.")

('89) 2 Oudh Cas 17 (23).]

4. ('14) AIR 1914 All 98 (98) : 36 All 264.

('04) 26 All 223 (224, 226).

('81) 7 Cal 78 (81).

('37) AIR 1937 Mad 501 (502).

[See ('35) AIR 1935 Lah 672 (676) : 16 Lah 640 (F B). (Even apart from O. 34 R. 14 it was held that the causes of action were different and that O. 2 R. 2 did not apply.)]

[See also ('94) 17 Mad 122 (129).

('10) 6 Ind Cas 655 (656) : 1910 Pun Re No. 32.]

5. ('96) 20 Bom 469 (473, 474).

*For cases prior to the amendment of the Act see:*

('81) 5 Bom 614 (616).

('83) 7 Bom 377 (379).

6. ('25) AIR 1925 Lah 459 (460) : 6 Lah 384. (Agreement by *A* to sell property to *B*—Then, *A* agreeing to sell same property to *C* — *B* suing *A* for injunction restraining him from selling to *C* — Suit dismissed on ground that *B*'s proper remedy was by way of suit for specific performance and not by way of suit for injunction— *B* then suing for specific performance—Suit not barred.)

#### Note 15

1. ('14) AIR 1914 Bom 130 (130, 131) : 38 Bom 444.

2. ('18) 20 Ind Cas 892 (893, 894) : 35 All 512 (FB). [See contra ('95) 17 All 593 (596). (Claim for possession and for mesne profits arising out of one cause of action—Suit for possession—Subsequent suit for mesne profits barred.)]

3. ('22) AIR 1922 Lah 118 (119).

4. ('09) 32 Mad 330 (332, 333).

[But see ('82) 6 Mad 159 (163, 166). (This view cannot be accepted as correct.)]

5. ('83) AIR 1933 Rang 107 (109). (First suit for rent—Second suit for possession.)

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have, on the other hand, held that the causes of action for the two suits are *different* and the second suit is therefore not barred. See also the case cited below.<sup>6</sup> But in a recent case<sup>7</sup> the Allahabad High Court has held that where under a contract of lease of this kind the lessor first sues for rent, and subsequently for ejectment, the latter suit is barred under Order 2 Rule 2.

**16. Suits for specific performance and other reliefs.** — Where *A* sues *B* for specific performance of an agreement to sell, and subsequently on the basis of the *same agreement* sues for possession, the suit is barred under this rule inasmuch as the reliefs in both flow from the same cause of action.<sup>1</sup> But where the subsequent suit is based on the *conveyance obtained in pursuance of the decree in the first suit*, the cause of action is different, and the suit is not barred.<sup>2</sup> Where *A* first sues for possession and later on for specific performance, both being based on the same *agreement*, the latter suit is barred.<sup>3</sup>

*A* first agrees to sell his property to *B*, and then agrees to sell the same to *C*. Thereupon, *B* sues *A* for an injunction restraining *A* from executing a sale deed to *C*. The suit is dismissed on the ground that a suit for a permanent injunction does not lie. *B* then sues *A* for specific performance of his agreement. The suit is not barred.<sup>4</sup> The reason is that in such a case the plaintiff is not "entitled to more than one relief in respect of the same cause of action" as required by this rule.

**17. Partition suits.** — A partition suit should, as has been seen in Note 10 *ante*, include the entire divisible property of the parties. Similarly, a plaintiff who omits to ask for any relief which he could have claimed in a suit for partition cannot bring a separate suit for such relief. Thus, matters such as a charge of negligence against the manager should be dealt with when accounts are taken in the partition suit and not by separate suit.<sup>1</sup>

But a suit for damages for use and occupation during the period the partition suit was pending is based on a different cause of action<sup>2</sup> as also a suit on a promissory note executed by one member of a joint Hindu family in favour of another.<sup>3</sup>

8. ('37) AIR 1987 Sind 300 (302) : 32 Sind L R 80. (Cause of action distinct— Default clause in covenant is for benefit of party in whose favour it exists— It is not obligatory but optional with party to exercise it —Default clause in lease giving right to lessor to sue for ejectment and rent for unexpired period at higher rate— Lessor suing for rent from date of default till date of suit and not exercising his right under default clause— Another suit by lessor on subsequent default for rent is not barred.)

7. ('83) AIR 1983 All 84 (85).

#### Note 16

1. ('24) AIR 1924 Mad 860 (361, 363): 47 Mad 150.

('94) 18 Bom 537 (542).

('20) AIR 1920 Pat 89 (91) : 5 Pat L Jour 314. (Even possession can be asked on the basis of the agreement to sell.)

[See also ('12) 16 Ind Cas 988 (991) (Cal). (Suit for specific performance— Possession also may be asked.)

('10) 5 Ind Cas 205 (206): 37 Cal 57. (Do.)]

2. ('24) AIR 1924 Mad 860 (363): 47 Mad 150.

('94) 18 Bom 537 (542).

('14) AIR 1914 Mad 465 (466): 38 Mad 698. (Dis-senting from 22 Mad 24 which was followed by the same Judges in 12 Mad L Jour 71.)

('18) AIR 1918 Nag 221 (223): 14 Nag L R 176. ('04) 4 Nag L R 14 (18).

('26) AIR 1926 Rang 197 (198).

('38) AIR 1938 Rang 290 (291). (Obiter.)

[See also ('25) AIR 1925 Bom 181 (182).]

3. ('01) 24 Mad 491 (503): 28 Ind App 221 (PO).

4. ('25) AIR 1925 Lah 459 (460) : 6 Lah 384.

#### Note 17

1. ('22) AIR 1922 Bom 119 (120) : 46 Bom 327.

('22) AIR 1922 Bom 9 (9): 46 Bom 823. (Partition suit —Subsequent suit for accounts for a period prior to partition suit is barred.)

('35) AIR 1935 Pat 80 (82). (Partition suit by coparcener—Until his share is actually determined, he cannot claim meane profits in sense of damages from karta or coparcener in possession of property—Equally so a purchaser of his interest — But coparcener in possession must account for share of profits from date of suit—Such accounting must be in partition suit itself and not by separate suit.)

[See also ('32) AIR 1932 Lah 448 (449). (Suit for partition — Subsequent suit for meane profits due before former suit barred but not for subsequent meane profits.)]

2. ('20) AIR 1920 Cal 587 (588).

3. ('12) 18 Ind Cas 458 (462): 36 Mad 151.

It has been held that when there is no *omission* on the plaintiff's part to claim a certain relief, the mere fact that the final decree fails to grant such relief will not make this rule applicable.<sup>4</sup>

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**Notes 17-18**

**18. Mortgage suits.** — Ordinarily a suit on a mortgage bond should be for the whole amount due under the mortgage to avoid multiplicity of suits and neither the mortgage money, nor the security can be split up without the consent of the parties or permission of the Court.<sup>1</sup>

In a suit for redemption, all claims between mortgagor and mortgagee should be settled, and a separate suit for excess profits received by the mortgagee cannot be brought even though such profits may accrue after the institution of the suit.<sup>2</sup> But a separate suit is maintainable for the mesne profits accruing after the date of payment under the preliminary decree.<sup>3</sup> There is, however, one case in which it has been held that the plaintiff is bound to claim mesne profits up to *delivery of possession*<sup>4</sup> while, on the other hand, there is a decision to the effect that a separate suit lies for mesne profits accruing after the *decree*.<sup>5</sup>

Where a usufructuary mortgagee being deprived of possession, sues for possession alone, and fails to pray in the alternative for the return of the mortgage money, under Section 68, Transfer of Property Act, he cannot, on his suit for possession being dismissed, sue for the mortgage money.<sup>6</sup>

But where the two suits are based on distinct causes of action, the second suit will not be barred although the claim to relief may arise out of the same mortgage.<sup>7</sup>

For a full discussion, see Note 10 above.

4. ('35) AIR 1935 Nag 187 (138): 31 Nag L R 304. (Omission to divide profits of certain property—Fresh suit not barred — In this case, however, the effect of Section 11 Explanation 5 was not considered.)

#### Note 18

1. ('31) AIR 1931 Cal 806 (807).  
2. ('69) 6 Bom H C R A C 97 (99, 100). (Surplus due from the mortgagees not sued for—Subsequent suit therefore is barred.)

('08) 30 All 225 (227).

('08) 30 All 36 (37).

('07) 31 Bom 527 (533, 534). (Deposit of mortgage money in Court preceding suit—Suit to include claim for subsequent mesne profits.)

('27) AIR 1927 Nag 302 (303). (Do.)

('09) 2 Ind Cas 834 (835): 12 Oudh Cas 152. (Do.)

('07) 34 Cal 223 (232, 238). (Do.)

('25) AIR 1925 Rang 13 (14): 2 Rang 382. (Claim for mesne profits from date of order of redemption must be incorporated in suit for redemption and no separate suit will lie.)

('10) 6 Ind Cas 336 (337) (Cal).

('20) AIR 1920 Mad 531 (532). (Suit to enforce mortgage dismissed because the mortgage was found satisfied and the mortgagee was found liable to pay to the mortgagor—Mortgagor cannot sue for such excess amount.)

('14) AIR 1914 Mad 120 (120). (Mortgagee cannot sue separately for value of crops standing on the land at the time of delivery of possession to the mortgagor.)

('36) AIR 1936 Cal 200 (202). (The claim of the mortgagor for over-payments to the mortgagee or excess profits received by the mortgagee must

be included in his suit for redemption and if he does not include this claim he would be debarred from claiming the same in a subsequent suit.)

3. ('20) AIR 1920 Pat 106 (106): 5 Pat L Jour 595.

('26) AIR 1926 Cal 178 (178).

('18) AIR 1918 Mad 284 (284). (Mortgagor's remedy is not restricted to adjustment in final decree.)

('16) AIR 1916 Oudh 230 (231): 19 Oudh Cas 161.

4. ('24) AIR 1924 All 909 (910).

5. ('10) 6 Ind Cas 336 (337) (Cal).

6. ('21) AIR 1921 Lah 809 (810).

('32) AIR 1932 Lah 523 (524, 525).

('81) 1881 Pun Re No 90.

('26) AIR 1926 Pat 87 (88, 89).

('25) AIR 1915 Oudh 524 (525): 28 Oudh Cas 82.

('24) AIR 1924 Oudh 147 (149).

('36) AIR 1936 Pesh 86 (87).

7. ('27) AIR 1927 All 713 (713). (Mortgagee bound to pay rent, but committing breach—Mortgagor paying the same — He can recover the same in the redemption suit or by a separate suit under Section 69, Contract Act.)

('04) 27 Mad 102 (105). (Usufructuary mortgagee may sue for possession after the dismissal of a suit for sale as on a simple mortgage.)

('13) 19 Ind Cas 398 (394): 6 Sind L R 140. (Suit for a declaration that a mortgage has been satisfied and for recovery of surplus money paid to the mortgagee which is dismissed as premature as the mortgage was not found to be satisfied does not bar a suit for redemption.)

[But see contra ('18) AIR 1918 Lah 289 (290): 1918 Pun Re No. 119.]

**O. 2 R. 2**  
**Note 19**

**19. Other examples. —**

- (1) A suit for specific performance of a contract bars a subsequent suit for damages for failure to perform the contract.<sup>1</sup>
- (2) A suit for a personal decree for maintenance bars a subsequent suit for declaring it a charge on property.<sup>2</sup>
- (3) A suit for exclusive possession being dismissed, a second suit for joint possession is barred.<sup>3</sup>
- (4) The dismissal of a suit for possession bars a suit for declaration of title.<sup>4</sup>
- (5) Where there is an agreement to pay a debt partly in cash and partly by executing a mortgage, a single suit must be brought for *both* the reliefs.<sup>5</sup>
- (6) A suit for damages for dismantling a building bars a subsequent suit for declaration of title to and partition by metes and bounds of the land on which the building stood where the allegations in the previous suit were that the defendant had not only deprived plaintiff of the possession of the land but also had wrongfully appropriated the materials of the building on demolishing it.<sup>6</sup>
- (7) A suit for an injunction bars a subsequent suit for damages on the same cause of action.<sup>7</sup>
- (8) A suit for the recovery of the value of property wrongfully taken bars a subsequent suit for damages for the wrongful act.<sup>8</sup>
- (9) A suit by a lessee against his lessor for loss of income caused by his eviction before the expiry of the lease bars a suit for damages for breach of the covenant for quiet enjoyment.<sup>9</sup>

See also the undermentioned cases.<sup>10</sup>

Note 10 *ante* and Note 26 *infra* may also be referred to in this connection.

**Note 19**

1. ('71) 15 Suth W R 408 (410).
2. ('88) 11 Mad 127 (129).  
( '93) 17 Mad 268 (270).  
( '31) AIR 1931 Mad 705 (707).  
( '89) 12 Mad 285 (286).  
( '37) AIR 1937 All 56 (57) : I L R (1937) All 269.  
(The mere ground that the wife entertains any apprehension as regards the husband's transferring his property would not afford her a new cause of action for the relief sought for by her in the second suit.)
3. ('11) 11 Ind Cas 87 (88) (All).  
[See ('03) 1903 All W N 97 (98). (Suit for possession of a share of joint property on the ground that it has been partitioned bars a subsequent suit for partition and possession of such share.)]
4. ('02) 5 Oudh Cas 173 (175).  
( '07) 10 Oudh Cas 44 (48). (Suit for possession against lessee.)  
( '05) 8 Oudh Cas 389 (392, 398).
5. ('01) 25 Bom 161 (166).
6. ('20) AIR 1920 Cal 978 (979) : 46 Cal 640.
7. ('88) 1888 Pun Re No. 190, page 489.
8. ('72) 18 Suth W R 337 (338).  
(1865) 4 Suth W R (S C C Ref) 20 (21).
9. ('92) 2 Mad L Jour 190 (199).
10. ('86) 1886 Pun Re No. 47, page 88. (Occupancy tenant mortgaging holding with possession — Suit by landlord for cancellation of mortgage

bars suit for possession.)

- ( '33) AIR 1933 Bom 437 (438) : 58 Bom 67.  
(Beneficiary entitled to charge on trustee's property for money not accounted for — Beneficiary obtaining personal judgment without reserving right to charge loses his right to enforce charge.)
- ( '10) 5 Ind Cas 126 (127) (All). (Suit for damages on the ground of dispossession bars suit for possession.)
- ( '81) 1881 All W N 93 (93). (Suit to avoid mutation order bars a subsequent suit to establish right to property in respect of which mutation order is made.)
- ( '93) 20 Cal 822 (825). (Suit for possession of land — Second suit for possession of trees on land — Defendant's wrongful acts same in both the cases — Second suit barred.)
- ( '78) 20 Suth W R 144 (145).
- ( '07) 1907 Pun L R No. 28. (First suit for a declaratory decree to build a drain on a piece of land — Second suit for damages caused by the defendant's refusal to allow the plaintiff to build the drain barred.)
- ( '20) AIR 1920 Mad 680 (685). (Claims arising out of same partnership — Only one suit lies.)
- ( '01) 24 Mad 491 (508) : 28 Ind App 221 (P C).  
(Suit for possession on an agreement to sell — Subsequent suit for specific performance of the agreement barred.)
- ( '24) AIR 1924 Oudh 129 (131) : 26 Oudh Cas 98.  
(Co-sharer obtaining declaration that certain gift will not affect his rights — Further suit that

**20. Leave of Court.** — Under sub-rule 3, where a plaintiff is entitled to more than one relief in respect of the same cause of action but omits to ask for some of them, he shall not, *except where the omission has been with the permission of the Court*, sue again for them.<sup>1</sup> The leave need not be *express* but may be inferred from the circumstances of the case.<sup>2</sup> The competence of the Court to grant leave is not affected by the value of the relief sought to be omitted.<sup>3</sup> But, as has been seen in Note 10 *ante*, its power is confined to reliefs only and does not extend to allowing a splitting up of *claims*.<sup>4</sup>

Under the Code of 1882, the leave had to be obtained *before the first hearing*. The said words having been omitted in this Code, it would seem that the leave may be granted at any stage of the suit.

Leave under this rule may be obtained after the first hearing; it is not necessary that the application for leave should precede or accompany the plaint in the suit.<sup>5</sup>

**21. Identity of the parties necessary for the application of the rule.** — In order that the rule may apply, the two suits must be between the same parties or between persons claiming through the same parties.<sup>1</sup> Thus, where the plaintiff<sup>2</sup> or the defendant<sup>3</sup> in the subsequent suit is different from the plaintiff or the defendant in the

the gift should not affect the choice by the partition Court to allot the plot to the plaintiff not barred.)

(‘09) 4 Ind Cas 534 (535) (Cal). (Suit for specific performance of a contract to reconvey land to plaintiff bars a suit for mesne profits to which plaintiff is entitled on account of the delay in reconveyance.)

(‘83) 6 Mad 159 (163, 166). (Suit for rent does not bar suit to enforce a forfeiture for non-payment of the same rent.)

(‘35) 158 Ind Cas 1119 (1120) (Nag). (A suit for specific performance in which damages have been disallowed is a bar to a suit for mesne profits for the period in respect of which damages were disallowed.)

(‘85) AIR 1935 Pat 222 (224). (Suit for possession of property covered by lease—Decree obtained—Subsequent suit for ejectment and decree obtained—Third suit for demolition of buildings on such property—*Held* separate suit for such relief did not lie—This ought to have been raised in executing Court—Fact that such point by defendant was not taken in second suit does not help plaintiff in maintaining third suit—Fact that another person not party to original proceeding has been impleaded does not enable plaintiff to meet plea of defendant in third suit.)

#### Note 20

1. (‘21) AIR 1921 Pat 193 (195) : 6 Pat L Jour 373 (F B). (Leave of Court exempts the plaintiff from the bar.)

(‘38) AIR 1938 Rang 200 (292).

(‘38) AIR 1938 Rang 76 (79) : 1937 Rang L R 447. (There is no provision of law by which a plaintiff can reserve the right to split his claim arising out of the same cause of action.)

2. (‘21) AIR 1921 Pat 193 (195) : 6 Pat L Jour 373 (F B).

(‘27) AIR 1927 Rang 237 (238). (It is sufficient if

it can be implied from the order.)

(‘38) AIR 1938 Mad 865 (876, 877).

[See (‘37) 1937 Oudh W N 1146 (1149). (Where there has been an omission to sue for all reliefs in respect of the same cause of action, the remark of the Court in its judgment that a suit in respect of the omitted relief could be brought later on, does not amount to the leave of the Court in the sense in which it is used in O. 2 R. 2 (3), C. P. Code.)]

3. (‘10) 8 Ind Cas 689 (690) : 33 All 244.

(‘16) AIR 1916 Low Bur 43 (44).

[See (‘38) AIR 1938 Rang 290 (292). (Competency of Court to grant relief does not affect question of leave.)]

4. (‘17) AIR 1917 Cal 841 (843, 844) : 43 Cal 95.

5. (‘38) AIR 1938 Mad 979 (982) : 1 L R (1939) Mad 317.

#### Note 21

1. (‘10) 6 Ind Cas 226 (227) (All).

(‘29) AIR 1929 Mad 96 (103).

(‘12) 17 Ind Cas 434 (436) (Mad).

(‘12) 15 Ind Cas 833 (835) (Oudh).

(1865) 3 Suth W R 25 (26). (Suit by an heir on the same cause of action on which a suit is previously brought by his father, though for different property, is barred.)

2. (‘95) 22 Cal 692 (705, 707). (Plaintiff in a subsequent suit was a defendant in the former suit.)

(‘20) AIR 1920 Cal 537 (538). (Do.)

(‘10) 6 Ind Cas 603 (604) (Mad). (Title asserted in one plaintiff—Subsequent suit on the basis of title vesting in the plaintiff and others not barred.)

3. (‘19) AIR 1919 All 270 (271) : 41 All 588. (First suit against A—Second suit against A and others not barred.)



**O. 2 R. 2**  
**Note 21**

previous suit, the rule does not apply. The same principle holds good even in cases where same persons sue or are sued in different capacities in the two suits.

*Illustrations*

1. When a decree is obtained and its execution is resisted, a suit against the person resisting execution is not barred under this rule.<sup>4</sup>
2. A suit for money does not bar a subsequent suit against others for enforcement of charge or lien in respect of that debt.<sup>5</sup>
3. A prior mortgagee sues on the mortgage without making the puisne mortgagee a party to the suit. A subsequent suit for the sale, by the mortgagee against the puisne mortgagee is not barred.<sup>6</sup> Similarly, a suit by the puisne mortgagee for sale without impleading the prior mortgagee does not bar a suit for redemption of the prior mortgage.<sup>7</sup>
4. A suit for redemption against a mortgagee is no bar to suit for contribution against a co-mortgagor.<sup>8</sup>
5. A suit for accounts and profits against a co-sharer does not bar a suit for profits against the same person as lambardar.<sup>9</sup>
6. In the case of joint promisors separate suits are maintainable against each of them, because under the Indian Contract Act joint promisors are jointly and severally liable.<sup>10</sup>
7. Where certain trustees had failed to ask for a certain relief in a suit brought by them, the Advocate-General is debarred from suing for that relief subsequently.<sup>11</sup>
8. A suit against J. M. and a suit against "Picture Palace," by its managing proprietor J. M. are suits against different defendants.<sup>12</sup>
9. A suit for profits by plaintiff in respect of his own share is no bar to a suit by him as the assignee of the profits due to another co-sharer.<sup>13</sup>
10. A suit against a mother in her personal capacity on a mortgage executed by her on behalf of her son is no bar to a suit against the son on the basis of the mortgage.<sup>14</sup>

('20) AIR 1920 Bom 90 (93) : 44 Bom 352. (Separate suits for possession against different sets of defendants, of different properties included in one auction sale are not barred.)

('16) AIR 1916 Bom 810 (812) : 40 Bom 851.

('83) 1883 All W N 172 (172).

('76) 2 Agra 323 (323). (Several suits against several representatives of a deceased debtor not prohibited.)

('03) 27 Bom 379 (388, 389).

('90) 14 Bom 408 (415, 416). (Nominal defendant in former suit — Later suit against him as real defendant — Not barred.)

('18) 21 Ind Cas 397 (400) (Cal).

('02) 25 Mad 736 (740).

('80) AIR 1980 Nag 119 (120). (Suit by a landlord against mortgagees from tenant for declaring the mortgage void — Subsequent suit against mortgagees and tenant for eviction not barred.)

('18) AIR 1918 Nag 241 (241).

('25) AIR 1925 Oudh 58 (54).

('24) AIR 1924 Oudh 129 (131) : 26 Oudh Cas 98.

('90) 3 C P L R 3 (6).

4. ('98) 16 Mad 449 (450). (First suit against executant of a bond, second suit against other person resisting execution of decree not barred.)

('86) 1886 All W N 269 (269, 272). (Mortgagee obtaining decree against mortgagor—Execution of decree resisted by another—Suit against latter not barred.)

('81) 6 Cal 142 (146, 147). (Suit by mortgagee against mortgagor—Third person resisting execution of decree—Suit against him not barred.)

('69) 11 Suth W R 149 (149). (Decree against A — Suit against B who resists execution of that decree, not barred.)

5. ('80) 1880 Pun Re No. 118, page 276. (First suit for money against mortgagor—Second suit to enforce lien against subsequent purchaser not barred.)

('71) 15 Suth W R 486 (486). (Mortgagee obtaining money decree — Mortgaged property in the hands of different alienees—Mortgagee may sue the alienees separately to enforce his lien.)

('82) 1882 Pun Re No. 142, page 412. (Money decree against mortgagor is no bar to a suit to enforce lien against third parties.)

[See also ('82) 4 All 257 (258). (Mortgagee obtaining mortgage decree against mortgagor — Purchaser of property resisting execution—Suit for declaration that the property was liable for sale in execution of the mortgage decree against purchaser not barred.)]

6. ('10) 5 Ind Cas 451 (452) : 32 All 119.

7. ('97) 19 All 879 (880, 881, 883, 884, 885) (FB). [But see ('07) 10 Oudh Cas 145 (149). (Suit for sale by puisne mortgagee dismissed—Subsequent suit for redemption held barred.)]

8. ('29) AIR 1929 All 696 (697).

9. ('10) 6 Ind Cas 809 (809) (All).

[See also ('19) AIR 1919 All 438 (438) : 41 All 286. (Suit for profits against lambardar does not bar suit against him as trespasser for mesne profits of other lands.)]

10. ('10) 83 Mad 317 (322).

('84) 10 Cal 924 (927, 928).

('80) 5 Cal 291 (294).

11. ('94) 18 Bom 551 (568, 569).

12. ('24) AIR 1924 Rang 161 (162) : 1 Rang 682.

13. ('12) 17 Ind Cas 838 (838) (All).

14. ('16) AIR 1916 Mad 459 (460, 461).

('88) 1888 Pun Re No. 41.



11. A suit for specific performance of a contract of sale against *A* is no bar to a suit for possession against *A* and *B* in whose favour *A* had executed a conveyance.<sup>15</sup>

12. A suit for partition of properties held jointly by the plaintiff's family is no bar to a suit for partition of properties held by the family jointly with strangers.<sup>16</sup>

For other instances, see the undermentioned cases.<sup>17</sup>

**22. The previous decision must have been on the merits to operate as a bar.** — The rule will not operate as a bar where the decision in the previous suit has not been on the merits. Thus, where the Judge in the previous suit has refused to adjudicate on a certain matter, a fresh suit in respect of it is not barred.<sup>1</sup>

Similarly, where a previous suit has been dismissed on the ground of technical defect, the bar of this rule does not apply.<sup>2</sup> As has been seen already in Note 10 *ante*, where a plaint has been returned for re-presentation to the proper Court or where the suit is withdrawn with leave to sue again under O. 23 R. 1, the fresh suit may include reliefs omitted in the prior plaint.

15. ('02) 6 Cal W N 314 (818).

16. See Note 10 foot-note 68 *supra*.

17. (01) 1901 All W N 115 (115) : 22 All 384. (Plaintiff claiming by succession — Estate in hands of different persons—Separate suits lie.)

('02) 25 Mad 736 (740). (Omission to include present claim for land in a former suit for other land—Ground of title similar in both suits, but defendants different and different lands claimed —Held, suit was maintainable.)

('67) 2 Arg 328 (323). (Property of deceased in hands of his several representatives—Creditor of deceased not bound to sue all in same suit.)

('08) 27 Bom 379 (888, 889). (Auction-purchaser may sue separately different persons in possession of the estate.)

('20) AIR 1920 Bom 90 (93) : 44 Bom 352. (Separate suits for possession against different sets of defendants, of separate properties included in one auction sale are not barred.)

('27) AIR 1927 Cal 287 (238).

('18) 21 Ind Cas 897 (400) (Cal). (First decree against *E* as legal representative of *J*.—Second suit against *J*'s widow as *J*'s legal representative not barred.)

('08) 8 Cal W N 54 (55). (First suit to annul incumbrances against some cosharers under-tenure-holders—Second suit against other cosharers not barred.)

('73) 20 Suth W R 450 (453) (PC). (Different properties—Different defendants—Separate suits maintainable.)

('26) AIR 1926 Lah 549 (549). (Prior suit for possession by heir of deceased owner against proprietary body—Proprietary body claiming by escheat—Part of property in possession of mortgagee — Subsequent suit for redemption after expiry of period of mortgage is not barred.)

('24) AIR 1924 Oudh 129 (181) : 26 Oudh Cas 98. (Suit against Hindu widow for possession — Separate suit lies for setting aside gift in favour of daughter.)

('86) AIR 1986 All 422 (429). (Previous suit for possession and management of certain estate against certain persons in personal capacity — Subsequent suit against same persons, as shebais and managers, in respect of property

of idol—Decision in previous suit does not bar subsequent suit.)

### Note 22

1. ('18) AIR 1918 All 412 (413) : 40 All 292.

('25) AIR 1925 Rang 313 (314). (Court rejecting claim for mesne profits as not claimable — Second suit for mesne profits not barred, as there is no omission or intentional relinquishment on part of plaintiff.)

('90) 14 Bom 31 (55, 56). (Partition suit—Amendment of plaint so as to include claim to partition based on award—Second suit based on award is not barred.)

('73) 10 Bom H C R A C 369 (372).

('24) AIR 1924 Lah 21 (23) : 4 Lah 76. (Suit by mortgagee for maintenance of possession or in the alternative for interest, is not barred by a previous suit for possession.)

('15) AIR 1915 Lah 303 (305). (Relief claimed but not granted—Direction to file separate suit—Subsequent suit for the relief not barred.)

('12) 15 Ind Cas 930 (931, 932, 933) : 1912 Pun Re No 56. (Previous suit dismissed against some of the defendants for non-disclosure of cause of action, with liberty to bring fresh suit against them—The dismissal, not being adjudication between the parties, subsequent suit is not barred.)

('31) AIR 1931 Mad 830 (832). (Court refusing a relief since suit not properly framed, with liberty to bring a fresh suit—Subsequent suit for the relief not barred.)

('28) 108 Ind Cas 406 (406) (Mad).

('01) 11 Mad L Jour 332 (333).

2. ('15) AIR 1915 Lah 416 (417) : 1915 Pun Re No. 87. (Former suit was dismissed as it was for partial partition.)

('30) AIR 1930 Lah 634 (635).

('85) 1885 Pun Re No. 35, page 65. (Suit for declaration dismissed for not asking consequential relief—Fresh suit not barred.)

('84) 1884 Pun Re No. 66, page 181.

('01) 14 O P L R 104 (106).<sup>1</sup>

[See also ('85) AIR 1985 Cal 764 (766). (Amendment of plaint—Plaintiff directed to give value of property and put in deficit court-fee — Non-compliance — Suit dismissed for default on

**O. 2 R. 2**  
**Note 23**

**23. Rule does not apply to different causes of action.** — The rule does not require that the plaintiff should unite in the same suit *all the causes of action* he may have against the defendant. So, it does not operate as a bar when the subsequent suit is based on a cause of action different from that on which the first suit was based,<sup>1</sup>

rejecting application for permission to withdraw—Fresh suit is not barred.)]

[**But see** ('37) AIR 1937 Rang 324 (380). (First suit for partition of one item of property as co-heir of deceased—Suit dismissed as suit for partial partition does not lie — Second suit claiming possession of the whole of that item of property on the ground that plaintiff is the sole heir of deceased — Suit held to be barred under this rule.)]

**Note 23**

1. ('15) AIR 1915 Mad 888 (888) : 38 Mad 247.
- ('33) AIR 1933 All 852 (858). (Account suit for particular period—Subsequent suit for different period prior to that in former suit on allegation of existence of separate account.)
- ('32) AIR 1932 Bom 86 (88). (Suits on two different contracts.)
- ('33) AIR 1933 Bom 398 (400): 57 Bom 456. (Suit for setting aside sale — Separate suit for possession not barred.)
- ('95) 21 Bom 267 (271).
- ('11) 10 Ind Cas 26 (27) (All). (Suit to recover mortgage money by sale of mortgaged property dismissed mortgage being usufructuary — Subsequent suit for possession not barred.)
- ('05) 2 All L Jour 342 (344). (Suit for possession of the whole property dismissed, parties being joint owners—Subsequent suit for declaration of right, not barred.)
- ('05) 27 All 142 (144). (Suit by heirs of a deceased Mahomedan to recover share, against the deceased's widow in possession—Suit dismissed as the widow held the property by virtue of lien on it for unpaid dower—Subsequent suit for redemption of the dower debt and possession after redemption—The two causes of action being separate and distinct, the latter suit not barred.)
- ('29) AIR 1929 All 29 (30). (Government revenue of certain patti assigned to two persons in different shares — Suit against one, by the mortgagee of both to recover revenue — Subsequent suit against the other not barred.)
- ('71) 3 N W P H C R 27 (30).
- ('29) AIR 1929 All 696 (697). (Redemption and contribution are different causes of action.)
- ('71) 3 N W P H C R 20 (21).
- ('29) AIR 1929 Bom 460 (462).
- ('99) 23 Bom 597 (598, 599). (First suit for partition of family property—Second suit for partition of property held jointly by family and others.)
- ('72) 9 Bom H C R 257 (259).
- ('29) AIR 1929 Cal 98 (96).
- ('23) AIR 1923 Cal 371 (373).
- ('20) AIR 1920 Cal 755 (757).
- ('21) AIR 1921 Cal 321 (322). (Same property — Same creditor having two independent mortgages can bring separate suits.)
- ('31) AIR 1921 Cal 277 (279, 280).
- ('29) AIR 1929 Mad 545 (561).
- ('15) AIR 1915 Cal 475 (476).
- ('15) AIR 1915 Cal 126 (126, 128) : 41 Cal 825.
- ('15) 26 Ind Cas 228 (230) : 41 Ind App 142 (PC).
- ('12) 16 Ind Cas 383 (384, 385) (Cal).
- ('09) 3 Ind Cas 395 (396) (Cal).
- ('88) 15 Cal 800 (808) : 15 Ind App 106 (P C).
- ('67) 11 Moo Ind App 551 (605) (P C).
- ('70) 13 Suth W R 196 (197).
- ('66) 5 Suth W R 182 (184).
- ('28) AIR 1928 Lah 298 (239) : 9 Lah 451.
- ('20) AIR 1920 Lah 184 (186).
- ('17) AIR 1917 Lah 139 (141).
- ('15) AIR 1915 Lah 416 (417) : 1915 Pun Re No. 87.
- ('94) 1894 Pun Re No. 23, page 56.
- ('81) 1881 Pun Re No. 123, page 296.
- ('85) 1885 Pun Re No. 35, page 65. (Suit for declaration of title as adopted son, dismissed — Subsequent suit for partition on the ground of adoption not barred.)
- ('30) AIR 1930 Mad 264 (267).
- ('28) AIR 1928 Mad 840 (842). (Suit under O. 21 R. 63 for declaration decreed — Subsequent suit for possession not barred.)
- ('25) AIR 1925 Mad 1172 (1172). (Causes of action different — Same relief claimed in both suits — Subsequent suit not barred.)
- ('23) AIR 1923 Mad 257 (260) : 46 Mad 135.
- ('18) AIR 1918 Mad 78 (80, 81). (Suit on non-existent or false cause of action does not bar suit on true cause of action.)
- ('09) 2 Ind Cas 313 (314) : 82 Mad 330. (First suit for possession; second suit for rent not barred.)
- ('03) 26 Mad 760 (766).
- ('03) 26 Mad 104 (107, 108).
- ('98) 21 Mad 153 (156, 158).
- ('87) 10 Mad 347 (350). (First suit for declaration of title to continue to enjoy separate possession of land—Subsequent suit for partition.)
- ('85) 8 Mad 510 (524) : 12 Ind App 116 (P C). (First suit for possession upon dispossession — Subsequent suit for share of personal property, plaintiff being entitled to both under will.)
- ('83) 6 Mad 49 (58).
- ('79) 2 Mad 352 (355).
- ('27) AIR 1927 Nag 322 (322, 323). (Alternative causes of action.)
- ('26) AIR 1926 Nag 109 (114) : 22 Nag L R 49. (Suit for refund of purchase money from vendor on ground of defective title is not barred by a previous suit for possession of property sold.)
- ('24) AIR 1924 Nag 214 (214, 215). (Dispossession at different times of two different properties — Defendant claiming under different titles — Held, there were two distinct causes of action.)
- ('24) AIR 1924 Nag 89 (90) : 20 Nag L R 28. (Suit for partition of unalienated portion of joint Hindu family property — Subsequent suit for partition of the alienated property against the same defendant and his transferee.)

although such cause of action may arise from the same transaction as the cause of action in the previous suit.<sup>3</sup>

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**Notes 23-24**

Where a plaint is returned for presentation to the proper Court, a cause of action arising after the *original* presentation of the plaint should be deemed to have arisen subsequent to the previous suit.<sup>3</sup>

**24. First suit for possession — Second for mesne profits.** — There is a conflict of opinion as to whether a suit for possession bars a subsequent suit for mesne profits accrued *before* the suit. It was held in the undermentioned cases<sup>1</sup> that it does not, on the ground that the second suit is based on a cause of action different from that

('28) AIR 1923 Pat 575 (575). (First suit for compulsory registration of document — Subsequent suit for possession is not barred.)

('21) AIR 1921 Pat 148 (145). (Relief to which plaintiff is not entitled on his allegations in plaint in previous suit, is not barred in the subsequent suit.)

('29) AIR 1929 Oudh 162 (166).

('28) AIR 1928 Oudh 411 (412, 413). (Previous suit on the ground of unchastity of a widow resulting in forfeiture of her rights—Subsequent suit based on the right of reversioners arising on the widow's death—The later suit not barred.)

('17) AIR 1917 Oudh 20 (22). (Causes of action in respect of same property different — Subsequent suit is not barred.)

('27) AIR 1927 Rang 237 (238).

('28) 109 Ind Cas 65 (67) (Nag).

('29) AIR 1929 Rang 55 (59) : 6 Rang 691.

('90) 14 Bom 31 (55, 56).

('35) AIR 1935 All 790 (790, 791). (Two separate and unconnected buildings erected on land — Suit for removal of one and possession of land underneath dismissed — Subsequent suit for removal of other is not barred.)

('35) AIR 1935 All 174 (178).

('35) AIR 1935 Lah 842 (843).

('37) 41 Cal WN 1179 (1182) : I L R (1937) 2 Cal 651. (Suit to set aside sale under Bengal Revenue Sales Act on ground of irregularities in sale — Allegation that irregularities were due to fraudulent conduct of defendant—Suit dismissed for default — Subsequent suit for declaration that defendant has bought property fraudulently and for directing him to re-convey property is not barred as causes of action are different.)

('35) AIR 1935 Lah 672 (676) : 16 Lah 640 (FB). (Mortgagee is not bound to sue for the realisation of his security in a suit to enforce the personal covenants of the mortgagor to pay the overdue interest as the two claims arise out of distinct causes of action.)

('36) AIR 1936 Nag 268 (269) : I L R (1937) Nag 94.

('37) AIR 1937 Sind 300 (302) : 32 Sind L R 80.

('38) AIR 1938 Rang 364 (366). (Contract of sale of 1500 bags in 8 instalments—Each instalment giving rise to separate cause of action.)

('35) AIR 1935 Bom 306 (308) : 59 Bom 454. (Suit for partition and possession decreed— Suit for mesne profits, cause of action not having arisen when first suit was filed—No bar.)

('35) AIR 1935 Lah 156 (156). (Where one of the proprietors reclaims *shamilat* land and a suit

for ejectment by the proprietary body is dismissed and the former reclaims a further piece of *shamilat* land, a subsequent suit to eject him from the land reclaimed subsequently is not barred under O. 2 R. 2.)

2. ('30) AIR 1930 Lah 688 (689).

('26) AIR 1926 Cal 1022 (1026).

('15) 26 Ind Cas 228 (230) : 41 Ind App 142 : 17 Nag L R 56 (PC).

('37) AIR 1937 All 401 (405) : I L R (1937) All 489. (Property misdescribed in sale deed — Suit by vendee for possession without any prayer for relief of rectification—Suit dismissed as no cause of action arose for possession—Subsequent suit for rectification and possession is not barred under S. 11 or O. 2 R. 2 as causes of action are distinct and separate though arising from same transaction.)

('36) AIR 1936 Rang 167 (167). (Where a suit for possession of land on the ground that the plaintiff had bought it fails, on the ground that the transaction really amounts to a mortgage by conditional sale and not to an agreement to purchase coupled with an agreement for resale, it is not a bar to a subsequent suit on the basis that the transaction was a mortgage.)

('37) AIR 1937 Oudh 263 (265) : 13 Luck 192. (Prior suit for rectification of sale-deed and for possession of portion of property wrongly shown as exempted from sale—Subsequent suit for possession of property shown as sold in sale-deed is not barred though both arose out of the same transaction of sale.)

('38) AIR 1938 Mad 255 (256).

3. ('25) AIR 1925 Nag 54 (56, 57).

('90) 1890 All W N 243 (244).

#### Note 24

1. ('91) 4 C P L R 88 (89).

('20) 1920 All 302 (302).

('02) 24 All 501 (503). (Suit for possession under S. 9, Specific Relief Act, no bar to suit for mesne profits.)

('24) AIR 1924 Bom 368 (368).

('92) 19 Cal 615 (617).

('70) 13 Suth W R 15 (19) (FB). (No adjudication as to mesne profits in the first case.)

('67) 7 Suth W R 429 (429). (Do.)

('89) 1889 Pun Re No. 129, page 452.

('16) AIR 1916 Mad 328 (331). (Suit for possession under S. 9, Specific Relief Act, no bar to suit for mesne profits.)

('15) AIR 1915 Mad 912 (913) : 38 Mad 829 (FB).

('08) 31 Mad 405 (406). (11 Mad 151, Not followed.)

**O. 2 R. 2**  
**Note 24**

of the first. The High Court of Allahabad<sup>3</sup> and the Oudh Judicial Commissioner's Court<sup>3</sup> have taken a contrary view. There is also a conflict of opinion as to the maintainability of a separate suit for mesne profits accruing *after* the institution of a prior suit for possession, some cases being in favour of the maintainability of such a suit<sup>4</sup> and others against it.<sup>5</sup> But where the claims for possession and mesne profits are based on the *same allegations* of facts, the reliefs cannot be split up.<sup>6</sup>

Though a suit for possession and a suit for mesne profits may be treated as being based on distinct causes of action, a claim for mesne profits cannot itself be split up; the plaintiff should include the whole of the mesne profits accrued due at the time of the suit.<sup>7</sup>

It has been held in the undermentioned cases that a suit for mesne profits is no bar to a subsequent suit for possession.<sup>8</sup> The contrary view has been taken in the cases cited below.<sup>9</sup>

- (21) AIR 1921 Nag 112 (113) : 17 Nag L R 62. (Claim for mesne profits need not be made in application for reinstatement of possession whether S. 144, C. P. C. applies or not.)
- (26) AIR 1926 Rang 137 (138) : 4 Rang 103. (3 Low Bur Rul 56, Dissented from.)
- (10) 8 Ind Cas 445 (447, 448) (Low Bur). (1900-02) 1 Low Bur Rul 13 (14). [See also ('92) 14 All 531 (536, 537).]
- (69) 6 Bom II CR A C 109 (112, 113). (Suit for mesne profits accrued during the previous suit.)
- (90) 17 Cal 968 (971).
- (69) 1869 Pun Re No. 44.
- (31) AIR 1931 Pat 233 (233, 234) : 10 Pat 329. (Claim for mesne profits is maintainable in absence of claim for recovery of possession.)
- [But see ('14) AIR 1914 Bom 130 (130) : 38 Bom 444. (Stipulation in lease entitling lessor to recover possession on lessee's failure to pay rent—Failure to pay rent—Suit for recovery of possession only brought and decreed—Subsequent suit to recover arrears of rent barred.)]
2. ('82) 1882 All W N 3 (3).
- (95) 17 All 533 (535, 536).
- (89) 1883 All W N 198 (198).
- (81) 1881 All W N 58 (58).
- (81) 1881 All W N 41 (42) : 3 All 660. (Suit by usufructuary mortgagee.) [See also ('94) 16 All 401 (408, 409). (Reference under Court Fees Act, S. 5.)]
3. ('06) 9 Oudh Cas 224 (227).
4. ('90) 17 Cal 968 (971).
- (32) AIR 1932 All 45 (45). (When subsequent mesne profit was asked for in prior suit there is no bar under O. 2 R. 2.)
- (31) AIR 1931 Cal 788 (789) : 58 Cal 1040. (Decree in previous suit for possession silent as to future mesne profits—Second suit for such mesne profits is not barred.)
- (82) AIR 1932 All 510 (511) : 54 All 65 (68).
- (31) AIR 1931 All 429 (432) : 53 All 951 (SB).
- (27) AIR 1927 All 772 (773).
- (82) AIR 1932 Bom 222 (223, 224) : 56 Bom 292.
- (24) AIR 1924 Cal 442 (448).
- (82) AIR 1932 Lah 448 (449). (Partition suit—Subsequent suit for subsequent mesne profits.)
- (26) AIR 1926 Mad 1015 (1016).
- (01) 11 Mad L Jour 332 (333).
- (28) AIR 1928 Nag 65 (65). (Partition suit—Subsequent suit for subsequent mesne profits.)
- (25) AIR 1925 Pat 145 (147).
- (81) AIR 1931 Oudh 131 (132) : 6 Luck 243.
- (16) AIR 1916 Low Bur 35 (35).
- (95) 19 Bom 532 (538, 539).
- (18) AIR 1918 Nag 28 (29) : 15 Nag L R 101. (Suit for ejectment by mortgagor on determination of right to possession—Subsequent suit for mesne profits not barred.)
- (35) AIR 1935 Bom 306 (308) : 59 Bom 454.
- (37) AIR 1937 Mad 849 (851).
- [See ('35) AIR 1935 All 96 (97). (Suit for redemption of mortgage—Decree and deposit—Failure of defendant to deliver possession—Fresh suit for mesne profits from final decree to delivery of possession not barred.)]
- (34) 3 All W R 735 (736). (A claim for mesne profits for the period covered by a prior partition suit is a claim based on a different cause of action and is not barred by the provisions of O. 2 R. 2.)]
5. ('27) AIR 1927 All 716 (716, 717) : 49 All 597.
- (75) 1875 Pun Re No. 72.
- (17) AIR 1917 All 479 (480) : 36 All 61. (The procedure of permitting separate suits for mesne profits is to be severely discountenanced (Per Walsh, J.)—However, in this case the mesne profits were allowed without costs.)
6. ('81) 3 All 660 (661, 662) (FB).
- (81) 3 All 543 (544, 545).
7. ('74) 21 Suth W R 228 (223, 224).
- (86) 12 Cal 482 (484) (PC).
- (74) 22 Suth W R 424 (425).
- [But see ('29) AIR 1928 Cal 371 (372, 373). (Suit for mesne profits upto delivery of symbolical possession is no bar to suit for mesne profits accruing subsequently.)]
8. ('83) 9 Cal 283 (287, 288).
- (09) 1 Ind Cas 644 (645) (Mad).
- (88) 11 Mad 210 (212).
- (88) 1 C P L R 143 (144).
9. ('89) AIR 1939 All 52 (54). (Plaintiff mortgagee although entitled to sue both for mesne profits and possession, suing only for mesne profits—He cannot subsequently sue for possession according to O. 2 R. 2—When once plaintiff's right to sue for possession is barred, he becomes disentitled to sue for mesne profits also.)

**25. First suit for interest, second for principal.**—See Note 10, *ante*, under the heading “first suit for interest on a mortgage and second suit for the principal.”

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Notes 25-26**

**26. Other Examples. —**

(1) *A* sues *B* for declaration of his title and for injunction restraining *B* from interfering with *A*'s possession. The suit is dismissed as *A* is found not to be in possession. *A* then sues *B* for declaration and possession. The suit is not barred.<sup>1</sup>

(2) *A* sues *B* for declaration of his right to certain land. The suit is dismissed on the ground that *A* might and ought to have sued for possession also. Then he sues *B* for possession. The suit is not barred as the *causes of action* for the two suits are not the same.<sup>2</sup>

(3) The dismissal of a suit for specific performance of an agreement to transfer land is no bar to a suit for the return of the consideration money.<sup>3</sup>

(4) The dismissal of a suit for sale as on a simple mortgage does not bar a suit for possession as on a usufructuary mortgage.<sup>4</sup>

(5) Where a suit is compromised, a second suit based on the compromise is not barred.<sup>5</sup>

(6) Distinct trespasses on different parts of the plaintiff's land committed at different times give rise to different causes of action.<sup>6</sup>

(7) A person whose property had been wrongfully attached in execution of a decree, sued for and obtained a decree that the property was not liable to attachment and sale under the decree. This does not bar a suit for damages for wrongful attachment.<sup>7</sup>

(82) 1882 Pun Re No. 139.

(06) 9 Oudh Cas 322 (325). (Suit for mesne profits bars suit for possession.)

(15) AIR 1915 Sind 35 (36) : 9 Sind L R 23.

**Note 26**

1. ('30) AIR 1930 Sind 87 (88, 89).

('12) 13 Ind Cas 154 (155) : 34 All 172.

('19) AIR 1919 Mad 45 (45).

[But see ('10) 8 Ind Cas 9 (16) (All).]

2. ('15) AIR 1915 Mad 888 (888) : 38 Mad 247.

('29) AIR 1929 All 906 (307).

('92) 14 All 512 (513).

('83) 5 All 845 (354) (FB). (Note: — In this case the declaration was granted in the first suit ; yet it was held it made no difference in principle.)

('82) 4 All 261 (267) (FB).

('79) 2 All 356 (357) (FB).

('76) 1 All 252 (253).

('86) 12 Cal 291 (293, 294). (First suit was for declaration of title and confirmation of possession—Subsequent suit was to recover possession.)

('83) 9 Cal 43 (47).

('82) 8 Cal 819 (824).

('82) 8 Cal 825n (826n). (Following 8 Cal 819.)

('10) 6 Ind Cas 926 (927) : 6 Nag L R 81.

('26) AIR 1926 Rang 123 (123, 124).

('17) AIR 1917 Low Bur 28 (29) : 9 Low Bur Rul 37.

('93-1900) 1898-1900 Low Bur Rul 410.

[But see ('22) AIR 1922 Nag 129 (134) : 21 Nag L R 124.

('23) AIR 1923 All 554 (555). (Prior suit for mere declaration dismissed on merits — Subsequent

suit for possession held barred—Res judicata.)]

3. ('04) 27 Mad 380 (381).

('23) AIR 1923 All 321 (321) : 45 All 378.

('94) 1894 All W N 157 (158). (Subsequent suit for the return of half currency notes given in lieu of earnest money.)

[But see ('98) 8 Mad L Jour 61 (62)].

4. ('05) 15 Mad L Jour 374 (375).

('04) 27 Mad 102 (105).

5. ('05) 2 All L Jour 680 (681).

('98) 2 Cal W N 663 (664).

('20) AIR 1920 Lah 184 (186). (First suit for dissolution of partnership and accounts — Suit referred to arbitration — Award fixing shares — Decree passed in accordance with the award — Second suit for partition and accounts as per the decree on award is not barred.)

[See also ('94) 1894 Pun Re No. 47, page 148.]

6. (1900) 10 Mad L Jour 136 (138).

('84) 6 All 616 (617). (Ouster from two different houses on two different occasions gives rise to two causes of action.)

('24) AIR 1924 Nag 214 (214). (Dispossession at different times of two different properties — Defendant claiming under different titles—Rule is not a bar.)

7. ('27) AIR 1927 Oudh 48 (48). (In view of the provisions of S. 42, Specific Relief Act.)

('19) AIR 1919 Oudh 81 (92).

[See ('02) 5 Oudh Cas 304 (306). (Suit for declaration that property not liable to attachment and sale dismissed—Second suit for compensation for illegal attachment is barred.)]

**O. 2 R. 2**  
**Note 26**

(8) A suit by reversioners for declaration of their reversionary rights and a suit by them for possession are based on distinct causes of action.<sup>8</sup>

(9) A suit by a Mahomedan widow for *dower* does not bar a suit by her for declaration of her right to possess her husband's estate for her life, in accordance with a local custom.<sup>9</sup>

(10) A suit by Hindu reversioners for injunction restraining alienations by a Hindu widow is no bar to a suit for declaration that a gift by the widow is inoperative and cannot affect their rights.<sup>10</sup>

(11) A suit for possession of land held under a will, in consequence of plaintiff having been wrongfully deprived of it, is no bar to a suit for personal property under the will.<sup>11</sup>

(12) A suit for the wrongful conversion of goods given in a will is no bar to a suit to obtain payment of the legacies where there is no claim in the latter suit in respect of any of the goods to which the former suit related.<sup>12</sup>

(13) Where a Hindu widow transfers by several alienations different portions of her husband's estate, the reversioners have a distinct cause of action in respect of each alienation.<sup>13</sup>

(14) A suit by a Hindu reversioner during the widow's lifetime for a declaration that a transfer by the widow is not binding on him is no bar to a suit after the widow's death, for possession of the property transferred.<sup>14</sup>

(15) A suit for declaration that property is not liable to attachment and sale under a decree is no bar to a suit for possession.<sup>15</sup>

(16) A suit by a Hindu daughter to establish her title to her father's estate as heir in reversion on her mother's death is no bar to a suit for possession of a specific portion of the estate.<sup>16</sup>

(17) A suit to eject the defendant on the basis of a lease is no bar to a suit based on title.<sup>17</sup>

(18) Where a vendee or other transferee of property sues for possession but the suit is dismissed, he is not debarred from suing for the return of the consideration money.<sup>18</sup>

8. ('20) AIR 1920 Cal 755 (757).

('15) AIR 1915 Lah 127 (128).

9. ('94) 21 Cal 157 (163) : 20 Ind App 155 (PC).

10. ('89) 16 Cal 98 (102) : 15 Ind App 156 (PC).

11. ('85) 8 Mad 520 (524) : 12 Ind App 116 (PC).

12. ('25) AIR 1925 PC 105 (108) : 48 Mad 812 : 52 Ind App 214 (PC).

13. ('67) 8 Suth W R 364 (365). (Sales by guardian of a minor.)

('16) AIR 1916 Bom 310 (310) : 40 Bom 351.

(Sales by deceased challenged by the heir.)

('72) 9 Bom H O R 257 (259).

('73) 10 Beng L R 1 (11) : 14 Moo Ind App 176 (PC).

('30) AIR 1930 Nag 3 (4) : 26 Nag L R 121.

('22) AIR 1922 Oudh 171 (175).

14. ('10) 5 Ind Cas 207 (208) : 32 All 189 (193).

[See also ('98) 1898 Pun Re No. 91, page 321. (Right of reversioner to possession does not accrue during the lifetime of the widow.)]

15. ('91) 1891 Pun Re No. 29, page 168.

('91) 14 Mad 23 (24, 25).

('37) AIR 1937 Rang 183 (184).

('37) AIR 1937 Rang 249 (250).

16. ('29) AIR 1929 P C 166 (169) : 56 Ind App 267 : 51 All 439 (P C).

17. ('96) 1896 Pun Re No. 55, page 164.

('19) AIR 1919 Mad 743 (745).

('03) 13 Mad L Jour 475 (476).

[See also ('05) 28 Mad 406 (408). (Former suit to redeem kanam, no bar to subsequent suit based on the kanam and the title so far as the latter is based on title.)]

18. ('01) 24 Mad 27 (31).

('83) AIR 1933 Lah 1017 (1017). (Suit for declaration of title to property purchased by plaintiff allowed to be dismissed — Subsequent suit for refund of purchase money is not barred.)

('27) AIR 1927 Mad 273 (275, 276).

(1900) 10 Mad L Jour 204 (205).

('24) AIR 1924 Cal 558 (562).

('88) 15 Cal 51 (53). (The suit was however dismissed on ground of limitation.)

('26) AIR 1926 Nag 109 (114) : 22 Nag L R 49.

('29) AIR 1929 Pat 241 (241). (Suit by lessor to recover possession of land is no bar to a subsequent suit for rent.)

[See also ('26) AIR 1926 P C 118 (119) (P C).]

(19) The dismissal of a suit for redemption on the basis of one mortgage is no bar to a suit on the basis of another mortgage.<sup>19</sup>

(20) Where a suit is dismissed for want of a cause of action, a second suit on the basis of the true cause of action is not barred.<sup>20</sup>

(21) A suit for redemption and a suit for ejectment on the ground of title are based on distinct causes of action.<sup>21</sup>

(22) The dismissal of a suit for enhancement of rent is no bar to a suit for recovery of rent at the rate originally fixed.<sup>22</sup>

(23) A decree for rent at the original rate is no bar to a suit to recover the difference between the rent at the old rate and that at the enhanced rate for the same period (where plaintiff obtained a decree for enhancement of rent after a decree for rent at old rate was passed).<sup>23</sup>

(24) A promissory note or other negotiable instrument creates a distinct cause of action from the original debt for which the instrument was given,<sup>24</sup> so that, if several promissory notes are given for portions of the same debt, each promissory note can be sued on separately.<sup>25</sup>

(25) A suit for cancellation of a deed of transfer does not preclude a suit for possession of the property.<sup>26</sup>

('12) 16 Ind Cas 24 (25) : 1912 Pun Re No. 104.  
(Two plots sold by one sale-deed — Recovery of sale price in regard to one on the ground of want of title in the vendor is no bar to recover possession of the other.)

('92) 19 Cal 123 (126) : 18 Ind App 158 (P C).  
(Privy Council expressly left the question open.)]

19. ('11) 9 Ind Cas 53 (54) : 33 All 302.

('03) 26 Mad 760 (775).

('06) 29 Mad 153 (154) (F B).

[See also ('15) AIR 1915 Low Bur 152 (153).  
(Suit for redemption dismissed — No bar to a subsequent suit on an agreement to allow redemption.)]

20. ('72) 17 Suth W R 380 (382).

('04) 26 All 501 (503, 504). (Suit for possession of a portion of a house alleged to have been partitioned in proceedings before Revenue Court — Subsequent suit for partition of the same house in a Civil Court.)

('25) AIR 1925 Lah 459 (460) : 6 Lah 384.  
(Suit for a relief which the Court cannot give does not bar a suit for a relief which the Court can give.)

('84) 1884 Pun Re No. 47, page 110.

('18) AIR 1918 Mad 78 (81).

('15) 29 Ind Cas 678 (679) (U P B R).

[See also ('96) 6 Mad L Jour 51 (52). (Suit to eject defendant as trespassor dismissed on the ground that the latter had a charge on land — Subsequent suit to redeem on payment of charge held barred.)

('15) AIR 1915 All 404 (405) : 37 All 646. (Deliberate omission to sue for right relief operates as bar.)]

21. ('89) 13 Bom 326 (329).

('88) 15 Cal 800 (808) : 15 Ind App 106 (P C).  
(Suit to recover talukdari right dismissed — Subsequent suit to redeem the same property not barred.)

('12) 15 Ind Cas 15 (16) (All).

('05) 27 All 142 (144).

('27) AIR 1927 Lah 752 (753).

('24) AIR 1924 Lah 143 (144) : 4 Lah 187.

('13) 21 Ind Cas 42 (42) (Mad).

('05) 28 Mad 406 (408).

('97) 20 Mad 82 (83).

('25) AIR 1925 Oudh 386 (388).

('74) 11 Bom H O R 224 (230).

[But see ('96) 6 Mad L Jour (51 52).]

22. ('70) 13 Suth W R 317 (318).

('88) 15 Cal 145 (149, 150) (F B). (Overruling 9 Cal 919.)

23. ('28) AIR 1928 Cal 684 (685). (A I R 1925 Cal 463, Distinguished.)

[But see ('25) AIR 1925 Cal 463 (464).]

24. ('15) AIR 1915 Mad 688 (689).

('14) AIR 1914 All 494 (496) : 36 All 560.

('15) 26 Ind Cas 228 (231) : 41 Ind App 142 (P C).

('25) AIR 1925 Rang 304 (304).

[See also ('20) AIR 1920 All 340 (341) : 42 All 193. (In this case previous suit on promissory note was dismissed in default of appearance, hence fresh suit on basis of original debt was held barred.)]

[But see ('17) AIR 1917 Lah 220 (222) : 1917 Pun Re No. 63. (Where there was held to be only one cause of action.)]

25. ('12) 13 Ind Cas 458 (461) : 36 Mad 151.

('83) 7 Bom 134 (136, 137).

[See also ('35) AIR 1935 Rang 365 (366, 367).  
(Where the original obligation is single and entire, but when one party has chosen to execute separate documents for portions of the obligation and the other party has chosen to accept the said documents, each document constitutes a distinct cause of action.)]

[But see ('07) 29 All 256 (259). (Where a second suit was held to be barred.)]

26. ('28) AIR 1928 Oudh 359 (362) : 3 Luck 487.

[See also ('33) AIR 1933 Bom 398 (400) : 57 Bom 456.]



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**Note 26**

(26) A suit for divorce on the ground of misconduct, among the Burmese Buddhists, is no bar to a suit for partition.<sup>27</sup> But where judicial separation has been once obtained on the ground of cruelty and adultery, a new petition on the same facts for annulment of marriage is barred.<sup>28</sup>

For other instances, see the undermentioned cases.<sup>29</sup>

- [But see ('16) AIR 1916 Low Bur 43 (44). (Where it was held that such a suit was barred.)]
27. ('02) Upp Bur Rul Buddhist Law, Divorce p. 6. ('11) 11 Ind Cas 497 (498) : 38 Cal 629 : 38 Ind App 140 : 6 Low Bur Rul 18 (P C). ('1900) 1 Low Bur Rul 7 (8). [See also ('97-1901) 2 Upp Bur Rul 28.] [But see ('09) 4 Ind Cas 306 (308) : 5 Low Bur Rul 114.]
28. ('28) AIR 1928 Cal 806 (808) : 56 Cal 166.
29. ('30) AIR 1930 All 824 (825). (Plaintiff agreeing to construct defendant's house and provide funds approximately to the extent of Rs. 2000—Plaintiff's money repayable gradually in ten years—House hypothecated to plaintiff to secure repayment—No provision made in case expenditure exceeded Rs. 2000—On accounts being taken, defendant found liable for Rs. 1400 over and above Rs. 2000—Defendant executing sarkhat for Rs. 1400—Plaintiff suing on basis of this sarkhat prior to expiry of ten years of original agreement—As sarkhat was a contract for distinct and separate sum suit was not premature.) ('34) AIR 1934 Mad 46 (47). (Suits for kattubadi due in successive years—Kattubadi not fixed in money or kind but on gross produce—Causes of action are different and suits are not barred.) ('84) AIR 1934 Pat 515 (518). (Suit for declaration of title to certain share—Partition by Collector in the mean time forming six estates out of parent estate—Execution and obtaining of possession of share—Refusal by Collector to record plaintiff's name—Fresh suit for distribution of decreed share to newly formed estates—Suit held not barred by S. 27, Bengal Estates Partition Act, or C. P. C., S. 11 or O. 2 R. 2.) ('30) AIR 1930 All 116 (117). (Suit for money had and received for the plaintiff's use against the agent does not bar a subsequent suit for general account against such agent.) ('29) AIR 1929 All 29 (30). (Assignees of revenues of different properties mortgaging their rights to plaintiff—Plaintiff can sue separately for the revenues assigned by each mortgagor.) ('29) AIR 1929 All 696 (697). (Redemption and contribution suits against persons who had a part of the equity of redemption, are different causes of action.) ('25) AIR 1925 All 486 (487) : 47 All 567. (Prior suit to set aside sale and for possession dismissed on the ground that a part of the sale price has been received—Subsequent suit for balance of sale price not barred.) ('24) AIR 1924 All 718 (715) : 46 All 542. (Suit for share of inheritance and suit for dower—Causes of action are different.) ('23) AIR 1923 All 311 (312) : 45 All 376. (Suit for setting aside sale no bar to suit for possession as heir.) ('22) AIR 1922 All 510 (511, 512, 513). (Suit against the husband for a share in the plaintiff's sister's estate as one of the latter's heirs is no bar to a subsequent suit for dower due by the husband.) ('19) AIR 1919 All 433 (435) : 41 All 286. (First suit against lambardar for profits—Second suit for mesne profits on the ground of trespass on another mahal not barred.) ('11) 9 Ind Cas 200 (202) : 33 All 291. (Suit for portion of dower as prompt is no bar to suit for balance as for deferred dower.) ('12) 17 Ind Cas 833 (833) (All). (Suit for partition pending—Second suit against the lambardar for profits not barred.) ('10) 7 Ind Cas 284 (285) (All). (Suit for declaration that a will executed by the father was null and void no bar to suit for partition.) ('09) 4 Ind Cas 457 (459) : 31 All 557 : 36 Ind App 210 : 13 Oudh Cas 183 (P C). (First suit for share inherited from sister no bar to suit for share inherited from father.) ('04) 26 All 501 (503, 504). (Suit for possession on the ground that partition had taken place dismissed—Second suit for partition not barred.) ('94) 1894 All W N 61 (62). (First suit for damages for misappropriation of fruits of trees—Second suit for possession of the trees—Second suit based on denial in previous suit of plaintiff's title to the trees—Second suit not barred.) ('73) 5 N W P H C R 172 (175). (First suit to set aside sale in defendant's favour—Second suit for possession of other lands against same defendant not barred.) ('87) 9 All 23 (25). (Rent suit in Revenue Court no bar to suit to enforce mortgage executed to secure payment of rent.) ('87) 1887 All W N 77 (77). (Suit by zamindar-owner of land to avoid sale of land—Subsequent suit by zamindar for haqq-i-chaharum in respect of sale of house not barred.) ('84) 6 All 70 (71). (Plaintiff in a suit obliged to pay stamp duty payable by defendant—Plaintiff may sue separately for the amount so paid.) ('82) 4 All 180 (181). (Suit for rent in Revenue Court is no bar to suit to enforce mortgage executed by tenant to secure payment of rent.) ('81) 3 All 857 (858). (First suit for foreclosure dismissed as premature—Second suit for another relief i. e. for sale, not barred.) ('75) 7 N W P H C R 60 (63 to 66). (Suit on basis of will no bar to suit as for share of inheritance.) ('69) 1 N W P H C R 70 (71). (Suit for recovery of receipt deposited by plaintiff with the defendant—Subsequent suit for balance due on whole account between them not barred.) ('30) AIR 1930 Bom 60 (60) : 54 Bom 11. (Suit on one khata—Account running through other



## 27. "Shall not afterwards sue." — The omission of a portion of a claim or

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Note 27

- khatas also—Suit dismissed — Subsequent suit on all khatas is maintainable.)
- ('29) AIR 1929 Bom 460 (462). (Suit prompted by order of Magistrate no bar to suit for other properties though claimed under the same title.)
- ('28) AIR 1928 Bom 440 (441). (Suit for profits on basis of tenancy-in-common is no bar to subsequent suit for partition.)
- ('97) 21 Bom 267 (271). (Separate contracts contained in the same document give rise to distinct causes of action.)
- ('04) 28 Bom 447 (449, 450). (Suit on accounts stated is no bar to suit on a mortgage.)
- ('20) AIR 1920 Cal 600 (601). (A title suit is no bar to a suit to declare a right of way.)
- ('09) 8 Ind Cas 395 (396) (Cal). (Different plots—Different causes of action—Different suits maintainable.)
- ('01) 5 Cal W N 423 (426). (Suit for apportionment of mortgage debt against purchasers of portions of mortgaged property not barred by omission to make them parties to mortgage suit.)
- ('98) 20 Cal 716 (719). (Separate suits maintainable in respect of injury to permanent and leasehold interests in land.)
- ('99) 20 Cal 385 (387). (Suit for exclusion from joint property and suit for partition of joint property—Causes of action different.)
- ('86) 12 Cal 60 (63). (Suit for legacy and suit for share of inheritance — Causes of action are different.)
- ('82) 8 Cal 483 (514) (FB). (Decree declaring right to accounts is no bar to suit for amount found due on adjustment of accounts.)
- ('81) 7 Cal 169 (171). (Decree declaring plaintiff's right to accounts is no bar to suit for money found due on adjustment of accounts.)
- ('80) 5 Cal 24 (26). (Suit for abatement of rent which has been decreed is no bar to suit for refund of the excess rent paid.)
- ('75) 24 Suth W R 212 (213). (Lessee resuming possession of lands on behalf of landlord — Suit by landlord for the lands is no bar to suit for lands leased to the same defendant and wrongfully retained by him.)
- ('72) 18 Suth W R 202 (203). (Suit for declaration of right to share in debt no bar to suit for payment of share in debt.)
- ('71) 16 Suth W R 264 (264). (Claim as heir of S's father dismissed—Suit for possession of same property as heir of S not barred.)
- ('89) 16 Cal 545 (548). (Defendant cutting and carrying away crops and subsequently dispossessing plaintiff—Suit for possession and mesne profits and suit for damages for removal of crops—Causes of action are different.)
- ('68) 6 Suth W R 44 (46). (Suit for declaration of title as reversioner to widow — Previous suit based on title as heir to ancestral joint estate prior to widow—Causes of action different.)
- (1864) 1 Suth W R 199 (200). (Suit to recover from co-sharer share of surplus proceeds of sale in execution of decree for arrears of rent, not barred by former suit by plaintiff on requisition of Collector for declaration of his right to share in the fund then in the collectorate.)
- ('28) AIR 1928 Lah 238 (239) : 9 Lah 451. (Suit for pre-emption of one portion of land no bar to suit for redemption of another portion.)
- ('28) AIR 1928 Lah 534 (534). (Prior suit for possession of demised premises — Subsequent suit for compensation for holding over not barred.)
- ('28) AIR 1928 Lah 63 (64). (Two successive mortgagees—Sale to prior mortgagee — Suit for redemption by puisne mortgagee entitled to pre-empt decreed—His subsequent suit for pre-emption is not barred.)
- ('25) AIR 1925 Lah 459 (460) : 6 Lah 384. (Suit for injunction restraining A from selling to B is no bar to suit for specific performance of agreement to sell against A.)
- ('25) AIR 1925 Lah 193 ('194). (First suit dismissed as properties were wrongly described — Second suit not barred.)
- ('20) AIR 1920 Lah 41 (42). (Suit for injunction prohibiting defendant from removing fodder from land dismissed — Second suit for recovery of money advanced under a contract and for damages for breach of that contract not barred.)
- ('17) AIR 1917 Lah 139 (141). (Suit to recover share of inheritance — Subsequent suit for declaration of share in decree owning interest therein is maintainable.)
- ('14) AIR 1914 Lah 245 (246). (Suit for dissolution of partnership no bar to suit for property held by the partners as co-owners independently of partnership.)
- ('11) 11 Ind Cas 35 (36) : 1912 Pun Re No. 4. (Suit against sister for share of property left by father is no bar to suit against sister's husband for property left by the sister even as regards items not included in the first suit.)
- ('09) 1903 Pun Re No. 87, page 383. (Relief claimed in subsequent suit not included in previous suit, though previous suit might not have been bad for misjoinder—Subsequent suit not barred.)
- ('02) 1902 Pun Re No. 78, page 308. (Suit for value of crops misappropriated no bar to suit for possession of land on which the crops were lying.)
- (1900) 1900 Pun Re No. 113. (Suit for share of patti no bar to suit for share in shamilat land.)
- ('86) 1886 Pun Re No. 6, page 442. (Suit for pre-emption dismissed—Suit for possession on ground of title not barred.)
- ('83) 1883 Pun Re No. 110. (Separate sales of different plots — Separate suits for possession maintainable.)
- ('83) 1883 Pun Re No. 59. (Suit for profits of land which defendant, as plaintiff's agent, had misappropriated — Second suit for possession not barred.)
- ('82) 1882 Pun Re No. 168, page 495. (First suit ignoring agreement between the parties—Second suit on the basis of the agreement not barred.)
- ('82) 1882 Pun Re No. 24, page 81. (Suit by reversioner during widow's lifetime for lands alienated by widow dismissed — Second suit after widow's death on the ground of alienation not binding on him not barred.)

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**Note 27**

the omission to ask for a relief does not affect the maintainability of the suit wherein

- ('82) 1882 Pun Re No. 108, page 310. (Sale by widow—Suit to set aside by reversioners — Suit dismissed on ground of there being legal necessity—After widow's death plaintiff suing again for pre-emption—Suit not barred.)
- ('31) AIR 1931 Mad 313 (315). (Executors agreeing to pay interest on legacy but declining to pay principal except on production of succession certificate — Prior suit by legatee for interest alone — O. 2 R. 2 does not bar subsequent suit for principal.)
- ('29) AIR 1929 Mad 545 (561). (Suit by mother of minor for maintenance, no bar to suit by minor for share of inheritance.)
- ('26) AIR 1926 Mad 683 (686) : 49 Mad 596. (Purchaser of interest of undivided Hindu coparcener — Suit by purchaser for declaration of his right to possession under O. 21 R. 103 is no bar to suit for partition.)
- ('25) AIR 1925 Mad 1172 (1172). (Suit for possession based on one marupat is no bar to suit based on another marupat.)
- ('15) AIR 1915 Mad 348 (352) : 38 Mad 1162. (Suit based on certain title to certain property no bar to suit to recover some other property on some other ground.)
- ('13) 18 Ind Cas 610 (611) (Mad). (Mortgagee agreeing to pay off certain debts of the mortgagor as also to satisfy a previous mortgage decree obtained against the mortgagor—Mortgagee paying off debts and then suing the mortgagor for them — Subsequent satisfaction of the previous mortgage decree and subsequent suit therefor is not barred.)
- ('13) 19 Ind Cas 393 (394) : 6 Sind L R 140. (Suit for declaration that mortgage has been satisfied dismissed — Second suit for redemption not barred.)
- ('10) 5 Ind Cas 758 (759) : 33 Mad 162. (Suit for revocation of agency is no bar to suit for dismissal of agent for misconduct.)
- ('09) 4 Ind Cas 1082 (1082) : 33 Mad 238. (Prior suit on alleged entrustment of paddy no bar to suit for rent.)
- ('09) 4 Ind Cas 97 (97) (Mad). (Interference with possession is a different cause of action from dispossession.)
- ('09) 1 Ind Cas 806 (806) (Mad). (Wrong description of property in the decree made in plaintiff's favour by clerical error — Subsequent suit for restraining the defendant from taking possession of that property not barred.)
- ('08) 26 Mad 104 (108). (Suit to set aside alienation by widow is no bar to suit for possession on the ground that the widow has no right at all to the estate.)
- ('02) 25 Mad 669 (671). (Previous suit for injunction restraining defendants from digging up and removing shells dismissed — Subsequent suit for value of shells removed not barred.)
- ('09) 4 Ind Cas 763 (767, 768) : 12 Oudh Cas 347. (Suit for redemption as full owner dismissed — Second suit for redemption as co-owner not barred—Discussed under S. 11 mainly.)
- ('08) 11 Oudh Cas 69 (78). (Suit for dower and suit for share of inheritance — Causes of action are different.)
- ('06) 9 Oudh Cas 235 (238). (Suit based on gift, no bar to suit for share of inheritance.)
- ('05) 8 Oudh Cas 65 (74). (Claim for maintenance on basis of agreement with A is distinct from claim to inherit estate left by A.)
- ('99) 2 Oudh Cas 17 (28). (Cause of action against administrator failing in his duty is different from cause of action against trespasser withholding possession.)
- ('29) AIR 1929 Rang 285 (287).
- ('22) 1922 Upp Bur 1 (2) : 4 Upp Bur Rul 62. (Mortgaged property sold in execution of money-decree for interest alone — Suit for payment of mortgage money out of sale proceeds of the property deposited in Court—Second suit to enforce the mortgage lien not barred — Cause of action distinct.)
- ('21) AIR 1921 Low Bur 18 (15) : 11 Low Bur Rul 94. (First suit for possession of a part on the allegation that it had fallen to plaintiff on a partition — Second suit on the basis that the whole was yet undivided and for plaintiff's share in the entirety is not barred.)
- ('15) AIR 1915 Low Bur 152 (153). (Dismissal of a suit for redemption according to the terms of a mortgage is no bar to suit for redemption on a subsequent agreement.)
- ('04) 1 All L Jour 20 (25). (Formal possession given by Court—Judgment-debtor persisting in taking rents from tenants — There is new cause of action.)
- ('03) 16 C P L R 107 (111). (Do.)
- ('88) 1888 All W N 6 (6). (Suit for compulsory registration no bar to suit for possession.)
- ('24) AIR 1924 Cal 600 (610). (Relief under S. 77 of the Registration Act cannot be joined with that for possession and mesne profits.)
- ('01) 24 Mad 147 (157) : 27 Ind App 151 (P O). (Suit for partition by younger brother of zamindar dismissed as the property was impartible—Suit for maintenance not barred.)
- ('99) 22 Mad 197 (202). (Suit for possession of land — Subsequent conversion of moveables on the land — Second suit for damages for conversion not barred.)
- ('90) 13 Mad 44 (45). (Suit to cancel document on the ground that defendant had agreed to execute a release is based on a different cause of action from a suit to obtain declaration that it had been executed for a nominal purpose.)
- ('86) 9 Mad 92 (95). (Purchaser of portion of equity of redemption obtaining under redemption decree portion purchased by him, is not precluded from suing for possession of the other portion on his purchasing them.)
- ('88) 6 Mad 49 (53). (Suit to cancel a deed of release of all the plaintiff's claims got by the defendant under duress, no bar to suit for dissolution of partnership entered into subsequent to the settlement of accounts.)
- ('82) 5 Mad 1 (3). (Malabar tarwad — Suit by Karnavan against Anandavan for recovery of

the omission takes place; it only entails a disability as regards *subsequent* proceedings.<sup>1</sup> The rule says "shall not *afterwards* sue." Hence, the rule does not apply to suits filed *simultaneously*.<sup>2</sup> The Allahabad High Court has held in the undermentioned case that the suit which bears the *later number* should be presumed to have been filed later and should be held as barred.<sup>3</sup> According to the High Court of Madras, the plaintiff in such a case should be given an option to choose as to which of the two suits should be dismissed and which should be allowed to go on.<sup>4</sup>

tarwad property—Some items omitted—Separate suit can be brought for these.)

('28) AIR 1928 Pat 575 (575, 576). (Suit for compulsory registration no bar to suit for possession.)

('18) AIR 1918 Pat 354 (355). (Obstruction to water-course—Suit for injunction for removal of obstruction no bar to suit for damages accruing after decree in such suit.)

('31) AIR 1931 Oudh 57 (58). (Suit for declaration of title to land — Second suit for recovery of share of compensation money paid under the Land Acquisition Act.)

('28) AIR 1928 Oudh 411 (412, 413). (Prior suit based on forfeiture of widow's rights on the ground of unchastity — Subsequent suit to recover possession after death of widow—Cause of action is different.)

('10) 5 Ind Cas 489 (440) : 18 Oudh Cas 19. (Suit for declaration that defendants had no higher rights than ordinary tenants is no bar to suit for possession.)

('87) 10 Mad 847 (350). (Title to enjoy separate possession declared — Subsequent suit for partition is not barred, though in this case it was held that such suit was unnecessary.)

('37) AIR 1937 Mad 804 (805). (Suit for ejectment by assignee of Kanomdar against tenant R—N, another assignee of kanom interest attempting to get possession in collusion with R—N made party to ejectment suit and relief claimed against him — Suit dismissed as no collusion was found and as N was found in possession — Subsequent suit by A based on title — Subsequent suit held was not barred.)

('39) AIR 1939 Cal 523 (526). (Suit for injunction dismissed as plaintiff found to be already dispossessed — Subsequent suit for possession on establishment of title—O. 2 R. 2 held could not be invoked so as to bar second suit.)

('35) AIR 1935 Lah 842 (843). (Attachment of T's house—Objection by purchaser of particular portion (being three-fourths share) from other co-sharers at private partition — Partition not proved—Decree for three-fourths of that portion — Suit by purchaser and his vendors for three-fourths of other portion — Suit held not barred by O. 2 R. 2.)

('38) AIR 1938 Lah 492 (493). (Gift of certain property to wife in lieu of dower — Widow remarrying after death of her husband — Suit for pre-emption by brother of her husband dismissed — Subsequent suit for declaration of title to property on ground of remarriage of widow and for avoidance of gift — Suit is not barred under S. 11 or O. 2 R. 2.)

('35) AIR 1935 All 90 (97). (Suit for redemption — Plaintiff getting preliminary decree — Deposit

of decretal amount — Final decree — Possession not given to plaintiff by defendant — Suit for mesne profits from date of final decree is not barred.)

('38) AIR 1938 Mad 255 (256). (The dismissal of a suit by the vendee on the ground of dispossession by the purchaser at a sale in execution of a decree on an undisclosed prior mortgage, the dispossession being found to be false, is no bar under O. 2 R. 2, C. P. C., to a second suit on a separate cause of action, namely that the vendee, at a time anterior to the date of the alleged dispossession was compelled to pay off the claim under the undisclosed mortgage.)

('36) AIR 1936 Nag 268 (269); ILR (1937) Nag 94. (First suit based on dismissal of plaintiff's objection to attachment — Subsequent suit based on sale to plaintiff not barred.)

('37) AIR 1937 Rang 204 (205). (Suit for decree for redemption alleging mortgage by conditional sale — Subsequent suit to declare sale deed void on ground of executant's minority is not barred.)

('37) AIR 1937 Lah 633 (634). (A suit for accounts brought subsequent to a suit for dissolution of partnership is not barred as the two suits are not based on the same cause of action.)

('36) AIR 1936 Rang 167 (167). (Where a suit for possession of land on the ground that the plaintiff had bought it fails, on the ground that the transaction really amounts to a mortgage by conditional sale and not to an agreement to purchase coupled with an agreement for resale, it is not a bar to a subsequent suit on the basis that the transaction was a mortgage.)

('35) AIR 1935 All 81 (82). (Plaintiff's claim for contribution of expenses in Privy Council case without reference to having acted as manager or agent of defendant — Alternative relief based on having acted as manager — Previous suit based solely on latter ground — Second suit is barred to the extent of alternative relief but not barred so far as it is based on the other ground.)

#### Note 27

1. ('38) AIR 1938 Mad 979 (981, 982) : I L R (1939) Mad 817.

2. ('90) 1890 Pun Re No. 76, page 227.

3. ('94) 16 All 165 (172, 173) (FB). (1 All 650 Doubtful; decision in 1888 All W N 147 held to be wrong.)

[See also ('24) AIR 1924 Rang 161 (162); 1 Rang 682.]

4. ('86) 9 Mad 279 (280).

('36) AIR 1936 Mad 934 (936) : 49 Mad 869.

**O. 2 R. 2**  
**Notes 27-31**

The bar of the rule applies only to a later *suit*. It does not apply to any other remedy open to the plaintiff.<sup>5</sup> Thus, a landlord who is precluded by the rule from suing for the rent of any particular year can enforce the summary process of *distrain* provided for by the Madras Rent Recovery Act.<sup>6</sup>

The burden of establishing a bar of the suit under this rule is on the defendant,<sup>7</sup> and the Court is not bound to take up the point *proprio motu*.<sup>8</sup> Further, the objection under the rule should be treated as a preliminary point and the defendant cannot raise it for the first time in appeal except on terms which would indemnify the other side for the omission to take it at the proper time.<sup>9</sup>

**28. Set-off.** — A defendant who claims a set-off under O. 8 R. 6 is in the position of the *plaintiff* [vide O. 8 R. 6 (2)] and if he omits any portion of the claim he is entitled to make by way of set-off, he cannot subsequently sue in respect of it.<sup>1</sup>

**29. Plea in defence not barred.** — The rule precludes only a subsequent *suit*. It does not bar a plea in *defence*.<sup>1</sup>

**30. Insolvency proceedings, not suits.** — The rule, as has been seen already, merely bars a fresh *suit* on the same cause of action. It does not enable the Official Assignee to apply to the Insolvency Court for a declaration that the right of a certain creditor of the insolvent to sue for a certain debt is barred under this rule.<sup>1</sup>

**31. Execution Proceedings.** — Order 2 Rule 2 does not apply to execution proceedings.<sup>1</sup> (See Notes under Section 141, Civil Procedure Code.) Thus, where a decree grants different reliefs, as for example, possession of land and *mesne profits*, the decree may be executed by means of separate and successive applications in respect

5. ('19) AIR 1919 Sind 79 (79): 13 Sind L R 153. (Suit for declaration that decree is null and void — Subsequent application for restitution is maintainable.)

('98) 21 Mad 236 (237). (Landlord precluded from suing for rent not included in previous suit — He can recover the rent by *distrain* under the Rent Recovery Act.)

('05) 7 Bom L R 138 (141). ("To sue" applies to any legal proceedings — Only the right of suing is taken away — The right yet remains.)

[See also ('06) 4 Cal L Jour 492 (495). (Whether a proceeding for revocation of probate is a suit or not — *Quære*.)]

6. ('98) 21 Mad 236 (237).

7. ('27) AIR 1927 Lah 840 (848, 841). (20 Cal 716, Followed.)

('93) AIR 1933 All 852 (853).

('09) 2 Ind Cas 115 (116) (All).

('93) 20 Cal 716 (719).

('73) 19 Suth W R 429 (430).

('18) AIR 1918 Lah 388 (389). (Bar to be specially pleaded and proved.)

8. ('15) AIR 1915 Lah 285 (286).

('85) 1885 Pun Re No. 37, page 70.

9. ('11) 11 Ind Cas 497 (498): 38 Cal 629: 6 Low Bur Rul 18 (PC).

('81) 1881 All W N 144 (144). (Plea of bar taken in first Court but not raised in lower Appellate Court or in memorandum of second appeal — Plea not allowed to be raised at the hearing of second appeal.)

('09) 1 Ind Cas 327 (328): 12 Oudh Cas 21. (Plea

not allowed in second appeal.)

[But see ('32) AIR 1932 All 510 (511): 54 All 65 (68). (Plea allowed in appeal as being one of law.)]

**Note 28**

1. ('05) 32 Cal 654 (657).

[See ('37) AIR 1937 Oudh 394 (395): 13 Luck 328.

(In this case, a plea of set-off was raised in the previous suit and then abandoned — The same plea was raised as a defence to a subsequent suit — It was held that this rule did not bar the plea — No reason was given — It will be noted that there was no omission of any portion of the claim in the plea of set-off in the previous suit.)]

**Note 29**

1. ('19) AIR 1919 Lah 168 (164).

('83) AIR 1933 Bom 51 (55): 57 Bom 346.

('09) 8 Ind Cas 725 (729): 32 All 88.

('26) AIR 1926 Lah 494 (494): 7 Lah 297.

('21) AIR 1921 Lah 351 (351).

('86) AIR 1936 Mad 473 (476). (Suit for sale by prior mortgagee — Omission to claim benefit of S. 101, T. P. Act, as against puisne mortgagee — Subsequent suit by latter — Prior mortgagee not precluded from making claim under S. 101.)

**Note 30**

1. ('25) AIR 1925 Mad 1120 (1120, 1121): 48 Mad 703.

**Note 31**

1. ('88) AIR 1933 Bom 864 (865, 866): 57 Bom 468.

('32) AIR 1932 Nag 89 (90): 28 Nag L R 1. (Partial execution does not bar subsequent application for executing the balance.)

of each relief.<sup>2</sup>

The rules applicable to proceedings in execution are applicable to proceedings for restitution also, and hence, this rule does not apply to such proceedings.<sup>3</sup> See also Note 2, *ante*.

But where a particular sum of money is due under the decree and the decree-holder fails, in his application for execution, to claim the whole amount, he cannot, on general principles of *res judicata*, be allowed to apply again for the balance of the amount so omitted in the first application.<sup>4</sup> It has however been held by the Judicial Commissioner's Court of Nagpur that where the judgment-debtor does not raise objection to a partial execution of a decree, he cannot be heard to say later on that a subsequent application for the execution of the rest of the decree does not lie.<sup>5</sup>

**32. Proceedings under Paragraph 20 of Schedule II of the Code.** — The rule does not apply to an application to file an award under Schedule II, Paragraph 20 of the Code. Hence, the failure to ask for possession in such an application does not preclude a separate suit for possession.<sup>1</sup> Similarly, where only one matter arising out of a dispute is referred to arbitration, a separate suit in respect of other matters arising from the *same dispute* is not barred.<sup>2</sup>

But the privilege of abandoning a portion of his claim to bring his suit within the jurisdiction of any Court applies also to an applicant for the filing of an award.<sup>3</sup>

**33. Application to sue in forma pauperis.** — An application to sue in *forma pauperis* becomes a suit only after it has been accepted. Hence, where it has been rejected it does not amount to a *suit* and therefore the provisions of this rule do not apply to it.<sup>1</sup>

**34. Exceptions to the rule as to the splitting up of claims.** — See Note 14, *ante*.

**35. Amendment of plaint.** — The bar of suit under this rule applies only where a decree has been passed in the previous suit. The rule does not preclude the amendment of plaint by the addition of the claim which had been omitted.<sup>1</sup>

2. ('97) 19 All 98 (100) (FB).

('09) 2 Ind Cas 105 (106) (All). (Objection to attachment by judgment-debtor regarding a portion of the property does not bar subsequent objection regarding other portions of the property.)

('26) AIR 1926 Cal 1019 (1021); 53 Cal 582. (Partial execution of decree no bar to subsequent application for execution of entire decree.)

('91) 18 Cal 515 (517). (Decree for possession and costs — Application for realizing costs in execution is no bar to a later application for possession.)

('16) AIR 1916 Mad 767 (767). (Meane profits and possession — Decree for — Separate applications maintainable.)

('15) AIR 1915 Mad 811 (812); 21 Ind Cas 32 (34); 38 Mad 199.

('82) AIR 1982 Nag 89 (90); 28 Nag L R 77.

('21) AIR 1921 Sind 18 (16); 15 Sind L R 11.

3. ('18) AIR 1918 Pat 396 (397, 398); 3 Pat L Jour 387.

('17) AIR 1917 Mad 185 (186); 40 Mad 780.

('21) AIR 1921 Nag 112 (118); 17 Nag L R 62.

('85) AIR 1985 All 195 (197). (Therefore an applica-

tion by the judgment-debtor for restitution of the principal amount under S. 144 does not bar a second application by him to recover interest for the period during which the decree-holder had the use of the money.)

4. ('80) AIR 1980 Cal 349 (350). (Interest omitted in previous application is not claimable in subsequent application.)

('93) AIR 1933 Bom 364 (366, 367); 57 Bom 468.

('29) AIR 1929 Rang 182 (183).

5. ('82) AIR 1982 Nag 89 (90); 28 Nag L R 77.

#### Note 32

1. ('02) 1902 Pun Re No. 65, page 237.

2. ('25) AIR 1925 Sind 242 (243).

3. ('78) 20 Suth W R 56 (57).

#### Note 33

1. ('99) 21 All 359 (360, 361).

#### Note 35

1. ('19) AIR 1919 Cal 904 (906, 907); 45 Cal 305.

('85) 1885 All W N 167 (168).

('78) 3 Cal 785 (786).

('19) AIR 1919 Lah 198 (199); 1919 Pun Re No. 84.

**O. 2 R. 2**  
**Note 36**

**36. Revenue and Village Courts.** — The rule has been held to apply to proceedings in the Revenue Court for the recovery of the rent.<sup>1</sup> But proceedings in the Revenue Court for *partition* are not "suits" and the rule does not consequently apply to them.<sup>2</sup>

The provisions of the Civil Procedure Code are not applicable to Village Munsif's Courts and hence this rule does not apply to a suit brought in such Courts.<sup>3</sup>

**O. 2 R. 3**

**R. 3.** [S. 45, Paras. 1 and 3.] (1) Save as otherwise provided,<sup>2</sup> a plaintiff may unite in the same suit several causes of action<sup>3</sup> against the same defendant,<sup>6</sup> or the same defendants jointly;<sup>7</sup> and any plaintiffs having causes of action in which they are jointly interested against the same defendant<sup>10</sup> or the same defendants jointly<sup>12</sup> may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction<sup>16</sup> of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

[1877, S. 45; R. S. C., O. 18 R. 1. See Rr. 4 to 6 below.]

*Synopsis*

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| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Save as otherwise provided."</li> <li>3. The Rule presupposes several causes of action.</li> <li>4. Cause of action. See S. 20 Notes 14 to 31.</li> <li>5. Alternative reliefs.</li> <li>6. One plaintiff, one defendant, several causes of action.</li> <li>7. One plaintiff, two or more defendants—Causes of action joint against all the defendants.</li> <li>8. One plaintiff, separate causes of action against several defendants (i. e.), misjoinder of defendants and causes of action.</li> <li>9. Conspiracy to commit wrong or breach of contract.</li> </ol> | <ol style="list-style-type: none"> <li>10. Two or more plaintiffs, one defendant—Plaintiffs jointly interested in the causes of action.</li> <li>11. Two or more plaintiffs, one defendant—Causes of action in which plaintiffs are severally interested—Misjoinder of plaintiffs and causes of action.</li> <li>12. Two or more plaintiffs, two or more defendants—Plaintiffs jointly interested in each of the causes of action against all the defendants jointly.</li> <li>13. Two or more plaintiffs, two or more defendants—Plaintiffs severally interested against defendants severally—Misjoinder of parties and causes of action.</li> <li>14. Procedure in cases of misjoinder.</li> <li>15. Addition of unnecessary parties.</li> <li>16. Jurisdiction.</li> <li>17. Revision.</li> </ol> |
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**Note 36**

1. ('22) AIR 1922 Cal 101 (108); 49 Cal 1026.  
( '88) 5 All 406 (413). (Rule applies to suits under N W P Rent Act XII of 1881).  
[See also ('69) 1 N W P H C R 119 (120). (Para. 2 applies to suits under Act X of 1859.)]  
[But see ('16) AIR 1916 All 88 (84) : 88 All 802 (FB).]

2. ('16) AIR 1916 All 88 (84) : 88 All 802. (This case holds that O. 2 R. 2 does not apply to proceedings in Revenue Court under the Land Revenue Act.)

( '27) AIR 1927 Oudh 498 (499).

3. ('16) AIR 1916 Mad 544 (546).

*Other Topics (miscellaneous)***O. 2 R. 3  
Notes 1-2**

- Claim suits—Different purchasers. See Note 7.  
 Contribution suits. See Note 8.  
 Defendants claiming under derivative titles. See Note 7.  
 Defendants not claiming under same trespasser. See note 7.  
 Ejectment suits against different tenants of different properties. See Note 8.  
 Paramount title in mortgage suits. See O. 34 R. 1, Notes; see also Note 8.  
 Partition suits. See Note 8;  
 Partnership suits or suits for dissolution. See Note 4.  
 Pre-emption suits. See Note 15.  
 Reference to arbitration — Distinct agreements but one transaction. See Note 6.  
 Rent suits. See Note 6.  
 Single cause of action—Different titles or alienations. See Notes 7 and 11.  
 Strangers to contracts. See Note 8.  
 Suits under S. 73, C. P. C. See Note 7.  
 Two or more defendants and single cause of action. See Note 7.

**1. Scope of the Rule.** — Order 1 relates to *parties* to suits. Order 2 relates to *frame* of suits. But the two Orders cannot be treated as relating to two distinct topics. The question of parties involves that of a cause of action, and *vice versa*. A person is made a party because there is a cause of action against him, and when causes of action are joined, parties are joined.<sup>1</sup> This rule must, therefore, be read with O. 1 Rr. 1 and 3.<sup>2</sup> The Legislature, has in fact, effected a compromise of two fundamental principles by means of the rules, embodied in Orders 1 and 2, *first*, that needless *multiplicity of suits* should be avoided and *secondly*, that the trial of suits should not be embarrassed by simultaneous investigation of totally unconnected controversies.<sup>3</sup> The rules in Orders 1 and 2 may thus overlap to some extent in their application to concrete cases.<sup>4</sup> A plaintiff may not only join different causes of action against the same defendant or the same defendants as provided in this rule but he may also join different causes of action against different defendants if he is able to bring his case within the purview of O. 1 R. 3.<sup>5</sup>

The fact that several causes of action have been properly joined under this rule does not prevent the Court, whenever necessary, from holding separate trials of the different issues that may arise in the suit.<sup>6</sup>

The question of misjoinder must be decided on the *allegations* in the plaint and not on what is *found* to be correct ultimately.<sup>7</sup>

**2. "Save as otherwise provided."** — This rule is to be applied subject to any provisions of law to the contrary, such as Rules 4 and 5 of this Order,<sup>1</sup> or the provisions of the Agra Tenancy Act which enacts that a joinder of several causes of action against the same defendant in a rent suit is not competent.<sup>2</sup> This rule is also subject to the general principles of pleading, and a plaintiff cannot, on the authority of

**Order 2 Rule 3 — Note 1**

1. ('18) AIR 1918 Cal 858 (859, 862) : 45 Cal 111.
2. ('18) AIR 1918 Cal 858 (859) : 45 Cal 111.
- (79) 4 Cal 949 (952, 953).
- ('11) 12 Ind Cas 357 (358) : 7 Nag L R 130.
3. ('18) AIR 1918 Cal 858 (868) : 45 Cal 111.  
[See also (1865) 4 Suth W R 109 (110).]
4. ('18) AIR 1918 Cal 858 (863) : 45 Cal 111.
5. ('26) AIR 1926 Sind 66 (68) : 19 Sind L R 395.
6. ('11) 10 Ind Cas 48 (48, 49) (Lah).
- ('18) AIR 1918 Cal 858 (860) : 45 Cal 111.
7. ('05) 7 Bom L R 925 (927).
- ('05) 27 All 564 (566).
- ('19) AIR 1919 Pat 381 (382, 383).
- ('25) AIR 1925 Bom 342 (342). (Five persons making five contracts with the same defendant — One suit by all five on the contracts is not maintainable because not based on the same

cause of action.)

- (18) AIR 1918 Cal 858 (861) : 45 Cal 111.

*The contrary view in the following cases that it depends upon the facts found is not good law.*

- (87) 14 Cal 681 (686).
- (87) 14 Cal 435 (439).
- ('74) 21 Suth W R 206 (207).
- ('79) 4 Cal 949 (952, 953).

**Note 2**

1. ('25) AIR 1925 Pat 674 (675).
  2. ('05) 3 All L Jour 610 (612) : 29 All 18 (19).  
(Decision under S. 57 of N. W. P. Tenancy Act.)
  - ('24) AIR 1924 All 720 (721). (Objection under O. 2 R. 6 was overruled.)
- [See ('29) AIR 1929 P C 171 (174) : 56 Ind App 238 (P O). (If a suit can be brought against a holder in respect of all his separate holdings the consequent decrees and orders can be so



**O. 2 R. 3  
Notes 2-6**

this rule, claim on alternative titles which arise out of inconsistent facts, though he may claim even on inconsistent titles.<sup>3</sup>

**3. The Rule presupposes several causes of action.** — This rule enables the joinder of several causes of action in one suit subject to certain restrictions.<sup>1</sup> It presupposes that there are *several* causes of action to be united in a single suit; so where there is really but a *single* cause of action no question of misjoinder arises.<sup>2</sup> A joinder of several *reliefs* is not a joinder of several *causes of action*, in a suit based on a single cause of action,<sup>3</sup> nor does an *ancillary relief* claimed in a suit amount to a distinct cause of action.<sup>4</sup>

See also Section 20 Note 20, "Cause of action".

**4. Cause of action.** — See Section 20 Notes 14 to 31.

**5. Alternative reliefs.** — Alternative reliefs may be claimed either on the same cause of action against different defendants or on different causes of action against the same defendant or defendants. The former class of cases is provided for in Order 1, Rule 3. The present rule deals with the latter class of cases.<sup>1</sup>

Though, in the case of several defendants, this rule uses the word "jointly" and does not use the word "in the alternative" found in O. 1 Rules 1 and 3, joinder of alternative causes of action will not be repugnant to this rule, provided *in respect of each of the alternative causes of action*, the several defendants are "jointly" interested.

**6. One plaintiff, one defendant, several causes of action.** — This rule authorises a plaintiff to unite several causes of action against a single defendant<sup>1</sup> subject, however, to the limitation that if all the causes of action cannot be

moulded as to apply distributively to the separate holdings.)]

[**But see** ('97) 24 Cal 197 (205, 206). (Such a joinder under the Bengal Tenancy Act is not improper.)]

**3.** ('25) AIR 1925 Pat 674 (675).

**Note 3**

**1.** ('02) 24 All 358 (360).

('16) AIR 1916 Lah 363 (363) : 1915 Pun Re No. 100.

**2.** ('83) 9 Cal 763 (765).

('02) 29 Cal 257 (259). (Suit for possession on sale or refund of purchase money, only one cause of action.)

('94) 16 All 359 (361). (Ouster by same defendants — Cause of action single — Though on different dates and on different portions but as part of same cause of contest.)

('29) AIR 1929 Bom 51 (53). (Transferor and transferee suing jointly for rent due to each — One cause of action.)

('13) 20 Ind Cas 347 (348) (Cal).

('06) 33 Cal 601 (603, 605).

('75) 28 Suth W R 400 (400).

('74) 22 Suth W R 532 (533). (Mortgage by conditional sale—Suit by mortgagee against vendor and his transferees for possession and declaration of the invalidity of transfers—One cause of action.)

('70) 14 Suth W R 381 (382).

('70) 18 Suth W R 271 (272).

('19) AIR 1919 Lah 280 (282) : 1919 Pun Re No. 10.

('88) 11 Mad 77 (81, 82). (Eviction of tenants holding different lands but under one *muchalika*.)

**3.** ('29) AIR 1929 Bom 51 (53). (Suit to recover rent — Transferor and transferee joining in — Only one cause of action—Though reliefs several.)

**4.** ('06) 29 Mad 29 (31).

('92) 16 Bom 608 (613 to 617).

('15) AIR 1915 Mad 217 (220).

('24) AIR 1924 Pat 65 (66). (Partnership suits.)

[**See also** ('84) 8 Mad 75 (76).]

**Note 5**

**1.** ('24) AIR 1924 Pat 280 (282). (Rescission of contract or specific performance in the alternative.)

('24) AIR 1924 Mad 520 (521). (Claim under promissory note can be combined with claim on original consideration in the alternative.)

('12) 14 Ind Cas 399 (401) : 8 Nag L R 7. (A claim on original contract, or substituted contract in the alternative.)

('72) 4 N W P H C R 70 (72). (Declaration of right to redeem and for damages not claimable in same suit.)

[**See also** ('72) 9 Bom H C R 1 (6).

('12) 17 Ind Cas 334 (337) (Oudh).]

[**But see** ('95) 1895 Pun Re No. 96, page 445. (*Quare*.)]

**Note 6**

**1.** ('66) 10 Moo Ind App 438 (451). (A claim for arrears of rent and to remove cloud on title.)

('19) AIR 1919 All 79 (80) : 42 All 64. (Declaration of title and mesne profits.)

('69) 8 Beng L R App 77 (77). (For possession of a house and rent.)



conveniently tried together, an order may be made directing separate trials of the same. But the joinder of *numerous* causes of action amounting to an abuse of the process of the Court is not contemplated by this rule.<sup>2</sup> Thus, where the plaintiffs joined in one action claims for infringement of 23 patents, Collins, M. R., said: "*Prima facie* a dozen causes of action cannot be combined in one writ; they must be so *intimately connected* as to justify their being included in one writ."<sup>3</sup>

A person who is made a defendant in different capacities is not the "same defendant" within the meaning of this rule.<sup>4</sup>

**7. One plaintiff, two or more defendants — Causes of action joint against all the defendants.** — It is a condition precedent to the applicability of the rule that the defendants must be *jointly* liable in respect of *each and every one* of the causes of action sought to be joined.<sup>1</sup> It is not, however, necessary, that each of such defendants should be interested in all the *reliefs* claimed provided they are interested jointly in the main questions raised in the litigation.<sup>2</sup> Thus, where two agents are jointly liable to render accounts, though not each for the same period of time,<sup>3</sup> or where several

against some defendants and as shebait against some—Separate suits ordered.]]

#### Note 7

1. ('09) 3 Ind Cas 165 (169) : 34 Bom 358.
- ('84) 6 All 106 (108). (5 All 163 (F B), Followed.)
- ('88) 5 All 163 (171) (FB).
- See the following cases :
- ('10) 7 Ind Cas 86 (88). (Claims in one suit for possession of land in tenant's holding and also those encroached upon—No misjoinder.)
- ('19) AIR 1919 Cal 343 (344). (Defendants co-sharers with plaintiff in certain tenures—Plaintiff paying up two decrees for rent and averting the sales of the holdings—Single suit for contribution in respect of the two causes of action will lie.)
- ('23) AIR 1923 All 306 (310).
- ('06) 3 All L Jour 123 (124, 125). (Declaration of title to immovable property can be joined with a prayer for cancellation of two sale deeds relating to that property.)
- ('14) AIR 1914 Bom 193 (195) : 38 Bom 120. (Claim by a Hindu widow against several coparceners of her deceased husband for stridhan joined with a claim for maintenance—No misjoinder.)
- ('07) 11 Cal W N 1154 (1156). (Suit for enhancement under S. 30 and for increase of rent under S. 50, Bengal Tenancy Act, lies.)
- ('07) 17 Mad L Jour 515 (516).
- ('19) AIR 1919 Pat 381 (383). (Suit for the recovery of a sum of money on the basis of two rokkas with an allegation that all the defendants were benefited by the loan although one of the rokkas was executed by two and the other by one only of the several defendants is not bad for multifariousness.)
- ('06) 4 Low Bur Rul 183 (186, 187).
- [See also ('06) 4 Low Bur Rul 183 (186, 187).]
2. ('84) 6 All 106 (108). (Joint interest in the main questions raised is a condition precedent.)
- ('09) 2 Ind Cas 3 (4) (All).
- ('09) 3 Ind Cas 165 (169) : 34 Bom 358.
- (1900) 4 Cal W N 590 (592).
3. ('81) 7 Cal 654 (658).
- ('05) 27 All 564 (565, 566).

('38) AIR 1938 Cal 165 (168). (Claim for work done and for reimbursement for expenses incurred for being ready for other promised work can be joined together.)

('07) 84 Cal 298 (301). (Rent of several holdings.)

('06) 83 Cal 601 (605). (Rent of holding and fishery attached to the holding consolidated.)

('01) 5 Cal W N 880 (881). (Both enhancement and arrears of rent at an enhanced rate.)

('67) 7 Suth W R 403 (409). (Claim for a hundi with a claim for return of money paid in excess of rent due.)

('16) AIR 1916 Lah 363 (363) : 1915 Pun Re No. 100. (Several pro-notes executed by the same defendants.)

('11) 9 Ind Cas 655 (656) : 1911 Pun Re No. 35. (Sch. 2, cl. 17 — Single application for three distinct agreements to refer.)

('08) 1908 Pun Re No. 80, page 187. (For possession and mesne profits.)

('69) 4 Mad H C R 334 (335). (Rent due in four instalments—All fallen due—Claimable in single suit.)

('28) AIR 1928 Oudh 67 (78). (Claim for mut-walliship can be joined with claim for wakf property as appendage thereto.)

('19) AIR 1919 Oudh 181 (182); 22 Oudh Cas 183. (Claim for share of profits and arrears of revenue.) (1862) 1 Hay 555.

2. ('35) AIR 1935 Rang 209 (210). (Although under the provisions of O. 2 R. 3, a plaintiff may unite in the same action several causes of action against the same defendant, he cannot be permitted to do so when the joinder of such causes of action embarrasses the defendant in his defence.)

[See also ('35) AIR 1935 Rang 315 (315). (Cause of action for personal decree upon promissory note is incompatible with cause of action upon mortgage.)]

3. (1908) 1 Ch 410 (422), Saccharin Corporation v. Wild.

4. ('28) AIR 1928 Mad 764 (769).

('19) AIR 1919 Low Bur 51 (52).

[See also ('38) AIR 1938 Cal 199 (202) : 55 Cal 164. (Claim by plaintiff in personal capacity

**O. 2 R. 3**  
**Note 7**

defendants are sued for refund of monies by each under a wrong order for rateable distribution,<sup>4</sup> there is no misjoinder.

Where there is only a *single* cause of action against several defendants there can be no misjoinder of causes of action. Thus, where *A* sues *B* and his mortgagee *C* for a declaration of his right to his share of the property and for possession thereof, the cause of action is the *infringement of A's* right by the mortgage and dispossession effected by *B* and *C* respectively, and consequently there is no misjoinder of defendants and causes of action.<sup>5</sup> Similarly, when *A* sells a certain property to *B* and thereafter in execution of a decree obtained by *X* against *A* the property is sold and purchased in portions by *C*, *D* and *E*, and *B* sues *A*, *X*, *C*, *D* and *E* to set aside the execution sale, the cause of action is only one against all the defendants and there is no misjoinder.<sup>6</sup>

Where possession is claimed against *A* and also against persons holding by *derivative titles* under *A*, the cause of action is a *single* one and there is no misjoinder.<sup>7</sup> Thus, where a reversioner sues to set aside the alienations by a Hindu widow in favour of several defendants, the suit is not bad for misjoinder<sup>8</sup> inasmuch as the plaintiff's cause of action against the alienees is the same as that against the alienor from whom they derive their title.<sup>9</sup> Similarly, where *A* leases certain lands to *B* and thereafter, ignoring the lease, again leases out the same in separate parcels to *C* and *D* and on that basis *A*, *C* and *D* dispossess *B*, a suit by *B* against *A*, *C* and *D* is not bad for misjoinder.<sup>10</sup> The position will be different where the defendants do *not claim* under the same trespasser<sup>11</sup> or where the unity of the cause of action is broken up by joining with it a cause of action on an alienation by a stranger.<sup>12</sup>

4. ('86) 13 Cal 159 (162).

('97) 1897 Pun Re No. 43, page 195.

5. ('89) 11 All 33 (35).

('08) 30 All 560 (562).

('02) 24 All 358 (360).

6. ('83) 9 Cal 763 (764, 765).

('78) 1 All 555 (556, 557).

[See however ('70) 2 N W P H C R 153 (155, 156).

(Different alienations from same person—Different trials.)]

7. ('02) 29 Cal 871 (880, 881).

('09) 1 Ind Cas 120 (121) : 33 Bom 293.

('97) 22 Bom 630 (632).

('13) 18 Ind Cas 852 (853) (Cal). (All defendants did not claim under same landlord.)

(1865) 4 Suth W R 109 (110). (The policy of law is not to favour multiplication of suits.)

(1865) 3 Suth W R 102 (103).

('01) 1901 Pun Re No. 10, page 40.

The following cases which hold to the contrary are of doubtful authority :

('83) 7 Bom 289 (290).

('94) 16 All 279 (280, 283).

('05) 1905 Pun Re No. 1, page 1.

('72) 4 N W P H C R 108 (108).

('71) 3 N W P H C R 86 (86, 87).

('68) 10 Suth W R 187 (187).

('67) 8 Suth W R 15 (16) (FB).

('06) 9 Oudh Cas 326 (329).

8. ('78) 7 Mad H C R 260 (262).

('14) AIR 1914 All 898 (894) : 36 All 406. (By virtue of O. 1 R. 3.)

('16) AIR 1916 Bom 310 (311, 312) : 40 Bom 351. (O. 2 R. 3 is permissive.)

('10) 6 Ind Cas 248 (249) (Cal).

('97) 24 Cal 881 (882). (Suit for ejectment against several defendants who claimed under different titles.)

('11) 10 Ind Cas 48 (48, 49) (Lah).

('90) 1890 Pun Re No. 149, page 480. (Several alienees of the person against whom possession is claimed also made parties.)

('21) 59 Ind Cas 522 (522) (Lah).

('18) AIR 1918 Lah 184 (185) : 1918 Pun Re No. 59.

[See also ('89) 12 Mad 234 (235). (Alienees from karnavan of tarwad.)

('07) 29 All 267 (270 to 272). (Property claimed under one title from defendants professing to hold under various titles.)

('08) 18 Mad L Jour 265 (265, 266). (Alienations by guardian.)]

[But see ('69) 1 N W P H C R 128 (129). (Suit against alienees from guardian—No relief sought for against guardian.)

('67) 8 Suth W R 364 (365).]

9. See the following cases :

('88) 11 Mad 106 (111). (Malabar stanom.)

('74) 7 Mad H C R 290 (292, 293) (FB).

('90) 1890 Pun Re No. 149, page 480.

10. ('02) 29 Cal 871 (880).

11. ('18) AIR 1918 All 425 (426) : 40 All 7.

12. ('10) 6 Ind Cas 577 (578, 579) (Cal). (Alienations by reversioner's father and brother—Alienations by widow—Separate causes of action.)

**8. One plaintiff, separate causes of action against several defendants, (i.e.) misjoinder of defendants and causes of action.** — A suit against several defendants for causes of action accrued against each of them *separately* and in respect of which they are *not jointly* liable is bad for misjoinder.<sup>1</sup>

"Such a joinder complicates the case before the Judge and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him, though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants."<sup>2</sup>

In *Seturatnam Aiyar v. Venkatachela Goundan*,<sup>3</sup> where a single suit was filed to eject several tenants in possession of different parcels of the land of the plaintiff Sir Lawrence Jenkins, in delivering the judgment of the Privy Council, said :

"They (the defendants) are not in joint possession; on the contrary, they have *separate* holdings and should have been separately sued . . . . But the plaintiff, in disregard of the provisions of the Code, has united in the same suit not merely several causes of actions but several actions or suits against separate defendants with the result that the litigation has been conducted throughout as though the defendants were a community with common interests."

The principle underlying the said observation equally applies to suits for possession against *several trespassers*,<sup>4</sup> unless the trespass is committed *jointly* by all the defendants.<sup>5</sup>

Where the first defendant was the executant of a bond to the plaintiff and in a suit for the money due on the bond the other defendants were joined on the ground that they had colluded with the first defendant in taking assignments of his property to defraud the plaintiff, their Lordships of the Privy Council held that there was a misjoinder, as the plaintiff's cause of action for the money was only as against the *first defendant* and not as against the other defendants.<sup>6</sup>

In suits on contracts, strangers to the contract having distinct interests by themselves cannot be joined,<sup>7</sup> but if the third party is only a *benamidar*<sup>8</sup> or is

#### Note 8

1. ('88) 5 All 163 (171) (FB). (While causes of action must be joint against all the defendants, the relief asked may be joint, several or in the alternative.)
- ('88) 142 Ind Cas 542 (543, 544) (Nag).
- ('09) 1 Ind Cas 361 (362) (Cal).
- ('96) 28 Cal 821 (825, 826).
- ('67) 8 Suth W R 64 (67).
- ('67) 8 Suth W R 461 (462).
- ('67) Ben L R Sup. Vol. 731 (733).
- ('92) 1892 Pun Re No. 127, page 426.
- ('82) AIR 1932 Rang 132 (135) : 10 Rang 342. (Suit under S. 92, C. P. C. — Some defendants strangers to trust—Misjoinder.)
- ('19) AIR 1919 Low Bur 51 (52).
- (1884) 26 Ch D 35 (39, 41), *Burstall v. Bayfus*. (Solicitors cannot be made defendants for claiming costs against them in a suit against others.)
- (1871) L R 12 Eq 547 (551), *Pointon v. Pointon*. (See observations of Sir John Wickens, V. C. on the subject of multifariousness.)
- ('87) AIR 1937 Nag 99 (100) : I L R (1937) Nag 349. (Two mortgages of same property to same mortgagees—Mortgagors different—One mortgage suit against both does not lie under S. 67A — Such mortgagors cannot be joined in one suit under this rule as they are not jointly liable on each mortgage.)
2. ('67) 8 Suth W R 15 (16) (F B). (Per Peacock, C. J.)

[See also ('32) AIR 1932 Cal 512 (513, 514) : 59: Cal 548. (Paramount title in mortgage suits.)

('06) 38 Cal 425 (441).]

3. ('20) AIR 1920 P C 67 (67, 70) : 43 Mad 567 : 47 Ind App 76 (P C).

4. ('69) 11 Suth W R 397 (397, 398).

('10) 5 Ind Cas 835 (838, 839) (Lah).

('18) AIR 1918 All 425 (426) : 40 All 7.

('19) AIR 1919 Low Bur 121 (122).

*In the light of the Privy Council case referred to above the following cases cannot be accepted as laying down the correct law :*

('08) 7 Cal L Jour 460 (465).

('10) 8 Ind Cas 885 (885) (Mad).

('13) 20 Ind Cas 347 (348) (Cal). (Note—This is a case of a single cause of action against the several defendants.)

('13) 18 Ind Cas 852 (853) (Cal).

5. ('79) 4 Cal L Rep 455 (458).

6. ('67) 11 Moo Ind App 468 (473) (P C).

7. ('81) 5 Bom 177 (179). (Suit for specific performance.)

('11) 12 Ind Cas 813 (822) (Bom).

('18) AIR 1918 Mad 681 (687) : 40 Mad 365 (F B). (Addition of strangers to the contract would amount to misjoinder.)

('04) 27 Mad 80 (82, 83). (Suit against partner for dissolution of partnership—Claim against agent of the firm for breach of contract cannot be joined.)

(1866) L R 2 Ch App 164 (170), *Hoghton v. Money*.

8. ('84) 10 Cal 1061 (1069).

**O. 1 R. 3**  
**Notes 8-9**

otherwise liable in law for the contract,<sup>9</sup> there is no distinct interest. Where several defendants enter into contracts with the plaintiff but each is liable only for his transaction *separately*,<sup>10</sup> or where there is a separate cause of action against each of the several defendants,<sup>11</sup> a single suit against all of them is incompetent.

A cause of action arising out of a joint liability of some defendants cannot be united with another cause of action under a transaction in which one of them *alone* was concerned.<sup>12</sup> Nor can separate causes of action against separate sets of defendants be joined in one suit.<sup>13</sup>

In suits for partition no cause of action can be joined which has no bearing on the question of partition.<sup>14</sup>

Regarding suits for specific performance of contracts and suits for contribution, see the undermentioned cases.<sup>15</sup>

Though a suit may fall outside this rule by reason of joinder of distinct causes of action against different defendants, it may be supported by the terms of O. 1 R. 3, if the several causes of action are so connected with the *same act or transaction* as to give rise to a *common question of law or fact* at the trial.<sup>16</sup> See also Notes to Order 1 Rule 3.

**9. Conspiracy to commit wrong or breach of contract.** — Distinct causes of action against several defendants may be united in one suit if the joint liability of the defendants arises by reason of a conspiracy or common design to commit the injury.<sup>1</sup>

9. ('01) 26 Bom 326 (328). (Agreement to sell joint family property by father—Minor son not a "stranger" to the contract.)

10. ('94) 17 Mad 168 (175).

('74) 21 Suth W R 206 (207). (Defendants had purchased timber separately, though at same time.)

11. ('70) 2 N W P H C R 221 (222).

('24) AIR 1924 Cal 511 (511). (Suit for account against defendant 1 and for loss due to negligence against defendant 2—Misjoinder.)

('06) 88 Cal 425 (440, 441). (Person claiming adversely to mortgagor and mortgagee should not be joined.)

('72) 18 Suth W R 288 (288).

Bourke O O 8 : Cor. 94.

('10) 8 Ind Cas 926 (928) : 4 Sind L R 152.

12. ('09) 4 Ind Cas 1097 (1101, 1102) (Mad).

('90) 1890 Pun Re No. 32, page 85. (One bond executed by father and son—Another by son alone—Suit on both incompetent.)

('88) 1888 Pun Re No. 189, p. 487. (Suit on joint account of two, and on account of only one of them is incompetent.)

13. ('88) 6 Mad 278 (276). (Suit on foreign judgment against parties to it as well as strangers on the cause of action on which the foreign judgment was obtained is incompetent.)

('09) 4 Ind Cas 600 (602) : 3 Sind L R 108.

('02) 6 Cal W N 585 (587, 589).

('05) 2 All L Jour 91 (94).

('14) AIR 1914 Sind 70 (74) : 8 Sind L R 69. (*Obiter*.)

[See also ('15) AIR 1915 All 106 (106) : 28 Ind Cas 602 (608). (Redemption of mortgage against some defendants — Ejectment against others — It is doubtful whether such reliefs can be joined in one suit.)]

[See however ('69) 12 Suth W R 11 (12).]

14. ('08) 18 Mad L Jour 85 (87). (Suit for partition between melwaramdars — No question between melwaramdars and the kudiwaramdars to be joined.)

('77) 1 Mad 393 (394, 395). (Suit for partition of inam lands—Ryots were impleaded as defendants and ejectment claimed against them—Suit incompetent.)

15. ('96) 22 Bom 46 (49). (Specific performance — Subsequent vendee from the plaintiff's vendor could be made a defendant—10 Cal 710, Followed.)

('77) 1 All 455 (456). (Contribution.)

('78) 5 N W P H C R 215 (216, 217). (Single suit for contribution competent where ascertainment of shares forms a portion of a relief — This is an exception to the rule that separate suits must be brought.)

('76) 25 Suth W R 41 (41). (Contribution.)

('17) AIR 1917 Mad 517 (517). (Suit for specific performance and possession — Vendor's usufructuary mortgagee impleaded—Misjoinder.)

('94) 18 Mad 415 (417). (Specific performance.)

16. ('18) AIR 1918 Cal 858 (859, 860) : 45 Cal 111 (122, 128). (All questions need not be common — It is sufficient that there is a common question.)

('08) 31 Mad 252 (256, 257). (O. 1 R. 8 applies also to a case of several causes of action.)

('05) 9 Cal W N 556 (661). (Rent for two leases — Properties undivided and leases alike.)

[See also ('19) AIR 1919 Lah 280 (282) : 1919 Pun Re No. 10.]

**Note 9**

1. ('91) 14 Mad 103 (108).

('78) 1 All 555 (556). (Collusive attachment and court sale.)

('01) 28 Cal 769 (788). (Combination to deprive plaintiff of rights in joint family.)

Thus, where *A* and *B* combine together to assault *C*<sup>2</sup> or to keep him out of possession of certain lands,<sup>3</sup> a suit by *C* against *A* and *B* for damages for the assault or for declaration of his right to the property is maintainable. The view that the joinder will be bad if the conspiracy or common design is *found* against ultimately does not seem to be sound inasmuch as the question of misjoinder must be decided on the *allegations* made in the plaint. See Note 1, *ante*.

**O. 2 R. 3**  
**Notes 9-11**

**10. Two or more plaintiffs, one defendant — Plaintiffs jointly interested in the causes of action.** — Where two or more plaintiffs are *jointly* interested in two or more causes of action against the same defendant, they can join all the causes of action in the same suit.<sup>1</sup> It is enough if the plaintiffs are *jointly* interested though not *equally* interested in the causes of action.<sup>2</sup> Conflicting or antagonistic interests among the plaintiffs cannot be joint interest.<sup>3</sup>

This rule has no application when the cause of action is a single one, because, in such a case, there is no question of any joinder of causes of action. In such cases, the several plaintiffs entitled to sue on the cause of action may join as plaintiffs in the same suit under O. 1 R. 1 *ante*.<sup>4</sup> As has been seen already in Note 8 above, this rule is subject to O. 1 R. 1 and therefore several plaintiffs may unite several causes of action in the same suit though they may not be jointly but severally interested in them all, provided their rights to relief arise out of the *same act or transaction* and a *common question of fact or law* arises for trial.<sup>5</sup>

Suppose *A* and *B* sue *C* for recovery of certain property. *A* bases his title on inheritance and *B* on purchase of a portion of the property from *A*. In such a case, is the cause of action one and the same for both the plaintiffs or distinct? On this question there is a conflict of decisions. The Allahabad High Court has held that *A* and *B* have distinct causes of action in such a case,<sup>6</sup> while the contrary view has been held by the Calcutta High Court.<sup>7</sup>

**11. Two or more plaintiffs, one defendant — Causes of action in which plaintiffs are severally interested — Misjoinder of plaintiffs and causes of action.** — Under this rule more plaintiffs than one, having distinct causes of action, might join in a suit against the same defendant, only if they are all jointly interested in the causes of action. But this rule is to be read subject to the provisions of

(‘78) 19 Suth W R 203 (203).

[See also (‘37) AIR 1937 Mad 192 (192, 193).

(Application by Official Assignee to set aside number of alienations made by insolvent — Alienations alleged to be outcome of one scheme of fraud and conspiracy between insolvent and alienees — Alienations held could be attacked in one application and proceeding.)]

[But see (‘71) 16 Suth W R 155 (155).]

2. (‘02) 26 Bom 259 (264).

3. (‘86) 18 Cal 147 (153).

#### Note 10

1. (‘84) 6 All 632 (638). (Maintenance of mother and daughter residing together.)

(‘96) 6 Mad L Jour 186 (137). (Melwaramdar and kudiwaramdar joining together as plaintiffs.)

(1900) 18 C P L R 130 (135, 136). (Tenants-in-common have a right to sue in respect of a joint damage and may also join in an action of account.)

(‘14) AIR 1914 Mad 256 (256).

(‘12) 16 Ind Cas 623 (624) (Cal).

2. (‘82) 6 Mad 239 (242).

3. [See (‘82) 6 Mad 239 (242, 243).]

4. (‘95) 22 Cal 833 (841, 842). (Meaning of same cause of action.)

(‘06) 33 Cal 367 (370).

(‘96) 19 Mad 335 (336, 337). (Suit for possession by number of plaintiffs, some of them being entitled to melwaram and others being entitled to kudiwaram — Suit not bad for misjoinder.)

(‘02) 26 Bom 577 (582, 583). (One cause of action.)

(‘29) AIR 1929 Bom 51 (53, 54). (One cause of action — Plaintiffs interested severally or in the alternative might join.)

5. (‘18) 18 Ind Cas 764 (765) (Cal).

6. (‘96) 18 All 219 (221).

(‘96) 18 All 131 (140).

7. (‘06) 33 Cal 367 (370).

[See also (‘95) 22 Cal 833 (843).

(‘87) AIR 1937 Pat 250 (251). (Transferor and transferee joining together as plaintiffs in suit for declaration.)]

**O. 2 R. 3**  
**Notes 11-14**

**O. 1 R. 1.** O. 1 R. 1 enables several plaintiffs to unite in one suit, though their causes of action may be distinct and separate, if their rights to relief arise out of the same act or transaction or series of acts or transactions, and a common question of fact or law would arise if they brought separate suits. Thus, two or more plaintiffs cannot properly unite in one suit two or more causes of action, in which they are *separately* interested unless they can do so under O. 1 R. 1.<sup>1</sup>

Where a single wrongful act or infringement gives rise to separate causes of action in favour of several plaintiffs, a single suit by all of them is maintainable under O. 1 R. 1.<sup>2</sup> The undermentioned cases<sup>3</sup> held to be bad under the old Code may, it is submitted, be maintainable under O. 1 R. 1 of the present Code. It was decided under the old Code that claims to property by several plaintiffs under *independent* titles to portions thereof cannot be joined in the same suit.<sup>4</sup>

Five persons brought a single suit against the same defendant basing their claim on a single contract. But the evidence revealed five different contracts, one with each of the plaintiffs. In such a case no question of misjoinder of parties or causes of action can arise. The suit will have to be dismissed on the ground that there was no *single* contract in respect of which the plaintiffs could maintain a single suit. Nor could any one of the plaintiffs be granted the benefit of election under O. 1 R. 2 as no one plaintiff could be said to be entitled to the contract *as set up*.<sup>5</sup>

**12. Two or more plaintiffs, two or more defendants — Plaintiffs jointly interested in each of the causes of action against all the defendants jointly.** — Two or more plaintiffs suing two or more defendants on several causes of action must be jointly interested in each of the causes of action against all the defendants.<sup>1</sup>

**13. Two or more plaintiffs, two or more defendants—Plaintiffs severally interested against defendants severally — Misjoinder of parties and causes of action.** — Where each plaintiff has only a separate right against each defendant<sup>1</sup> or the defendants jointly,<sup>2</sup> or different sets of plaintiffs are *separately* entitled against *different sets* of defendants,<sup>3</sup> the suit is bad for misjoinder.

**14. Procedure in cases of misjoinder.**—Under the old Code where the plaint was bad for misjoinder of parties or multifariousness, the Court could return the plaint for amendment, or reject it or dismiss the suit if the necessary amendment was not made. If the suit was dismissed, and the plaintiff appealed, the Appellate Court might

**Note 11**

1. ('97) 24 Cal 540 (543).
- (28) AIR 1923 Pat 411 (412).
2. (1899) 1 Ch 55 (59, 60), *The Universities of Oxford and Cambridge v. George Gill & Sons*. (1899) 1 Ch 398 (397), *Drinquier v. Wood*.
3. ('96) 18 All 432 (434). (Creditors owning separate debts could not sue jointly to avoid a fraudulent deed of gift by debtor — *Compare* S. 53, T. P. Act.)
- (07) 34 Cal 662 (670). (One act of libel against several plaintiffs.)
- (85) 8 Mad 361 (363, 364). (Proceedings dismissing several trustees of a temple.)
- (85) 11 Cal 524 (526). (Wrongful detention of several plaintiffs in jail by the Superintendent.)
4. ('05) 2 Cal L Jour 602 (606).
5. ('25) AIR 1925 Bom 342 (342).

**Note 12**

1. ('96) 18 All 131 (136).
- (98) 1898 Pun Re No. 91, page 321.
- (96) 1896 Pun Re No. 5, page 12. (Two different bonds for same transaction—Single cause of action.)
- (12) 16 Ind Cas 84 (85) (Cal).
- [See also ('82) 4 All 261 (270).
- (22) AIR 1922 All 80 (80, 81). (Single suit for redemption, though shares of each of several mortgages specified but right to redemption agreed to be indivisible as against them.)]

**Note 13**

1. ('10) 6 Ind Cas 15 (15) : 34 Mad 55.
2. ('01) 26 Bom 259 (264, 265).
- (68) 9 Suth W R 525 (526).
3. ('97) 1 Cal W N clii (cli).
- [See also ('80) AIR 1980 Lah 843 (846). (Consolidation of two such suits wrong.)]

remand it for returning the plaint for amendment.<sup>1</sup> Under the provisions of the present Code, Section 99 and O. 2 R. 7, the misjoinder is regarded only as an *irregularity* and no suit will be dismissed on the mere ground of misjoinder of causes of action.<sup>2</sup> As a general rule the question of misjoinder will not be considered unless objection is taken at the proper time. See Rule 7 of this Order. When a valid objection is taken at the proper time the Court may allow appropriate amendments or withdrawal under the provisions of the Code.<sup>3</sup> This power exists, though with regard to cases of misjoinder of *causes of action*, there is no provision in this Code corresponding to O. 1 R. 9 relating to misjoinder of *parties*. A plea of misjoinder cannot, under the present Code, be taken in appeal as a ground for the reversal of a decree or for a remand unless it has

**O. 2 R. 3  
Note 14**

**Note 14**

1. ('85) 8 Mad 361 (365).
- ('78) 5 N W P H C R 215 (216).
- ('98) 15 All 380 (381).
- ('08) 1908 Pun Re No. 88, page 120.
- ('88) 1888 Pun Re No. 189, page 487. (It is an error of jurisdiction to try a suit which is bad for misjoinder of causes of action.)
- See also the following cases :
- ('85) 7 All 860 (862). (7 All 79, Referred to.)
- ('83) 7 Bom 289 (291, 292). (Dismissal of the suit was confirmed in appeal.)
- ('07) 84 Cal 662 (671). (The trial Court (the Original Side High Court) allowed the plaintiffs to elect as to which of them should go on with the suit in a case of misjoinder of plaintiffs.)
- ('97) 24 Cal 540 (545). (Objection as to misjoinder was allowed to be raised in second appeal.)
- ('87) 14 Cal 681 (687). (The Appellate Court confirmed the order of dismissal.)
- ('87) 14 Cal 435 (439). (Though the High Court held that rejection of the plaint and not dismissal was the proper order, it did not remand the case for that purpose.)
- ('86) 18 Cal 159 (162). (Suit should not be dismissed for misjoinder of parties.)
- ('05) 2 All L Jour 91 (94). (Misjoinder — Mere irregularity.)
- ('04) 26 All 218 (220). (After issues only Court can amend plaint — It cannot order the plaintiff to amend to remedy defect of joinder of plaintiffs.)
- ('96) 18 All 432 (435).
- ('96) 18 All 219 (221). (Plaint ordered to be returned for amendment.)
- ('96) 18 All 181 (141). (Do.)
- ('94) 16 All 279 (283). (Plaintiff allowed to abandon his claim against some defendants with liberty to sue for claim so omitted.)
- ('88) 6 All 106 (108). (Suit bad for misjoinder of defendants and causes of action — High Court upheld the order of dismissal by the lower Court.)
- ('71) 8 N W P H C R 86 (87). (Suit to be dismissed for misjoinder.)
- ('70) 2 N W P H C R 221 (222). (Lower Court dismissed suit on merits — But High Court dismissed it on account of misjoinder.)
- ('69) 11 Suth W R 897 (898). (Decree of dismissal confirmed on appeal.)
- ('69) 11 Suth W R 278 (274). (It will be too late to raise an objection as to multifariousness after the suit has been tried on the merits.)
- ('68) 10 Suth W R 187 (187, 188). (Case remanded for trial as made up of separate suits.)
- ('67) 8 Suth W R 364 (365). (Suit bad for causes of action ought not to be entertained.)
- (1865) 4 Suth W R 109 (110).
- ('92) 1892 Pun Re No. 127, page 426. (Case remanded for plaintiff's election.)
- ('90) 1890 Pun Re No. 82, page 85. (Plaintiff allowed to elect which cause of action he would proceed with.)
- ('08) 27 Mad 80 (85). (Suit on distinct causes of action — Dismissal is proper.)
- ('98) 17 Mad 168 (176, 179). (Misjoinder which has affected the merits of the case cannot be condoned under Section 578.)
- ('84) 7 Mad 171 (174).
- ('70) 2 N W P H C R 158 (155). (Suit should have been rejected for misjoinder of causes of action.)
- ('69) 1 N W P H C R 128 (131). (Objection not raised by parties — No portion of the suit need be dismissed in appeal.)
- ('02) 26 Bom 259 (266).
- ('84) 8 Bom 616 (619). (Lower Court dismissed defendants from suit — Wrong procedure.)
- ('81) 5 Bom 177 (179).
- ('05) 2 Cal L Jour 602 (608, 609).
- ('02) 6 Cal W N 585 (588, 589).
- ('79) 4 Cal 949 (953, 954). (Dismissal not justified.)
- ('78) 20 Suth W R 240 (241).
- ('78) 20 Suth W R 147 (148). (Objection as to misjoinder upheld by Appellate Court — This is no ground for special appeal.)
- ('70) 13 Suth W R 284 (285). (Suit not to be dismissed for misjoinder of causes of action.)
- ('70) 13 Suth W R 271 (272). (Plaintiff not to be non-suited on account of multifariousness.)
- ('88) 6 Mad 278 (276). (Decree of dismissal upheld in appeal.)
- ('88) 6 Mad 239 (244). (Plaint returned for amendment.)
- ('06) 9 Oudh Cas 326 (329, 330). (Plaintiff allowed to elect.)
- (1893) 1 Q B 771 (772), *Sandev. Wildsmith*. (Do.)
2. ('17) AIR 1917 Mad 517 (517).
- ('82) 142 Ind Cas 542 (544) (Nag). (In such a case Court should call upon plaintiff to elect to confine his suit to one set of defendants.)
- ('87) AIR 1937 P C 42 (45) : 16 Pat 149 (P C).
3. ('32) 142 Ind Cas 542 (544) (Nag).
- [See ('08) 85 Cal 495 (509). (The suit was allowed to be continued in respect of one cause of action.)
- ('86) AIR 1936 Pat 142 (143). (Plaintiff joining in one suit two independent claims—Court should not try suit in that form — It should ask plaintiff to elect.)]



**O. 2 R. 3**  
**Notes 14-17**

affected the *merits of the case* or *jurisdiction of the Court*<sup>4</sup>: see Section 99, *ante*. If the merits have been affected the Court may remand the case for a separate finding on any one or more of the claims in the suit<sup>5</sup> or for any amendment that may be deemed necessary.<sup>6</sup>

**15. Addition of unnecessary parties.** — The question of misjoinder will have to be determined only with reference to necessary parties in the suit. So in suits for pre-emption where the vendor is not a necessary party to the suit, the joinder as defendants of different vendors of the same vendee will not make the suit bad for misjoinder.<sup>1</sup>

**16. Jurisdiction.** — The value of a suit in which more causes of action than one have been united is the aggregate value of the several subject-matters at the date of suit.<sup>1</sup>

**17. Revision.** — Where the lower Court either misunderstands the nature of judicial *discretion* or otherwise wrongly holds that a suit is bad for misjoinder of causes of action, a revision will lie.<sup>1</sup>

**O. 2 R. 4**

**R. 4.** [S. 44, Rule A.] No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, except —

Only certain claims to be joined for recovery of immoveable property.

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- (c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

[1859, S. 10; 1877, S. 44A; R. S. C., O. 18 R. 2.]

4. ('18) 18 Ind Cas 117 (118) (Cal).  
(‘09) 3 Ind Cas 382 (385) : 36 Ind App 103 : 36 Cal 780 (P O).

(‘69) 12 Suth W R 114 (115). (Case under the old Code.)

(‘87) AIR 1937 P C 42 (45) : 16 Pat 149 (P C).

5. ('10) 6 Ind Cas 15 (16) : 34 Mad 55.

6. ('09) 4 Ind Cas 600 (608) : 3 Sind L R 108.

**Note 15**

1. ('24) AIR 1924 Lah-166. (157).

(‘09) 3 Ind Cas 735 (736) : 32 All 14. (Dissenting from 4 All 168 and 6 All 106).

**Note 16**

1. ('16) AIR 1916 Lah 368 (363) : 1916 Pun Re No. 100.

(‘67) 7 Suth W R 174 (176). (Land and mesne profits.)

**Note 17**

1. ('22) AIR 1922 Mad 332 (333, 334) : 45 Mad 194.  
(‘22) AIR 1922 Mad 486 (486).

(‘22) AIR 1922 Mad 174 (175) : 46 Mad 186.



*Synopsis*O. 2 R. 4  
Notes 1-3

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|--|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Suit must be for the recovery of immovable property.</li> <li>4. Leave of Court — When can be granted.</li> <li>5. Joinder of claims for mesne profits or arrears of rent — Clause (a).</li> </ol> | <ol style="list-style-type: none"> <li>6. Claims in which relief is sought on the same cause of action — Clause (c).</li> <li>7. Suit for foreclosure or redemption — Proviso.</li> <li>8. Objection as to misjoinder of causes of action. See O. 2 R. 7.</li> <li>9. Appeal.</li> <li>10. Revision. See O. 2 R. 8 Note 17.</li> </ol> |
|--|--|

*Other Topics (miscellaneous)*

Counter-claims. See Note 2.

Joinder of claims for moveables and immovables. See Note 6 and Illustration 1.

Suits on title to immovables. See Note 3.

Various reliefs on a single cause of action. See Note 6.

**1. Legislative changes. —**

1. The words "or to obtain a declaration of title to immovable property," which occurred in the old Section 44 (a) have been omitted.
2. The words "or any part thereof" have been added to clause (a).
3. Clause (c) of the old Code has been omitted and a new clause has been substituted.
4. The proviso to the rule is new.

**2. Scope of the Rule. —** This rule declares that, in suits for the recovery of immovable property, only the claims specified in the three clauses can be joined.<sup>1</sup> If any other claim is sought to be added, the *leave of the Court* must be obtained; and such leave may be granted if the claims joined may be conveniently disposed of in one suit. The object of the rule appears to be to avoid a joinder of claims of a character *dissimilar* to a claim for recovery of immovable property,<sup>2</sup> and to prevent consequent embarrassment in the trial of the suit.

The rule does not apply to a joinder of several claims where the relief sought is based on the *same cause of action*. Nor does it apply to joinder of several claims, all for the recovery of immovable property.<sup>3</sup> On the contrary, Rule 3 warrants the joinder of such claims against the same defendant or defendants jointly.

This rule applies to counter-claims also.<sup>4</sup>

**Order 2 Rule 4 — Note 2**

1. ('82) 5 Mad 161 (161, 162).
- ('08) 1908 Pun Re No. 30, page 187. (Possession and mesne profits.)
- ('95) 17 All 274 (277).
- ('85) AIR 1935 Pesh 161 (163). (Mortgagee of share in property purchasing share in execution of his decree—Suit by him for possession of share by partition — He can also claim rendition of accounts — The decision seems to hold that such a case is covered by cl. (a).)
- [See ('69) 11 Suth W R 542 (548). (Possession and rent properly claimed in a single suit.)]
2. ('82) 5 Mad 161 (161, 162). (Section obscure.)
- ('06) 8 All L Jour 128 (124).
- ('02) 25 All 229 (280). (Suit on several mortgages — Even assuming it is a suit for recovery of immovable property, suit not barred—5 Mad 161 Followed.)

- ('94) 17 All 274 (276, 277).
- ('86) 8 All 191 (194). (Joinder of a claim for grain.)
- ('69) 11 Suth W R 398 (399). (Claim for damages and registration.)
- ('95) 5 Mad L Jour 53 (54, 57). (Joinder of money claim.)
3. ('82) 5 Mad 161 (161).
- ('26) AIR 1926 All 710 (711) : 49 All 219. (Recovery of part as owner and rest as pre-emptor.)
- ('09) 8 Ind Cas 735 (736) : 32 All 14. (Suit for pre-emption in respect of four sales, all to the same vendee.)
- ('06) 3 All L Jour 128 (125).
- ('94) 17 All 274 (276).
- ('09) 4 Ind Cas 116 (118) (Cal). (Suit for recovery of land and also for right of way the latter being held to be immovable property.)
4. (1882) 21 Ch D 188 (142), *Compton v. Preston*.

**O. 2 R. 4**  
**Notes 3-6.**

**3. Suit must be for the recovery of immovable property.** — This rule will have no application unless the suit is for the *recovery* of immovable property.<sup>1</sup> The omission of the words "or to obtain a declaration of title to immovable property" in Section 44A of the Code of 1882 has rendered this rule inapplicable to a suit for declaration of title. Such a suit is not one for the *recovery* of immovable property.<sup>2</sup> A suit upon a mortgage for recovery of money and a claim for arrears of rent on the lease of the mortgaged property executed by the mortgagor<sup>3</sup> or a suit for a share in a mortgage decree<sup>4</sup> or a suit for specific performance of an agreement to sell immovable property<sup>5</sup> is not a suit for recovery of immovable property within the meaning of this rule. So also a suit to restrain a trespass on immovable property is not a suit for the recovery of immovable property.<sup>6</sup>

**4. Leave of Court — When can be granted.** — Though the leave of the Court must ordinarily be obtained before instituting the suit, it can be obtained even afterwards in proper cases.<sup>1</sup> Where leave of the Court would be necessary for the joinder of several claims, it is optional with the plaintiff either to apply for leave under this rule or to file separate suits in respect of each of them; this rule does not compel him to obtain leave and assert all his claims at the same time.<sup>2</sup>

Where leave is not obtained as required by this rule and a suit is dismissed on the ground of misjoinder of causes of action, the time occupied in the previous proceedings may be deducted in computing the period of limitation for instituting separate suits.<sup>3</sup>

**5. Joinder of claims for mesne profits or arrears of rent—Clause (a).** — As to whether claims for recovery of *immovable property* and claims for *mesne profits* before suit constitute one cause of action or distinct causes of action, there is a conflict of opinion. According to one view, clause (a) itself shows that they constitute different causes of action. According to the other view clause (a) is not really an exception but is merely an *explanation*. See the cases in Note 24 to Order 2 Rule 2.

**6. Claims in which relief is sought on the same cause of action — Clause (c).** — Clause (c) is not really an exception to the rule, but has been inserted in order to avoid the possibility of mistake and to make the rule perfectly clear.<sup>1</sup> This rule has to be read with O. 2 R. 2, which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action.<sup>2</sup> Therefore, there is nothing irregular in seeking to recover in one suit *immovable* and *moveable* property, if the cause of action is the *same* in respect of both.<sup>3</sup>

**Note 3**

1. (1880) 14 Ch D 492 (494, 495, 500, 501), *Gledhill v. Hunter*. ('03) 30 Cal 369 (384).
2. (1880) 14 Ch D 492 (495), *Gledhill v. Hunter*.
3. ('91) 14 Mad 284 (286).
4. ('11) 12 Ind Cas 684 (686) (Cal).
5. ('79) 5 Cal L Rep 487 (489, 490).
6. 37 L J N S 578, *Spears Glass Works Ltd. v. Spear*.

**Note 4**

1. (1907) 2 K B 727 (731), *Lloyd v. Great Western Dairies*.
2. ('87) 1887 All W N 266 (266). (May be given even in appeal.)
3. ('84) 6 All 858 (862).
3. ('97) 20 Mad 48 (51).

**Note 6**

1. ('18) 19 Ind Cas 981 (984): 1914 Pun Re No. 4.
2. ('87) 10 Mad 375 (506).
3. ('04) 31 Cal 262 (272): 31 Ind App 10 (PC). ('82) AIR 1932 P C 216 (227): 59 Cal 1899: 59 Ind App 331 (PC). ('02) 24 All 358 (360). ('88) 1888 All W N 37 (38). (Cause of action being two separate awards, declaring title to the ornaments and land in the possession of defendants.) ('82) AIR 1932 Bom 595 (596). (Covenant to pass a sale deed and deliver possession — Both the reliefs can be claimed in the same suit.) ('18) 19 Ind Cas 981 (984): 1914 Pun Re No. 4. ('07) 1907 Pun L R No. 28, p. 54 (55). ('87) 10 Mad 375 (506). [See ('18) AIR 1918 Cal 159 (159). (Suit for partition—Moveable and immovable properties)]

*Illustrations*

1. A Hindu widow sues her husband's coparceners for recovery of immovable and moveable properties, being her deceased husband's share in the family properties under a partition which had not been completed during her husband's lifetime. The suit is not bad for misjoinder under this rule: *Ganesh Dutt v. Tewach*, I. L. R. 81 Calcutta 262 (P. C.).

2. A files an administration suit in which he joins a claim to a relief in regard to a partnership business and a claim for the recovery of immovable property on the *same cause of action*. The suit is not bad for misjoinder.<sup>4</sup>

But if, in Illustration 2 above, the two claims are based on *different* causes of action, the joinder of the two claims will violate this rule.<sup>5</sup> Thus, in a suit against an administrator to recover *damages* for malfeasance, a claim for the recovery of immovable property in the hands of the administrator and certain others, cannot be joined.<sup>6</sup> But, though the plaintiff may sue on a *single* cause of action, it may entitle him to various kinds of relief. In such a case no leave of the Court is necessary to bring a suit for all such reliefs. Thus, no leave is required to join a claim for an injunction, or for an account of rents and profits, or for appointment of a receiver, or for any declaration that merely establishes the plaintiff's right to possession, inasmuch as all these things are simply *machinery* to enforce the plaintiff's one cause of action.<sup>7</sup>

See also the undermentioned decision.<sup>8</sup>

**7. Suit for foreclosure or redemption—Proviso.**—The High Court of Patna has held in the undermentioned case<sup>1</sup> that, where in a suit for redemption, the plaintiff claims to be put into possession of the mortgaged property not only as against the mortgagee but also against persons in possession under a paramount title, leave of the Court is necessary for a joinder of those claims.

**8. Objection as to misjoinder of causes of action.** — See Rule 7 below.

**9. Appeal.** — An order rejecting an application for leave to join two causes of action is not appealable, though, if the plaint is rejected, it will be appealable as a *decree*.<sup>1</sup>

**10. Revision.** — See Order 2 Rule 3 Note 17.

## R. 5. [S. 44, Rule B.] No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are

Claims by or against executor, administrator or heir.

can very properly be claimed together — Such suit not one for possession of immovable property.)]

4. ('27) AIR 1927 Bom 470 (471) : 51 Bom 800. [See also ('99) 26 Cal 891 (922).]

5. ('02) 24 All 558 (555).

('07) 17 Mad L Jour 185 (189). (Claim for damages and declaration of title.)

6. ('17) AIR 1917 Pat 74 (76) : 2 Pat L Jour 642.

7. (1880) 14 Ch D 492 (499 to 501), *Gledhill v. Hunter*.

8. ('85) AIR 1985 Sind 129 (181). (Suit for pos-

session—Different claims made in consequence of separate orders in respect of different parcels of land—But all claims based on same cause of action viz., the assertion of the adverse title by the defendant—Suit is permissible without leave of Court.)

### Note 7

1. ('24) AIR 1924 Pat 618 (615) : 8 Pat 244. (Where the Court allows the issue to be tried leave of the Court might be presumed.)

### Note 9

1. ('86) 8 All 191 (198, 194).

O. 2 R. 4  
Notes 6-10

O. 2 R. 5

**O. 2 R. 5**  
**Notes 1-2**

such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

[R. S. C., O. 18 R. 5.]

### *Synopsis*

1. Scope of the Rule.
2. Claim by or against executor, administrator or heir, as such.
3. "Estate," meaning of.
4. Joinder of personal claims, when permissible.
5. Amendment of plaint.
6. Objections as to misjoinder. See Order 2 Rule 7.
7. Appeal. See Section 99.
8. Revision. See Order 2 Rule 8.

### *Other Topics (miscellaneous)*

Maintenance claims against surviving coparceners. See Note 3.  
Misjoinder—Procedure. See Note 5.  
Misjoinder under this rule. See Note 5.  
Moneys in hands of executors as such—Not attachable for personal claims. See Note 1.

1. **Scope of the Rule.** — The following propositions follow from this rule —
  - (a) Subject to the provisions of Rules 1 to 3 *ante*, any number of claims by or against an executor, administrator or heir may be joined in one suit, provided the plaintiff or defendant, as the case may be, sues or is sued *as such*.
  - (b) A claim by or against an executor, etc., *as such* cannot be joined with a claim by or against him *personally* in the same suit, except
    - (i) where the *personal* claim arises with reference to the *estate* of the deceased, or
    - (ii) where the plaintiff or defendant was *jointly entitled to or liable for with the deceased* in regard to the personal claim.

This rule deals with suits by or against only three classes of persons, *viz.*, *executors, administrators or heirs*. But those are not the only classes of persons who owe their legal condition to the death of another. A legatee or the next of kin, for example, also will come under the same category. The reason why executors, administrators and heirs are alone singled out by the Legislature in the rule is that, while acquiring title from the deceased in the same manner as the legatees or the next of kin, they, in addition, *represent* him. The closing words of this rule indicate this reason.<sup>1</sup> For the application of the principle of this rule to execution proceedings, see the case cited below.<sup>2</sup>

It makes no difference to the applicability of this rule that the two claims are made in the *alternative*.<sup>3</sup>

**2. Claim by or against executor, administrator or heir as such.** — A person is said to claim *qua* heir when, in making the claim, he is alleged to *represent* the estate of a deceased person. The words "claim by an heir as such" mean claim by him in a representative capacity, that is, as representing the person whose heir he claims to be.<sup>1</sup> He is not *claiming as an heir* if he claims *for himself*; for the fact of

#### **Order 2 Rule 5 — Note 1**

1. ('07) 81 Bom 105 (110, 111).
2. ('17) AIR 1917 Low Bur 17 (18). (Money with executor as such not attachable for personal

claims.)

3. ('85) AIR 1985 Bom 848 (844) : 59 Bom 578.

#### **Note 2**

1. ('96) 18 All 256 (249).

his being an heir is only the foundation of his claim and does not give him a representative capacity. Where, for example, a Mahomedan widow sues her daughters for her share in her deceased husband's estate,<sup>2</sup> or *A* sues the executors of *B* for property in their possession on the ground that *A* inherited the property from *B*,<sup>3</sup> the claim of the plaintiff is not *as an heir* but in his own and personal right. It has been held that a claim as the surviving coparcener of a joint Hindu family and a claim as the sole heir of a deceased member of the family for the recovery of a debt due on a promissory note executed in favour of the latter cannot be joined in the same suit.<sup>4</sup>

In a suit to administer the assets of a deceased person, various acts of maladministration may be sought to be redressed in the same suit.<sup>5</sup>

Under Section 328 of Act X of 1865, an administrator is liable for neglect to get in any part of the property of the deceased person.<sup>6</sup>

**3. "Estate," meaning of.** — The word "estate" means not only the estate rightly and properly held by executors, but also the "estate" which they hold *in the belief* that they are executors.<sup>1</sup> The claim of a Hindu widow of a deceased undivided coparcener for maintenance against the surviving coparceners, is not against the estate of the deceased husband.<sup>2</sup>

**4. Joinder of personal claims, when permissible.** — A *personal* claim can be joined with a claim as *representing* the estate, if it arises with reference to the *same estate*. Thus, a suit against an executor for the administration of the estate of a deceased person, and for an account of the partnership carried on by the executor and the deceased is not bad for misjoinder.<sup>1</sup> Similarly, where *A* and *B* carried on a partnership and after *A*'s death his son *C* continued the partnership with *B*, and subsequently *C* as administrator sued *B* for accounts of the partnership between *A* and *B* and also for dissolution of his own partnership, it was held that there was no misjoinder inasmuch as his *personal* claim arose out of the estate.<sup>2</sup> The expression "arises with reference to" is not to be narrowly construed.<sup>3</sup>

**5. Amendment of plaint.** — Where two claims are joined in contravention of this rule, the practice is to amend the plaint by striking out one of them and proceeding with the other.<sup>1</sup>

**6. Objections as to misjoinder.** — See Order 2 Rule 7.

**7. Appeal.** — See Section 99.

**8. Revision.** — See Order 2 Rule 3.

[See also ('99) 1899 Pun Re No. 79, page 331.]

2. ('96) 18 All 256 (258).

3. ('07) 81 Bom 105 (110, 111). (Dissenting from 6 Bom 390.)

[But see ('11) 10 Ind Cas 890 (891) : 85 Bom 297. (Plaintiff claiming property as heir of two different persons in the alternative—*Held* cause of action related to different "estates".)]

4. ('35) AIR 1935 Bom 843 (844) : 59 Bom 573.

5. ('99) 26 Cal 891 (922, 923).

6. ('98) 17 Bom 687 (644).

#### Notes 3

1. ('18) AIR 1918 Cal 870 (878). (The defendants believed they had the character of executors and took possession as executors though they were

found to be not so.)

('17) AIR 1917 Cal 662 (663). (Claim for certain ornaments not belonging to the estate of the testator but of which possession was obtained by executors as such.)

2. ('14) AIR 1914 Bom 193 (195) : 20 Ind Cas 533 (534, 535) : 38 Bom 120.

#### Notes 4

1. ('27) AIR 1927 Bom 470 (472, 473) : 51 Bom 800.

2. ('22) AIR 1922 Mad 436 (436, 437).

3. ('22) AIR 1922 Mad 436 (436, 437).

#### Notes 5

1. ('82) 6 Bom 890 (894).

[See also ('87) 9 All 221 (224).]

O. 2 R. 6

**R. 6.** [S. 45, Para. 2 and Ss. 46 and 47.] Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

[R. S. C., O. 18 R. 1.]

### Synopsis

- |                                    |                                   |
|------------------------------------|-----------------------------------|
| 1. Scope of the Rule.              | 3. Powers of the Appellate Court. |
| 2. Power to order separate trials. | 4. Consolidation of suits.        |

### Other Topics (miscellaneous)

Pre-emption suits. See Note 8. Rent suits. See Note 1.

**1. Scope of the Rule.** — This rule will apply only when it is open to a plaintiff to *combine* several causes of action in one suit. It does not apply to a case of *misjoinder* of causes of action.<sup>1</sup> See also Order 2 Rule 3 Note 6.

Under the Code of 1882, the power given by this rule could be exercised only before the first hearing, unless the parties otherwise agreed.<sup>2</sup> The words "before the first hearing" which occurred in the old Section have now been omitted in this rule and the scope of this rule has been enlarged.

See also the case cited below.<sup>3</sup>

**2. Power to order separate trials.** — Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, it may order separate trials.<sup>1</sup> If the facts alleged in the plaint arise out of facts that are common to two causes of action joined in one suit, the Court should not exclude one of them on the ground that it would not be convenient to try those two

### Order 2 Rule 6 — Note 1

1. ('18) 18 Ind Cas 181 (182) (Rang).
- ('04) 27 Mad 80 (84).
- ('24) AIR 1924 All 720 (721). (Under the Agra Tenancy Act different suits must be filed in respect of different holdings.)
- ('02) 29 Cal 257 (259). (One cause of action—Suit allowed to continue against both defendants as the justice of the case required such a course.)
- ('69) 12 Suth W R 70 (71).
- ('86) AIR 1988 Rang 420 (422) : 1988 Rang L R 397.
- [See ('28) AIR 1928 Cal 514 (516). (Suit multifarious but common question of fact and law and so separate trial will not lead to proper administration of justice.)]
- [But see ('14) AIR 1914 Cal 795 (795). (The rule as to separate trials applied to a case of misjoinder.)
- ('73) 20 Suth W R 482 (482). (Misjoinder of defendants and cause of action — Suit to be tried in regard to cause of action common to all defendants.)]
2. ('97) 30 Mad 860 (862).

('85) 7 All 79 (100) (FB).

3. ('99) AIR 1989 Nag 256 (257). (The joinder of causes of action and parties is not invariably fatal to the suit. O. 2 R. 6 is a rule of expediency and convenience. Whether the trial would be convenient or not is a matter which has to be determined on the facts of each case and no hard and fast rule of an absolute character can be laid down.)

### Note 2

1. ('92) 14 All 531 (536). (Claim for immovable property and mesne profits.)
- ('28) AIR 1928 Mad 764 (767).
- ('85) 8 Mad 75 (76). (Suit against several alienees.)
- ('10) 6 Ind Cas 577 (578, 579) (Cal). (Do.)
- ('75) 24 Suth W R 217 (218). (Suit by landlord against tenant in respect of different holdings.)
- ('26) L R 7 All 189 (189) (Rev). (Do.)
- ('25) 12 Oudh L Jour 191 (198).
- ('88) AIR 1988 Lah 658 (671). (Proceedings under S. 285, Companies Act, started in High Court against certain persons—Matters alleged against some of them entirely different from those alleged against others—Claims against all cannot be

causes of action together.<sup>3</sup> In cases where the Court orders separate trials, it should deal with separate causes of action as sub-suits under the title and number of the principal suit from which they spring,<sup>3</sup> and should not order the plaintiff to file separate plaints.<sup>4</sup>

**O. 2 R. 6**  
**Notes 2-4**

**3. Powers of the Appellate Court.** — If the trial Court does not think fit to act under this rule but tries all the causes of action together, it is not proper for the Appellate Court to interfere with the discretion of the trial Court in that matter.<sup>1</sup>

**4. Consolidation of suits.** — Although the Code contains no express provision, it has an inherent power *ex debito justitiæ* to consolidate proceedings.<sup>1</sup> Such power will be exercised only where it is asked for before the trial of the suits begins, and only where the parties are the same and the evidence given is common in all cases.<sup>2</sup> But where the cases have very little in common and all parties except one are against it, a consolidation of the cases will be a material irregularity within the meaning of Section 115 of the Code.<sup>3</sup> If the trial Court consolidates cases, and passes a single decree, a single appeal may be preferred against the decree.<sup>4</sup>

**R. 7. [New.]** All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

**O. 2 R. 7**

Objections as to misjoinder.

[See S. 99, O. 1 Rr. 9 & 13.]

### Synopsis

1. Objection to misjoinder of causes of action.
2. Waiver of objections.

**1. Objections to misjoinder of causes of action.** — Under Sections 46 and 47 of the old Code, a plaint which was bad for misjoinder of causes of action could be

tried jointly on principles underlying Order 2 Rule 6, C. P. C.)

('38) AIR 1938 Rang 420 (422):1938 Rang L R 897.  
( '38) AIR 1938 All 86 (87, 88) : I L R (1938) All 153. (Suit for possession, mesne profits and debt pending at date of Collector's order under S. 6, U. P. Encumbered Estates Act—Suit regarding possession and mesne profits should not be stayed —With regard to claim for debt separate trial should be ordered and stayed.)

[See ('38) AIR 1938 All 957 (958). (Court has a discretion in this matter which must be exercised judicially.)]

2. ('16) AIR 1916 Cal 49 (50).

3. ('84) 8 Bom 616 (619).

[See also ('18) AIR 1918 Lah 184 (185):1918 Pun Re No. 59. (Several alienations—Procedure.)]

4. ('70) 2 N W P H O R 153 (155).

#### Note 3

1. ('24) AIR 1924 Lah 156 (157). (Single suit for

pre-emption in respect of four sales in four plots of land from different owners and at different dates and for different prices impleading the vendee and also the various vendors of the four sales.)

[See also ('69) 11 Suth W R 280 (280).]

#### Note 4

1. (06) 33 Cal 927 (932).

('13) 40 Cal 955 (959).

[But see ('94) 22 Cal 511 (518).]

2. ('17) AIR 1917 Cal 841 (841) : 43 Cal 95.

('84) 10 Cal 58 (60).

('12) 15 Ind Cas 897 (898) (Cal).

('74) 21 Suth W R 196 (197). (Parties and subject-matter are different—Consolidation refused.)

('71) 15 Suth W R 110 (111). (All the cases to be tried together—Judgment in one case should not be made to govern other cases.)

3. ('88) AIR 1938 Pat 61 (62).

4. ('71) 15 Suth W R 395 (395).

**O. 2 R. 7  
Notes 1-2**

returned for amendment under Section 53 thereof; failure to comply with the order for amendment resulted in the rejection of the plaint. These provisions have not been re-enacted in this Code and this rule provides instead, that an objection on the ground of misjoinder of causes of action must be taken at the earliest possible opportunity, and, in all cases in which issues are settled, at or before such settlement of issues. The wording is similar to that in O. 1 R. 13.

The plea of misjoinder cannot for the first time be taken in appeal or in second appeal.<sup>1</sup> The defect of misjoinder is not a ground for reversing a decree; for, Section 99 provides that no decree shall be varied or reversed on account of misjoinder of causes of action, unless the defect has affected the merits of the case or jurisdiction of the Court.<sup>2</sup> If an objection as to misjoinder is taken in the written statement, the Court must raise an issue and decide it.<sup>3</sup> Where, in a case requiring leave under O. 2 R. 4, an objection as to misjoinder is raised but nothing is said about it in the judgment, the Court must be deemed to have impliedly granted the necessary leave.<sup>4</sup> Where a suit is bad for misjoinder of causes of action, the Court should not dismiss the suit; but should give the plaintiff an opportunity to amend his plaint and to proceed with the claim in respect of one of the causes of action.<sup>5</sup>

**2. Waiver of objections.**—An objection on the ground of misjoinder of causes of action being of a "dilatory character and quite besides the merits" will be deemed to have been waived if not taken at the proper time.<sup>1</sup> The same will be the case where the objection is raised but not *pressed*.<sup>2</sup> It has been held by the Bombay

**Order 2 Rule 7 — Note 1**

1. ('32) AIR 1932 Bom 595 (596).  
(94) 16 All 130 (131).  
(84) 6 All 692 (693).  
(92) 16 Bom 119 (122).  
(82) 5 Bom 554 (561).  
(18) AIR 1918 Cal 635 (686).  
(15) AIR 1915 Cal 441 (441). (Second appeal.)  
(10) 6 Ind Cas 327 (328, 331) (Cal).  
(03) 30 Cal 794 (800).  
(03) 5 Bom L R 185 (185, 186).
2. ('15) AIR 1915 Mad 320 (320).  
(11) 34 Mad 55 (57). (The defect having affected the case on its merits High Court remanded it for fresh findings.)  
(05) 2 All L Jour 91 (94).  
(93) 15 All 380 (382). (Irregularity not affecting the merits of the case.)  
(82) 4 All 168 (165).  
(81) 1881 All W N 15 (15) : 3 All 509.  
(70) 2 N W P H C R 443 (444) (F B). (Mere misjoinder is no ground of special appeal.)  
(10) 6 Ind Cas 248 (249) (Cal).  
(68) 10 Suth W R 45 (46).  
(09) 4 Ind Cas 106 (106) (Mad).  
(04) 27 Mad 80 (84). (Where it affects the merits of the case it ought not to be condoned.)
3. ('72) 18 Suth W R 288 (288).  
[See also ('67) 8 Suth W R 15 (16) (F B).  
(69) 11 Suth W R 273 (274).]
4. ('82) 1882 All W N 207 (208).
5. ('09) 8 Ind Cas 735 (735) : 32 All 14. (*Obiter*.)  
(87) 9 All 221 (224). (Where all the evidence is taken suit should not be dismissed for misjoinder but should be disposed of on the merits.)  
(05) 9 Cal W N 498 (500).

- (05) 2 Cal L Jour 602 (609).
- (87) 14 Cal 435 (439, 440). (Plaintiff's refusal to amend—Plaint to be rejected and not suit to be dismissed.)
- (82) 6 Mad 239 (245). (Appellate Court can order return for amendment.)
- (11) 10 Ind Cas 737 (738) : 7 Nag L R 43.  
[But see ('84) 6 All 106 (108).  
(73) 20 Suth W R 147 (148). (Plaint intentionally indistinct and obscure.)]

**Note 2**

1. ('21) AIR 1921 Cal 368 (371).
- (82) AIR 1932 Bom 595 (596). (Not allowed to be taken in appeal — Per Barlee, J.)
- (28) AIR 1928 Mad 764 (771). (Misjoinder noticed at a late stage — Even Court should not strike out issues.)
- (81) AIR 1931 Pat 64 (68) : 10 Pat 284.
- (82) 5 Bom 554 (561, 562). (Case of want of leave under O. 2 R. 4.)
- (94) 16 All 130 (131).
- (24) AIR 1924 Pat 613 (615) : 3 Pat 244. (In such cases leave must be presumed to have been given.)
- (86) 1886 Bom P J 170. (Do.)
- (08) 8 Cal L Jour 196 (199). (Do.)
- (1907) 2 K B 727 (729) : 23 Times Rep 570; Lloyd v. Great Western and Metropolitan Dairies Co. Ltd. (Do—Followed in 8 Cal L Jour 196.)
- (25) AIR 1925 Pat 674 (676).  
[See also ('30) AIR 1930 Sind 170 (178) : 24 Sind L R 145.]
2. ('27) AIR 1927 Bom 470 (471) : 51 Bom 300.
- (78) 20 Suth W R 240 (241).
- (28) AIR 1928 Lah 289 (290). (Objection taken but held abandoned later on as not pressed.)



High Court that even if a party to the suit waives his objection on this point, it is still open to the Court to take the objection at any time on its own initiative and adopt the procedure laid down in Rule 6 of this Order.<sup>3</sup>

O. 2 R. 7  
Note 2

### Local Amendments

#### LAHORE

Rule 8 — (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed, and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in Rule 18 of Order 6 and as required by the provisions of the Court-Fees Act.

N.-W. F. P. (Peshawar)

Same as that of the Lahore High Court.

O. 2 R. 8  
(Lahore)

## ORDER III.

### RECOGNIZED AGENTS AND PLEADERS

**R. 1.** [S. 36.] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader *appearing, applying or acting, as the case may be*, on his behalf:

O. 3 R. 1

Appearances, etc., may be in person, by recognized agent or by pleader.

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

[1877, Ss. 36, 49, 50, 417, 418, 435; 1859, Ss. 26, 16.]

a. Substituted by the Code of Civil Procedure (Second Amendment) Act, XXII of 1926, Section 2, for "duly appointed to act."

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Amendments after 1908.</li> <li>2. Scope of the Rule.</li> <li>3. Appearance and act.</li> <li>4. Appearance of party in person.</li> </ol> | <ol style="list-style-type: none"> <li>5. Appearance by recognized agent.</li> <li>6. Appearance by pleader.</li> <li>7. "Except where otherwise expressly provided." See Note 2.</li> <li>8. Direction to appear in person — Proviso.</li> </ol> |
|---|---|

### Other Topics (miscellaneous)

Appearing, applying or acting. See Order 3 Rule 4.  
Application for leave to sue in forma pauperis. See Note 2.  
Recognized agent of a Sovereign prince. See Order 3 Rule 2.

3. ('11) 12 Ind Cas 818 (822, 824) (Bom).

**O. 3 R. 1  
Notes 1-2**

**1. Amendments after 1908.** — By the Code of Civil Procedure (Second Amendment) Act, 1926, the words "appearing, applying or acting" were substituted for the words "duly appointed to act" which occurred after the words "or by a pleader."

**2. Scope of the Rule.** — This rule enacts that an appearance, application or act, in or to any Court may, *except where otherwise expressly provided* by any law for the time being in force, be done —

- (1) by a party in person, or
- (2) by his recognised agent, or
- (3) by a pleader appearing, applying or acting on his behalf.

This is the general rule.<sup>1</sup> There are, however, other modes of appearances, applications, or acting, expressly prescribed by the Code for particular cases which, by reason of the words "except where otherwise expressly provided by any law for the time being in force" are taken out of the operation of the general rule to the extent so prescribed. Thus, O. 5 R. 1 sub-rule 2 enacts that a *defendant* to whom summons has been issued under sub-rule 1 may appear —

- (a) in person, or
- (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or
- (c) by a pleader accompanied by some person able to answer all such questions.

The form of summons given in Form No. 1 of Schedule B of the Code also requires the defendant to appear in the above manner. The test, therefore, as to whether a *defendant* has *appeared* is to see whether such of the requirements of O. 5, Rule 1 and of the summons, as relate to appearance have or have not been complied with.<sup>2</sup> A defendant who is not present in person at the hearing<sup>3</sup> and whose pleader is also absent or has no instructions to go on with the case<sup>4</sup> cannot be said to have appeared at the hearing.

Other express provisions to the contrary are furnished by O. 33 R. 3 and O. 44 R. 1 under which an *application* to sue or appeal in *forma pauperis* should be presented to the Court in *person* unless the applicant is exempted from appearing in Court.

This rule does not recognise the practice of parties, their agents or their pleaders making applications to the Court by post.<sup>5</sup>

It must be noted that if a party is entitled to take part in or to conduct an examination, the ordinary rule must prevail that he is entitled to do so with the help of a counsel.<sup>6</sup>

See also the undermentioned case.<sup>7</sup>

**Order 3 Rule 1 — Note 2**

1. ('84) AIR 1934 Pat 290 (291).
2. ('14) AIR 1914 Cal 360 (361): 41 Cal 956. ('98) 28 Bom 414 (421).
3. ('66) 6 Suth W R 86 (87). (Being present at previous hearing will not affect the case.) ('96) 23 Cal 738 (758) (F B).
4. ('69) 1 N W P H C R 154 (154). (Mere putting in of written statement is not appearance.) ('85) 7 All 538 (540). ('72) 18 Suth W R 400 (400).
4. ('26) AIR 1926 Mad 971 (978).
5. ('98) 20 All 195 (198).
6. ('86) 8 All 140 (142).
7. ('98) 23 Bom 414 (421, 422). (Instructed only to apply for adjournment.) ('04) 8 Cal W N 621 (624, 625). (Do.)

8. ('82) 11 Cal L Rep 537 (539). (Pleaders who had filed vakalats being unavoidably prevented from appearing.)
9. ('67) 7 Suth W R 81 (81). (Mere filing of vakalat-nama is not appearance either by person or pleader.)
10. ('13) 18 Ind Cas 360 (361) (Mad). [See also ('72) 15 Suth W R 503 (504). (Case decided *ex parte* in spite of repeated requests for adjournment — High Court remanded the case.)]
11. [But see ('73) 20 Suth W R 53 (53). (A pleader not duly instructed appears for his client — Decree passed is not *ex parte*.)]
12. 5. ('72-92) 1872-92 Low Bur Rul 504.
13. 6. ('81) AIR 1931 Lah 8 (11).
14. 7. ('84) AIR 1934 Bom 450 (452).

**3. Appearance and act.** — "These words have a well-defined and well-known meaning. To *appear* for a client in Court is to be present and to represent him in the various stages of the litigation at which it is necessary that the client should be present in Court by himself or by some representative. To *act* for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court."<sup>1</sup> Thus, 'acting' includes applying; so that a pleader who makes an application on behalf of a litigant 'acts' for him and cannot do so unless he is authorised in writing under Rule 4 *infra*.<sup>2</sup> The words "appearance" and "act" do not include "pleading" and a recognised agent who is entitled to appear and act for a party is not entitled to a right of audience.<sup>3</sup>

**4. Appearance of party in person.** — The mere presence of a party in Court at the hearing is sufficient to constitute "appearance." The purpose for which he appeared or the action which he took on appearance is immaterial.<sup>1</sup> Thus, the fact that he asks for adjournment which is refused,<sup>2</sup> or that he does not put in any answer or written statement,<sup>3</sup> will not prevent his presence from being an "appearance." Where the party does not actually appear before Court when the suit is called on for hearing, the fact that he was present in the precincts of the court-house<sup>4</sup> does not constitute appearance. But suppose a party has *engaged a pleader and is also present in Court* at the hearing. In such a case, it has been held by the High Court of Bombay<sup>5</sup> that where the pleader so engaged is absent at the hearing but the party himself is ready to go on with the case, he must be deemed to "appear" in the case. According to the High Court of Madras, where the pleader so engaged reports "no instructions" and the party *takes no further part in the proceedings*, his mere presence in Court will not make it an appearance in the suit.<sup>6</sup> The reason given is that the appearance contemplated by the rule must be not as a *man* but as a *party* and with the intention of *acting as such party*, and that his mere presence when his pleader reports no instructions will not amount to an appearance inasmuch as he is merely there as the person who is represented by the pleader. The High Courts of Calcutta<sup>7</sup> and Patna<sup>8</sup> have also taken a similar view.

A party can himself appear, act or make applications on his behalf. A barrister or a pleader appearing before the Court as a litigant ought not to address the Court

**Note 3**

1. ('81) 6 Cal 585 (590).
- (‘89) AIR 1939 Rang 1(5):1939 Rang L R 108.
2. ('38) AIR 1938 Lah 698 (701) : I L R (1938) Lah 417.
- [See also ('37) AIR 1937 Mad 760 (761).]
3. ('34) AIR 1934 Cal 563 (568) : 61 Cal 924.
- (‘36) AIR 1936 Oudh 261 (261) : 12 Luck 123.
- (Recognized agent has no right to argue and plead.)
- [See also ('37) AIR 1937 Mad 937 (938) : I L R (1938) Mad 12 (FB). (Power-of-attorney—Agent has no right of audience either in appellate or original side of High Court.)]

**Note 4**

1. ('99) 28 Bom 414 (422).
- ('18) AIR 1918 All 333 (334) : 40 All 590. (One plaintiff representing other plaintiffs — His presence is appearance of all.)
- (‘10) 10 Ind Cas 908 (904) : 33 All 690.
- (‘24) AIR 1924 Nag 26 (27).

2. ('18) AIR 1918 Mad 1163 (1164). (Per Seshagiri Aiyar, J.)

[But see ('27) AIR 1927 Mad 109 (110). (Application for adjournment by plaintiff's pleader refused—Presence of plaintiff is not appearance for purposes of O. 41 R. 17.)]

3. (1863) Marsh 92.
- (1865) 2 Mad H C R 311 (312).
4. ('11) 12 Ind Cas 903 (904) (Bom).
5. ('09) 3 Ind Cas 992 (993) : 33 Bom 475.
6. ('26) AIR 1926 Mad 971 (973).
- (‘34) AIR 1934 Mad 199 (199).
- (‘07) 30 Mad 274 (276).
7. ('32) AIR 1932 Cal 418 (419) : 59 Cal 756.
- (‘32) AIR 1932 Cal 425 (426, 427) : 59 Cal 906.
8. ('22) AIR 1922 Pat 485 (487) : 1 Pat 188.
- (‘20) AIR 1920 Pat 589 (590) : 4 Pat L Jour 712.
- (‘18) AIR 1918 Pat 351 (351) : 3 Pat L Jour 355.
- (‘20) AIR 1920 Pat 373 (374) : 5 Pat L Jour 17.
- (Presence for conducting the case held necessary.)

**O. 3 R. 1** from the same place and in the same way as an advocate or even in the robes of such  
**Notes 4-6** advocate or pleader.<sup>9</sup>

**5. Appearance by recognized agent.** — See Order 3 Rule 2 and also Section 9, Agra Tenancy Act, III of 1926 and Section 32 (ii) of the C. P. Land Revenue Act, II of 1917.

**6. Appearance by pleader.** — The appearance of the pleader of a party is, under this rule, equivalent to the appearance of the party himself.<sup>1</sup> The mere presence of the pleader, however, unlike the presence of the party, is not necessarily an "appearance" within the meaning of the rule.<sup>2</sup> It has been seen in Note 2 above that a *defendant* who has received a suit summons can under O. 5 R. 1 appear by a pleader *only when he is duly instructed and able to answer all material questions relating to the suit* or when he is accompanied by some person able to answer all such questions. There is no specific provision that when a *plaintiff* appears by a pleader, the latter should be so instructed or accompanied. But it has been held that the principle of O. 5, R. 1 applies also to the case of a plaintiff appearing by a pleader.<sup>3</sup> In order therefore to constitute the presence of the pleader of a party, whether plaintiff or defendant, an "appearance" on his behalf, it is necessary that he should have been *duly instructed and able to answer all material questions relating to the suit*.<sup>4</sup> Thus, where the pleader of a party is absent,<sup>5</sup> or refuses to appear for him,<sup>6</sup> or reports "no instructions,"<sup>7</sup> or is instructed only to apply for an adjournment on the refusal of which he withdraws from the case,<sup>8</sup> there is no "appearance" on behalf of the party. But if, without

9. ('87) 9 All 180 (181). (Observations by Edge, C. J. in the course of arguments.)

#### Note 6

1. ('97-'01) 2 Upp Bur Rul 240.
- (29) AIR 1929 All 811 (812). (Party gone to fetch senior pleader—Junior pleader applying for time—*Held* no default of appearance.)
- (11) 9 Ind Cas 857 (858) (All). (Party appearing by pleader who from physical disability did not argue—Yet it was held there was no default.)
- (96) 18 All 119 (120).
- (75) 7 N W P H C R 77 (79).
- (09) 3 Ind Cas 45 (45, 46) (Bom).
- (67) 7 Suth W R 295 (296). (Notwithstanding no written statement was filed.)
- (27) AIR 1927 Pat 291 (292) : 6 Pat 383.
- (18) AIR 1918 Pat 259 (259). (Presence of party himself not necessary.)
2. ('25) AIR 1925 Oudh 549 (550) : 28 O C 166. See also foot note (3) below.
3. ('24) AIR 1924 Mad 842 (843).
4. ('24) AIR 1924 Mad 842 (843).
- (24) AIR 1924 Bom 139 (139).
- (66) 4 Bom H C R 206 (207).
- (23) AIR 1923 Pat 520 (521).
- (28) AIR 1928 Mad 831 (834 to 836).
- (20) AIR 1920 Low Bur 96 (96, 97) : 10 Low Bur Rul 329. (Pleader instructed only to apply for adjournment—*Held* no appearance.) See also Note 2.
5. ('68) 10 Suth W R 348 (348).
- (25) AIR 1925 All 58 (58). (When a vakil represents his client the right of audience is, for the time being, vested in him.)
- (87) 1887 All W N 65 (66).
- (78) 20 Suth W R 425 (426).

6. ('24) AIR 1924 Mad 842 (843). (Refusing to appear and failing to appear are of the same category.)

7. ('24) AIR 1924 Mad 842 (843).

- (22) AIR 1922 All 68 (68).
- (99) 23 Bom 414 (420, 422).
- (26) AIR 1926 Cal 246 (246).
- (10) 5 Ind Cas 499 (499) (Cal).
- (07) 84 Cal 235 (238).
- (28) AIR 1928 Mad 234 (234).
- (10) 5 Ind Cas 23 (24) : 33 Mad 241.
- (06) 18 Mad L Jour 51 (54 to 56). (And also abstains from taking part in further proceedings.)
- (23) AIR 1923 Pat 156 (157).
- (18) AIR 1918 Pat 256 (257) : 3 Pat L Jour 481. (Though pleader present in Court.)
- (86) AIR 1936 Lah 1000 (1001).
8. ('30) 124 Ind Cas 402 (408) (All).
- (28) AIR 1928 All 760 (761).
- (1900) 22 All 66 (76) (FB).
- (82) AIR 1932 Cal 418 (418) : 59 Cal 756.
- (11) 9 Ind Cas 842 (843, 844) (Cal). (Pleader unable to proceed for want of evidence—Tantamount to no instructions and withdrawal.)
- (07) 84 Cal 408 (417) (FB). (Overruling 27 Cal 529.)
- (25) AIR 1925 Mad 21 (22) : 47 Mad 819 (FB). (Pleader writing on plaint that he had no further instructions than to apply for adjournment—*Held* sufficient withdrawal.)
- (07) 30 Mad 274 (276).
- (23) AIR 1923 Pat 530 (531). (Reporting no instructions after refusal of adjournment.)
- (27) AIR 1927 Rang 46 (48) : 4 Rang 408.
- (10) 6 Ind Cas 851 (854) : 3 Sind L R 208 (FB).
- (23) AIR 1923 Mad 13 (13, 15) : 42 Mad 889. (Taking no further part, tantamount to withdrawal.)

reporting "no instructions" he simply asks for an adjournment on the ground that he is not prepared with the case, it cannot be said that there is no appearance.<sup>9</sup>

As to appointment of pleaders, their authority and their duties, see O. 3 R. 4. See also the Legal Practitioners Act, XVIII of 1879.

7. "Except where otherwise expressly provided." — See Note 2 above.

8. **Direction to appear in person — Proviso.** — A Court has jurisdiction to direct, under the proviso, a party to appear in person, and on his failure to do so, to dismiss the suit or proceed *ex parte* as the case may be under O. 9 R. 12.<sup>1</sup> This should not however be done except for very good reasons.<sup>2</sup> The fact that one party desires the presence of the opposite party in Court for the purpose of examining him as a witness is not a good reason: the proper procedure in such a case is to adopt the procedure provided by O. 16.<sup>3</sup> In the undermentioned case, where in a suit for rent, the defendant pleaded discharge but was prepared to withdraw the plea if the plaintiff would depose that there was no discharge and thereupon the Court ordered the plaintiff's appearance under O. 10 R. 4, and on his failure to do so dismissed the suit under that rule, it was held that the proper procedure was to have ordered the plaintiff to appear under this proviso and not under O. 10 R. 4.<sup>4</sup> Where the Court directs the attendance of a party but omits to quote the Section under which the order is made, it must be deemed to be made under O. 10 R. 4.<sup>5</sup>

O. 3 R. 1  
Notes 6-8

**R. 2. [S. 37.]** The recognized agents of parties by whom such appearances, applications and acts may be made or done are —

O. 3 R. 2

Recognized agents.

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

('05) 1 Cal L Jour 76n (76n). (Do.)

('28) AIR 1928 Rang 191 (198) : 6 Rang 828.

('07) 1 Sind L R 224 (225).

('38) AIR 1938 Cal 74 (75); ILR (1938) 1 Cal 213.

('85) AIR 1935 Rang 123 (126). (But where both the pleader and party appear and the pleader withdraws from the case on the refusal of the Court to grant adjournment, the party must be deemed to have appeared. The purpose for which he appears or the action which he takes on appearance is immaterial.)

[See also ('71) 15 Suth W R 143 (143).]

[But see ('96) 23 Cal 991 (995).]

9. ('92) 16 Bom 28 (24, 26).

('09) 2 Ind Cas 621 (622) (All).

('98) 20 All 294 (296).

('98) 1898 All W N 25 (25).

('75) 7 N W P H C R 77 (79).

('24) AIR 1924 Mad 43 (44).

('18) AIR 1918 Mad 787 (788).

('08) 26 Mad 267 (268).

('29) AIR 1929 Nag 89 (89).

('04) 17 O P L R 1 (2).

[See ('98) 1898 All W N 208 (209). (1898 All W N 25, Followed).]

[See also ('25) AIR 1925 Nag 236 (238).]

[But see ('86) 12 Cal 605 (606).]

#### Note 8

1. ('19) AIR 1919 Pat 36 (37); 4 Pat L Jour 152. (One of several plaintiffs ordered to appear in person—Such plaintiff failing to appear — Court has no jurisdiction to dismiss the suit as against the remaining plaintiffs.)

('20) AIR 1920 Mad 213 (214). (Party though minor or of unsound mind can be ordered to appear in person.)

('18) AIR 1918 Mad 1256 (1257); 41 Mad 256. (If the party so directed refuses to appear, the Court may declare him *ex parte* even though he has engaged a pleader who is prepared to appear for him.)

[See also ('38) AIR 1938 Rang 214 (215). (Appeal by counsel on behalf of S—Court doubting genuineness of power of attorney, directing personal appearance of S — S not attending on ground of personal inconvenience—Appeal can be dismissed.)]

2. ('33) AIR 1933 Mad 821 (822).

3. ('20) AIR 1920 Mad 213 (216).

('38) AIR 1933 Mad 821 (822).

4. ('26) 98 Ind Cas 728 (729) (Mad).

5. ('09) 2 Ind Cas 468 (468) (All).

O. 3 R. 2  
Note 1

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

[1877, S. 37 ; 1859, S. 17B.]

## Local Amendment

## BOMBAY

Clause (a) shall be read as follows :

"Persons holding on behalf of such parties either (i) a general power-of-attorney, or (ii) in the case of proceedings in the High Court of Bombay an Attorney of such High Court or an Advocate, and in the case of proceedings in any district, any such Attorney or any Advocate, or a Pleader to whom a sanad for that district has been issued, holding the requisite special power-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them or him to make and do such appearances, applications and acts on behalf of such parties."

## Synopsis

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|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Persons holding powers-of-attorney.</li> <li>3. Power-of-attorney.</li> <li>4. Objection to authority.</li> </ol> | <ol style="list-style-type: none"> <li>5. Persons carrying on business.</li> <li>6. Recognized agent of Government.<br/>See Order 27 Rules 2 and 4.</li> <li>7. Recognized agent of Princes.</li> </ol> |
|--|---|

## Other Topics (miscellaneous)

Amendment of clause (a) by the Bombay High Court. See Note 2.  
Extent of agent's powers. See Note 2.  
Resident. See Notes 2 and 5.  
Where business is stopped. See Note 5.

**1. Legislative changes.** — The word "general" preceding the words "powers-of-attorney" and the sentence "from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done" which occurred in the old Section have now been omitted from sub-clause (a). The result is that the rule has become more comprehensive and authorises any person holding a simple power-of-attorney to act or make applications or appearances in Court. The clause making specific provisions for *mukhtears* was therefore found unnecessary and has been deleted.<sup>1</sup> See the undermentioned cases relating to *mukhtears*.<sup>2</sup>

## Order 3 Rule 2 — Note 1

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|---|--|
| <ol style="list-style-type: none"> <li>1. See the Statement of Objects and Reasons.</li> <li>2. ('67) 7 Suth W R 475 (476). (A mukhtearnama under seal is as valid as mukhtearnamah under signature.)</li> <li>('05) 1 Cal L Jour 96n. (Application for certifying payment by unauthorised mukhtears saves limitation under Article 182, Limitation Act.)</li> <li>('04) 8 Cal W N 401 (408). (Mukhtear must obtain special leave for offering any legal argument or for examining any witness.)</li> </ol> | <ol style="list-style-type: none"> <li>('96) 1 Cal W N 11 (12). (Mukhtear may apply for execution.)</li> <li>('88) 15 Cal 638 (647).</li> <li>('87) 14 Cal 556 (566).</li> <li>('75) 24 Suth W R 238 (238, 234). (Meaning of the words "act" and "plead" explained.)</li> <li>('72) 17 Suth W R 389 (390). (Mukhtear who is not an authorised agent of a party is not a proper person to be served with notice.)</li> <li>('68) 10 Suth W R 355 (356). (Mukhtear standing behind pleader cannot be said to put in an appearance.)</li> </ol> |
|---|--|

The last paragraph of old Section 37 directing the Lieutenant-Governor of the Punjab, the Chief Commissioners of Oudh and the Central Provinces to declare from time to time, the persons competent to act as recognised agents of parties, has been omitted as being no longer necessary.<sup>3</sup>

**O. 3 R. 2**  
**Notes 1-2**

**2. Persons holding powers-of-attorney.** — As seen in Note 1 already, it was necessary under the old Section 37 that the principal should be a person not resident within the jurisdiction of the Court.<sup>1</sup> But the term "non-resident" was construed very liberally.<sup>2</sup> The Bombay High Court has, however, amended the present rule by practically bringing it in conformity with the old Section.<sup>3</sup>

An agent who holds a power-of-attorney should be allowed to appear and act under this rule<sup>4</sup> but the defendant may question his authority to do so.<sup>5</sup> He can show that a plaint signed by an authorised agent is not valid by reason of the suit not having been instituted with the approval of the plaintiff.<sup>6</sup> It is the duty of the first Court to decide the question of authority; it should not be left for decision to the Appellate Court.<sup>7</sup>

A recognized agent is competent to refer a matter in dispute to arbitration<sup>8</sup> unless specially restricted by the power<sup>9</sup> and may file an affidavit of documents<sup>10</sup> or sign an amended plaint.<sup>11</sup> He can also offer to be bound by the oath of the other party under Section 9 of the Oaths Act,<sup>12</sup> but all acts and appearances should be done *only*

**3. See the following cases relating to recognized agents in the Punjab:**

- ('67) 1867 Pun Re No. 26. (The proviso applies to principals whether living within or outside jurisdiction.)
- ('05) 1905 Pun Re No. 84, page 258. (Collector is competent to institute suit on behalf of the Secretary of State for India without obtaining a power-of-attorney in his favour.)
- ('07) 1907 Pun Re No. 109, page 506. (Agent carrying on business at Lyallpur in the name of partners of a firm, resident in England was held not to be a recognized agent.)
- ('75) 1875 Pun Re No. 28, page 88. (Court not competent to refuse to hear agent because of his not being a legal practitioner.)
- ('78) 1878 Pun Re No. 9, page 61. (The authority need not be in writing.)
- ('90) 1890 Pun Re No. 134, page 433. (Pleader engaged by am-mukhtear holding a general power of attorney can appear on behalf of the party.)

**Note 2**

- 1. ('66) 1 Agra 215 (217).
- ('06) 28 All 135 (136). (Temporary absence at that time from the limits of Court's jurisdiction is sufficient.)
- ('04) 26 All 19 (21).
- ('01) 23 All 499 (500, 501).
- ('88) 12 Bom 66 (70, 71). (Agent obtaining decree on behalf of principal — No objection taken to agent's right to represent principal — Objection must be deemed to have been waived and cannot be raised afterwards.)
- ('69) 6 Bom H C R A C 159 (161).
- ('99) 1899 Pun Re No. 5, page 28.
- 2. ('81) 6 Bom 100 (102). (A person who went for a few months from his usual place of residence to his native province to get his sister married was held during his absence to be "not resident"

at that place.)

- ('04) 14 Mad L Jour 223 (225). (6 Bom 100, Followed.)
- 3. ('23) AIR 1923 Bom 41 (41).
- ('32) AIR 1932 Bom 367 (368). (Bombay High Court Rules — General power of attorney essential for signing plaint.)
- [See also ('39) AIR 1939 Bom 347 (348) : I L R (1939) Bom 295. (An attorney of Bombay High Court can act both under a general as well as a special power of attorney, but a person who is not an attorney can act only under a general power.)]
- 4. ('36) AIR 1936 Lah 894 (895). (Rules framed under S. 46A, Punjab Courts Act, cannot in any way abrogate, modify or alter the rules contained in O. 3 Rr. 1 and 2, C. P. C.)
- 5. ('92) 19 Cal 678 (681) : 19 Ind App 135 (PC).
- ('06) 33 Cal 625 (629). (In the Calcutta High Court, under R. 748 of the Rules and Orders of the Court, Court may require further evidence of the verification of the power of attorney.)
- ('16) AIR 1916 Oudh 207 (208) : 18 Oudh Cas 372. (If genuineness of the power of attorney is suspected, proof of its execution can be called for.)
- 6. ('15) 31 Ind Cas 859 (859) (U P B R).
- 7. ('17) AIR 1917 All 90 (91) : 39 All 943.
- 8. ('82) 1882 Pun Re No. 1, page 1.
- ('98) 1898 Pun Re No. 51, page 234 (FH).
- ('82) 1882 Pun Re No. 48, page 140.
- 9. ('86) 12 Cal 173 (178). (An agent to look after a particular business cannot make a reference.)
- ('97) 24 Cal 469 (472). (Though agent not entitled to make a reference, opposite party's tacit ratification estops the latter from questioning such reference.)
- 10. ('90) 1890 Bom P J 158 (158).
- 11. ('14) AIR 1914 Low Bur 173 (175).
- 12. ('82) AIR 1932 Lah 414 (416).



**O. 3 R. 2  
Notes 2-3**

on behalf of and in the name of the principal. He cannot bring suits in his own name.<sup>13</sup> He has no right of audience and cannot plead or examine witnesses.<sup>14</sup> No power can be given in such a way as to evade the special provisions relating to the appointment of pleaders.<sup>15</sup> An agent who has been given a general power of attorney authorising him to mortgage a certain property on behalf of his principal and do other necessary acts in respect of the principal's *interest in the property*, cannot bind the principal to a personal money decree for the balance remaining due after the sale of the property.<sup>16</sup>

Where there is a valid authority, mere formal defects will not invalidate the acts of the agent.<sup>17</sup> Thus, a defect in the signature in the plaint<sup>18</sup> or in the description of the agent<sup>19</sup> is only an irregularity and does not invalidate the proceeding. It has been held that even where there is no authority originally to do an act, it could be given subsequently by the principal *ratifying* the unauthorised acts.<sup>20</sup> A suit should not be dismissed for defect in the authority of the agent, but the Court should give the defaulting party an opportunity to remedy it.<sup>21</sup>

A power-of-attorney was filed not along with an application for execution but later. As it was filed within the period of limitation prescribed for the execution application, it was held that the application was properly presented.<sup>22</sup>

**3. Power-of-attorney.** — The term "power-of-attorney" is not defined in the Civil Procedure Code. Broadly speaking it is a formal instrument by which authority is conferred on an agent. Such an instrument should be construed strictly and as giving only such authority as it confers *expressly* or by *necessary implication*.

Every agent has got an implied authority to do whatever is necessary for, or ordinarily incidental to the effective execution of, his express authority in the usual way.<sup>1</sup> Thus, an authority to "prosecute a claim" will include an authority to file an appeal.<sup>2</sup> A person authorised to take all steps necessary to complete the execution of

13. ('69) 1 N W P H C R 277 (277, 278).

('72) 4 N W P H C R 59 (60).

('70) 2 N W P H C R 179 (190).

('70) 13 Suth W R 944 (945).

('72) 4 N W P H C R 68a (68a).

('71) 3 N W P H C R 175 (176).

('82) 1882 Pun Re No. 20, page 75. (Plaintiff's suing in his own name as the gumastha of a specified firm is not correct practice.)

[See ('67) 2 Agra 101 (103).

('70) 2 N W P H C R 60 (62).]

14. (1865) 3 Suth W R 108 (108, 109).

('16) AIR 1916 Cal 181 (181).

15. ('14) AIR 1914 Upp Bur 27 (28).

16. ('31) AIR 1931 Rang 223 (224). (The general words in the power of attorney were construed as only authorising acts in respect of the principal's interest in the property.)

17. ('08) 26 Mad 197 (198, 199). (Vakalatnama—Omission to put date—Not fatal.)

('82) AIR 1932 Pat 3 (4). (Vakalatnama—Omission of pleader's name in margin—Mere clerical error.)

('20) AIR 1920 Lah 212 (213). (Party or his agent failing to sign pleader's power of attorney—Mere oversight.)

18. ('27) AIR 1927 All 514 (514, 515).

19. ('29) AIR 1929 Lah 759 (760).

('10) 5 Ind Cas 582 (584) : 37 Cal 399. (A mukh-

tearnama in which the name of the mukhtear is omitted by mistake may be amended by Court.)

('23) AIR 1923 Nag 281 (281). (Name of pleader engaged absent from the vakalatnama—Held a mere irregularity.)

[But see ('14) AIR 1914 All 596 (597) : 36 All 46. (Name of the pleader not mentioned in the vakalatnama—Appeal held to be not properly presented.)]

20. ('25) AIR 1925 Mad 660 (668). (Leave to sign and verify plaint granted subsequently not fatal.) ('26) AIR 1926 Lah 223 (224).

[See ('31) AIR 1931 All 507 (511) : 54 All 57 (SB).]

[But see ('20) AIR 1920 Pat 581 (582). (Appeal presented by pleader without a vakalatnama—Vakalatnama signed by party after limitation and produced — Invalid.)]

21. ('17) AIR 1917 All 90 (91) : 39 All 348.

('32) AIR 1932 Bom 367 (370).

[See also ('22) AIR 1922 Bom 113 (113) : 46 Bom 150.]

22. ('29) AIR 1929 Lah 478 (479).

**Note 3**

1. ('31) AIR 1931 All 320 (320). (Power to defend suit includes authority to appoint pleader.)

2. ('34) AIR 1934 Lah 973 (973).

('32) AIR 1932 Lah 480 (481) : 13 Lah 256.

('36) AIR 1936 Lah 583 (583, 584).



a decree can sign and present an execution application to save the decree from the bar of limitation.<sup>3</sup> Similarly, an agent authorised to get a postponement of a judicial sale has power to raise a loan for the attainment of that object.<sup>4</sup> A power of attorney to defend a suit includes a power to appeal against an order refusing to set aside a decree passed *ex parte*<sup>5</sup> as it includes a necessary step for the defence in the suit or to establish the grounds of defence in the suit.<sup>6</sup>

The authority given must, however, be construed with reference to the special purpose for which it is given. Thus, a power to conduct suits generally does not authorise the agent to bring them to a close in an out of the ordinary way.<sup>7</sup> An agent authorised to file a suit cannot, without the express authority of the principal, enter into an agreement with the pleader engaged by him promising to pay the latter more than a reasonable remuneration.<sup>8</sup> An agent authorised to act only in connection with one particular matter such as the realisation of an amount due, is one acting under a special power-of-attorney.<sup>9</sup> An authority to sign mortgage bonds on behalf of the principal does not include a power to enter into mortgage transactions.<sup>10</sup> Where the manager of a firm files the vakalat as its agent, it should be clearly described as such to avoid further litigation.<sup>11</sup>

**4. Objection to authority.** — An objection to the validity of a power-of-attorney must be taken very early at the trial Court, and if not taken must be deemed to have been waived.<sup>1</sup> A defect in the authority of the agent is only an irregularity not affecting the merits of the case within Section 99 of the Code and will not be a ground for interference in appeal.<sup>2</sup>

**5. Persons carrying on business.** — The person must really carry on business for and in the name of parties not resident within the local limits of the jurisdiction of the Court within which the applications, appearances or acts are to be done.<sup>1</sup> The clause refers to a *gumastha* or person acting for others, and does not include a partner

**O. 3 R. 2  
Notes 3-5**

[But see ('93) AIR 1933 Lah 504 (505).]

3. ('16) AIR 1916 Mad 601 (603): 18 Ind Cas 185 (186): 88 Mad 134.

4. ('07) 6 Cal L Jour 639 (647).

5. ('27) AIR 1927 Lah 134 (134).

6. ('99) 3 Cal W N 579 (581).

7. ('90) 14 Bom 455 (457). (By offering to be bound by the oath of the opposite party given in a particular form.)

8. ('74) 6 N W P H C R 210 (213). (By joining in a reference to arbitration.)

[See also ('35) AIR 1935 P C 119 (121): 14 Pat 545: 62 Ind App 196 (PC). (Compromise by karpardaz of a party without any authority to compromise—Compromise is not binding.)]

[But see ('32) AIR 1932 Lah 414 (415, 416). (Offer to be bound by oath can be made by duly authorised agent.)]

8. ('86) 10 Bom 18 (20).

9. ('16) AIR 1916 Bom 155 (156): 41 Bom 40.

10. ('80) AIR 1980 Bom 511 (512). (And a plaint signed by such an agent is irregular.)

11. ('07) 6 Cal L Jour 490 (500, 516).

11. ('26) AIR 1926 Sind 51 (53).

#### NOTE 4

1. ('24) AIR 1924 Lah 296 (296, 297).

2. ('68) 12 Bom 68 (71). (Cannot raise in execution.)

2. ('69) 6 Bom H C R 159 (161).

3. ('80) AIR 1930 Bom 511 (513).

4. ('23) AIR 1923 Bom 44 (44): 47 Bom 227.

5. ('86) 1886 Bom P J 63.

6. ('71) 15 Suth W R 245 (245).

7. ('07) 4 Low Bur Rul 284 (286).

[See also ('39) AIR 1939 Rang 162 (163, 164).

(Suit instituted by plaintiff through agent—Fact that agent is duly authorized agent for purposes of suit not shown by production of power-of-attorney or other evidence—Objection raised for the first time in High Court—It is a mere irregularity which does not affect merits of case.)]

[But see ('07) 1907 Pun Re No. 109, page 506.

(Defect in authority of agent cannot be cured as a mere irregularity.)]

#### NOTE 5

1. ('07) 1907 Pun Re No. 109, page 506.

2. ('31) AIR 1931 All 449 (450). (Looking after zamindari is not carrying on business for the zamindar.)

3. ('18) AIR 1918 Lah 295 (296). (Service on the munim of party resident within jurisdiction not sufficient, he not being a recognized agent.)

[See however ('31) AIR 1931 Pat 262 (264): 10 Pat 441. (Residence within or without jurisdiction immaterial for purposes of service of summons upon recognized agent—*Obiter*.)]

**O. 3 R. 2**  
**Notes 5-7**

carrying on business *for himself and for others*.<sup>2</sup> When a firm has ceased to carry on business, a person engaged in collecting the assets of such a firm is not a recognized agent according to the Calcutta High Court<sup>3</sup> but is one according to the Bombay High Court.<sup>4</sup>

The expression "carrying on business" in this rule must be interpreted in a restricted sense, *viz.*, as relating to *commercial* business.<sup>5</sup> The appearance, application or act made or done must relate to matters connected with the trade or business.<sup>6</sup>

**6. Recognized agent of Government.** — See Order 27 Rules 2 and 4.

**7. Recognized agent of Princes.** — Section 85 does not prevent the institution of a suit by an independent Prince in his own name and through a recognized agent appointed under this rule.<sup>1</sup>

A political agent appointed by the Government to manage the estates of a Chief is not a recognized agent within the meaning of this rule so as to enable him to sue on behalf of the Chief in British Courts.<sup>2</sup>

See also Notes under Section 85, *ante*.

**O. 3 R. 3****R. 3. [S. 38.] (1)** Processes served on the recognized agent

Service of process  
on recognized agent.

of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

[1877, S. 38; 1859, S. 17.]

**1. Service of process on recognized agent.** — This rule provides for the mode of service of processes on a recognized agent, and says that service on a recognized agent is as effectual as service on the party in person. "It is not a mere question of constructive notice or inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings."<sup>1</sup> The rule, however, does not prohibit service on the parties themselves.<sup>2</sup> A person holding a power-of-attorney is at liberty to refuse to accept service of summons and appear in a suit brought against the principal even though he is authorised by the power to appear and defend suits.<sup>3</sup> Service of notice on a *muktear* who is not the recognized agent of the judgment-debtor is not sufficient service within the meaning of this rule.<sup>4</sup>

2. (1862) 1 Hyde 97 (97).

3. ('70) 18 Suth W R 344 (345).

4. ('72) 9 Bom H C R 427 (428, 429). (In this case the firm was in existence though it was not actively carrying on business.)

5. ('37) AIR 1937 Mad 293 (294). (Person looking after factory does not carry on business.)

6. ('87) AIR 1937 Mad 293 (294).

**Notes 7**

1. ('97) 19 All 510 (518).

('84) 10 Cal 136 (137).

('89) 1889 Pun Re No. 165, page 576.

2. ('87) 11 Bom 58 (55).

('80) 2 All 690 (694).

**Order 3 Rule 3 — Note 1**

1. ('03) 25 All 1 (17); 29 Ind App 203 (P C).

[See ('31) AIR 1931 Pat 282 (284); 10 Pat 441. (Principal of recognized agent need not be a resident outside jurisdiction for operation of this rule—*Obiter*.)]

2. (1864) 1864 Suth W R Misc. 21 (21).

3. ('82) 8 Cal 317 (326).

4. ('72) 17 Suth W R 389 (390).

**R. 4.** [S. 39.] (1) *No pleader<sup>3</sup> shall act for any person in any Court, unless he has been appointed<sup>14</sup> for*

**O. 3 R. 4**

*Appointment of pleader.*

*the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.*

(2) *Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court<sup>16</sup> by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended<sup>17</sup> so far as regards the client.*

(3) *For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connexion with the suit shall be deemed to be proceedings in the suit.*

(4) *The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.*

(5) *No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating —*

- (a) *the names of the parties to the suit,*
- (b) *the name of the party for whom he appears, and*
- (c) *the name of the person by whom he is authorized to appear :*

*Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.*

[1877, S. 39; 1859, S. 18.]

<sup>a</sup>. Substituted by the Code of Civil Procedure (Second Amendment) Act, XXII of 1926, Section 2, for the original Rule 4.

**O. 3 R. 4**  
**Notes 1-2****Local Amendments****BOMBAY**

In sub-rule (3) the words "or any application relating to such appeal" shall be *inserted* between the words "order in the suit" and "and any application or act."

**MADRAS**

In sub-rules (1) and (2) *substitute* the words "a document subscribed with his signature in his own hand" *for* "in writing signed."

*Insert* the following as clause 6 :—

"(6) No Government or other pleader appearing on behalf of the Secretary of State for India in Council, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act."

**PATNA**

*Substitute* the following :—

(4) Notwithstanding anything contained in O. 3 R. 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognized agent or by some other agent duly authorized by power-of-attorney to act in this behalf ; or unless he is instructed by an attorney or pleader duly authorized to act on behalf of such person.

**RANGOON**

*For* sub-rule (2) *substitute* the following :—

(2) Every appointment shall be filed in Court and shall be deemed to be in force until determined by the discharge of the contract between the pleader and his client or until all proceedings in the suit are ended so far as regards the client.

**Synopsis**

- |   |   |
|---|---|
| 1. Amendments after 1908.                                       | 10. Control and conduct of suit.                    |
| 2. Scope of the Rule.   | 11. Liability of pleader for misconduct.            |
| 3. Pleader.   | 12. Privileges and rights of pleaders.              |
| 4. Authority to abandon issue or claim.                         | 13. Duties.   |
| 5. Power to make admissions.                                    | 14. Appointment of pleaders.                        |
| 6. Power to withdraw suit.                                      | 15. Acceptance of engagement.                       |
| 7. Power to compromise suit.                                    | 16. "Until determined with the leave of the Court." |
| 8. Power to refer to arbitration — See Sch. II Para. 1 Note 18. | 17. "Until all proceedings in the suit are ended."  |
| 8a. Power to file petition offering special oath.               | 18. Bombay Pleadors Act, 1920.                      |
| 9. Delegation of authority.                                     |   |

**Other Topics (miscellaneous)**

A document in writing. See Note 14.  
Advocates. See Notes 2 and 3.  
Defective vakalatnama. See Note 14.

Fresh vakalatnama, when necessary. See Note 17.  
Revocation of authority. See Note 16.  
"Signed." See Note 14.

**1. Amendments after 1908.**—The present rule was amended by the Code of Civil Procedure (Second Amendment) Act, 1926. In sub-rule 2 the words "when accepted by a pleader" which occurred after the words "every such appointment" have been omitted. Sub-rules 2 to 5 and the proviso are new.

**2. Scope of the Rule.**—This rule provides in what *manner* a pleader should be appointed and till what time the appointment is to be in force. It assumes that a pleader who is appointed is *competent* to appear. It is only an enabling provision by which a pleader, when he accepts an engagement and files vakalatnama, is entitled to

conduct the proceedings till he or his client dies, or till the termination of the proceedings. It does not give an absolute right to any practitioner to appear in Court in any matter he chooses. It is subject to the rules governing the qualifications of the various classes of pleaders and the rules governing the procedure of Courts.<sup>1</sup> The proviso to Rule 23 of the Appellate Side Rules of the Madras High Court requiring that when a vakalatnama is executed by a man who is either blind, illiterate or unacquainted with the language in which the vakalatnama is written, the officer before whom it is executed shall certify that the contents of the vakalatnama were explained to the executant who seemed to understand it and signed in his presence, is *intra vires* and does not conflict with anything that is contained herein.<sup>2</sup>

As to appointment of pleaders, see Note 14 *infra*.

**3. Pleader.** — The term "pleader" signifies all persons who are entitled to appear and plead and includes an advocate, vakil or attorney.<sup>1</sup> It must, however, be read in the narrowest sense and does not include *agents*.<sup>2</sup> A pleader in India combines in himself the duties performed in England by a barrister and attorney, in that he can both *plead* and *act*, whereas a barrister can only *plead* and an attorney can only *act*.<sup>3</sup>

The status of an advocate of the Calcutta High Court, it has been held, does not differ from that of a barrister in England.<sup>4</sup> In the undermentioned case<sup>5</sup> it was held that an advocate of the Allahabad High Court can also act for his client.

In Burma, barristers appear as advocates and not as barristers. Hence a memorandum of appearance filed by them without a power-of-attorney will not enable them to bind their client by a compromise entered into by them.<sup>6</sup>

A *barrister* is not technically his client's agent but the contract between a *pleader* and his client is governed by the law relating to agency.<sup>7</sup>

**4. Authority to abandon issue or claim.** — A pleader's general powers in the conduct of a suit include the power to abandon an issue, which, in his discretion, he thinks it inadvisable to press.<sup>1</sup> He may ask for an issue, or give up an issue, and the same will be binding on his client.<sup>2</sup> But he cannot relinquish a portion of the *claim* in the suit, *unless specially authorised* to do so.<sup>3</sup> It is the duty of the pleader in such cases to consult his client, and get his *express* consent before giving up any such portion of the claim.<sup>4</sup> Similarly, a pleader cannot, unless authorised to do so,

**Order 3 Rule 4 — Note 2**

1. ('25) AIR 1925 Mad 1201 (1202): 48 Mad 676.
- ('82) AIR 1982 Cal 1 (2, 3): 59 Cal 370. (Sub-rule (5) contrary to the rule framed by Calcutta High Court under Letters Patent — Latter to prevail.)
- ('88) 15 Cal 706 (707). (Pleader cannot be heard in second appeal in the absence of a memo of grounds and without order of admission of appeal.)
- ('70) 14 Suth W R (Civil) 168 (169). (Pleader himself appellant — Cannot certify memo of appeal — High Court Rules.)
- ('14) AIR 1914 Upp Bur 27 (28). (An unqualified person cannot practise as an advocate.)
2. ('28) AIR 1928 Mad 472 (472, 473).

**Note 3.**

1. ('84) 8 Bom 105 (137).
- ('36) AIR 1936 Rang 315 (316): 4 Rang 249. (Pleader includes advocate.)

(1903) 1 Ch 812 (818), *In re Newen*.

2. ('28) AIR 1928 Lah 733 (734).
3. ('88) 15 Cal 638 (644).
4. ('25) AIR 1925 Cal 696 (698): 52 Cal 386.
5. ('87) 9 All 617 (621). (Advocate can perform all the duties of a pleader.)
6. ('30) AIR 1930 Rang 313 (314): 8 Rang 290.
7. ('34) AIR 1934 Bom 299 (301): 58 Bom 597.

**Note 4**

1. ('02) 25 Mad 867 (877): 29 Ind App 76 (P C).
- ('35) AIR 1935 Lah 71 (74): 16 Lah 328. (25 Mad 867 (P C), Followed.)
- ('17) AIR 1917 Oudh 375 (377): 20 Oudh Cas 49.
- ('99) 22 Mad 538 (543).
2. ('99) 22 Mad 538 (543, 544).
- ('16) AIR 1916 Oudh 195 (197).
3. ('69) 8 Beng L R App 15 (16).
- ('72) 18 Suth W R 436 (436).
- ('69) 12 Suth W R 279 (280).
4. ('80) AIR 1980 Cal 477 (479). (Counsel admitting claim.)

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**Notes 4-5**

bring the suit to a close by offering to be bound by the oath of the opposite party.<sup>5</sup> An opinion expressed by the pleader in the course of arguments adversely to the claims of the client, which he undertook to advocate, is also not binding on the client.<sup>6</sup>

**5. Power to make admissions.** — Verbal admissions made by a pleader should be received with caution,<sup>1</sup> must be taken as a whole and must not be unduly pressed, but the Court will nevertheless accept a statement of a pleader from the bar without burdening him with an oath.<sup>2</sup> An admission on a *question of fact* will always bind the client,<sup>3</sup> unless the pleader has been induced or misled by a mistake<sup>4</sup> or misapprehension<sup>5</sup> as to the actual facts. An order or judgment based on the admission of the pleader can, generally speaking, be set aside upon any ground which would invalidate an agreement.<sup>6</sup> But a party repudiating the admission should do so at the earliest possible opportunity.<sup>7</sup>

Admissions made by a pleader against instructions<sup>8</sup> or at a time when he was not engaged by the client<sup>9</sup> or as to what is beyond the scope of the suit<sup>10</sup> will not, however, bind the client.

An erroneous admission by a pleader on a *question of law* is of no effect and

'71) 14 Moo Ind App 203 (207) (P C).

5. ('90) 14 Bom 455 (457).

('80) AIR 1930 Cal 463 (465). (But the Court can infer such authorization.)

('82) AIR 1932 Lah 414 (415). (Agent authorized to offer to be bound by the oath of the other party.)

[But see ('27) AIR 1927 All 584 (584) : 49 All 842. (Agreement to be bound by the statement of certain witnesses — No special power necessary.)]

6. ('95) 18 Mad 73 (83).

**Note 5**

1. ('06) 29 All 29 (32, 33) : 34 Ind App 1 (P C). (It is dangerous to come to a conclusion on a mere suggestion made by a pleader.)

('84) 6 All 406 (415).

('70) 6 Mad H C R 127 (130). (Where statements are out of the ordinary scope of vakil's authority.)

2. ('98) 3 Cal W N 694 (695).

(1900) 27 Cal 428 (439). (If the other side objects to reception of such statements without oath, the counsel may be put on oath.)

(1895) 2 Ch 638 (643), *Hickman v. Berens*. (Cited in 27 Cal 428.)

3. ('85) AIR 1935 Lah 71 (73) : 16 Lah 328. (Statement as to intention of a party as regards a document is a statement as to a matter of fact.)

('68) 9 Suth W R 485 (486).

('73) 5 N W P H O R 2 (4). (Admission as to payment and state of the accounts is binding.)

('31) AIR 1931 All 415 (416). (Party's allegation to the contrary cannot contradict his pleader's statement.)

('18) AIR 1918 Cal 282 (282).

('74) 21 Suth W R 832 (832). (Admission of liability — Sufficient to warrant a decree.)

('68) 9 Suth W R 375 (376).

('68) 10 Suth W R 322 (323). (Admission as to receipt of money.)

('1861) 3 L T 742; *Haller v. Worman*.

(1887-'41) 2 Moo Ind App 253 (259, 260) (P C). (The client need not be present at the time of admission.)

('16) AIR 1916 Sind 45 (45) : 9 Sind L R 220.

('96) 18 All 884 (887). (Acknowledgment of debts by pleader contained in a memorandum of appeal signed by him will save limitation.)

('31) AIR 1931 All 398 (399, 400).

('96) 23 Cal 374 (387).

('29) AIR 1929 All 446 (447).

('34) AIR 1934 Bom 186 (187). (Provided such admissions are made during the actual progress of the litigation.)

[See also ('18) AIR 1918 Mad 1039 (1042) : 40 Mad 687.

('71) 15 Suth W R 135 (136). (Admission by pleader is evidence against party in another case.)]

4. ('22) AIR 1922 Bom 233 (234).

('16) AIR 1916 All 308 (308).

(1876) 3 Ch D 177 (182, 188), *Holt v. Jesse*. (Cited in AIR 1925 Cal 696.)

5. (1876) 3 Ch D 177 (182, 184), *Holt v. Jesse*. (Cited in 15 C P L R 78.)

('16) AIR 1916 Lah 301 (302).

('25) AIR 1925 Rang 314 (316) : 8 Rang 261. (Consent given under misapprehension can be withdrawn before order is made.)

('37) AIR 1937 Bom 81 (88).

6. (1877) 7 Ch D 888 (889), *Attorney-General v. Tomline*.

[See also (1895) 2 Ch 273 (280 to 284), *Huddersfield Banking Co. v. Lister*.]

7. ('17) AIR 1917 Oudh 375 (377) : 20 Oudh Cas 49. ('25) AIR 1925 Mad 1031 (1032).

8. ('27) AIR 1927 Mad 852 (859) : 50 Mad 786.

9. (1882) 4 B & Ad 339 (340, 341), *Wagstaff v. Wilson*.

10. (1865) 2 Mad H C R 423 (426). (Consent to a decree being made binding property in which parties to the suit have no interest is beyond the scope of the suit.)

does not preclude the party from claiming his legal rights in a higher tribunal.<sup>11</sup>

Though statements made by pleaders are not pleadings in the strict sense of the term, yet they may be considered as explanatory of and supplemental to the pleadings.<sup>12</sup>

**6. Power to withdraw suit.** — A *vakalatnama* couched in general terms suffices *prima facie* to authorise a pleader to apply for a withdrawal of the suit and, in the absence of anything to show that the pleader has acted contrary to instructions or is otherwise guilty of misconduct, the client is bound by such act on the part of the pleader.<sup>1</sup>

**7. Power to compromise suit.** — In the absence of *specific authority*, a pleader ordinarily employed cannot enter into a compromise on behalf of the client, and, if he does so, the compromise is not binding on the client<sup>1</sup> unless the latter

11. ('25) AIR 1925 Oudh 150 (151).  
 ('82) AIR 1932 Bom 291 (298) : 56 Bom 324.  
 ('88) AIR 1933 Cal 513 (514).  
 ('83) AIR 1933 Lah 404 (404). (Pleader giving up plea of limitation — Party not bound.)  
 ('32) AIR 1932 Mad 409 (410).  
 ('29) AIR 1929 Rang 55 (58) : 6 Rang 691.  
 ('04) 28 Bom 408 (412).  
 (1900) 24 Bom 360 (363).  
 ('25) AIR 1925 Cal 1171 (1172).  
 ('19) AIR 1919 Cal 972 (973).  
 ('11) 9 Ind Cas 621 (622) (Cal).  
 (1900) 27 Cal 156 (163) : 26 Ind App 216 (PC).  
 ('99) 26 Cal 250 (252).  
 ('99) 3 Cal W N cccxxi.  
 ('71) 16 Suth W R 246 (247).  
 ('24) AIR 1924 Lah 702 (705).  
 ('12) 16 Ind Cas 746 (746) (Mad).  
 ('25) AIR 1925 Nag 207 (210).  
 ('25) AIR 1925 Oudh 665 (665).  
 ('19) AIR 1919 Sind 67 (68) : 13 Sind L R 128.  
 ('14) AIR 1914 Sind 36 (39) : 8 Sind L R 156.  
 ('29) AIR 1929 Bom 89 (92) : 53 Bom 309.  
 ('81) AIR 1931 Bom 295 (296). (Counsel conceding that compromise decree comprises matters not relating to the suit is an admission on a point of law and hence not binding.)  
 ('29) AIR 1929 Lah 879 (880). (An admission to the effect that an appeal was understamped is an admission of a point of law.)  
 ('39) 181 Ind Cas 721 (724) (Pat). (But decree based upon such admission is binding unless it is set aside.)  
 [See ('32) AIR 1932 Oudh 172 (174) : 7 Luck 564. (Mixed question of law and fact—Question was allowed to be argued.)]  
 [But see ('32) AIR 1932 Lah 343 (343) : 13 Lah 185. (Counsel abandoning mixed issues of law, custom and fact cannot be re-agitated in second appeal.)  
 ('30) AIR 1930 Mad 547 (547, 548).  
 ('29) AIR 1929 All 446 (447).]  
 12. ('29) AIR 1929 Oudh 204 (206, 207).

#### Note 6

1. ('66) 5 Suth W R 80 (81).  
 ('12) 14 Ind Cas 190 (190) (Cal).

#### Note 7

1. ('28) AIR 1928 P C 13 (15, 18) (P.C).

- ('28) AIR 1928 P C 98 (99) (P.C).  
 ('29) AIR 1929 Lah 746 (746). (Neither a general power-of-attorney nor the ordinary powers of a pleader are sufficient for effecting a compromise on another's behalf.)  
 ('70) 2 N W P H C R 149 (150).  
 ('81) AIR 1931 Lah 628 (629, 630) : 12 Lah 403.  
 ('67) 2 Agra 222 (223).  
 ('10) 5 Ind Cas 968 (969) : 34 Bom 408.  
 ('80) AIR 1930 Rang 313 (314) : 8 Rang 290.  
 (1900) 27 Cal 428 (448, 449). (Compromise outside the scope of the particular case — Special authority from the client must be shown.)  
 ('98) 1898 Pun Re No. 50, page 164. (But advocates can enter into compromise.)  
 ('98) 21 Mad 274 (277).  
 ('27) AIR 1927 Oudh 222 (223). (Pleader deriving authority from an agent who had no power to confess judgment for his principal cannot compromise the suit.)  
 ('26) AIR 1926 Oudh 315 (316) : 1 Luck 341.  
 ('16) AIR 1916 Sind 64 (64) : 9 Sind L R 218 (219, 220). (Specific authority may be inferred.)  
 ('14) AIR 1914 Sind 139 (139) : 8 Sind L R 91.  
 ('29) AIR 1929 Oudh 211 (212). (It will be presumed that the Court passing the consent decree satisfied itself as to the authority of the pleader — The party attacking the decree is to rebut the presumption.)  
 ('33) AIR 1933 All 955 (955). (Vakalat authorizing vakil to compromise— Compromise by vakil is binding on client.)  
 ('36) AIR 1936 Sind 59 (61) : 29 Sind L R 437. (Mere written statement by pleaders that they have special power to compromise is not sufficient.)  
 [See ('27) AIR 1927 Pat 199 (200) : 6 Pat 217. (Counsel should not prepare and sign a petition of compromise in which he was not engaged from the beginning and there were other lawyers.)  
 ('17) AIR 1917 Pat 136 (137). (Nor can a pleader refer the matter to arbitration.)  
 (1900) 6 Cal W N 82 (87).  
 ('87) AIR 1937 Lah 91 (92). (Decree assented to by pleader appearing on behalf of party — No statement on record that pleader was not authorized to enter into compromise— It must be assumed, unless contrary is established,



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**Note 7**

*acquiesces* in or *ratifies* the same.<sup>3</sup> Where the original *vakalatnama* itself specially empowers the pleader to compromise the suit, no second or special *vakalatnamah* is again necessary to compromise it.<sup>3</sup> A strict interpretation ought to be placed upon the terms empowering the pleader to enter into a compromise.<sup>4</sup> Thus, a power to file a compromise does not include a power to *make* a compromise or *sign* it;<sup>5</sup> nor does an authority to compromise a suit necessarily give an authority to *negotiate* the terms thereof without reference to his client.<sup>6</sup>

A *counsel*, as distinguished from a *pleader*, can compromise a suit in the absence of any limitation on his authority. *Express* authority, as in the case of a pleader, is not required.<sup>7</sup> But his authority extends only to matters *involved in the suit* and not to collateral matters.<sup>8</sup>

As regards *attorneys* or *solicitors*, the law in England is that they are entitled in the exercise of their discretion to enter into a compromise on behalf of the client.

that pleader had authority to compromise and that Court passing decree had satisfied itself that he had such authority.)]

2. ('16) AIR 1916 Sind 64 (64) : 9 Sind L R 218. (1900) 6 Cal W N 82 (88).

('25) AIR 1925 Cal 696 (700, 702) : 52 Cal 386. (Advocate of Calcutta High Court entitled to compromise *coram judice* even against instructions—But compromise out of Court must be authorised or subsequently ratified.)

('32) AIR 1932 Cal 231 (232, 233) : 59 Cal 31. (Client in Court not objecting to compromise—Compromise valid.)

[See also ('20) AIR 1920 Mad 508 (509). (Parties themselves entering into compromise—No question of authority of pleader arises.)]

3. ('12) 17 Ind Cas 391 (391) (Mad).

('28) AIR 1928 Lah 642 (643).

4. ('18) AIR 1918 Mad 656 (657) : 41 Mad 233 (235). (Authority to compromise does not authorise negotiations without reference to the client.)

('21) 60 Ind Cas 912 (912) (All). (*Vakalatnama* expressly specifying presentation of compromise petition as one of the acts authorised—*Vakil held* empowered to compromise.)

('12) 13 Ind Cas 595 (596) (Mad). (Compromise setting none of the matters in dispute—Whole matter left to be fought out in fresh litigation—Client's property meanwhile surrendered to adversary—*Held*, *vakil* acted improperly in entering into the agreement which he had no power to do although he had power to enter into compromise.)

[See ('31) AIR 1931 All 415 (416).]

[See also ('36) AIR 1936 Cal 68 (70). (Terms of compromise beyond subject-matter of suit—Pleader cannot compromise without reference to client though authorized to compromise.)]

5. ('30) AIR 1930 Oudh 112 (113).

('33) AIR 1933 Pat 306 (328) : 12 Pat 359.

('34) AIR 1934 Oudh 417 (417).

('28) AIR 1928 Oudh 886 (390).

[See ('35) 62 Cal 642 (653, 654). (Authority to sign compromise petition includes authority to compromise.)]

6. ('18) AIR 1918 Mad 656 (657) : 41 Mad 233.

[See also ('80) AIR 1930 Cal 477 (479). (A client in Court must be consulted—Consent decree.)]

7. ('30) AIR 1930 P C 158 (161, 162) : 27 Ind App 133 : 57 Cal 1311 (PO).

('21) AIR 1921 Bom 414 (417).

('24) AIR 1924 P C 200 (201) (PC). (But authority to compromise so as to make his client's fortune depend on the determination of the pleader for the opposite side is doubtful.)

('24) AIR 1924 Cal 651 (652, 653) : 51 Cal 385.

(1900) 27 Cal 428 (448).

(1887) 20 Q B D 141 ( ) *Matthews v. Munster*, (Cited in 13 All 272 (F B).)

('91) 13 AIR 272 (275) (FB). (If client notifies revocation of authority to opposite side, then compromise is not binding.)

('86) 13 Cal 115 (117, 120). (Do.)

('22) AIR 1922 Pat 232 (234) : 1 Pat 489. (Do.)

('25) AIR 1925 Cal 866 (872). (Compromise without reference to the client—Not binding.)

('35) AIR 1935 P C 119 (121) : 14 Pat 545 : 62 Ind App 196 (PC). (But if in fact, counsel has had his authority withdrawn or restricted, the Courts will not feel bound to enforce a compromise made by him contrary to the restriction, even though the lack of actual authority is not known to the other party.)

('36) AIR 1936 Lah 199 (200) : 17 Lah 456. (Advocate only authorized to appear can compromise—Power of attorney is not necessary—AIR 1930 P C 158, Followed.)

[See also ('25) AIR 1925 Rang 314 (316) : 3 Rang 261. (Compromise given under misapprehension can be withdrawn before order is drawn up.)]

[See however ('02) 1902 App Cas 465 (472), *Neal v. Lennox*. (Counsel has no authority to refer an action against the wishes of his client or upon terms different from those which his client has authorized.)]

[But see ('20) AIR 1920 Low Bur 103 (104). (Barrister practising in Burma cannot bind his client by a compromise.)]

8. (1900) 27 Cal 428 (449).

('27) AIR 1927 Mad 852 (854) : 50 Mad 786.

('27) AIR 1927 Cal 714 (716) : 55 Cal 118.

('85) AIR 1985 P C 119 (122) : 14 Pat 545 : 62 Ind App 196 (PO).

('85) AIR 1985 All 626 (627). (No power to compromise collateral matters without express authority—A I R 1927 Mad 852, Followed.)



If they act *bona fide* and not against the express directions of the client, the compromise will be binding on him.<sup>9</sup>

A compromise entered into by a pleader duly authorised cannot be interfered with unless there is fraud, collusion, mistake or misapprehension on the part of the pleader.<sup>10</sup> But the Court has plenary powers to enquire into the justice or the *bona fides* of a settlement reported to it<sup>11</sup> and where grave injustice is likely to result by allowing the compromise to stand, it can interfere and set it aside.<sup>12</sup> Where the client expressly *prohibits* the compromise and notifies his dissent to the opposite side, the compromise is not valid and will be set aside.<sup>13</sup>

Where a pleader was engaged by two clients *A* and *B* who filed a suit and the vakalatnamah authorised him to compromise the suit but he did not act on the authority and merely acted 'as a messenger between the clients and the compromise was entered into by *B*, it was held that it would not bind *A* unless *B* was authorised by *A* to compromise the suit.<sup>14</sup>

**8. Power to refer to arbitration.**— See Schedule II Paragraph 1, Note 18.

**8a. Power to file petition offering special oath.**— See the undermentioned case.<sup>1</sup>

**9. Delegation of authority.**— Under the rule as it stood before the amendment of 1926 referred to in Note 1 above, there was a conflict of opinion as to whether a pleader engaged by the party could delegate his authority to another pleader and request him to appear on his behalf.<sup>1</sup> Under the new proviso to the rule, however, it is clear that such a delegation can be made.<sup>2</sup>

9. (1859) 1 E & F 839 (847 to 849), *Fray v. Voules*, Halsbury Vol. 26, Para 1230. (Professional Ethics by Sundara Iyer, page 300.)

(1897) 2 Q B 122 (123), *Macaulay v. Polley*.

(1867) L R 2 Ex 109 (114), *Butler v. Knight*.

(1858) 5 C B (NS) 59 (82, 83). (Compromise by solicitor binding on the client, if the client induces him to believe that he is authorized.)

(1910) 2 K B 658 (663, 664), *Little v. Spreadbury*. (Do.)

10. ('26) AIR 1926 Pat 73 (76) : 4 Pat 766.

(1895) 2 Ch 638 (646, 647), *Hickman v. Berens*.

('81) 6 Cal 687 (706). (Mistake of both the parties and the Court as to the subject-matter.)

(1897) 2 Ch 534 (545, 546), *Wilding v. Handerson*. [See also ('39) 2 Moo Ind App 181 (251, 252) (PC).

(1857) 1 O B (NS) 864 : 26 L J C P 97, *Swinfein v. Swinfein*.

11. (1888) 20 Q B 141 (143), *Matthews v. Munster*. (This rule is applicable to counsel as well.)

('82) AIR 1932 Oudh 68 (66) : 7 Luck 350. (Inherent power to set aside compromise entered into by pleader without party's consent.)

12. (1919) 1 K B 474 (481), Halsbury Vol 2, para. 668, *Shepherd v. Robinson*.

13. ('86) 18 Cal 115 (119, 120).

14. ('86) AIR 1986 Cal 68 (70). (A I R 1985 P C 119, Followed.)

#### Note 8a

1. ('39) AIR 1939 Pat 222 (224). (Where a vakalatnamah by which the pleader was appointed

empowered him to file petition of compromise in the suit, file petition for referring the case to the arbitrators with and without the signatures of the defendants, withdraw the suit by putting in petition without their signatures, and, amongst other things, to take whatever steps he thought necessary in the suit—*Held*, that the powers given by the vakalatnamah were wide enough to authorize the pleader to file a petition for special oath.)

#### Note 9

1. ('87) 9 All 613 (616, 617). (He can.)

('98) 22 Bom 654 (657, 658). (Do—20 Bom 293 which held a contrary view was distinguished.)

('06) 9 Oudh Cas 65 (68, 69). (Can.)

('10) 8 Ind Cas 958 (959) (Low Bur). (One advocate can represent another in formal matters—But transfer of whole brief requires client's consent.) ('96) 20 Bom 293 (295). (He cannot.)

('29) AIR 1929 Nag 109 (109). (Second grade pleader authorized to engage another pleader cannot appoint another pleader to file an appeal in High Court.)

('16) AIR 1916 Nag 10 (10, 11): 12 Nag L R 189. (Oral delegation illegal—Pleader expressly empowered to employ a colleague must strictly comply with O. 3 R. 4 (1).)

[See also ('22) AIR 1922 Cal 515 (532): 49 Cal 732. (Permission express or implied of the client is required.)]

2. [See ('32) AIR 1932 Lah 373 (374): 13 Lah 775. (Can delegate only to "plead" not to "act".)]

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**Notes 9-11**

A presentation by the pleader's clerk or by another pleader delegated for that purpose is equivalent to a presentation by the pleader.<sup>3</sup> But the Punjab Chief Court has held that the Code does not recognise the status of a pleader's clerk.<sup>4</sup> The presence of the pleader's clerk will not, however, amount to *appearance* by the pleader himself.<sup>5</sup> Nor can the pleader completely delegate to his clerk the duties he owes to his client without being responsible for his defaults.<sup>6</sup>

**10. Control and conduct of suit.** — A counsel has authority to do what he considers best for his client in the management and conduct of the suit and if, in the exercise of such authority, he enters into any agreement with the opposite side it will be binding on the client unless any limitation was imposed on his authority and unless such limitation was communicated to the opposite side.<sup>1</sup> Parties are bound by the *bona fide* acts of their pleaders acting within the scope of their authority and a mere error of judgment on their part affords no valid ground for avoiding such acts.<sup>2</sup>

If a party has employed more than one pleader, the senior among them has the entire control of the case.<sup>3</sup>

**11. Liability of pleader for misconduct.** — A pleader is liable to be suspended or dismissed from practising if he is guilty of misconduct of the kind specified in Section 13 of the Legal Practitioners Act, XVIII of 1879. As to what amounts to misconduct and what does not, see the undermentioned cases.<sup>1</sup>

3. ('96) 20 Mad 87 (87).
- ('39) AIR 1939 Rang 1 (6) : 1939 Rang I, R 108. (Delegation of ministerial act allowed.)
4. ('96) 1896 Pun Re No. 36, page 97.
5. ('28) AIR 1928 Lah 841 (842).
6. ('12) 22 Mad L Jour 284 (294).

**Note 10**

1. (1866) L R 1 Q B 379 (381, 382), Strauss v. Francis.
- ('91) 13 All 272 (275) (FB). (Compromise.)
- ('02) 15 C P L R 78 (75, 77).
2. ('29) AIR 1929 P C 33 (34) (PC).
3. ('69) 12 Suth W R 375 (375).

**Note 11**

1. ('03) 31 Cal 44 (46). (Pleader appropriating client's money.)
- ('84) AIR 1984 Cal 794 (794).
- ('88) AIR 1988 Lah 575 (577) (SB).
- ('84) AIR 1984 Pat 598 (599, 603). (Pleader should not blindly follow instructions and make reckless accusation.)
- ('28) AIR 1928 P C 264 (265, 266) (PC). (Getting exorbitant fee from the client separately while holding brief for another pleader.)
- ('07) 34 Cal 129 (141, 148) : 34 Ind App 55 (PC). (Advising client to bribe a witness.)
- ('91) 13 All 93 (94) : 17 Ind App 199 (PC).
- ('27) AIR 1927 All 45 (48) : 48 All 542 (FB). (Signing a false statement and using it in evidence.)
- ('70) 2 N W P H C R 46 (47). (Pleader should not purchase the decree of his client.)
- ('98) 22 Bom 317 (320). (Presenting document of suspicious appearance—It must be shown that the pleader was aware that the document was forged.)
- ('16) AIR 1916 Cal 329 (330) : 43 Cal 685. (Professional misconduct.)

- (07) 34 Cal 729 (733, 734). (Demanding higher and more exorbitant fee than that fixed.)
- ('06) 4 Cal L Jour 262 (264, 267). (Agreement to furnish funds for a litigation.)
- (1900) 5 Cal W N 48 (48, 49). (Scope of the Legal Practitioners Act explained.)
- (1900) 5 Cal W N 45 (47). (Advising to pay money to witness to keep back unfavourable evidence.)
- (1900) 4 Cal W N 663 (665). (Filing a petition untenable in law is not misconduct.)
- ('30) AIR 1930 Lah 947 (950). (Mere acceptance of vakalatnama without the settlement of fees — Pleader not bound to appear for client.)
- ('88) 10 Cal 256 (263). (Making use of privileged documents secretly procured by the client is no misconduct provided the pleader is neither party nor privy to their obtaining.)
- ('78) 11 Beng L R 312 (319, 320). (Not giving proper account of the money paid to the pleader amounts to misconduct.)
- ('72) 17 Suth W R 405 (406). (Omission to examine the records to verify the statements of his parties is not misconduct.)
- ('70) 18 Suth W R 67 (67). (Drawing document of a fraudulent nature.)
- ('14) AIR 1914 Mad 512 (519) : 17 Ind Cas 544 (552) : 37 Mad 238 (FB). (Purchase of actionable claims.)
- ('02) 26 Mad 448 (449, 450). (Writing anonymous letter to an officer conducting an enquiry containing allegations intended to prejudice the mind of the officer is a misconduct on the part of the pleader.)
- ('69) 4 Mad H C R App 43 (48). (Vakil changing sides after remand amounts to misconduct.)
- ('23) AIR 1923 Pat 135 (137) (SB). (Deliberately taking the law into his own hands and defying the orders of constituted authority is misconduct.)

Practising in contravention of Section 10 of the Legal Practitioners Act, i. e., without a proper certificate as required by Section 7 of the Act amounts to misconduct.<sup>3</sup> A pleader who has been convicted of any criminal offence implying a defect of character which unfits him to be a pleader is liable to be suspended or dismissed by the High Court<sup>3</sup> (Section 12 of the Legal Practitioners Act). But before any action is taken against a pleader he should be given notice of the charges levelled against him and an opportunity of vindicating his character.<sup>4</sup> The misconduct of a pleader cannot, however, be a ground for deciding the *suit* against his client.<sup>5</sup>

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Notes 11-12

**12. Privileges and rights of pleaders.** — A pleader cannot, as a general rule, refuse to take up a case for any member of the public if a fair and proper fee is tendered to him, adequate instructions are given and the case is of a class which the lawyer is accustomed to take up. Such a refusal will amount to professional misconduct.<sup>1</sup> Of course, refusal to accept a brief for valid reasons like having to go to mofussil or having to attend some social function, or owing to physical incapacity cannot be questioned.<sup>2</sup> In the conduct of the suit he is entitled to examine witnesses in his chamber before examining them in Court.<sup>3</sup> He can also examine the documents produced by his witness or by his party before tendering them in evidence.<sup>4</sup>

A pleader is not liable for *slander or libel* in respect of words used by him in the course of a judicial enquiry.<sup>5</sup> The Court has no power to cut short his arguments unless they are irrelevant or involve a repetition.<sup>6</sup>

A pleader or solicitor has a *lien* on the papers entrusted to him until all his costs are paid off<sup>7</sup> and the Court will not grant the party leave to change his attorney

(‘68) 10 Suth W R 469 (472). (Benami purchase by pleader.)

(‘96) 23 Cal 805 (817). (Pleader purchasing in execution in the name of his clerk and for an inadequate sum.)

(‘92) 15 Mad 389 (398). (Vakil bidding in sale through agent.)

(‘06) 83 Cal 151 (171, 172) : 32 Ind App 217 (PC). (Allowing clients to compromise in derogation of their rights.)

(‘72) 17 Suth W R 338 (338). (Drawing grounds of appeal from copies and not originals of the records, not a misconduct.)

(1865) 17 All 498 (510) : 22 Ind App 193 (PC). (Soliciting work from District Court vakil is misconduct.)

[See also (‘18) AIR 1918 Cal 358 (359). (Acquiring a beneficial interest in the subject-matter of the litigation.)

(‘72) 17 Suth W R 480 (483). (Pleader purchasing property sold to his client—Highly objectionable.)]

2. (‘82) 4 All 375 (376).

3. (1900) 22 All 49 (55) : 26 Ind App 242 (PC).

(‘96) 18 All 174 (176) (FB).

4. (‘85) 7 All 290 (290, 291). (Pleader convicted of an offence was allowed to go behind the conviction and prove his innocence.)

(‘88) 10 Cal 256 (264). (Interim suspense is not proper.)

5. (‘66) 6 Suth W R 67 (67).

#### Notes 12

1. (‘29) AIR 1929 All 367 (367) : 51 All 892.

(‘80) AIR 1980 All 262 (268).

(‘24) AIR 1924 Oudh 372 (372) : 27 Oudh Cas 401.

(‘25) AIR 1925 Oudh 672 (672).

[But see (‘08) 35 Cal 317 (319).]

2. (‘29) AIR 1929 All 367 (367) : 51 All 892.

3. (‘12) 14 Ind Cas 763 (763) (Low Bur).

4. (‘24) AIR 1924 All 625 (640) : 46 All 575.

5. (‘27) AIR 1927 Mad 379 (380) : 50 Mad 667.

(‘70) 14 Suth W R Cr 53 (59).

(1888) 11 Q B D 588 (599), Munster v. Lamb. (Ogders on Libel, 4th Edn., p. 225 and cases there cited.)

[See also (‘31) AIR 1931 Rang 83 (85).]

6. (‘28) AIR 1928 Lah 319 (319).

7. (80) 4 Bom 353 (356). (Lien extends even over translations.)

(‘25) AIR 1925 Bom 351 (352) : 49 Bom 505. (Priority of solicitor's lien.)

(‘21) AIR 1921 Cal 67 (68) : 48 Cal 817. (Lien can be exercised though suit on lien barred.)

(1898) 2 Ch 1 (25), Re Hawkes Ackerman v. Lockhart. (Principle and extent of solicitor's lien discussed.)

(1883) 24 Ch D 408 (418), *In re Capital Fire Co.* (Lien gives no greater rights to the attorney than his client would have had.)

(‘81) 6 Cal 1 (5, 6).

(1892) 1 Ch 101 (103), Boden v. Hensby.

(1892) 1 Ch 434 (442), Brunton v. Electrical Corporation.

(‘36) AIR 1936 Mad 48 (49). (Pleader retaining papers of client because fees were not paid is not guilty of misconduct.)

[See (‘35) 62 Cal 464 (466). (If the contract between attorney or solicitor and client is terminated unjustifiably by the client, the attorney has the absolute right to maintain his lien in

**O. 3 R. 4** until such costs are paid.<sup>8</sup> The lien is, however, an *equitable* one and can be claimed only as against the client and not third parties.<sup>9</sup>

**Notes 12-13**

In certain circumstances the lien cannot even prevail over the rights of parties themselves.<sup>10</sup>

A pleader who has not been paid by the client his remuneration can file a suit for the recovery of the fee *agreed upon*<sup>11</sup> or by way of *quantum meruit* under Section 65 of the Indian Contract Act.<sup>12</sup> No written agreement is necessary for such a suit.<sup>13</sup> A promissory note taken by the pleader and not filed in Court as required by Section 28 of the Legal Practitioners Act was, under the Legal Practitioners Act as it stood before 1926, held to be invalid and unenforceable.<sup>14</sup> Section 28 of that Act, however, has been repealed by Act XXI of 1926.

Where a pleader receives a fee to conduct a case for his client, he is not bound to refund any portion of the fee, if the case is compromised by the parties before trial.<sup>15</sup>

It may be usefully mentioned here that a receipt given by counsel for payment made by the client is exempt from stamp duty.<sup>16</sup>

**13. Duties.** — When a pleader accepts a brief it is his bounden duty to attend to his client's interests throughout the proceedings in the case,<sup>1</sup> to represent his interests properly<sup>2</sup> and to prosecute the case with due diligence.<sup>3</sup> If he fails to do so, he is liable to be dealt with for neglect and is also answerable to the client.<sup>4</sup> If he is

law and to refuse to give up his client's papers until his legitimate costs already incurred are paid. If on the other hand, the attorney puts an end to the contract himself, he is not so entitled. Though he retains his lien, it is postponed. It comes into effective operation only after the case is ended and after the other attorney has completed his work; he only retains a modified lien, the priority of his lien being sacrificed and to that extent impaired — There is, however, no lien in favour of an attorney who is discharged by his client for misconduct.]]

8. ('99) 3 Cal W N cxi.

('02) 6 Cal W N 306 (306).

(1900) 4 Cal W N 767 (769).

('34) AIR 1934 Cal 58 (59) : 60 Cal 1273. (4 Cal W N 767, Followed.)

[But see ('33) AIR 1933 Bom 182 (183). (The attorney is not entitled to say that the client shall continue to employ him till his costs are paid.)]

9. (1877) 6 Ch D 105 (106), Snell, In re.

(1878) 10 Ch D 291 (293), Sheffield v. Eden.

('98) 25 Cal 887 (889, 890). (Defendant cannot pay under a compromise with plaintiff to the detriment of plaintiff's attorney's lien.)

(1891) 3 Ch 145 (148), Llewellyn, In re.

(1878) 10 Ch D 729 (732), Mason and Taylor, In re.

(1851) 1 De G M and G 16, Pelly v. Wathen.

10. ('32) AIR 1932 Bom 352 (354). (Solicitor's lien does not preclude a fair and honest arrangement between parties.)

('82) AIR 1932 Bom 619 (622).

11. ('81) 7 Cal 401 (402).

('71) 6 Mad HCR 265 (266). (Cause of action does not ordinarily arise until the pleader has completely discharged his duty.)

('81) 7 Cal 140 (144). (Defending suit against minor — Attorney's costs may be recovered in a

suit against the minor as necessaries.)

12. ('66) 6 Suth WR 108 (109). (Pleaders engaged by several defendants in same interest are entitled only to reasonable fee and not separate fee from each.)

('80) AIR 1930 Mad 132 (135) : 53 Mad 309.

('97) 20 Mad 365 (366).

('73) 19 Suth W R 105 (106).

13. ('86) 9 Mad 375 (376). (Suit under S. 70 of the Contract Act.)

('02) 29 Cal 595 (606).

[But see ('98) 25 Cal 805 (807).]

14. ('91) 14 Mad 63 (65).

('94) 17 Mad 306 (308).

15. ('30) AIR 1930 Bom 22 (23) : 54 Bom 1.

16. ('86) 9 Mad 140 (141).

### Note 13

1. ('22) AIR 1922 Oudh 75 (75) : 25 Oudh Cas 40. ('12) 14 Bom L R 700 (706) : 36 Bom 606.

2. ('23) AIR 1923 Lah 97 (97). (If a pleader cannot appear to argue his client's case he must arrange for another pleader to appear for him.)

('24) AIR 1924 Cal 257 (268, 269) (F B). (Pleader should not tell the trial Judge that his client has no case to succeed.)

3. ('02) 29 Cal 63 (67, 68).

('24) AIR 1924 All 652 (657) : 46 All 553. (Counsel is to protect his client from liability to pay excessive fees.)

('21) AIR 1921 Mad 320 (320) : 44 Mad 978. (Cannot refuse to take steps because his whole fee is not paid.)

4. ('71) 15 Suth W R 143 (143). (Pleader refusing to argue.)

('12) 14 Ind Cas 965 (967, 968) (Mad). (Receiving printing charges from client and not paying into Court — Not informing the client true state of affairs.)

unable to attend when the case is called on, the brief should be returned in good time.<sup>5</sup>

It is also the duty of a pleader to advise his client properly out of Court.<sup>6</sup> A pleader filing an obviously improper and groundless criminal complaint will be guilty of serious misconduct. It is his duty to make due enquiries of the clients and to act with such care and prudence that his good faith cannot successfully be questioned.<sup>7</sup> It is not proper for a pleader to associate himself with reckless charges of fraud and criminality or to indulge in abuse; nor should he put questions attacking a witness's honour unless he has reasonable grounds for believing them to be true.<sup>8</sup> Where, pending suit, counsel for the plaintiff sent a threatening notice to the defendant asking him to withdraw a plea taken by him in his written statement, it was held that such an action amounted to a contempt of Court. A counsel's capacity is not inviolable and his privileges cannot possibly extend to interference with the administration of justice. Counsel are expected to help and not to hinder the administration of justice.<sup>9</sup>

A pleader having once appeared for a client should not appear against him in another litigation arising out of the same dispute<sup>10</sup> and use the information received formerly in his professional capacity.<sup>11</sup> But before a counsel can be said to be engaged by a particular party so as to make it unprofessional for him to appear for the opposite party, the counsel must have had a definite retainer with a fee paid, or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other.<sup>12</sup> Any contract entered into by the pleader with his client in respect of the subject of litigation or advice is liable to be questioned and undue influence will be presumed to have been exercised.<sup>13</sup>

Pleaders owe a duty not only to their clients but *also to the Court* and are bound to co-operate with the Court in the orderly and pure administration of justice.<sup>14</sup> Thus, a pleader is bound to correct any errors committed by the Court of which he is aware<sup>15</sup> and bring to the notice of the Court facts within his knowledge such as the death of a party.<sup>16</sup> When a matter is heard *ex parte*, he is bound to bring to the notice of the Court adverse as well as favourable authorities on the point.<sup>17</sup> He cannot make personal attacks or unfounded charges of impropriety against the trial Judge when the real ground is that he has failed to create an impression in his mind by arguments.<sup>18</sup>

5. ('32) AIR 1932 Bom 634 (635).

6. (1888) 20 Q B D 141 (143), *Matthews v. Munster*.

7. ('25) AIR 1925 All 247 (249); 47 All 377 (F B).

8. ('25) AIR 1925 All 641 (641, 642); 47 All 729 (F B).

(27) AIR 1927 Cal 823 (825); 55 Cal 85.

(76) 25 Suth W R 366 (367).

(35) AIR 1935 Mad 578 (580). (Pleader has no right to make reckless charges of fraud even on instructions of client—He must satisfy himself that there are reasonable grounds for them.)

9. ('35) AIR 1935 All 117 (119); 57 All 573.

10. ('17) AIR 1917 P C 80 (84) (P C).

(81) 6 Cal 79 (83).

(70) 13 Suth W R 209 (214, 215). (Pleader acting for judgment-debtor should not become interested with the decree-holder in a purchase.)

(17) AIR 1917 Oudh 169 (169); 19 Oudh Cas 237. [See also ('28) AIR 1928 Mad 592 (593). (He is not debarred unless his services were sought by the party and refused on insufficient grounds.)]

11. ('21) AIR 1921 Mad 666 (667).

(02) 26 Bom 428 (430) (F B).

(88) 12 Bom 85 (88 to 91). (It must be shown that the pleader is possessed of knowledge which might prejudice the client to restrain him from appearing for the opponent.)

(25) AIR 1925 Mad 1201 (1205); 48 Mad 676. (Pleaders should avoid even the suspicion that they might use such information.)

12. ('32) AIR 1932 All 536 (537).

13. ('68) 1 Beng L R A C 95 (98).

(69) 1 N W P H C R 1 (3, 4). (Pleader must show that the contract is above board.)

(1865) 2 Suth W R 307 (314).

(81) 3 Mad 188 (140) (F B). (Agreement for additional reward is unprofessional.)

[But see ('84) 8 Bom 413 (414). (Agreement for additional reward—Not invalid.)]

14. ('23) AIR 1923 Cal 212 (215).

15. ('26) AIR 1926 Sind 244 (245); 20 Sind L R 261.

16. ('29) AIR 1929 P C 58 (59); 56 Ind App 80; 51 All 267 (P C).

17. ('16) AIR 1916 P C 227 (229); 14 Cal 573; 44 Ind App 80 (P C).

18. ('24) AIR 1924 All 565 (566).

**O. 3 R. 4** Unwarranted or unfounded attacks against the Judge on the part of a pleader amount to misconduct.<sup>19</sup>

It is against the etiquette of the bar that a counsel should hold a brief and conduct a case in which he is himself a *witness* and is personally interested.<sup>20</sup> He should retire from the case when he knows that his evidence is important.<sup>21</sup>

See also the case cited below.<sup>22</sup>

**14. Appointment of pleaders.** — It was held under the old rule that the appointment of a pleader should be in *writing* signed by the party or by the person acting on his behalf.<sup>1</sup> The powers intended to be entrusted to a pleader should be specified in the vakalatnama,<sup>2</sup> though mere technical and formal defects therein do not invalidate the pleader's authority.<sup>3</sup>

The manner of appointment under the present rule depends upon the *purpose* for which he is engaged. If he is appointed to *act* in Court, such appointment must, under sub-rule 1, be in *writing* signed by the party or by a person duly authorised by him.<sup>4</sup> An act done on behalf of his client by a pleader who has not been duly appointed

19. ('07) 29 All 95 (108, 109).

('24) AIR 1924 All 253 (254) : 46 All 121.

('22) AIR 1922 Cal 550 (556).

20. ('25) AIR 1925 Mad 1153 (1155).

('25) AIR 1925 Sind 99 (100) : 18 Sind L R 30.

(1862) 9 H L C 711 (719), New Brunswick Co. v. Coneybeare.

('85) 39 Cal W N 274 (275). (Pleading in case in which he is personally interested is undesirable.)

21. ('33) AIR 1933 Pat 306 (327) : 12 Pat 359.

22. ('35) AIR 1935 Bom 119 (120). (A solicitor or counsel appearing for a client who is interested in two different capacities can state the case of his client in respect of each capacity but he cannot appear separately for the same person—Nor is the same party entitled to appear by separate counsel or separate solicitors in different capacities.)

#### Note 14

1. ('94) 16 All 240 (244) (F B).

('22) AIR 1922 P O 225 (226) : 48 Ind App 534 : 44 Mad 736 (P C).

('94) 1894 All W N 90 (91). (Illiterate appellant getting the vakalat signed for him by another in his presence—Vakalat is valid.)

('86) 1886 All W N 172 (174).

('20) AIR 1920 Pat 581 (582). (Appeal presented without proper vakalatnama is not proper.)

('97) 1 Cal W N ccviii.

('28) AIR 1928 Mad 175 (176) : 51 Mad 242. (Stamped signature valid.)

('27) AIR 1927 Lah 398 (398). (Telegram informing pleader that power is being sent does not amount to an authority.)

('32) 33 Pun L R 517 (517). (Do).

('29) AIR 1929 Cal 11 (13). (Gumastha delivering vakalatnama is sufficient authority.)

2. ('92) 1892 All W N 78 (79) (F B).

3. ('27) AIR 1927 Lah 522 (523). (Heading not containing the names of the parties.)

('81) AIR 1981 Pat 137 (140) : 9 Pat 865.

('27) AIR 1927 All 816 (816). (Vakil's name not appearing in the body of the vakalatnama.)

('21) ...R 1921 All 210 (211) : 43 All 892. (Do.)

('18) R 1918 Cal 482 (482) (Do.)

('23) AIR 1923 Nag 281 (281) (Do.)

('23) AIR 1923 Nag 182 (185, 186) : 19 Nag L R 36.

('20) AIR 1920 Nag 110 (111).

('16) AIR 1916 Nag 10 (11) : 12 Nag L R 189. (Obiter.)

('32) AIR 1932 Pat 3 (4).

('30) AIR 1930 Lah 101 (102). (Vakalatnama signed by one of several defendants.)

('26) AIR 1926 Nag 40 (44). (Omission to sign a power of attorney by a minor's guardian.)

('24) AIR 1924 Nag 159 (160). (Person knowing to sign putting his marks—Defect technical.)

('24) AIR 1924 Pat 114 (117). (One person signing for another with full knowledge and acquiescence of the latter—Defect only formal.)

('20) AIR 1920 Lah 212 (213). (Omission to sign by party—Oversight—Defect cured.)

('32) AIR 1932 Lah 134 (135).

[See also ('37) AIR 1937 Lah 719 (719).]

[See however ('26) AIR 1926 All 252 (253). (Neither the name of the vakil nor of the party inserted in the body of the vakalatnama—Held vakalatnama defective for the purpose of presenting an appeal.)

('14) AIR 1914 All 536 (537) : 36 All 46.

('81) AIR 1981 All 767 (768). (Omission of vakil's name in vakalatnama—Held appointment invalid and presentation by pleader unauthorized.)]

4. ('32) AIR 1932 Lah 373 (374) : 13 Lah 775.

('32) 33 Pun L R 517 (517). (Appointment by telegram invalid.)

('38) AIR 1938 Lah 698 (699) : I L R (1938) Lah 417. (Pleader applying on behalf of client acts for him and must have his authority in writing.)

('37) AIR 1937 Nag 65 (67) : I L R (1937) Nag 494. (Party appointing general agent by power of attorney giving him all powers necessary for proper conduct of suit—Agent appointing pleader giving power to appoint another pleader—Such pleader appointing another pleader by vakalat-

by a document in writing as required by this rule is not valid.<sup>5</sup> The appointment will not be valid if the document does not contain the name of the pleader appointed.<sup>6</sup> If the pleader is appointed for the purpose of *pleading* only, he has to file only a *memorandum of appearance* signed by himself under sub-rule 5.<sup>7</sup> Under the proviso to the rule, a pleader who has been *engaged by another pleader* who has been duly appointed to act on behalf of a party, can *plead* on behalf of such party without either filing a vakalatnama or a memorandum of appearance.<sup>8</sup>

The words "High Court" in sub-rule 3 of the old rule were held to include the Patna High Court also.<sup>9</sup>

**15. Acceptance of engagement.**—The words "when accepted by a pleader" which occurred in the old Section after the words "every such appointment" in sub-rule 2, have now been omitted. Under the old rule, there was a conflict of opinion whether the acceptance had to be made in *writing*.<sup>1</sup> It was also held that the acceptance should be unconditional,<sup>2</sup> and that a pleader acting for a *pardanashin* lady should personally

nama signed by himself—Appeal filed by latter is proper.)

('36) AIR 1936 Lah 199 (199) : 17 Lah 456.

('85) 99 Cal W N 534 (587). (The omission by the Amending Act of 1926 of the words "duly appointed to act" in R. 1 of O. 3, C. P. C., does not make an oral authorization sufficient.)

[See ('86) 68 Cal 733 (735). (Execution petition filed without vakalatnama—Subsequent filing of vakalatnama with the leave of Court—Petition held duly presented.)]

[See also ('84) AIR 1934 Pat 290 (291, 292) (Vakalatnama in two sheets—Each sheet signed by different parties—Parties aware of contents of other sheet also—Vakalatnama held to be in order.)]

('87) 65 Cal L Jour 418 (420). (Signature of appellant on vakalatnama proved to be forgery—Presentation of appeal is unauthorized as appointment is invalid.)

('86) AIR 1936 Lah 195 (196). (Presentation of appeal amounts to acting on behalf of appellant—Presentation without authority is not proper.)]

5. ('87) AIR 1937 Mad 239 (240) : I L R (1937) Mad 820. (A pleader who has not been appointed by a document in writing as required by O. 3 R. 4 is wanting in capacity or competence to act—If a pleader purports to do something which he has no power or capacity to do, it can have no legal effect—The presentation of an execution petition by a pleader who holds no vakalat from the decree-holder is a nullity.)

('85) AIR 1935 Mad 786 (789). (An execution application filed by a vakil, who had no vakalat from the decree-holder is not one in accordance with law.)

('35) AIR 1935 All 727 (728) : 57 All 965. (Application for substitution and execution signed by pleader and accompanied by vakalatnama—Place in vakalatnama for pleader's name left blank and no signature of pleader in it—It is not in accordance with law.)

('37) AIR 1937 Nag 65 (65) : I L R (1937) Nag 494. (Still Court should give litigant chance to set matter on foot again as far as possible—

Time can be extended under S. 5, Limitation Act in proper case.)

6. ('35) AIR 1935 All 727 (728) : 57 All 965. (Omission of vakil's name in vakalatnama—Appointment is invalid—AIR 1931 All 767 and 19 Ind Cas 674, Followed.)

[See ('96) AIR 1936 All 636 (636) : 58 All 912. (Vakalatnama signed by party and by vakil who was intended to act for the party—Mention of name of another vakil in body of document—Defect only formal.)]

7. ('35) AIR 1935 Pesh 2 (3). (Where such memorandum is filed, and the pleader is present but the party is absent, it cannot be said that the party has not 'appeared' on the ground that the pleader has authority only to 'plead' and not to 'appear'—In such a case, no separate authority to 'appear' on behalf of party is necessary.)

('36) AIR 1936 Lah 199 (199, 200) : 17 Lah 456. (Power of attorney not necessary when pleader appears to plead.)

[See ('32) AIR 1932 Cal 1 (3) : 59 Cal 870. (Held that under Rules framed by the Calcutta High Court under Cl. 37, Letters Patent, such a memorandum is invalid unless party or another pleader has put in appearance in the case.)]

8. ('32) AIR 1932 Cal 1 (2) : 59 Cal 870.

('36) AIR 1936 Lah 500 (501) : 17 Lah 610. (There is power only to "plead" and not to "act.")

9. ('25) AIR 1925 Pat 614 (615).

#### Note 15

1. ('01) 5 Cal W N 816 (818). (Need not be in writing.)

('16) AIR 1916 Cal 979 (981) : 43 Cal 884. (Do.)

('26) AIR 1926 Lah 32 (32) : 6 Lah 461. (Do.)

('28) AIR 1928 Lah 402 (403). (Do.)

('16) AIR 1916 Cal 411 (412, 413). (Should be in writing.)

2. ('70) 14 Suth W R 7 (8).

[See also ('93) 16 Mad 285 (286). (One or two vakil's can accept.)]

('22) AIR 1922 Pat 504 (507). (Pleader can accept even after vakalat is filed in Court.)



- O. 3 R. 4** satisfy himself that the vakalat had been executed by her before accepting the same.<sup>3</sup>  
**Notes 15-17** See the undermentioned case under the present rule.<sup>4</sup>

**16. "Until determined with the leave of the Court."**—The appointment of a pleader may be put an end to by the client or the pleader; but in either case it can be done *only with the leave of the Court*.<sup>1</sup> Once a pleader is appointed his authority continues until and unless—

- (1) it is put an end to by a *writing* signed by the client or the pleader and filed in Court, or
- (2) the proceedings in the suit terminate,<sup>2</sup> or
- (3) the pleader or the client dies.<sup>3</sup>

The statute does not require the writing containing the withdrawal to be in any particular *form*. An endorsement on the back of the plaint that he (the vakil) has no instructions is sufficient.<sup>4</sup>

See also Note 12 *ante*.

**17. "Until all proceedings in the suit are ended."** — A *vakalatnama* once filed by a pleader in the suit remains in force until all the proceedings in the suit are ended so far as the client is concerned.<sup>1</sup> Thus, a fresh *vakalat* is not necessary for the purpose of appearing in execution proceedings<sup>2</sup> or in appeal<sup>3</sup> or for setting aside an *ex parte* decree<sup>4</sup> or for an application to restore a suit dismissed for default.<sup>5</sup> Similarly,

3. ('28) AIR 1928 Oudh 449 (458).

4. ('35) 62 Cal 642 (659). (Pleader not accepting vakalatnama in writing though his name appeared in it — Pleader allowed to appear and conduct case—*Held*, vakalatnama was accepted.)

#### Note 16

1. ('30) AIR 1930 Pat 403 (404) : 9 Pat 865.

('82) 6 Bom 416 (429).

('09) 2 Ind Cas 830 (831) : 36 Cal 609.

('22) AIR 1922 Cal 515 (533) : 49 Cal 732.

('99) 23 Mad 134 (136). (Leave will not be given for a change of attorney until his costs are provided.)

[See ('35) AIR 1935 Pesh 145 (145). ("Court" includes not only Court where original power of attorney is filed but also Court to which case is subsequently transferred.)]

2. ('17) AIR 1917 Pat 211 (213) : 2 Pat L Jour 259.

('80) AIR 1930 Lah 134 (135). (Termination by mutual consent but without leave of Court not within the rule.)

3. ('84) AIR 1934 Nag 274 (276) : 31 Nag L R 57. (Presentation of appeal by pleader on behalf of dead appellant is nullity.)

4. ('25) AIR 1925 Mad 21 (22) : 47 Mad 819.

#### Note 17

1. ('96) 20 Bom 198 (199).

(1900) 4 Cal W N 767 (769). (Case of attorney.)

('18) AIR 1918 Mad 545 (547). (Appointment of vakil by *guardian ad litem* of minor defendant—Power in force even after minor attains majority.)

('92) 15 Mad 135 (136). (Collector as agent of Court of Wards giving vakalatnama and dying before judgment—Fresh vakalat not necessary.)

('86) AIR 1936 Lah 583 (584). (Pleader validly representing party in lower Court has authority

to file appeal.)

[See ('31) 133 Ind Cas 877 (878) (Lah). (Death of party terminates authority.)]

2. ('69) 5 Bom H C R A C 83 (83).

('23) AIR 1923 Bom 412 (412). (Fresh vakalat not necessary for claim petition.)

('25) AIR 1925 Pat 692 (693).

3. ('26) AIR 1926 Lah 32 (32) : 6 Lah 461.

('33) AIR 1933 Pesh 67 (68).

('67) 8 Suth W R 92 (92).

('30) AIR 1930 Lah 134 (135).

('31) 132 Ind Cas 895 (896) (Lah).

('30) AIR 1930 Lah 68 (69, 70).

('32) 137 Ind Cas 279 (279) (Lah). (Power authorising pleader to appear and act in trial Court or in any other Court — Pleader has authority to present appeal.)

('36) AIR 1936 Lah 583 (584). (Pleader validly representing party in lower Court can file memo of appeal and prosecute it in lower Appellate Court.)

[See however ('33) AIR 1933 Lah 504 (505).

(Mukhtear appearing in trial Court cannot file appeal unless so expressly authorised by power.)

('39) AIR 1939 Nag 219 (220) : 29 Nag L R 296. (Vakalat expressly stating that fresh vakalat would be necessary for appeal.)]

4. ('22) AIR 1922 Bom 207 (209) : 47 Bom 11.

5. ('29) AIR 1929 Lah 96 (98, 99) : 10 Lah 570.

('98) 15 All 55 (55). (Fresh vakalat not necessary for restoration of appeal.)

('38) AIR 1938 Nag 272 (272) : ILR (1938) Nag 157. (Sub-rule 3 of R. 4 of O. 3 does not impose any restraint on the generality of the meaning of the expression "all proceedings in the suit" occurring at the end of sub-rule 2 of Rule 4, and cannot be regarded as exhaustive.)



no new vakalat is necessary for the purpose of appearing in the case after remand by the Appellate Court<sup>6</sup> or after a plaint is returned for presentation to the proper Court.<sup>7</sup> It has, however, been held in Bombay that the retainer of an attorney comes to an end when the suit is ended and that fresh authority would be needed for him to act for the client in execution proceedings.<sup>8</sup>

**O. 3 R. 4**  
**Notes 17-18**

Where a vakalat is filed in a pauper petition and the latter is subsequently converted into a suit, no fresh vakalat is necessary for the suit unless the vakalat already given was distinctly confined to the pauper petition alone.<sup>9</sup>

There is, however, no such general relationship as that of a pleader and client, of a standing and permanent character, upon all occasions and for all purposes.<sup>10</sup>

**18. Bombay Pleaders Act, 1920.**—Section 10 as also Form C of the Second Schedule of the Bombay Pleaders Act have been repealed by the Second Amending Act of 1926.

**R. 5. [S. 40.]** Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

**O. 3 R. 5**

Service of process  
on pleader.

[1877, S. 40; 1859, S. 18.]

#### Local Amendments

#### MADRAS

*Insert* the following at the end :

*Explanation* : — Service on a pleader who does not act for his client, shall not raise the presumption under this rule.

#### NAGPUR

*Substitute* the words "on a pleader who has been appointed to act for any party" for the words "on the pleader of any party."

#### N.-W. F. P.

*Add* the following at the end :

"provided that the pleader is acting and not merely pleading for the party."

#### OUDH

*For* "on the pleader of any party" *read* "on a pleader who has been appointed to act for any party."

**1. Service of process on pleader.**—The words "relative to a suit or appeal" which occurred in the old Code have been omitted with the result that this rule now

6. Proceedings dated 8th April 1869 on a reference by Civil Judge, Tanjore, (1868-69) 4 Mad H C R xliii (xliv).

7. ('22) AIR Nag 125 (126).

8. ('82) AIR 1982 Bom 387 (388).

9. ('84) AIR 1984 Mad 690 (690) : 58 Mad 176.

10. ('24) AIR 1924 Mad 840 (841).

[See ('83) AIR 1933 Lah 60 (60). (Although there is no general agency for all suits between a counsel and his client, still the latter can sue the counsel for rendition of accounts in respect of the suits for which the counsel was engaged —AIR 1927 Mad 157, Followed.)]

**O. 3 R. 5**  
**Note 1**

applies to all proceedings under the Code. The word "pleader" includes an attorney<sup>1</sup> as well as an advocate.<sup>2</sup> The words "personal appearance" include personal appearance to give evidence.<sup>3</sup>

A notice served on an attorney even after a decree *nisi* was passed and the party had left for England has been held to be equivalent to service on the party.<sup>4</sup> Until the engagement of a pleader is legally determined, any process served on him will be effectual in spite of the pleader's endorsement thereon that he is no longer appearing for the party.<sup>5</sup> But when a *proceeding is at an end* the pleader does not continue to act for the party thereafter and service on the pleader is of no avail. Thus, where an *ex parte* decree is passed and the suit comes to an end, a service on the pleader is not equivalent to a service on his client.<sup>6</sup>

The process, in order to be effectual, must be addressed to the pleader on whom it is to be served.<sup>7</sup> The pleader himself may, however, waive the correct formalities in effecting service.<sup>8</sup>

The presumption referred to in the rule can, according to the High Court of Calcutta, be rebutted by actual proof that the pleader did not communicate the matter to the party.<sup>9</sup> Where a pleader declined to accept notice of the transfer of a suit to another Court on the ground that he no longer represented the party and this fact was brought to the notice of the Court, and the Court nevertheless dismissed the suit for non-appearance of the plaintiff and his pleader, it was held by the High Court of Lahore that it was unfair to penalise the party notwithstanding the act of the pleader in refusing the notice was illegal.<sup>10</sup>

The High Court of Patna has, on the other hand, held that the presumption of communication is an irrebuttable one.<sup>11</sup>

The rule applies only when the Court *orders* that process be served on the pleader.<sup>12</sup> Though a service on the pleader of a party would be effectual as regards such party in relation to a civil suit, it cannot render the party liable to punishment under Section 174, Indian Penal Code.<sup>13</sup>

### Local Amendment

#### PATNA

Add the following rule :

**O. 3 R. 5B**  
**(Patna)**

"5B. Notwithstanding anything contained in Order 3 sub-rules (2) and (3) of R. 4 of the First Schedule of the Code of Civil Procedure, 1908, no pleader shall act for any person in the High Court, unless he has been appointed for the purpose in the manner prescribed by sub-rule (1) and the appointment has been filed in the High Court."

#### Order 3 Rule 5 — Note 1

1. ('82) 6 Bom 416 (429).  
See also O. 3 R. 4 Note 3, Foot-note. 1.
2. ('04) 7 Oudh Cas 303 (305, 306).
3. ('69) 6 Bom H O R A O 141 (142).
4. ('82) 6 Bom 416 (429).  
( '71) 15 Suth W R 290 (290).
5. ('04) 7 Oudh Cas 303 (305).  
( '28) AIR 1928 Lah 426 (426).  
( '27) AIR 1927 Lah 428 (429). (Endorsement that notice may be served on the party.)
- ( '20) AIR 1920 Lah 288 (288).
- ( '22) AIR 1922 Oudh 75 (75) : 25 Oudh Cas 40.

[See also ('80) AIR 1930 All 711 (712). (Notice served on pleader engaged to file objections to award sufficient.)]

6. ('21) 68 Ind Cas 47 (48) (Pat).
7. ('02) 6 Cal W N 927 (928).
8. ('27) AIR 1927 Pat 185 (189).  
( '27) AIR 1927 Cal 619 (621).
9. ('09) 2 Ind Cas 547 (548) (Cal).
10. ('84) AIR 1984 Lah 91 (91).
11. ('84) AIR 1934 Pat 592 (592).
12. ('21) 68 Ind Cas 47 (48) (Pat).
13. ('02) 6 Cal W N 927 (928).

**R. 6. [S. 41.]** (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process. **O. 3 R. 6**

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

Appointment to be in writing and to be filed in Court.

[1877, S. 41; 1859, Ss. 50, 51.]

#### Local Amendment

SIND

Add the following as sub-rule (3):

"(3) The Court may at any stage of a suit and whether upon application made to it, or of its own motion, direct any party to the suit, not having a recognised agent residing within the jurisdiction, of the Court, to appoint within a time to be specified an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under this sub-rule the provisions of sub-rule (2) shall be applicable."

### ORDER IV.

#### INSTITUTION OF SUITS

**R. 1. [S. 48.]** (1) Every suit shall be instituted by presenting<sup>3</sup> a plaint<sup>2</sup> to the Court or such officer as it appoints in this behalf.<sup>5</sup> **O. 4 R. 1**

Suit to be commenced by plaint.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

[1877, S. 48; 1859, S. 25. See S. 26.]

#### Local Amendments

ALLAHABAD

For sub-rule (1), substitute the following :

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf, a plaint, together with a true copy for service with the summons upon each defendant, unless the Court for good cause shown allows time for filing such copies.

(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

Re-number the present sub-rule (2) as sub-rule (3).

**O. 4 R. 1**  
**Notes 1-3**

**NAGPUR**

*Substitute the following for sub-rule (1) :*

"1. (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with as many true copies on plain paper of the plaint as there are defendants, for service with the summons upon each defendant, unless the Court, for good cause shown allows time for filing such copies."

*Add the following sub-rule (2) and renumber the present sub-rule (2) as sub-rule (3) :*

"(2) The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed, and in the case of all other proceedings when the process is applied for."

**ODDH**

To sub-rule (2), *add* the following words :

"and except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted until the necessary process-fee has been paid into Court."

### *Synopsis*

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|--|--|
| <ol style="list-style-type: none"> <li>1. <b>Legislative changes.</b></li> <li>1a. <b>Suit, meaning of.</b></li> <li>2. <b>Plaint, meaning of.</b> See S. 26, Note 3.</li> <li>3. <b>Presentation of plaint.</b></li> <li>4. <b>Place of presentation of the plaint.</b></li> <li>5. <b>Plaint to whom to be presented.</b></li> </ol> | <ol style="list-style-type: none"> <li>6. <b>Time of presentation.</b></li> <li>7. <b>Mode of presentation.</b></li> <li>8. <b>Suit when commenced.</b> See S. 26.</li> <li>9. <b>Presentation of plaint in Revenue Court.</b></li> <li>10. <b>Suit against dead person.</b> See O. 1 R. 10.</li> <li>11. <b>Suit against minor.</b> See Note 2 to Section 26 and Order 32.</li> </ol> |
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### *Other Topics (miscellaneous)*

- |  |   |
|--|---|
| <p>Courts to which plaint is to be presented. See Note 4.</p> <p>Date of suits for limitation purposes. See Note 3 and Section 26 Notes.</p> <p>Defect in presentation. See Note 7.</p> <p>Deficiency of court-fee on presentation. See Section 149 Notes.</p> | <p>Presentation in the case of holidays. See Note 6.</p> <p>Presentation to clerks or head-clerks. See Note 5.</p> <p>Presentation to Judge after office hours and outside court-house. See Note 6.</p> <p>Suits in forma pauperis. See Section 26.</p> |
|--|---|

**1. Legislative changes.** — Sub-rule (2) is new.

**1a. Suit, meaning of.** — The word "suit" ordinarily means a civil proceeding instituted by the presentation of a plaint. A claim against a company in liquidation not made by the presentation of a plaint is not a suit.<sup>1</sup>

**2. Plaint, meaning of.** — See Section 26 Note 3.

**3. Presentation of plaint.** — The institution of a suit is ordinarily made by the presentation of a plaint to the Court or such officer as it appoints in this behalf and the time of institution for purposes of Limitation Act is the time of presentation of the plaint.<sup>1</sup> See Limitation Act, 1908, Section 3, and Explanation thereto.

#### **Order 4 Rule 1 — Note 1a**

1. ('83) AIR 1933 P C 63 (64) : 60 Ind App 13 : 54 All 1067 (P C). (So also claim by liquidators is not a suit.)

#### **Note 3**

1. ('84) AIR 1984 Bom 91 (93). (Difference between "presentation of plaint" and "receipt or admission of suit" pointed out.)
- ('29) AIR 1929 Mad 480 (480). (Suit commences with the presentation of a plaint.)
- ('85) 62 Cal 1115 (1117). (Suit is instituted on the

date the plaint is presented although not admitted on that date owing to insufficiency of court-fee paid but admitted subsequently on balance being paid—Entry in register of suits is only prima facie evidence of date of presentation but not conclusive.)

[See ('85) AIR 1985 Sind 225 (226). (Where according to the practice laid down in Vol. 1 Ch. 1-B, R. 4 of the Rules and Orders of the High Court of Lahore, a plaintiff presents his plaint to the District Judge and the District

**4. Place of presentation of the plaint.** — The Court in which the plaint has to be presented is the Court of the lowest grade competent to try the matter under Sections 15 to 20.<sup>1</sup> In the case of plaints presented to the Court which has no jurisdiction to try the same, see O. 7 R. 10 *infra* and Section 14 of the Limitation Act, 1908.

**O. 7 R. 1  
Notes 4-6**

**5. Plaint to whom to be presented.** — The plaint must be presented either to the Court or to such officer as it appoints in this behalf.<sup>1</sup> The presentation, therefore, of a plaint to a person not so authorised,<sup>2</sup> or out of office hours, to an officer authorized to receive plaints only *within* office hours, is not a valid presentation, unless such presentation is ratified by the Court on that very day.<sup>3</sup> The mere registration of a plaint subject to objections does not cure the defect.<sup>4</sup>

**6. Time of presentation.** — A plaint may be validly received on a Court holiday<sup>1</sup> or out of office hours at the Judge's club or at his private residence.<sup>2</sup> By such act of acceptance, the Judge constitutes himself "an officer appointed in this behalf."<sup>3</sup> But the Court is not bound to accept it,<sup>4</sup> and when it refuses to do so the Appellate Court will not interfere.<sup>5</sup>

Section 4 of the Limitation Act, 1908, provides that when the period of limitation for a suit, appeal or application expires on a day on which the Court is closed, the suit, appeal or application may be presented on the re-opening day.<sup>6</sup> Again, under Section 14 of the Limitation Act, 1908, where the plaintiff prosecutes a suit *bona fide* in a wrong Court and upon a return of the plaint by that Court, re-presents it to the

Judge then sends it for disposal to a subordinate Court, the real date of presentation of the plaint is the date on which it is presented to the District Judge and not the date on which it is sent to the subordinate Court.]]

#### Note 4

1. ('1864) 2 Bom H C R O C 40 (45). (Sadar Amin's Court closed temporarily — Suit cannot be filed in District Court.)
  - (('78) 10 Bom H C R 495 (496). (Court of subordinate Judge closed—District Judge's Court is not a Court of lowest grade.)
  - (('29) AIR 1929 Mad 29 (30, 31):52 Mad 52. (High Court has no jurisdiction to receive a plaint which has to be received by an inferior Court when the latter Court is closed for summer vacation.)
- See also Notes to Sections 15 to 20 as to the *forum* for suits.

#### Note 5

1. ('18) AIR 1918 Mad 1152 (1153). (Presentation to head ministerial officers, e.g. Deputy Collector's head clerk duly authorized.)
2. ('72) 18 Suth W R 172 (173). (Presentation to Nazir of Court of Small Causes is not proper.)
- (('34) AIR 1934 Lah 622 (622): 15 Lah 308. (Judge absent—Presentation to the Naib Sheriff of the Court not authorized to receive the plaints is not proper.)
- (('10) 5 Ind Cas 330 (331) (All). (Plaint handed over to suits clerk who handed it over to munshim—Presentation not valid.)
- (('72) 4 N W P H C R 35 (36). (To Assistant Collector not authorized.)
- (('69) 6 Bom H C R A C 254 (256). (To wrong officer—Karkun left in charge during the vacation.)
- (1868) 1868 Suth W R Sm C C 86. (Presentation to Nazir.)

(('16) AIR 1916 Mad 3 (4): 38 Mad 295 (F B). (Head-clerk not authorized.)

(('21) AIR 1921 Mad 654 (655): 44 Mad 817.

[See also ('12) 14 Ind Cas 221 (224) (Oudh). (Application for restoration under O. 9 R. 4 presented to clerk not authorized to receive such applications—Presentation invalid.)]

3. ('14) AIR 1914 Mad 376 (376).

4. ('10) 5 Ind Cas 330 (331) (All).

#### Note 6

1. ('71) 16 Suth W R 230 (231). (Plaint filed on Sunday).
- (('70) 1870 Pun Re No. 43, p. 108. (Receipt of petition on gazetted holiday.)
2. ('22) AIR 1922 Nag 167 (167).
- (('12) 34 All 482 (486). (Overruling 7 N W P H C R 5—Appeal).
- (('24) AIR 1924 Mad 448 (448): 47 Mad 312.
- [See also ('37) AIR 1937 Bom 25 (25, 26): I L R (1937) Bom 136. (Clerk of Court authorised to receive plaints can do so out of office hours and outside Court precincts but is not bound to do so—Where clerk merely receives the plaint and refers the matter to the Court he cannot be said to have 'accepted' it.)]
3. ('24) AIR 1924 Mad 448 (448): 47 Mad 312.
4. ('12) 14 Ind Cas 744 (744): 34 All 482.
- (('24) AIR 1924 Mad 448 (448): 47 Mad 312.
5. ('25) AIR 1925 Mad 201 (201).
6. See cases under Section 4 of the Limitation Act, 1908 and also the following cases :  
(('06) 3 Cal L Jour 389 (342).  
(('91) 18 Cal 631 (634).  
(('91) 18 Cal 231 (234).  
(('80) 5 Cal 906 (910).  
(('99) 22 Mad 179 (182).

**O. 3 R. 1**  
**Notes 6-11**

proper Court, the period during which the suit was being prosecuted in the wrong Court will be excluded in computing the period of limitation for instituting the suit.<sup>7</sup>

As to the validity of other proceedings of Court on holidays, see Order 20, Rule 1, *infra*.

**7. Mode of presentation.** — The word “presenting” implies delivery to the Court or to its officer either in *person* or by a recognised agent or pleader of a party.<sup>1</sup> This is also made clear by O. 3 R. 1 *ante*, which provides that any appearance, application or act in or to any Court by a party in such Court may, except where otherwise expressly provided, be done by the party in person or by his recognized agent or by his pleader. See also the rules of practice framed by the various High Courts.<sup>2</sup> The sending of a plaint by post<sup>3</sup> or the placing thereof on a table when the officer is not present<sup>4</sup> is, therefore, not a proper presentation. Similarly, the presentation of a plaint by a *servant* of the plaintiff who is not his recognized agent is not a valid presentation.<sup>5</sup> Where a plaintiff has attained majority before the institution of the suit but the plaint is presented by a person purporting to be next friend, the presentation is not invalid if the mistake is *bona fide*.<sup>6</sup>

**8. Suit when commenced.** — See Section 26.

**9. Presentation of plaint in Revenue Court.** — Revenue Courts have no authority to specify certain days on which plaints shall not be received.<sup>1</sup> The general principles as to the place, time and mode of presentation of plaints apply to the Revenue Courts as well. Where a plaint is presented to the Collector instead of to the Deputy Collector, the institution of the suit is not void for want of jurisdiction but is only voidable at the instance of the defendant.<sup>2</sup>

**10. Suit against dead person.** — See Order 1 Rule 10.

**11. Suit against minor.** — See Note 2 to Section 26 and Order 32.

(‘97) 20 Mad 469 (470). (Gazetted holiday if last day can be excluded even if the Judge held Court on that day).

(‘84) AIR 1934 Lah 622 (622) : 15 Lah 308. (Judge temporarily absent — No arrangements for receiving plaints — Plaint received by naib-sheriff having no authority to receive it—Plaint time-barred when placed before Judge though in time when filed—Court is to be deemed closed in absence of Judge—Period is to be excluded).

7. See cases under Section 14 of the Limitation Act, 1908.

**Note 7**

1. (‘84) AIR 1934 Bom 91 (93).  
(‘92) 15 Mad 137 (138). (Case under the Criminal Procedure Code.)  
(‘96) 19 Mad 354 (355). (Petition placed in a petition box is not properly presented.)  
(‘89) AIR 1939 Nag 242 (244) : 1 L R (1939) Nag 515.  
(‘39) AIR 1939 Rang 1 (5, 6) : 1939 Rang L R 108. (Plaint drawn up and signed by authorised pleader presented by another pleader delegated to do so—Plaint or appeal must be deemed to have been presented by pleader signing it).

(‘35) 39 Cal W N 534 (537). (Plaint presented by pleader — Vakalatnama not signed by plaintiff — Presentation is irregular — Matter can be regularised only by order of condonation — Party cannot correct defect without reference to Court.) [See however (‘31) AIR 1931 All 507 (511) : 54 All 57 (SB). (Oral authority to agent to present sufficient.)]

2. Madras Civil Rules of Practice, Rule 21, Punjab Chief Court Instr. Vol. I, Rr. 13 and 15.

3. (1900) 1900 Pun Re No. 38, page 141.

4. (‘71) 8 N W P H O R 341 (342).

5. (‘22) AIR 1922 Bom 113 (113) : 46 Bom 150.

(‘82) AIR 1932 Bom 367 (368). (Plaint not signed by party or person holding general power not properly presented.)

[See also (‘99) 1899 Pun Re No. 5, page 28. (Filing suit by unauthorised person.)]

6. (‘31) AIR 1931 All 507 (511) : 54 All 57 (SB). (45 All 701 : AIR 1924 All 54, Overruled.)

**Note 9**

1. (‘69) 11 Suth W R 537 (538).

2. (‘74) 21 Suth W R 450 (452) (F B).

**R. 2.** [S. 58.] The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. **O. 4 R. 2**

**Register of suits.**

Such entries shall be numbered in every year according to the order in which the plaints are admitted.

[1877, S. 58; 1859, S. 38.]

### Local Amendment

#### CALCUTTA

*Insert* the following words after the words "particulars of every suit":

"Except suits triable by a Court invested with the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887."

### Synopsis

1. **Register of suits.**

2. **Form of Register.** See Appendix II, Form No. 14.

1. **Register of suits.** — As has been seen already in Note 2 to Section 26 *ante*, where two or more suits are filed on the same day, they will be presumed to have been filed in the order in which they appear in the Register.<sup>1</sup>

As to the practice of the Calcutta High Court of placing ordinary mortgage suits on the list of suits for liquidated claims, see Rule 281 of the Original Side Rules of that Court and the undermentioned case.<sup>2</sup>

2. **Form of Register.** — See Appendix H, Form No. 14.

## ORDER V.

### ISSUE AND SERVICE OF SUMMONS

#### *Issue of Summons*

**R. 1.** [S. 64.] (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified: **O. 5 R. 1**

**Summons.**

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear —

(a) in person, or

#### Order 4 Rule 2 — Note 1

1. ('04) 16 All 165 (173, 175) (F B).  
(195) 62 Cal 1115 (1116). (An entry in the register of suits, showing a plaint as having been presen-

ted on a particular date, is not conclusive evidence of presentation on that date.)  
2. (1900) 27 Cal 355 (357).

**O. 3 R. 1**  
**Notes 1-2**

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

[1877, Ss. 64, 68; 1859, S. 41. See O. 3 Rr. 1, 3, 4 and 5.]

### Local Amendment

#### OU DH

Add a new sub-rule (1A) as follows:

"(1A) A party shall file with his application for the issue of a summons to the defendant or opposite party a printed summons form, in duplicate, one part being in the Urdu and the other in Nagri character, duly filled up, except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting; provided that —

(a) if the party to be served is a European British subject, the party applying for the issue of the summons shall file a special form which shall be filled up in English; and

(b) the presiding officer may, in his discretion, direct that such forms in general or that any particular such form be filled up entirely in the office of the Court."

### Synopsis

1. "Summons may be issued."

1a. Defendant.

2. Contents of summons.

3. Summons not necessary where defendant has appeared.

4. Signature in summons.

5. Fresh summons.

6. "To appear and answer."

7. Duly instituted. See Section 27.

8. Summons to which place to be issued.

1. "Summons may be issued." — Sub-rule (1) of this rule is based on the maxim *audi alteram partem* "hear the other side," i. e., no one should be condemned unheard. The use of the word "may" in this rule cannot be taken to mean that it is optional with the Court to issue summons or not.<sup>1</sup> It has been simply used in view of the alternative remedy (*viz.*, of sending a letter instead of a summons) in Rule 30, *infra*.

The necessity for serving a summons is dispensed with, however, where the defendant voluntarily appears at the presentation of the plaint and admits the plaintiff's claim and this is what the proviso to sub-rule 1 enacts.<sup>2</sup> There is no time limit within which a summons to appear has to be issued.<sup>3</sup>

1a. Defendant. — It cannot be said that a person is not a defendant to a suit until the summons has been taken out and served.<sup>1</sup>

2. Contents of summons. — See Appendix B, Form 1. The summons should show *what claim* the defendant is called upon to answer and on *what date* he is to

#### Order 5 Rule 1 — Note 1

1. ('18) 85 All 168 (164).

[See ('98) 22 Bom 971 (972). (After registration of plaint summons cannot be refused for default of plaintiff in producing original account books).]

2. ('69) 12 Suth W R 482 (484).

[See also Bourke O. C. 244.]

3. ('80) 5 Cal 126 (127). (Time is however fixed by rules of Court.)

#### Note 1a

1. ('80) AIR 1930 Bom 567 (568).



be heard. It is not enough if he is made aware generally of the institution of a suit against him.<sup>1</sup>

**O. 5 R. 1**  
**Notes 2-8.**

**3. Summons not necessary where defendant has appeared.** — See Note 1. An appearance by the defendant in an interlocutory application before the registration of a suit itself is no *appearance* within the meaning of the proviso.<sup>1</sup>

**4. Signature in summons.** —<sup>\*</sup> As to whether signature will include initials, see Notes to Section 2 (20), *ante*.

**5. Fresh summons.** — A Court may, in its discretion, issue a fresh summons if and when necessary. See the undermentioned cases.<sup>1</sup>

**6. "To appear and answer."** — For the meaning of "appearance," see Order 17, Rule 2, Order 9 Rule 9 and Order 3 Rule 1.

**7. "Duly instituted."** — See Section 27 *ante*.

**8. Summons to which place to be issued.** — The summons should be taken out to the defendant at the place where he ordinarily or voluntarily resides or carries on business or works for gain; if the defendant has several places of residence and summons to one of such places is returned unserved, summons should be taken out to other places of residence, but it is not the duty of the plaintiff to take out summonses to the places where the defendant might have gone from his place of residence.<sup>1</sup> As to the definition of the words "reside" and "residence," see Section 20, Notes 3 to 7.

The provisions of the Civil Procedure Code relating to issue and service of summons have been made applicable to proceedings under the following Local Acts: The Burmah Land and Revenue Act, II of 1876, Section 54A; the Lower Burmah Town and Village Lands Act, IV of 1898, Section 39; the Indian Income-tax Act, VII of 1918, Section 46; the Madras, Ganjam and Vizagapatam Act, XXIV of 1839, Rule 25.

**R. 2. [S. 65.]** Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

**O. 5 R. 2**

Copy or statement  
annexed to summons.

[1877, S. 65.]

### Local Amendments

#### ALLAHABAD

*Omit the words "or, if so permitted, by a concise statement."*

#### OUDH

*Omit the words "or, if so permitted, by a concise statement."*

#### Note 2

1. ('13) 35 All 163 (164). (Defendant appears in Court in an interlocutory application to object to his appointment as guardian of minor co-defendant before registration of suit — Suit summons still obligatory.)

#### Note 3

1. See ('13) 35 All 163 (164).

#### Note 5

1. 1 Ind Jur (N s) 224. (Fruitless endeavour to serve the first summons.)

1 Ind Jur (N s) 283.

('75) 15 Beng L R App 12 (14). (Plaintiff's laches.)

#### Note 8

1. ('15) AIR 1915 Mad 342 (343). (If a defendant is travelling from place to place it is not the duty of the plaintiff to seek him in all those places.)

[See however ('16) AIR 1916 Mad 761 (762). (In which it does not appear if the place to which the defendant had gone was also a place of residence.)]

**O. 5 R. 2**  
**Note 1**

**1. Legislative changes.** — The words "if so permitted" are new. Concise statement cannot, therefore, be served under the present Code except with the permission of the Court.

**O. 5 R. 3**

Court may order defendant or plaintiff to appear in person.

**R. 3. [S. 66.]** (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

[1877, Ss. 66, 67; 1859, S. 42. See O. 9 R. 12.]

### Synopsis

1. Court may order party to appear in person.
2. Consequences of non-appearance. See O. 9 R. 12 Note 1.

**1. Court may order party to appear in person.** — Under O. 5 R. 1, sub-rule (2), a defendant has the option to appear in any one of the modes prescribed therein. But the Court *may* require the defendant or a *pro forma* party,<sup>1</sup> when necessary, to appear *in person*; and in that case the summons *shall* order accordingly. A plaintiff may likewise be ordered to appear in person. On such an order the party is bound to appear in person only on the date fixed therein. He is not bound to appear in person on any other date to which the suit is adjourned and the dismissal of the case on such date under O. 9 R. 12 for non-appearance is without jurisdiction.<sup>2</sup> Nor can a Court order the personal appearance of a party under this rule after the case has passed the stage of service of summons to the defendants.<sup>3</sup> For a proviso to this rule, see Rule 4, *infra*.<sup>4</sup> This rule is also subject to exceptions provided by the Code in favour of certain individuals such as a Ruling Prince<sup>5</sup> or a *pardanashin* lady.<sup>6</sup> See Sections 132 and 133.

**2. Consequences of non-appearance.** — See Order 9 Rule 12, Note 1.

**O. 5 R. 4**

No party to be ordered to appear in person unless resident within certain limits.

**R. 4. [S. 67.]** No party shall be ordered to appear in person unless he resides —

(a) within the local limits of the Court's ordinary original jurisdiction, or

### Order 5 Rule 3 — Note 1

- |  |  |
|--|--|
| 1. ('16) AIR 1916 Mad 445 (446).                 | 4. ('85) 1885 All W N 148 (144). (Rule 3 is controlled by Rule 4.) |
| 2. ('17) AIR 1917 All 95 (96) : 89 All 476.      | 5. Marsh 627.  |
| 3. ('82) AIR 1932 Nag 135 (136) : 28 Nag LR 146. | 6. ('39) AIR 1933 All 551 (553) : 55 All 666.                      |
| ('83) AIR 1933 All 551 (553) : 55 All 666.       |  |

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the court-house.

[1877, S. 67; 1859, S. 42.]

### Local Amendment

#### ALLAHABAD

Add the following Rule 4A :—

"4A. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

O. 5 R. 4A  
(Allahabad)

**R. 5.** [S. 68.] The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall

Summons to be either to settle issues or for final disposal.

contain a direction accordingly :

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

[1877, S. 68; 1859, S. 41.]

### Local Amendment

#### MADRAS

Delete the first paragraph and substitute the following in lieu thereof :

"R. 5. The Court shall determine, at the time of issuing the summons, whether it shall be —

(1) for the settlement of issues only, or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contests to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest for final disposal of the suit at once ; or (3) for the final disposal of the suit ; and the summons shall contain a direction accordingly."

**1. Summons for final disposal.** — It is, no doubt, for the Court to determine at the time of issuing the summons, whether it should be for the settlement of issues only or for the final disposal of the suit. But it is desirable to issue summons for the final disposal of the suit only in simple cases.<sup>1</sup> It is not proper to issue summons for the final disposal in mortgage suits.<sup>2</sup>

#### Order 5 Rule 5 — Note 1

1. ('14) AIR 1914 Bom 46 (47) : 38 Bom 377.

In suits under the Agra Tenancy Act (3 of 1926) and the Orissa Tenancy Act (3 of 1913)

summons to defendant shall be for final disposal unless the Court is of opinion that it should be for issues only.

2. ('14) AIR 1914 Bom 46 (47) : 38 Bom 377.

O. 5. R. 6

**R. 6. [S. 69.]** The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

[1877, S. 69; 1859, S. 45.]

**1. Sufficient time.** — It is not open to a plaintiff to obtain an *ex parte* decree before the returnable date mentioned in the summons.<sup>1</sup> A defendant is entitled to sufficient time to enable him to appear and answer in person or by pleader,<sup>2</sup> and Courts should carefully see that reasonable time is allowed to the defendant in all cases in order that the Courts themselves may not be made the instruments of fraud and injustice by means of those processes, the vigilant superintendence of the issue and the service of which is one of the most important duties of the Courts.<sup>3</sup> Thus, it has been held that a service in the afternoon of 27th January on an old woman of 65 to appear and answer in a Court some distance off on the morning of 29th January is not a due service.<sup>4</sup> The expression, "duly served" under Article 164 of the Limitation Act, 1908, however, does not mean "served in sufficient time to enable the party to attend the Court on the hearing date" but means only that the summons had been served in such a way that the defendant has *knowledge of the suit*,<sup>5</sup> and an application to set aside the *ex parte* decree must be made within 30 days from the date of decree.<sup>6</sup> The date of service is *prima facie* that shown in the return.<sup>7</sup>

O. 5 R. 7

**R. 7. [S. 70]** The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

[1877, S. 70; 1859, S. 43.]

#### Local Amendment

#### LAHORE

*Substitute for Rule 7 the following :*

"The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he bases his defence or any claim for set-off and shall further order that where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement."

#### Order 5 Rule 6 — Note 1

1. ('08) 82 Bom 534 (539).
2. ('66) 8 Mad H C R 167 (168). (When time allowed is insufficient Appellate Court will interfere.)
3. ('66) 5 Suth W R Act X Rulings 89 (89).
4. ('07) 1 Low Bur Rul 226 (227).
5. ('17) AIR 1917 Sind 27 (28) : 11 Sind L R 71.
6. ('14) AIR 1914 Sind 109 (110) : 8 Sind L R 158.
7. ('96) 28 Cal 573 (575).
7. ('70) 7 Bom H C R 188 (189).

**R. 8. [S. 71.]** Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case. **O. 5 R. 8**

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

[1877, S. 71.]

### *Service of Summons*

**R. 9. [S. 72.]** (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates. **O. 5 R. 9**

Delivery or transmission of summons for service.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

[1877, S. 72; 1859, S. 47.]

### *Synopsis*

1. Object of service of summons.
2. "Resident within that jurisdiction."
3. "Unless the Court otherwise directs."
4. Service by registered post. See Note 2 to Rule 10.
5. Proper officer.
6. Service of summons outside jurisdiction.
7. Service on public servant.

**1. Object of service of summons.** — The object of all service other than substituted service to which other considerations apply, is only to give notice to the party on whom it is made, so that he might be aware of and be able to resist the suit if he wishes to do so.<sup>1</sup> Where that has been done so that the Court might feel perfectly confident that service had reached him, everything is done that could be required.<sup>3</sup> The mere irregularity in the *manner* of service is not necessarily a ground for setting aside the decree.<sup>3</sup>

#### **Order 5 Rule 9 — Note 1**

1. ('97) 21 Bom 223 (225).
- ('33) AIR 1933 All 165 (165).
- ('18) AIR 1918 Lah 59 (60) : 1918 Pun Re No. 99.
- (1905) 1 K B 89 (45), *Kistler v. Tettmar*.
2. (1905) 1 K B 89 (44), *Kistler v. Tettmar*. (Where

it is proved that it has come to the knowledge of the defendant, personal service may be dispensed with.)

3. See S. 99 *ante* and also the following cases :  
 ('73) 11 Beng L R 1 (6).  
 ('17) AIR 1917 Nag 49 (50). (Omission of the process-server to get the signature of the defendant.)

**O. 5 R. 9**  
**Notes 2-7**

**2. "Resident within that jurisdiction."** — For the purpose of summons residence is not synonymous with ownership "of property within the territorial limits of the Court." Thus, a permanent absentee cannot be described as a resident in a place merely by virtue of ownership.<sup>1</sup> For the meaning of the words "reside" and "residence," see Notes 3 to 7 of Section 20.

**3. "Unless the Court otherwise directs."** — These words have been added to give the Court power to order service in any other way it thinks proper, *e. g.*, by post.<sup>1</sup> See also the Report of the Special Committee wherein they say "increased facilities have been given for the service of processes to which further reference has been made in the Notes on Clauses. It is hoped that by the gradual introduction of service by post may be found a solution of one of the principal defects in our legal system."

**4. Service by registered post.** — See Note 2 to Order 5 Rule 10.

**5. Proper officer.** — The Nazir is the proper officer of the Court to whom the summons is delivered for service and it is for him to return it to the Court if unserved.<sup>1</sup> But he can delegate the execution of a warrant to peons.<sup>2</sup> A service of summons is irregular if it is not made by the proper officer or by his subordinate.<sup>3</sup>

**6. Service of summons outside jurisdiction.** — Service of summons outside the jurisdiction of the Court issuing it, without sending it to the Court having jurisdiction, is irregular.<sup>1</sup>

**7. Service on public servant.** — It is within the discretion of the Court to serve a public servant either personally under this rule or through the head of the office in which he is employed. The rules of the Court providing for service on the public servant through the head of the office do not take away from the Court the discretion of effecting personal service if such service is more convenient.<sup>1</sup>

**O. 5 R. 10**

**R. 10. [S. 73.]** Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in

**Mode of service.**

this behalf, and sealed with the seal of the Court.

[1877, S. 73 ; 1859, S. 48.]

**Local Amendments****LAHORE**

Add the following proviso :

"Provided that in any case if the plaintiff so wishes, the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule."

**Note 2**

1. ('11) 9 Ind Cas 189 (191) : 88 Cal 394.

**Note 3**

1. ('16) AIR 1916 Cal 600 (602). (Case of *parda-nashin ladies*.)

**Note 5**

1. ('89) 18 Bom 500 (502).  
2. ('95) 22 Cal 596 (605, 606).

3. ('25) AIR 1925 Rang 325 (326) : 3 Rang 289.

**Note 6**

1. ('25) AIR 1925 Rang 325 (326) : 3 Rang 289.

**Note 7**

1. ('32) AIR 1932 Oudh 326 (326, 327).  
[But see ('09) 1 Ind Cas 163 (163, 164) (All).  
(Service effected contrary to rules held no service at all.)]

**N.-W. F. P.**

*Add the following proviso :*

"Provided that in any case the Court in its discretion may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule : and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this Order."

**PATNA**

*Add the following :*

"(1) Provided that in any case the Court may, of its own motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service."

### *Synopsis*

#### **1. Mode of service.**

#### **2. Service by post.**

**1. Mode of service.** — The Code prescribes three principal modes of serving a summons on a defendant<sup>1</sup> :

(1) Under this rule read with Rules 12, 16 and 18 *infra*, *i. e.*, by *delivering or tendering a copy* of the summons to the defendant personally or to his duly empowered agent and taking his signature in token of acknowledgment of such service. This is the mode of service that should normally be adopted unless it is not possible to do so.<sup>2</sup>

(2) Where the summons cannot be served in the above manner by reason of the fact that the defendant refuses to sign the acknowledgment of service or cannot be found or has no agent duly empowered to accept service, it should be *affixed to the outer door* or other conspicuous part of the defendant's residence under Rule 17, *infra*.<sup>3</sup>

(3) Where the summons cannot be served in either of the above two modes, or there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, the Court may order *substituted service* under Rule 20, *infra*, *i. e.*, by affixing a copy of the summons in the Court house and also in some conspicuous part of the defendant's last residence, or in such other manner as the Court thinks fit. This, however, unlike the other two modes of service, must be done after obtaining the *order of the Court* therefor.

Besides the three modes of service prescribed by the Code, the Court may, in particular cases, direct service of the summons by *post*. See Note 3 to Rule 9 and the following Note to this rule.

**2. Service by post.** — Although the Court may, in a particular case, direct that the summons should be sent by post, the normal mode of service is *personal service*.<sup>1</sup> Service by registered post is, at any time, a poor substitute for personal service; it is allowed to a litigant as a matter of convenience and very slight evidence is enough to

#### **Order 5 Rule 10 — Note 1**

1. ('18) AIR 1918 Lah 59 (60); 1918 Pun Re No. 99.
2. ('24) AIR 1924 Cal 1004 (1005).
- ('25) AIR 1925 Cal 627 (630) : 52 Cal 179.
- ('92) 19 Cal 201 (202).
3. ('18) AIR 1918 All 881 (881, 882).

('32) AIR 1932 Pat 150 (151).

#### **Note 2**

1. See Rule 12 *infra*.
- ('06) 29 Mad 324 (325).
- ('87) 14 Cal 204 (215, 216) (F B). (No different rules for service on minors.)

**O. 5 R. 10**  
**Notes 1-2**

**O. 5 R. 10**  
**Note 2**

displace the presumption of service raised by it.<sup>3</sup> Thus, where a summons sent by post was returned as "refused" by a person who was not shown to have been the defendant, it was held that it was not a good service.<sup>3</sup>

Under Section 27 of the General Clauses Act, 1897, where any Act, *passed after 11th March 1897* authorizes or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to have been effected, unless the contrary is proved, at the time, when a properly addressed and stamped letter containing the document, and sent by registered post would in the ordinary course of post reach the addressee. Where, therefore, a summons is sent by registered post, *e. g.*, under the provisions of R. 25, *infra*, properly addressed and is returned endorsed "refused," the Court can treat the service as sufficient.<sup>4</sup> It has been held that the words "unless the contrary is proved" in Section 27, General Clauses Act, refer both to the service and the time. Consequently, when notice is sent by registered post the presumption even as regards service is not conclusive but rebuttable.<sup>5</sup> That Section, however, does not apply to service by post authorized by an Act passed *before* 11th March 1897. In cases, therefore, arising under the old Code it was held that where a summons sent by registered post was returned as refused, the service could not be deemed to be sufficient unless there was sufficient proof of residence of the defendant in the place to which the summons was sent by post.<sup>6</sup>

A summons cannot be sent by post to any place to which letters are not registered by a post office in India.<sup>7</sup>

Under the proviso added to this rule by the Lahore High Court, service by registered post may be ordered even in the first instance. But if the defendant fails to appear, *ex parte* proceedings should not be taken but summons should be directed to be served by the ordinary process.<sup>8</sup> The Peshawar Court has also added a proviso to this rule, similar to that added by the Lahore High Court.<sup>9</sup> The Court has, however, no power to compel the plaintiff to deposit both the process fee and the postal charges, and cannot dismiss the suit for non-payment thereof.<sup>10</sup> In the undermentioned case<sup>11</sup> it was held that service on a party by registered post who refused to receive a summons was not due service, under the law as it stood before the new proviso.

2. ('22) AIR 1922 Bom 377 (377): 46 Bom 130. (Defendant alleging non-service is entitled to retrial.)

('28) AIR 1928 Pat 568 (571).

[See also ('15) AIR 1915 Cal 313 (320). (Presumption that notice sent by post was duly served, is not a conclusive presumption of law.) ('08) 7 Cal L Jour 251 (258). (Do.)]

3. ('94) 18 Bom 606 (607).

[See however ('97) 21 Bom 412 (418, 419). (The defendant not resident of British territory—Impossibility of proof that the person to whom summons was tendered and by whom it was refused was the defendant—Service held good.)]

4. ('11) 85 Bom 213 (215, 216).

('97) 21 Bom 412 (418, 419). (18 Bom 606, Distinguished.)

('14) AIR 1914 Bom 31 (32). (Refusal of the registered cover deemed to be at the risk of the addressee.)

('80) AIR 1930 Lah 439 (440).

('85) AIR 1935 Lah 171 (172). (Person refusing to accept service—Proceedings can be taken *ex parte* without effecting substituted service.)

[See also ('71) 16 Suth W R 223 (224). (Person

refusing a registered letter sent by post cannot afterwards plead ignorance of its contents.)

('01) 6 Cal W N 134 (137). (Do.)

('13) 20 Ind Cas 363 (365) (Cal).

('88) 15 Cal 681 (683). (Notice to quit.)]

5. ('32) AIR 1932 All 374 (374, 375): 54 All 543.

6. ('01) 23 All 99 (103).

[See ('71) 15 Suth W R 31 (31). (If the defendant does not appear, a verified statement should be put in to show that he is or has been recently residing in the place to which summons was sent.)]

7. ('68) 10 Suth W R 349 (350). (Nor can special bailiff be sent to serve civil process in foreign territory.)

8. ('26) AIR 1926 Lah 579 (580).

('27) AIR 1927 Lah 376 (377).

9. ('36) AIR 1936 Pesh 199 (200). (There is no legal justification for proceeding *ex parte* against the defendant on the ground that the summons was sent to him by post irrespective of the fact whether he received it or not.)

10. ('27) AIR 1927 Lah 157 (158). (Mode of service optional with plaintiff.)

11. ('29) AIR 1929 Lah 236 (236).



Under the Agra Tenancy Act a summons or notice may, *if the Local Government* by rule, either generally or in respect of any local area or any class of cases so directs, be served by post either in addition to or in substitution of, any other mode of service.

**O. 5 R. 10**  
**Note 2**

**R. 11.** [S. 74, Para. 1.] Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

**O. 5 R. 11**

Service on several defendants.

[1877, S. 74; 1859, S. 48.]

**1. Service on several defendants.** — The proviso to the old Section which contained rules relating to the mode of service on partners has been omitted in this rule but has been re-enacted under O. 30 R. 3 of the Code.

When there are more defendants than one, service should be made on each one of them.<sup>1</sup> But in a suit against the principal debtor and surety, the omission of the creditor to effect a service of summons on the principal debtor does not discharge the surety from his liability.<sup>2</sup>

**R. 12.** [S. 75.] Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient.

**O. 5 R. 12**

Service to be on defendant in person when practicable or on his agent.

[1877, S. 75; 1869, S. 49.]

### Synopsis

1. "Wherever it is practicable."
2. Service on minor.

3. Service on pardanashin lady.
4. Service on agent.

**1. "Wherever it is practicable."** — As a general rule the summons must be served on the defendant in person unless he has an agent empowered to accept service in which case it would be enough if it is served on him.<sup>1</sup> For that purpose the serving officer must make some substantial effort and proper enquiries to find out the person to be served in the place where he ordinarily resides or carries on business.<sup>2</sup> The mere

#### Order 5 Rule 11 — Note 1

1. ('76) 25 Suth W R 394 (395). (One summons on three brothers.)
- ('29) AIR 1929 Cal 218 (221). (Joint notice under S. 167, Bengal Tenancy Act, held bad.)
2. ('90) 14 Bom 267 (269).

#### Order 5 Rule 12 — Note 1

1. ('16) AIR 1916 Cal 181 (184); 43 Cal 447.
- ('87) AIR 1987 Pat 17 (19). (The service of summons against a major defendant upon a person who is described to be his guardian cannot be said to be a proper service on the defendant

though the supposed guardian may be his brother.)

[See also ('38) AIR 1933 Lah 114 (115). (Case remanded — Notice of trial not served on defendant but on counsel — No default of appearance.)]

2. ('16) AIR 1916 Cal 181 (183); 43 Cal 447.
- ('22) AIR 1922 Cal 128 (128). (Sufficient attempt not made to serve the defendant personally—Service on cousin.)
- ('11) 9 Ind Cas 763 (763) (Mad). (Service on brother without any attempt to serve on defendant personally—Ex parte decree set aside.)

**O. 5 R. 12**  
**Notes 1-4**

affixing of the summons on the door without any such attempt is not sufficient.<sup>3</sup>

A person whose name does not correspond to the description in the summons is justified in refusing it, but if *A* had posed as *B*, and had dealings with the plaintiff and if he is given summons addressed to *B*, he knows it is for him, and consequently service in the name of *B* is sufficient notice of the suit to *A*.<sup>4</sup>

**2. Service on minor.** — There are no special provisions as to service on infants and therefore the same rules which apply to adults apply to minors also. There should be personal service or such other service as is prescribed by the Code.<sup>1</sup> Service on the guardian *ad litem* alone of the minor is not good.<sup>2</sup> Where the guardian was evading service but the notice was served on the minor, the former must be deemed to have received information and under such circumstances it was held that the minor could not be allowed to plead that the service was irregular.<sup>3</sup>

**3. Service on pardanashin lady.** — When the summons has to be served upon a woman who is not accustomed to appear in public, as for example, a *pardanashin* lady, personal service is not possible, and the summons may therefore be served on any adult male member of the family or on her agent empowered to receive summons.<sup>1</sup> If there is no agent so empowered, it can be affixed to the outer door of the house in which she ordinarily resides.<sup>2</sup>

**4. Service on agent.** — A service on the agent is valid only if he is *empowered to accept service* on behalf of the defendant. By Rule 6 of Order 3 any person living within the jurisdiction of the Court may be appointed an agent to accept service of process, by instrument in writing signed by the principal.<sup>1</sup> Thus, *gumastas* and servants<sup>2</sup> and managers<sup>3</sup> merely looking after the affairs of the defendant or holding general powers-of-attorney cannot accept service. But a partner will be deemed an agent of the firm.<sup>4</sup>

**O. 5 R. 13**

**R. 13. [S. 76.] (1)** In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally

Service on agent  
by whom defendant  
carries on business.

3. ('76) 25 Suth W R 394 (395).

4. ('26) AIR 1926 Rang 73 (74): 3 Rang 515.

**Note 2**

1. (1900) 27 Cal 350 (351). (Both the minor and the guardian to be served.)

('87) 14 Cal 204 (215) (F B).

('99) 26 Cal 267 (273). (Personal service on guardian *ad litem* is necessary.)

2. ('87) 14 Cal 204 (215) (F B). (The guardian may by appearing waive all objections as to service.) ('99) 26 Cal 267 (273). (Section 75 (O. 5 R. 12) is not controlled by S. 443 (O. 32 R. 4).)

('11) 11 Ind Cas 317 (318): 1912 Pun Re No. 35.

3. ('23) L R 4 All Rev 250 (251).

**Note 3**

1. (1840) 2 Moo Ind App 263 (268) (PC). (Judicial Committee ordered service on the Dewan of a Hindu woman of rank.)

('23) AIR 1923 Pat 433 (433). (A husband to

whom a power has been executed but with no power to receive summons is not an agent.)

2. ('16) AIR 1916 Cal 600 (602).

('23) AIR 1923 Pat 433 (433).

('20) AIR 1920 Oudh 221 (222).

**Note 4**

1. ('18) AIR 1918 Mad 589 (590).

2. ('72) 17 Suth W R 33 (33).

('82) 8 Cal 317 (326). (A power to appear and defend suits does not include a power to accept summons.)

('13) 21 Ind Cas 922 (923) (Mad). (*Gumastha*.)

('20) AIR 1920 Oudh 220 (220): 23 Oudh Cas 104. (Service on a chela is insufficient.)

3. ('18) AIR 1918 Mad 589 (590). (Manager.)

4. ('73) 11 Beng L R App 26 (26). (But if the service on partner was not at the place of partnership business but in a different town, the summons will be deemed to be served on him personally.)

carries on such business or work for such person within such limits, shall be deemed good service.

**O. 5 R. 13**  
**Note 1**

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

[1877, S. 76.]

**1. Manager or agent personally carrying on business.** — In order that this rule may apply, two conditions are necessary to be satisfied —

- (a) the defendant residing without the jurisdiction of the Court must carry on business or work within jurisdiction through a manager or agent, and
- (b) the suit must relate to such business or work, that is, business or work either actually itself carried on by the agent or manager, or forming part of the business, in the sense of a connected course of transactions to the management of which he has been duly appointed.<sup>1</sup>

The manager or agent contemplated by the rule is one who has an initiative and independent discretion, though possibly subject to general orders for guidance.<sup>2</sup> Thus, a person simply employed for a particular voyage to obtain freight,<sup>3</sup> or a mere servant employed to do a particular work, or a person who acts also for other firms not initiating any business himself,<sup>4</sup> is not an agent or manager within this rule.

A service on an agent or manager as contemplated by this rule is valid service whether the fact of service is actually communicated to the principal or not.<sup>5</sup> In order that a service on an agent of a foreign corporation may be valid, the agent must have power to enter into contracts on behalf of such corporation.<sup>6</sup>

**R. 14.** [S. 77.] Where in a suit to obtain relief respecting,

**O. 5 R. 14**

Service on agent in charge in suits for immoveable property.

or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

[1877, S. 77.; 1859, S. 61.]

**1. Scope of the Rule.** — As to the meaning of the words "suit to obtain relief respecting, or compensation for wrong to, immovable property," see Notes to Section 16, *ante*. Where in a suit for foreclosure, it was found that the mortgagor had conveyed

('71) 7 Beng L R App 58 (58). (Dissenting from 1 Hyde 97.)

**Order 5 Rule 13 — Note 1**

1. ('80) 4 Bom 416 (421). (Section 76 and S. 37 clause (c) ought to be construed together.)

(22) AIR 1922 Pat 376 (877) : 1 Pat 48. (It is submitted that the view expressed in this case that this rule applies only to suits against firms is wrong.)

2. ('80) 4 Bom 416 (422).

3. ('71) 8 Bom H C R O C 159 (168).

4. ('80) 4 Bom 416 (422, 423).

5. ('80) 4 Bom 416 (424).

('70) 7 Bom H C R O C 97 (112). (Foreign principal carrying on business in India through local firm — Service on manager of local firm is sufficient.)

[See also ('81) AIR 1931 Pat 282 (284) : 10 Pat 441. (Case under Income-tax Act.)]

6. ('26) AIR 1926 Cal 1030 (1030).

**O. 5 R. 15  
Note 1**

his properties in trust to a body of persons, it was held that service on one trustee's agent who was in charge of the properties was sufficient.<sup>1</sup>

**O. 5 R. 15**

**R. 15.** [S. 78.] Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family.

*Explanation.* — A servant is not a member of the family within the meaning of this rule.

[1877, S. 78; 1859, S. 53.]

**Local Amendments****ALLAHABAD**

For the words "Where in any suit the defendant cannot be found," read "When the defendant is absent or cannot be personally served."<sup>1</sup>

**CALCUTTA**

*Substitute* the following :

"R. 15. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him :

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act, 1908, not to have been duly served.

*Explanation.*—A servant is not a member of the family within the meaning of this rule."

For a case decided under the rule, see the undermentioned decision.<sup>1</sup>

**LAHORE**

After the words "where in any suit the defendant cannot be found," insert the following words : "or is absent from his residence."

**MADRAS**

Delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent."

**NAGPUR**

*Substitute* the words "when the defendant is absent or cannot be personally served" for the words "where in any suit the defendant cannot be found."

**Order 5 Rule 14 — Note 1**

1. ('83) 9 Cal 733 (734).

**Order 5 Rule 15 — Allahabad**

1. ('85 AIR 1985 All 660 (661, 662). (*Pardanashin* lady is not person who cannot be personally served — Lady present in house — Serving summons on male member instead of on lady — Ser-

vice is not sufficient.)

**Calcutta**

1. ('89) AIR 1989 Cal 369 (376): I L R (1989) 1 Cal 580. (Notice under O. 21 R. 22 issued on heirs of judgment-debtor — Eldest son accepting only notice in his name — Notices in names of others affixed on door — Service held good.)

**N.-W. F. P.**

For the words "where in any suit the defendant cannot be found," *substitute* "where the defendant is absent from his usual place of residence."

**ODDH**

For the words "where in . . . . . found," *substitute* "where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."

**RANGOON**

For the words "Where in any suit the defendant cannot be found" in the first and second line, *substitute* the words "Where the defendant is absent."

Omit the word "male" between the word "adult" and the word "member" in the fifth line.

**O. 5 R. 15**  
**Notes 1-3**

### *Synopsis*

1. Scope of the Rule.
2. "Adult male member of the family."
3. Service on servant not valid — Explanation.

**1. Scope of the Rule.** — It is only when the defendant *cannot be found* and has no agent empowered to accept service on his behalf that service may be made on any adult member of his family. It cannot be said that the defendant "cannot be found" merely because he was not at home or had left for a particular place when the process-server went to effect service on him.<sup>1</sup> It is the duty of the process-server to take pains to find out the person to be served<sup>2</sup> and for this purpose he should make enquiries not only of the relations of the defendant but also of the neighbours.<sup>3</sup> In the absence of such an attempt at personal service on the defendant, the service on a member of the family is not sufficient.<sup>4</sup>

**2. "Adult male member of the family."**—A person above the age of 16 years has been held to be an "adult" within the meaning of this rule.<sup>1</sup> The service must be on an adult *male* member of the family. The law does not recognize service on any *female* member of the defendant's family.<sup>2</sup>

Where service was effected on an adult male member of the family under Rule 15 and the defendant was in communication with his family members, it was held that the service was sufficient.<sup>3</sup>

The adult male member on whom service is made must be one who is *residing with* the defendant.<sup>4</sup>

**3. Service on servant not valid — Explanation.** — As the Explanation shows, a servant is not a member of the family. Service on a servant therefore is not sufficient.<sup>1</sup> Service on a *munim* is similarly not one on a member of the family and is not valid.<sup>2</sup>

#### **Order 5 Rule 15 — Note 1**

1. ('11) 10 Ind Cas 242 (242, 248) (Lah).
2. ('12) 16 Ind Cas 600 (601) : 16 Oudh Cas 83. ('97) 21 Bom 228 (226). (Defendant gone to neighbouring village to return in four days—Affixing summons on the door is not proper service.)
3. ('21) AIR 1921 Cal 688 (689).
4. ('11) 9 Ind Cas 768 (768) (Mad). (Service on brother.) ('18) 21 Ind Cas 614 (614): 85 All 556. (Service on paternal uncle.)

#### **Note 2**

1. [See ('06) 85 Cal 286 (291, 292). (The case was

governed by S. 81 of the Public Demands Recovery Act.)]

2. ('97) 21 Bom 223 (226).
3. ('14) AIR 1914 Cal 845 (845) : 42 Cal 67. [See also ('71) 1871 Pun Re No. 27. (Even if the adult on whom the service was effected began to live in the family after the defendant had left it.)]
4. ('38) AIR 1938 Lah 797 (798). (Service on defendant's son who does not reside with him is not sufficient.)

#### **Note 3**

1. ('27) AIR 1927 Lah 200 (215) : 8 Lah 54.
2. ('18) AIR 1918 Lah 295 (296).

O. 5 R. 16

**R. 16.** [S. 79.] Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

[1877, Ss. 79, 80; 1859, S. 54.]

### Synopsis

1. Scope of the Rule.
2. "Shall require the signature."

**1. Scope of the Rule.** — This rule contemplates three distinct classes of service —

- (a) On the defendant in person.
- (b) On the defendant's duly appointed agent.
- (c) Upon any other person on behalf of the defendant.

The third class of service is contemplated by the law only when the party cannot himself be found.<sup>1</sup>

The words "other person on his behalf" can, according to context, only mean persons as contemplated by the preceding Rules 13 to 15.

**2. "Shall require the signature."** — As far as possible the officer serving the process should carry out the service in one of the modes prescribed by this rule and Rule 17 *infra*.<sup>1</sup> In other words, the serving officer delivering or tendering a copy of the summons should require the person served to sign an acknowledgment of service under this rule, and on his refusal to do so, should affix a copy of the summons to the outer door or other conspicuous part of his residence as prescribed by Rule 17.<sup>2</sup> Where a copy of the summons is tendered or delivered to the defendant but the latter refuses to sign the acknowledgment of service and the process-server *does not affix* the copy as per Rule 17, the defendant cannot be taken to have been validly served.<sup>3</sup>

A refusal to receive the summons or sign an acknowledgment of service is not an offence under Section 173 of the Indian Penal Code.<sup>4</sup>

#### Order 5 Rule 16 — Note 1

1. ('10) 6 Ind Cas 901 (902) (Bom).

#### Note 2

1. ('11) 11 Ind Cas 39 (40) : 33 All 649. (Summons affixed on the wrong house.)
2. ('18) AIR 1918 Lah 59 (60); 1918 Pun Re No. 99. ('33) AIR 1933 All 165 (166).
3. ('92) 16 Bom 117 (119). ('06) 8 Bom L R 584 (587). ('05) 7 Bom L R 159 (160). ('33) AIR 1933 All 165 (166). ('18) AIR 1918 Lah 59 (61); 1918 Pun Re No. 99. ('25) AIR 1925 Pat 441 (442) : 4 Pat 135. ('82) AIR 1932 Pat 150 (151, 152).

*Note:*—In the undermentioned case the summons to railway servant was refused on the ground of its not being served through his superior by Rule 28 of Allahabad High Court Rules of Practice. The

summons was not affixed and it was held that service was not sufficient. The question whether if it had been affixed it would be sufficient was not decided:

- ('09) 1 Ind Cas 163 (163) (All).  
[See ('16) AIR 1916 Mad 408 (410); 39 Mad 561.]  
[See however ('24) AIR 1924 Pat 446 (448) : 8 Pat 236. (The defendant took the copy of the summons tendered to him but refused to sign acknowledgment. Hence there was no copy to be affixed.)  
('17) AIR 1917 Nag 49 (50). (Under O. 5 R. 10, held service complete.)  
('35) AIR 1935 Lah 171 (172). (Person refusing summons—That summons was not affixed to outer door of house is only irregularity and does not affect validity of service.)]  
4. ('82) 5 Mad 199 (200). (Refusal to receive summons.)

**R. 17. [S. 80.]** Where the defendant or his agent or such **O. 5 R. 17**

**Procedure when defendant refuses to accept service, or cannot be found.**

other person as aforesaid refuses to sign the acknowledgment,<sup>3</sup> or where the serving officer, after using all due and reasonable diligence,<sup>5</sup> cannot find the defendant,<sup>4</sup> and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix<sup>7</sup> a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain,<sup>9</sup> and shall then return<sup>11</sup> the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

[ 1877, S. 80; 1859, S. 55.]

### Local Amendments

#### CALCUTTA

*Substitute the following :*

"R. 17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

#### NAGPUR

The following proviso shall be *inserted* :

"Provided that where a special service has been issued and the defendant refuses to sign the acknowledgment, it shall not be necessary to affix a copy as directed hereinbefore."

#### N.-W. F. P.

*Add* "The signature of a headman of the village shall be obtained on the summons and proclamation shall be made by beat of drum in the neighbourhood of the said house."

('98) 20 Cal 858 (859). (Refusal to sign a receipt for summons.)

('68) 5 Bom H O R Crown Cas 34 (35).  
(78) 3 Cal 621 (621).

**O. 5 R. 17**  
**Notes 1-3**

*Synopsis*

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Refusal to sign acknowledgment.</li> <li>4. Where the defendant cannot be found.</li> <li>5. "After using all due and reasonable diligence."</li> <li>6. Proof of service. See O. 5 R. 19.</li> </ol> | <ol style="list-style-type: none"> <li>7. Affixture.</li> <li>8. Service on minor. See O. 5 R. 12.</li> <li>9. "Resides or carries on business or personally works for gain." See S. 20.</li> <li>10. Temporary residence of defendant. See Notes 4 and 5 above.</li> <li>11. Return of service.</li> </ol> |
|---|---|

**1. Legislative changes. —**

1. The words "after using all due and reasonable diligence" are new. See Note 5 below.
2. The words "or on some other conspicuous part" have been added to provide for the contingency of the house having no outer door.
3. The words "or carries on business or personally works for gain" have been added.<sup>1</sup>
4. The words "and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed" have been newly added. See Note 11.

**2. Scope of the Rule. —** This rule enacts the second of the three modes of service referred to in Note 1 to O. 5 R. 10, and provides that it should be resorted to when the first of the said modes of service, namely, that prescribed in Rules 10, 12 and 16, is not possible.<sup>1</sup> The rule is of a highly penal nature and must be strictly complied with in order to give validity to the service purporting to be effected thereunder.<sup>2</sup>

This rule applies also to notices served under Section 49 of the Bengal Tenancy Act<sup>3</sup> and to notices under the Oudh Rent Act.<sup>4</sup>

See also the undermentioned case.<sup>5</sup>

**3. Refusal to sign acknowledgment. —** When a summons was offered to the defendant with an intimation of its purport, but the defendant without accepting it, went into his house and shut himself up, and the process-server affixed the summons on the outer door of the defendant's house, it was held that it was due service.<sup>1</sup> Where the defendant or his agent or other persons referred to in Rules 13 to 16 refuse to sign the acknowledgment and the service is effected by affixture to the outer door of the defendant's dwelling, the Court is perfectly justified in treating the service as good.<sup>2</sup>

Where the defendant refuses to sign the acknowledgment, but the serving officer does not affix a copy of the summons on the outer door, there is no valid service. See Note 2 to Order 5 Rule 16.

**Order 5 Rule 17 — Note 1**

1. ('08) 8 Cal L Jour 294 (297). (Under the old Code, affixing notice to the outer door of the office in which the defendant was an employee was held to be not good service.)

**Note 2**

1. ('33) AIR 1933 All 165 (166). (All available steps to effect personal service must be made before resort is had to this rule.)
2. ('99) 3 Cal W N 307 (310). ('17) AIR 1917 Nag 49 (50).
3. ('25) AIR 1925 Pat 441 (441) : 4 Pat 185. (Notice under S. 49, Bengal Tenancy Act.) ('29) AIR 1929 Cal 218 (221). (Notice under

- S. 167 of the Bengal Tenancy Act.) [See also ('86) 12 Cal 603 (604). (Bengal Act 7 of 1880, Public Demands Recovery Act.)]
4. ('10) 5 Ind Cas 804 (804) : 13 Oudh Cas 54. (S. 136 of the Oudh Rent Act corresponds to Order 5 R. 17.)
5. ('39) 1939 Oudh W N 787 (790). (The provisions of O. 5 R. 17, C. P. O. are not strictly applicable to the service of notice after the first hearing in the case.)

**Note 3**

1. ('16) AIR 1916 Nag 29 (31) : 13 Nag L R 46.
2. ('18) AIR 1918 Lah 166 (168, 169). (Defendant refusing service.)



**4. Where the defendant cannot be found.** — The affixture of summons will be a valid service under this rule only where, either —

1. the defendant or his agent or such other person as is mentioned in Rules 13 to 15 *refuses* to sign the acknowledgment, or
2. the serving officer, after using all due and reasonable diligence, *cannot find the defendant* and there is no agent or other person on whom the service can be made.

A person cannot be said to be “not found” within the meaning of this rule merely by reason of his being *temporarily absent* at another place.<sup>1</sup> The serving officer, before he can take advantage of the provisions of this rule, must use all due and reasonable diligence to find the defendant.<sup>2</sup>

But where, either by reason of the custom of the country or for some other reason *it is impossible for the serving officer to obtain access* to the person to be served, the case will be covered by the description “where the defendant cannot be found by the serving officer.”<sup>3</sup> Thus, a service by affixture will be good if the defendant is keeping out of the way to avoid service,<sup>4</sup> or if he shuts himself up in his house and does not come out for a reasonable time,<sup>5</sup> or where the defendant is a *purdanashin* lady who is not able to accept service personally and has no agent or other person to accept service on her behalf,<sup>6</sup> or where the defendant is lying sick and the serving officer cannot get access to him.<sup>7</sup>

The words “where the defendant cannot be found by the serving officer” will also cover a case where the absence of the defendant is for an *indefinite period*. The

(‘31) AIR 1931 Cal 546 (549). (Notice under O. 21, R. 22—Defendant absent—Undivided brother in joint family house refusing to accept notice.)

(‘28) AIR 1928 Nag 80 (81) : 23 Nag L R 166. (Agent refusing summons.)

(‘22) AIR 1922 Nag 105 (108). (Defendant absent — Undivided father refusing summons.)

(‘22) AIR 1922 Oudh 268 (269). (Adult male member of family refusing notice of appeal.)

#### Note 4

1. (‘24) AIR 1924 Oudh 287 (288). (It was observed that when service is made the very first time by affixing summons to the door of a defendant’s house there can be no presumption that he had notice of the case or date fixed for hearing.)

(‘17) AIR 1917 All 368 (368). (Respondent absent for 2 or 3 days—Affixture not proper.)

(‘16) AIR 1916 All 337 (337). (Serving officer knowing where the defendant is and is away temporarily—Affixture not proper.)

(‘24) AIR 1924 Lah 233 (233). (Mere temporary absence does not justify affixture.)

(‘68) 1868 Pun Re No. 79. (If defendant is absent to avoid service, affixture can be made.)

(‘68) 1868 Pun Re No. 85. (The circumstances under which affixture is to be made pointed out.)

(‘14) AIR 1914 Mad 159 (159). (Mere absence does not justify affixture.)

(‘98) 21 Mad 419 (421). (Do.)

(‘31) AIR 1931 Nag 119 (119, 120) : 27 Nag L R 53. (Substituted service when to be made.)

(‘12) 16 Ind Cas 600 (601) (Oudh). (Defendant absent temporarily, female members present—

Process-server to take pains to find out the defendant.)

[See also (‘16) AIR 1916 Mad 761 (762). (Facts are however not full—Return was simply that defendant had gone to Gudur.)]

2. (‘98) 21 Mad 419 (421).

(‘18) AIR 1918 All 331 (331, 332). (Process-server knowing where defendant was and still affixing.)

(‘16) AIR 1916 All 337 (337).

(‘10) 6 Ind Cas 282 (283) (All). (Process-server attempting on three different occasions to serve the summons personally on the defendants and having failed is right in effecting substituted service.)

(‘31) AIR 1931 Nag 122 (123) : 27 Nag L R 50. (Process-server visited the village five times to serve defendant and failed—Presumption is that defendant was evading service and substituted service held proper.)

(‘31) AIR 1931 Nag 119 (120) : 27 Nag L R 53. (The defendant being temporarily absent, and there being time to serve him personally, mere affixture held not sufficient.)

(‘24) AIR 1924 Cal 1004 (1005). (Process-server told where defendant is—Affixture is bad.)

[See (‘78) 20 Suth W R 62 (62, 63).]

3. (‘16) AIR 1916 Cal 600 (601).

4. (‘86) 10 Bom 202 (204).

(‘74) 22 Suth W R 482 (482).

5. (‘16) AIR 1916 Nag 29 (31) : 13 Nag L R 46.

6. (‘16) AIR 1916 Cal 600 (602).

(‘23) AIR 1923 Pat 433 (433).

7. 42 Abb Pr 169, Carter v. Young.

**O. 5 R. 17**  
**Notes 4-5**

serving officer is not bound to wait indefinitely for the defendant in such a case and will be justified in making the affixture under this rule.<sup>8</sup>

**5. "After using all due and reasonable diligence."** — These words are new and have been added to give effect to the decisions under the old Code which insisted on the necessity of a *bona fide* attempt at personal service.<sup>1</sup> The serving officer will not be deemed to have exercised due and reasonable diligence unless he has made a *real and substantial effort* after proper inquiries, to find the defendant.<sup>2</sup> He must attend at the right place and time at which he may expect to find the defendant, and, if he is absent, must make reasonable inquiries and take steps to discover where he is.<sup>3</sup> In *Cohen v. Nursing Dass*, I. L. R. 19 Calcutta 201, Sir Comer Petheram, C. J., observed as follows:

"It is true you may go to a man's house and not find him, but that is not attempting to find him. You should go to his house, make inquiries and, if necessary, follow him. You should make inquiries to find out when he is likely to be at home and go to the house at a time when he can be found. Before service like this can be effected, it must be shown that proper efforts have been made to find out when and where the defendant is likely to be found—not, as seems to be done in this country, to go to his house in a perfunctory way, and, because he has not been found there, to affix a copy of the summons on the outer door of his house."

If the defendant has two residences, inquiries must be made at *both* the places.<sup>4</sup> As has already been seen in Note 4, a mere temporary absence will not justify affixture even though the defendant had previously refused to accept service.<sup>5</sup> Where the process-server, not finding the defendant at his residence, tendered the summons to his adult son who refused it and, without making any further inquiry of the son as to where the defendant was, affixed the summons to the outer door of the residence, it was held that the service was not proper.<sup>6</sup>

It has been held in the undermentioned case<sup>7</sup> that the applicability of the words "after using all due and reasonable diligence" is specially restricted to the case

- 3. ('98) 21 Mad 324 (326).
- ('26) AIR 1926 Mad 31 (32).
- ('15) AIR 1915 Mad 342 (343). (Defendant going about from place to place.)
- ('15) AIR 1915 Mad 398 (399).
- ('14) AIR 1914 Mad 216 (217, 218).
- ('11) 12 Ind Cas 420 (421) (Mad).

**Note 5**

- 1. ('74) 21 Suth W R 242 (243).
- ('02) 24 All 302 (303).
- ('06) 30 Bom 623 (624). (No effort made to find the defendant.)
- ('99) 26 Cal 101 (102). (Serving officer should go to the place where and at the time when the defendant could be found.)
- ('92) 19 Cal 201 (203). (To go to defendant's house in a perfunctory way and to affix if he could not be found is not proper.)
- ('75) 24 Suth W R 381 (381).
- ('98) 21 Mad 324 (326). (No prospect of defendant being served personally — Affixture of notice is proper.)
- [See ('86) 12 Cal 603 (604). (Case under the Public Demands Recovery Act.)]
- 2. ('16) AIR 1916 Cal 181 (183) : 43 Cal 447.
- ('06) 30 Bom 623 (624). (No effort to find him — Affixture not proper.)
- ('18) 29 Ind Cas 564 (565) (U P B R). (Board of Revenue — Reasonable endeavours and real search necessary.)

- ('16) AIR 1916 Cal 511 (513). (Diligent search is necessary.)
- ('07) 5 Cal L Jour 12n.
- ('76) 25 Suth W R 394 (395). (Affixture without attempt to find the defendant is bad.)
- ('19) AIR 1919 Upp Bur 20(21) : 3 Upp Bur Rul 123.
- ('34) AIR 1934 Pat 274 (276) : 13 Pat 467. (Affixing without effort to find out defendant.)
- 3. ('25) AIR 1925 Cal 627 (630) : 52 Cal 179.
- ('26) AIR 1926 Cal 327 (332). (Reasonable and due diligence, what is — Appeal on AIR 1925 Cal 627 under Letters Patent.)
- ('99) 26 Cal 101 (102).
- ('97) 21 Bom 228 (226). (Summons to be sent at a time when the defendant could be found.)
- ('39) AIR 1939 All 180 (181). (Process-server affixing copy of summons to door of defendant's house merely upon being told that he had gone out and was expected to return in the evening — Summons cannot be said to be properly served.)
- ('37) AIR 1937 Rang 475 (476). (Going to defendant's house on several days and not finding defendant nor his agent or adult member of his family, posting summons on house — Summons held not duly served.)
- 4. ('25) AIR 1925 Cal 801 (802) : 52 Cal 453.
- 5. ('30) AIR 1930 Lah 192 (192).
- 6. ('06) 30 Bom 623 (624).
- 7. ('22) AIR 1922 Nag 105 (108).

where there is no agent empowered to accept service nor any other person on whom the service can be made, and that, where there is such a person, a *diligent effort* need not be made to effect personal service. It has also been held therein that even if the agent or other person *refuses* the summons, it is still necessary to show that the defendant "cannot be found." It is submitted that this latter view is not correct inasmuch as the Section states: "Where the defendant or his agent or such other person aforesaid *refuses* to sign the acknowledgment.....the serving officer shall affix a copy," etc.

**6. Proof of service.** — See Order 5 Rule 19.

**7. Affixture.** — As to the conditions under which alone an affixture could be made under this rule, see Notes 4 and 5 above. The affixture should be made on the outer door or other conspicuous part of *the house in which the defendant ordinarily resides or carries on business or personally works for gain.*<sup>1</sup> Where the serving officer finds that the defendant *never resided* in the village, he must return the summons *unserved*. Affixture in such a case is absolutely useless.<sup>2</sup> Similarly, an affixture to the outer door of a house in which the defendant was actually found but which was not *his ordinary place of residence is not sufficient.*<sup>3</sup> See also the undermentioned cases.<sup>4</sup>

The rule requires that there should be actual *affixture* of the summons. Merely leaving a copy of the summons on the teapoy in the defendant's house is insufficient.<sup>5</sup>

Where summons is sent by registered post (see O. 5 R. 9 Note 3) and the defendant refuses to accept delivery, no affixture of the summons on the outer door of the house or any conspicuous place is prescribed by law.<sup>6</sup>

**8. Service on minor.** — See Order 5 Rule 12.

**9. "Resides or carries on business or personally works for gain."** — See Section 20.

**10. Temporary residence of defendant.** — See Notes 4 and 5 above.

**11. Return of service.** — The law requires that the action of the person charged with the service of summons should be set out in full and must be supported by an affidavit.<sup>1</sup> The return must show that the defendant could not be found, that there was no other person on whom service could be made, that the summons was affixed on the outer door or some other conspicuous part of the house and that the house was one in which the defendant ordinarily resided or carried on business or personally worked for gain.<sup>2</sup> A return that the defendant was not in the village<sup>3</sup> or that the summons was served on the defendant's paternal uncle who was a member of a joint family<sup>4</sup> was held to be defective in the absence of an endorsement that the defendant

**Note 7**

1. ('15) AIR 1915 Cal 298 (241). (Affixture on door of place of business sufficient.)

2. ('66) 6 Suth W R 13 (14).

3. ('34) AIR 1934 Pat 274 (276) : 13 Pat 467.

4. ('20) AIR 1920 Lah 69 (70).

5. ('09) 1 Ind Cas 118 (119) (Cal).

6. ('25) AIR 1925 Cal 801 (802) : 52 Cal 453.

7. ('18) AIR 1918 Cal 179 (180). (Refusal by defendant at a place where he does not usually reside — Service must be made where he usually resides.)

8. ('16) AIR 1916 Cal 181 (182) : 43 Cal 447. (Merely going to person's place of business where he is a partner with another and then affixing notice on premises, not finding him, is not sufficient service.)

9. ('05) 9 Cal W N 108n (108n).

10. ('66) 6 Suth W R 13 (14).

11. ('69) 5 Mad IF C R 101 (109). (There may be dwelling sufficient to give jurisdiction and yet not the kind of dwelling necessary to make a good service.)

12. ('66) 1866 All W N 35 (35).

13. ('29) AIR 1929 Bom 257 (257).

14. ('35) AIR 1935 Lah 171 (172).

**Note 11**

1. ('13) 20 Ind Cas 318 (319) (All).

2. ('19) AIR 1919 Upp Bur 20 (21) : 3 Upp Bur Rul 123.

3. ('99) 26 Cal 101 (102). (Case under old law.)

4. ('14) AIR 1914 Mad 159 (159).

5. ('18) 21 Ind Cas 614 (614) : 35 All 556.

**O. 5 R. 17**  
**Note 11**

could not be found. So also a report that "respondent was not found" was held to be not good as it did not state that any effort or inquiry was made to find him.<sup>5</sup> The report must say that the copy of the summons was affixed to the *dwelling* house.<sup>6</sup> It must show that *at the time of service* the house was the ordinary residence of the defendant,<sup>7</sup> state the circumstances under which the affixture was made,<sup>8</sup> and also state the names and addresses of persons, if any, in whose presence the copy of the summons was affixed.<sup>9</sup> Failure to add in the return that the defendant's time of return was indefinite or was not known is, however, not a serious mistake.<sup>10</sup>

The addition of the words "the name and address of the person, if any . . . . . identified" merely gives effect to the existing practice. The words "if any" have been inserted to prevent a service without any identifier (*e. g.*, where the defendant is known to the process-server in person) being deemed illegal.

**O. 5 R. 18****R. 18.** [S. 81.] The serving officer shall, in all cases in

Endorsement of time  
and manner of service.

which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

[1877, S. 81; 1859, S. 56.]

**Synopsis**

- |                                  |                               |
|----------------------------------|-------------------------------|
| 1. Form of return.               | 3. Presumption as to service. |
| 2. Person identifying defendant. | 4. Revision.                  |

**1. Form of return.** — See Appendix B to Schedule I, Form 11.

The service of a summons or of a notice upon a person is a very important step and the law very properly requires that the action of the person charged with the service of such notice or summons should be set out in full and be supported by his affidavit. Until this has been done the summons cannot be considered to have been duly served.<sup>1</sup>

See also the undermentioned decision.<sup>2</sup>

**2. Person identifying defendant.**—It is not incumbent on a party to provide an identifier for the purpose of identifying the person served. The identifier can be a person in the village knowing the defendant.<sup>1</sup>

5. ('06) 30 Bom 628 (624).
- ('06) 29 Mad 324 (325).
- (1872-92) 1872-92 Low Bur Rul 641. (Affidavit must show that proper efforts were made to find the defendant.)
6. (1862) 1 Hyde 182 (139).
7. ('98) 2 Cal W N 188 (188) (Jour).
8. ('92) 16 Bom 117 (119).
- [See ('29) AIR 1929 Lah 884 (884). (No affixture.)]
9. ('28) AIR 1928 Nag 80 (80) : 28 Nag L R 166.
10. ('14) AIR 1914 Mad 216 (217, 218).

**Order 5 Rule 18 — Note 1**

1. ('13) 20 Ind Cas 318 (319) (All).
2. ('36) AIR 1936 Pat 598 (594). (It cannot be held that the minutest departure from procedure laid down invalidates the entire service, and it is a matter of fact in every case, within the jurisdiction of the Court to determine what the departure is, and whether notwithstanding that departure from the prescribed procedure, the service has in fact been effected.)

**Note 2**

1. ('28) AIR 1928 Pat 114 (114, 115),

**3. Presumption as to service.** — There is a presumption of service as stated in the process-server's report, and the burden lies on the party questioning it, to show that the return is incorrect.<sup>1</sup> Similarly, when there is any entry made *ex parte* in the order-sheet of the Court that summons has been served, there is no presumption that such entry is false and the party questioning it has to show that it is not correct.<sup>2</sup>

It has been held by the Calcutta High Court that the report of the serving officer that a summons was served on a person is not evidence as to service unless the serving officer is examined and the service is proved.<sup>3</sup> But where summons is sent under Rules 24, 26, 27 and 28, the return is evidence. See Rules 26 and 30 *infra*.

But an *affidavit* of the process-server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process-server should be put into the witness-box and opportunity of cross-examination given to those who deny the service.<sup>4</sup>

**4. Revision.** — The mere fact that lower Courts are wrong on the question of law relating to service of summons is not enough for the High Court to interfere in revision under Section 115.<sup>1</sup>

### Local Amendment

#### MADRAS

*Insert the following as Rule 18A :*

"R. 18A. A District Judge, within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial Officer of the District Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice board."

O. 5 R. 18  
Notes 3-4

O. 5 R. 18A  
(Madras)

**R. 19.** [S. 82.] Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that

O. 5 R. 19

Examination of  
serving officer.

#### Note 3

1. ('23) AIR 1923 Pat 327 (329).
2. ('17) AIR 1917 Cal 84 (86).
3. ('26) AIR 1926 Cal 539 (540).
- ('71) 15 Suth W R 270 (270). (The report of a Collectorate soon as to service of notice is not admissible in evidence.)
- ('68) 10 Suth W R 3 (4). (Do.)
- ('69) 12 Suth W R 365 (366).
- ('66) 6 Suth W R Act X 92 (93).
- (1865) 4 Suth W R Misc 4 (5).
- [See also ('72) 18 Suth W R 197 (197).]
4. ('36) AIR 1936 Mad 660 (661) : 59 Mad 1049.

[See also ('36) 164 Ind Cas 790 (791) (Lah). (The affidavit or statement on solemn affirmation of the process-server that he had been unable to find the party and had effected service by affixing the summons on his residence is legal evidence which at least shifts the onus to the party to prove that he was not properly served.)]

#### Note 4

1. ('14) AIR 1914 Mad 216 (218). (It was held that in case of extreme hardship, powers under S. 15 of Charter Act could be invoked—It will be noted that the High Court has no powers of revision under S. 224, Government of India Act, 1935.)

O. 5 R. 19  
Notes 1-2

the summons has been duly served or order such service as it thinks fit.

[1877, S. 82; 1859, S. 57.]

### Local Amendment

#### CALCUTTA

*Substitute* the following :

"R. 19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

### Synopsis

1. "Examine on oath."
2. "Shall declare that the summons has been duly served."
3. "Or order such service as it thinks fit."
4. Proof of service.

1. "Examine on oath." — If the return is not verified by the affidavit of the serving officer, the Court is bound to examine him before deciding as to the sufficiency of service; and the omission to do so is a material irregularity.<sup>1</sup> It cannot be said that there is due service in such a case.<sup>2</sup>

2. "Shall declare that the summons has been duly served." — The words "duly served" in this rule mean, served in such a manner as to give the defendant information of the proceedings against him.<sup>1</sup> Where, therefore, it appears from the return of the serving officer that there is no likelihood that the summons will come to the defendant's knowledge in due time or a probability that it will not so come to his knowledge, the Court should not declare the summons as duly served.<sup>2</sup> It has been held by the High Court of Bombay and by the Chief Court of Oudh that the Code in the matter of service of summons does not take into account the female members of the defendant's family and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence.<sup>3</sup> The High Courts of Madras and Calcutta have, on the other hand, held that an affixture of notice to the knowledge of the *wife* of the defendant is sufficient service under the law.<sup>4</sup>

Before the Court decides that there has been due service, it must be satisfied that the provisions of Rule 17 were really complied with, namely that the serving officer had used all due and reasonable diligence to find the defendant before affixing the summons<sup>5</sup> or that the defendant was keeping out of the way for purposes of

#### Order 5 Rule 19 — Note 1

1. [See ('15) 31 Ind Cas 479 (479). (U P B R). ('23) AIR 1923 Mad 27 (28).]
2. ('90) 3 C P L R 141 (141).

#### Note 2

1. ('17) AIR 1917 Sind 27 (28) : 11 Sind L R 71.
2. ('97) 21 Bom 223 (225). (Defendant temporarily absent from home — Court is not justified in treating the fixing of a summons to his door as due service.)
- ('14) AIR 1914 Mad 159 (159). (Return "Defendant not in village"—Affixture not due service.)

('32) AIR 1932 Lah 248 (249). (Service under O. 5 R. 17 only on the day previous to date of hearing held insufficient.)

('10) 6 Ind Cas 282 (288) (All). (Three attempts at personal service made — Service sufficient.) [See also ('24) AIR 1924 Oudh 287 (288). (First time affixed—No presumption that defendant had notice of the suit.)]

3. ('97) 21 Bom 223 (226).

('12) 18 Ind Cas 600 (601) : 16 Oudh Cas 88.

4. ('22) AIR 1922 Mad 98 (94) : 45 Mad 875.

('12) 18 Ind Cas 127 (128) (Cal).

5. ('26) AIR 1926 Cal 327 (330).

avoiding service<sup>6</sup> or that he refused service.

There is a difference of opinion as to whether the declaration of due service under this rule should be *express*. In the undermentioned cases<sup>7</sup> the High Court of Madras has held that an express order is necessary. The High Court of Allahabad also seems to take the same view.<sup>8</sup> In two other cases, however, the High Court of Madras held that the declaration may be an *implied one*, *e. g.*, where the Court orders attachment on receipt of the return by the process-server of the notice.<sup>9</sup> The Oudh Chief Court and the Lahore High Court have also taken a similar view.<sup>10</sup> It is submitted that the latter view is not correct. The provision for examination of the serving officer and for further inquiry in the absence of an affidavit by the serving officer, shows clearly that the spirit of the rule demands an *express* order.

The order should be made as early as possible after the summons is returned, and failure to pass such an order is not a mere irregularity.<sup>11</sup> An *ex parte* decree passed without a declaration of due service is liable to be set aside.<sup>12</sup> Where the summons is returned unserved, the Court should pass subsequent orders, not vaguely but very clearly, stating the reason for non-service.<sup>13</sup>

Where summons is sent by one Court to another Court for service, the serving Court is the proper Court to declare as to the propriety of the service.<sup>14</sup> See also Notes to Rule 23, *infra*.

**3. "Or order such service as it thinks fit."** — Even where the provisions of Rule 17 have been technically complied with, the Court may order fresh summons to another address or order service in another mode where it considers that the defendant could not get knowledge of the suit by the service effected. In *Khiroda Sundari Dasi v. Nabin Chandra Saha*,<sup>1</sup> the High Court of Calcutta observed as follows :

"It is open to the Court even where there has been a technical compliance with the provisions of Rule 17 to order service in another mode if the Court thinks fit to do so in the interests of justice. The Court may in a case of this description, direct the issue of summons to *purdanashin* ladies by means of notice sent by registered post, so that the cover may, in due course, reach the lady herself."

**4. Proof of service.**—The best proof of service is the return which the serving officer is bound to send to the Court and which must contain all that he has done in the matter of effecting service.<sup>1</sup> As to the admissibility of the report in evidence without the serving officer being examined as a witness, see Note 3 to Rule 18.

6. ('88) 1888 Pun Re No. 104, page 274.

('86) 10 Bom 202 (204).

[See also ('05) 27 All 491 (493). (Procedure of this rule should be complied with before issuing a warrant under O. 16 R. 10.)]

7. ('27) AIR 1927 Mad 813 (814). (Omission to make such declaration is not a mere irregularity.)

('33) AIR 1933 Mad 406 (406).

('08) 18 Mad L Jour 96 (97).

('33) AIR 1933 Mad 466 (470). (Unless Court declares service sufficient as imperatively required by this rule, summons cannot be held to be served.)

('85) AIR 1935 Mad 438 (439). (Provisions of Rule 19 are imperative.)

('86) AIR 1936 Mad 812 (813). (Omission to make declaration is fatal when it is sought to apply constructive principle of *res judicata* against judgment-debtor.)

('37) AIR 1937 Mad 84 (87). (Summons served on

refusal under O. 5 R. 17 — Still declaration of service by Court is essential under O. 5 R. 19 — Order passed without such declaration does not constitute *res judicata*.)

('37) 1937 Mad W N 184 (186).

8. ('18) AIR 1918 All 331 (331, 332).

9. ('09) 3 Ind Cas 474 (474) (Mad).

('14) AIR 1914 Mad 153 (154).

10. ('32) AIR 1932 Oudh 326 (327).

('34) AIR 1934 Lah 985 (985).

11. ('18) AIR 1918 All 331 (332).

12. ('22) AIR 1922 Mad 417 (417).

('18) AIR 1918 All 331 (332).

13. ('12) 15 Ind Cas 188 (188) (Mad).

14. ('11) 11 Ind Cas 39 (40, 41) : 33 All 649.

[But see ('95) 22 Cal 889 (891).]

#### Note 3

1. ('16) AIR 1916 Cal 600 (602).

#### Note 4

1. ('72) 17 Suth W R 362 (363).

**O. 5 R. 19  
Note 4**

Where there is a verification by the affidavit of the serving officer, the examination of the serving officer is a matter of discretion with the Court.<sup>2</sup> But the Court should not act *mechanically* on the affidavit of the serving officer. The Court ought to be *satisfied* that it can safely declare that the summons has been duly served.<sup>3</sup>

**Local Amendment****CALCUTTA**

*Insert the following :*

**O. 5 R. 19A  
(Calcutta)**

"R. 19A. A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons."

**O. 5 R. 20****R. 20.** [Ss. 82, Para. 2; 83, 84.] (1) Where the Court is

Substituted service.

satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as

Effect of substituted service.

effectual as if it had been made on the defendant personally.

Where service substituted time for appearance to be fixed.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

[1877, Ss. 82, 83, 84; 1859, Ss. 57, 58, 85.]

**Synopsis**

1. Scope of the Rule.
2. "Where the Court is satisfied."
3. Evasion of service by the defendant.
4. Non-possibility of service for other reasons.

5. Mode of effecting substituted service.
6. "Shall fix such time."—Sub-rule 3.
7. Return of substituted service.
8. Substituted service is as effective as personal service.
9. Revision.

**Other Topics (miscellaneous)**

Appellate Court's jurisdiction to question propriety of ordering substituted service. See Note 2.  
Service of process on unknown person. See Note 4.



**1. Scope of the Rule.** — This rule enacts the third of the three modes of service prescribed by the Code and referred to in Note 1 to O. 5 R. 10 and is called *substituted service*. It is to be adopted where there is reason to believe that the defendant is *keeping out of the way* for the purpose of evading service or that for some other reason the *summons cannot be served in the ordinary way*. But it should not be used in a way which is unbusinesslike or ridiculous, *e. g.*, where substituted service is made by affixture to the door of the court-house by way of serving the defendant admitted on all hands to be in Natal, South Africa.<sup>1</sup>

The substituted service under this rule, unlike the two other modes of service, can only be taken *by order of the Court* to that effect.<sup>2</sup> And it can be ordered only in cases where a personal service could have been effected if there were no difficulties in the way.<sup>3</sup> Thus, a foreign sovereign over whom the Courts have no jurisdiction cannot be ordered to be served by substitution under this rule.<sup>4</sup>

It has been held by the High Court of Allahabad<sup>5</sup> that a notice to show cause why a person should not be appointed guardian of an infant, cannot be served by substituted service under this rule.

The procedure laid down by this rule will also be applicable to the service of notice in appeals.<sup>6</sup> See Order 48 Rule 2.

**2. "Where the Court is satisfied."** — Before ordering substituted service the Court should be satisfied that the conditions on which alone it can be ordered exist, namely, that the defendant is keeping out of the way to avoid service<sup>1</sup> or that for any other reason service cannot be effected in the ordinary way.<sup>2</sup> The Court is not bound to order substituted service merely because the defendant has *refused* to accept service.<sup>3</sup> The mere statement of the plaintiff that he cannot ascertain the address of the defendant, without proof of reasonable efforts having been made to find out his whereabouts, is not enough to enable the Court to pass an order for substituted service.<sup>4</sup> Where, however, the plaintiff has done his best to get the defendant served personally and fails<sup>5</sup> or the Court is satisfied from the affidavit of the serving officer that the defendant is purposely evading service,<sup>6</sup> an order for substituted service can properly be made.

The non-fulfilment of either condition necessary before an order under this rule can be passed is a material irregularity<sup>7</sup> and an *ex parte* decree passed on such

**Order 5 Rule 20 — Note 1**

1. ('29) AIR 1929 Cal 553 (557) : 57 Cal 538.
2. ('20) AIR 1920 Lah 69 (70).
3. (1876) 1 C P D 563 (567), *Sloman v. New Zealand Governor and Government*. (Case of Colonial Government.)
4. (1915) 1 K B 857 (887), *Porter v. Frendenberg*. (Case of a defendant who is an alien enemy.)
5. (1918) W N 62 (63), *Kemp v. Necchi*.
6. (1886) 56 L J Q B 89 (91), *Field v. Bennett*.
7. (1889) 28 Q B D 395 (397, 398), *Fry v. Moore*.
8. (1894) 1 Q B 149 (153, 160), *Mighell v. Sultan of Johore*.
9. (1912) L R 1912 P 92, *Statham v. Statham*.
10. ('80) AIR 1980 All 609 (609, 610).
11. ('69) 11 Suth W R 496 (496).

**Note 2**

1. ('79) 4 Cal L Rep 397 (397, 398). (Following 19 W R 356.)

2. ('05) 7 Bom L R 159 (160).
3. ('74) 22 Suth W R 482 (482, 483).
4. ('73) 19 Suth W R 353 (356) (P C).
5. ('32) AIR 1932 Mad 472 (472, 473). (Substituted service cannot be invalidated on the ground that the Court's belief as to its necessity was erroneous.)
6. ('26) 94 Ind Cas 395 (395) (Nag).
7. ('85) AIR 1935 Lah 171 (172).
8. ('07) 4 Low Bur Rul 195 (196) (F B).
9. ('28) 107 Ind Cas 282 (283) (Lah). (Plaintiff each time giving different addresses — Inference is that correct address is not known to plaintiff — Order under this rule not proper.)
10. ('80) AIR 1980 Lah 397 (399).
11. ('68) 1868 Pun Re No. 35.
12. ('70) 1870 Pun Re No. 68.
13. ('31) AIR 1931 Pat 420 (421). (In such cases it is the duty of the Court to order substituted service.)
14. ('88) 1888 Pun Re No. 104, p. 274. (Whether defendant avoided service or not, not determined.)

**O. 9 R. 20**  
**Notes 2-5**

service being accepted as sufficient, will be set aside on an application under O. 9, R. 13.<sup>8</sup> Thus, where the plaintiff knew the whereabouts of the defendant but obtained by false representation an order for substituted service by giving the Court to understand that the defendant had been deliberately avoiding service, it was held that the defendant had not been properly served as required by law and the *ex parte* proceedings against him were not binding on him.<sup>9</sup>

The advisability of effecting substituted service is a matter primarily for the trial Court, and the Appellate Court has no jurisdiction to consider whether the order of the trial Court is based on sufficient grounds. It has only to see whether the order issued is according to law and whether the trial Court was satisfied that the conditions of this rule were fulfilled.<sup>10</sup>

**3. Evasion of service by the defendant.**—The question when the defendant must be deemed to be keeping out of the way has to be determined according to the circumstances of each case.<sup>1</sup> Mere temporary absence on the part of the defendant does not amount to evasion.<sup>2</sup> Where the plaintiff knew all along that the defendant had left a certain place two or three years before the suit, and he further knew that the defendant had left his brother in that place and was in communication with him, it cannot be said that there has been an evasion of service by the defendant.<sup>3</sup> But where a man gets away from the serving officer and shuts himself up with the obvious intention of not allowing the process-server to hold any communication with him, it clearly amounts to evasion.<sup>4</sup>

**4. Non-possibility of service for other reasons.**—Even though the defendant is not keeping out of the way, the Court has got power to order substituted service if it is satisfied that for any other reason the summons cannot be served in the ordinary manner.<sup>1</sup> Thus, where by the custom in India the respondent, a Hindu woman of rank, could not be served personally, the Judicial Committee ordered service under this rule on her Dewan.<sup>2</sup> So also in the case of unascertained persons or persons who cannot be traced and about whom it cannot be ascertained whether they are alive or dead, substituted service can be ordered. Thus, it has been held that where one of the co-owners is missing, the only reasonable course is to make him and his heirs parties and take out substituted service.<sup>3</sup>

**5. Mode of effecting substituted service.**—Service under this rule is effected by affixing a copy of the summons on the Notice Board of the Court-house, by affixing another copy to the outer door of the house in which the defendant was known to have last resided and by advertising in such of the newspapers as the Court may direct.<sup>1</sup> It has been held by the High Court of Lahore that the service by affixture will be bad unless a copy of the plaint is also affixed along with the summons.<sup>2</sup> The fact that a

8. ('28) AIR 1928 Lah 799 (800).

9. ('35) AIR 1935 Lah 129 (129).

10. ('27) AIR 1927 Mad 507 (507).

('33) AIR 1933 Lah 288 (289).

('81) AIR 1931 Lah 118 (118).

[But see ('85) AIR 1935 Lah 169 (170). (Question as to advisability of effecting substituted service — Order on such point — Appellate Court can examine legality of such order.)]

**Note 3**

1. ('98) 21 Mad 324 (326).

('97) 1 Cal W N 104 (104). (Father not knowing where the defendant son is—Process-server going to defendant's house thrice and not finding him

amounts to evasion.)

2. ('98) 21 Mad 419 (420).

('06) 29 Mad 324 (325).

3. ('24) AIR 1924 Lah 191 (191).

4. ('28) AIR 1928 All 118 (119).

**Note 4**

1. ('26) 94 Ind Cas 395 (395) (Nag).

('02) 1902 Pun L Rep No. 46, p. 172 (174).

2. (1841) 2 Moo Ind App 268 (268) (P O).

3. ('10) 6 Ind Cas 244 (245, 246, 247) (Cal).

**Note 5**

1. ('97) 1 Cal W N 104 (104).

2. ('27) AIR 1927 Lah 876 (877).

copy of the summons was affixed to a tree reasonably near the defendant's hut would not invalidate the service.<sup>3</sup>

O. 5 R. 20  
Notes 6-9

**6. "Shall fix such time"—Sub-rule (3).**— Under this rule the Court is bound to fix a time for the appearance of the defendant and it should see that ample and reasonable time is allowed for notice to come to the knowledge of the person concerned.<sup>1</sup> Thus, the publication of a notice in a newspaper in Lahore requiring a party at Hardoi to appear in Gurdaspur Court on the next day of the issue of paper is not a valid substituted service.<sup>2</sup>

**7. Return of substituted service.**— There is no provision in the Code for the return of such service showing how and when it was effected. But the Courts generally satisfy themselves by the affidavit or examination of the affixing officer and the production of the newspaper in which the notice was published.<sup>1</sup>

**8. Substituted service is as effective as personal service.**— Sub-rule (2) of this rule provides that service substituted by order of the Court shall be as effectual as personal service.<sup>1</sup> The words "as effectual" mean "as effectual for the purpose of enabling the Court to proceed with the suit."<sup>2</sup>

Where service has been effected under this rule and an *ex parte* decree is passed, the defendant is entitled to show that the circumstances justifying the order for such service did not exist, *e. g.*, he can show that he was not keeping out of the way for the purpose of avoiding service.<sup>3</sup> The fact that the original summons was destroyed will be no ground for refusing to set aside an *ex parte* decree.<sup>4</sup>

As to whether substituted service under this rule "is due service," within the meaning of Article 164 of the Limitation Act and whether time for an application to set aside an *ex parte* decree passed after such service runs from the date of the decree or from the date of the defendant's knowledge of the decree, see the Authors' Commentary on the Limitation Act, Article 164 and the Notes thereto.

**9. Revision.**— An order made under this rule without ascertaining whether the necessary conditions exist is open to revision.<sup>1</sup>

### Local Amendments

#### ODUH

Insert the following :

"R. 20A. (1) Where the defendant resides in British India outside the province of Oudh or within the limits of headquarters town of a district in the province, a summons may be served on him by registered post, and in this case, where an

O. 5 R. 20A  
(Oudh)

3. ('28) AIR 1928 Nag 18 (15).

#### Note 6

1. ('78) 2 Bom 449 (452).
- ('28) AIR 1928 Rang 185 (185, 186) : 6 Rang 218.
- ('32) AIR 1932 Lah 248 (249). (One day between date of substituted service under Rule 17 and hearing of appeal obviously inadequate except in special circumstances.)
2. ('29) AIR 1929 Lah 285 (286).

#### Note 7

1. [See ('85) AIR 1935 Pesh 112 (113). (Statement of process-server that substituted service has been made — *Ex parte* decree passed—Presumption that substituted service has been actually effected can be rebutted.)]

#### Note 8

1. ('28) AIR 1928 Mad 1052 (1054).  
Bourke O. O. 25.
- ('31) AIR 1931 Mad 818 (816) : 55 Mad 223.
- ('38) AIR 1938 Oudh 11 (12).
- ('34) AIR 1934 Cal 745 (746).
2. ('18) 19 Ind Cas 425 (426) : 9 Nag L R 35.
3. ('18) 19 Ind Cas 425 (426) : 9 Nag L R 35.
- ('34) AIR 1934 Cal 745 (746).
4. ('04) 1904 Pun Re No. 42 page 131.

#### Note 9

1. ('88) 1888 Pun Re No. 104, page 274.  
[See ('32) AIR 1932 Mad 472 (472). (Whether necessary conditions existed was ascertained by the Court—Revision was not allowed.)]

**O. 8 R. 20A**  
**(Oudh)**

acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process shall, unless the contrary is proved, be deemed to have been served.

(2) Where the registered address of the defendant or opposite party, as defined in O. 8 R. 11, is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served."

**RANGOON**

The following shall be *inserted* :

**O. 5 R. 20A**  
**(Rangoon)**

"20A. (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application, shall at the same time file in Court a proceeding stating his address for service.

(2) Every defendant or respondent who intends to appear and defend any suit, appeal, or originating petition or application shall on or before the date fixed for his appearance in the summons or notice served on him file in Court a proceeding stating his address for service.

(3) Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal, or petition or application is filed, or of the District Court within whose jurisdiction the party ordinarily resides.

(4) Where any party fails to file an address for service, as required by sub-rule (1) or sub-rule (2), he shall, if a plaintiff, appellant or applicant, be liable to have his suit, appeal, petition or application, dismissed for want of prosecution, and, if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party, and the Court may on such application make such order as it thinks just.

(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service; and such service shall be deemed to be as effectual as if the notice or process had been personally served on the party.

(6) Where a party is represented by an advocate or pleader, notices or processes for service on him shall be served in the manner prescribed by O. 3 R. 5, unless the Court directs service at the address for service given by such party.

(7) A party who desires to change the address for service given by him under sub-rule (1) or sub-rule (2) shall present a verified petition to that effect, and the Court may direct the amendment of the record accordingly. Notice of every such petition shall be given to all other parties to the proceedings.

(8) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner if it thinks fit to do so."

**R. 21.** [S. 85.] A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

O. 5 R. 21

Service of summons where defendant resides within jurisdiction of another Court.

[1877, S. 85; 1859, S. 59.]

### Synopsis

1. Service of summons outside jurisdiction.

2. Service by registered post. See Note 2 to Order 5 Rule 10.

**1. Service of summons outside jurisdiction.** — As a rule a Court cannot serve its own process outside its jurisdiction.<sup>1</sup> Under this rule a summons against a defendant residing within the jurisdiction of another Court should be sent to *that Court* by one of the officers of the Court issuing the summons, or by post, and it is the duty of the Court so receiving the summons to serve it on the defendant. (See Rule 23.) The service of summons effected outside the jurisdiction of the Court issuing it, and without any order of the Court having jurisdiction, is irregular.<sup>2</sup>

**2. Service by registered post.** — See Note 2 to Order 5 Rule 10.

### Local Amendments

#### BOMBAY

The following shall be *inserted* :

"R. 21A. Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post pre-paid for acknowledgment provided that such place is at a town or village in British India which is the headquarters of a district or recognised sub-division of a district, such as a taluka, tahsil or mahal, or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a Notification by the High Court published in the *Bombay Government Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

O. 5 R. 21A  
(Bombay)

#### RANGOON

The following shall be *inserted* :

"R. 21A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma, it shall, unless it is written in English, be accompanied

O. 5 R. 21A  
(Rangoon)

#### Order 5 Rule 21 — Note 1

1. (1862) 1 Hyde 186 (140). (High Court cannot serve its own process out of the local limits of its jurisdiction.)

(1868) 10 Suth W R 949 (850). (Special bailiff cannot be sent to serve process in foreign territory.)

2. (1925) AIR 1925 Rang 325 (326) : 8 Rang 289.

[But see (1978) 19 Suth W R 294 (236). (Service on defendant residing in another district, by a peon from the Court of the Collector of the District in which the suit is brought, instead of through the Collector of the District in which the defendants reside is not such an irregularity as vitiates the whole proceedings.)]

**O. 5 R. 21A** by a translation in English or in the language of the locality in which it is to be served."  
(Rangoon)

**SIND**

*Insert the following :*

**O. 5 R. 21A** "R. 21A. *Service of summons by pre-paid post wherever the defendant may be residing, if plaintiff so desires.* — Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post pre-paid for acknowledgment, provided that such place is at a town or village in British India which is the headquarters of a district or a recognised sub-division of a district, such as a taluka, or to which the provisions of this rule may, from time to time, be extended by a notification by the Court of Judicial Commissioner of Sind, published in the *Sind Official Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

**O. 5 R. 22**

**Service within Presidency-towns of summons issued by Courts outside.**

**R. 22. [S. 86.]** Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras *and Bombay* is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

[1877, S. 86.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, for "Bombay and Rangoon."

**Local Amendments****BOMBAY**

*Add the following proviso :*

"Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

**RANGOON**

*Add the following proviso :*

"Provided that where such summons is to be served within the limits of the town of Rangoon, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place within such limits where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant

refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

O. 5. R. 22

**R. 23.** [S. 85.] The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

O. 5 R. 23

Duty of Court to which summons is sent.

[1877, S. 85; 1859, S. 59.]

### Synopsis

#### 1. Sufficiency of service.

#### 2. Form of return — See Form 10 Appendix B, Schedule I.

**1. Sufficiency of service.** — There is a conflict of opinion as to whether the Court to which the summons has been transmitted for the service has power to declare as to the sufficiency of service and the effect of such a declaration on the powers of the transmitting Court. According to the High Court of Calcutta, Section 85 (O. 5 R. 23) does not require the Court which served the summons, to make a return to the Court from which it issued touching the sufficiency of service. The duty of the serving Court, according to the Calcutta view, is to proceed on receipt of the summons, as if it had itself issued it, and then to return it, with the record, if any, framed under this rule, to the Court which issued it. It then devolves upon the Court issuing the summons to determine upon the sufficiency of service before proceeding to try the suit.<sup>1</sup> The Allahabad<sup>2</sup> and Bombay<sup>3</sup> High Courts as well as the Chief Courts of Oudh<sup>4</sup> and Lower Burma<sup>5</sup> have held, on the other hand, that the last sentence of Rule 19 enables the serving Court also to make a declaration as to sufficiency of service as that Court is in the best position to decide whether the process has been duly served or not, and that such a declaration raises a strong presumption of due and proper service. But this presumption obtains only *donec probetur in contrarium* (until the contrary be proved) and there may now and then occur cases, where there is something in the return distinctly negating that presumption.<sup>6</sup> Such occasions are of course rare and on those occasions, the Court issuing the process should not interfere unless it be on strong and good evidence. The certificate of return must, however, be signed by the Judge himself and not by the *munsarim*.<sup>7</sup>

#### 2. Form of return. — See Form 10, Appendix B, Schedule I.

### Local Amendment

#### RANGOON

Insert the following :

"R. 23A. (1) Before re-transmitting a summons received from another Court for service, the Court shall either take down the deposition of the peon serving the summons as to the time when, and the manner in which the summons was served ; or cause the peon

O. 5 R. 23A  
(Rangoon)

#### Order 5 Rule 23 — Note 1

1. ('95) 22 Cal 889 (891).
2. ('11) 11 Ind Cas 89 (41) : 39 All 649.
3. ('86) 10 Bom 202 (205).
4. ('24) AIR 1924 Oudh 287 (288). (Here the

serving Court did not satisfy itself as to sufficiency of service.)

5. ('72-'92) 1872-92 Low Bur Rul 639.
6. ('86) 10 Bom 202 (206).
7. ('24) AIR 1924 Oudh 287 (288).

**O. 5 R. 23A**  
(Rangoon)

to make an affidavit before the bailiff, if the bailiff has been empowered to administer oaths; and shall transmit the same together with the summons, to the Court whence the summons originally issued. In the case of processes received from other provinces the deposition or affidavit of the peon serving the summons, if not recorded in English, shall be translated into English, before the summons is returned to the issuing Court.

(2) In the case of processes received from India, if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person, who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

(3) When a process is forwarded for service by one Court in Burma to another Court in Burma and when the person on whom the process is to be served is not personally known to the process-server, the case, in connexion with which the process was issued, shall not be heard *ex parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence. The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

(4) When the summons has been returned by the process-server under Rule 17, a declaration of due service or of failure to serve shall be recorded in Form (Civil) 47, and sent with the summons to the Court by which it was issued."

**O. 5 R. 24**

**R. 24.** [Ss. 87, 88.] Where the defendant is confined in a

Service on defendant  
in prison.

prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

[1877, Ss. 87, 88.]

**O. 5 R. 25**

**R. 25.** [S. 89.] Where the defendant resides out of British

Service where defendant  
resides out of British  
India and has no agent.

India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

[1877, S. 89; 1859, S. 60.]

#### Local Amendments

##### ALLAHABAD

For the word "shall" in the fourth line read the word "may."

##### MADRAS

Substitute the following for Rule 25 :

Service where defendant  
resides out of British India  
and has no agent.

"Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate."



Provided that if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon."

**NAGPUR**

*Substitute "may" for "shall."*

**ODDH**

*Substitute the word "may" in place of the word "shall."*

**RANGOON**

The words "may be addressed" shall be *substituted* for the words "shall be addressed."

### *Synopsis*

#### 1. Scope of the Rule.

#### 2. Service by post. See Note to O. 5 R. 10.

**1. Scope of the Rule.** — This rule applies only where the defendant resides out of British India. Where he is a resident of British India but is out of British India only temporarily, this rule does not apply.<sup>1</sup> In cases where the defendant resides out of British India, service of process is to be effected by registered post.<sup>2</sup>

Where the respondent had left for England, service on him was ordered to be made through an agent in England appointed for the purpose.<sup>3</sup>

It is advisable to send the summons under this rule in a registered cover<sup>4</sup> rather than in the form of a registered post card.<sup>5</sup>

#### 2. Service by post. — See Note 2 to Order 5 Rule 10.

### Local Amendments

**ALLAHABAD**

*Add the following :*

"R. 25A. When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the Court may, in addition to, or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service."

**O. 5 R. 25A.**  
(Allahabad)

**NAGPUR**

*Add the following rule :*

"R.25A. Where the defendant resides in British India but outside the limits of the Central Provinces, the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

**O. 5 R. 25A**  
(Nagpur)

#### Order 5 Rule 25 — Note 1

1. ('11) 12 Ind Cas 420 (421) (Mad).

2. ('17) AIR 1917 Mad 415 (415).

('97) 21 Bom 412 (418). (Defendant residing at Bushire — Service by post proper—18 Bom 606,

Distinguished.)

('22) AIR 1922 Pat 376 (377) : 1 Pat 48.

3. ('09) 1 Ind Cas 158 (161) : 96 Cal 226.

4. ('71) 15 Suth W R 31 (31).

5. ('29) AIR 1929 Cal 553 (557) : 57 Cal 539.

**Q. 5 R. 25A RANGOON**  
(Rangoon)

The following shall be *inserted* :

"R. 25A. Where the defendant resides in British India but outside the limits of the Province of Burma, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

**O. 8 R. 26**

**R. 26. [S. 90.] Where —**

Service in foreign territory through Political Agent or Court.

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in *the Central Government or the Crown Representative*, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

<sup>b</sup>[(b) *the Provincial Government* has, by notification in the *Official Gazette*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons *issued under this Code by a Court of the Province* shall be deemed to be valid service]

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

[1877, Ss. 90, 92; 1859, S. 66.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Governor-General in Council."

b. Sub-rule substituted by the Second Repealing and Amending Act, 1914, Section 2 and Schedule I for the original sub-rule.

c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."

d. Substituted by *ibid* for "issued by a Court under this Code."

**Local Amendments**

**ALLAHABAD**

After the words "the summons may" *insert* the words "in addition to, or in substitution for the method permitted by Rule 25."

**MADRAS**

*Substitute the following :*

"Where —

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory ;

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant; and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service."

**NAGPUR**

In Rule 26, *insert* the words "in addition to or in substitution for the method permitted by Rule 25," *between* the words "may" and "be sent."

**ODDH**

In Rule 26 (b), *after* the words "the summons may," *insert* the words "in addition to, or in substitution for the method permitted by Rule 25."

### *Synopsis*

1. Amendments after 1908.
2. Scope and object of the Rule.
3. Endorsement is evidence of service.

**1. Amendments after 1908.** — The words within the brackets in clause (b) of this rule have been inserted by Act XVII of 1914. For other amendments, see footnotes to the text of the Rule.

**2. Scope and object of the Rule.** — A special bailiff cannot be sent to execute a civil process in a foreign territory.<sup>1</sup> This rule provides for the service of summons in a foreign territory through a Political Agent or Court. Such summons may be sent direct by the Court and not necessarily through the District Judge.<sup>2</sup> A Court is not bound to proceed under this rule but can proceed under Rule 25 even where this rule applies.<sup>3</sup>

As no resident of a foreign territory can be compelled to appear before a British Indian Tribunal, service according to this rule is unnecessary if a mere notification of the proceedings is valid under the law of the tribunal.<sup>4</sup>

#### **Order 5 Rule 26 — Note 2**

1. ('68) 10 Suth W R 849 (350).
2. ('01) 28 All 99 (101).
3. ('01) 28 All 99 (101).
4. ('69) 1869 Pun Re No. 82.

**O. 5 R. 26**  
**Note 3**

**3. Endorsement is evidence of service.** — Under Rules 18 and 19 of this Order, the return of the serving officer is no evidence of service. The Court has to satisfy itself of the correctness of the return. But the return of service duly made under this rule is itself evidence of service.

**O. 5 R. 27**

Service on civil public officer or on servant of railway company or local authority.

**R. 27.** [S. 422.] Where the defendant is a public officer (not belonging to His Majesty's military, "naval or air forces"\*\*\*), or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

[1877, Ss. 422, 468; 1859, Ss. 62, 68.]

a. Substituted by the Repealing and Amending Act, 1927, S. 2 and Sch. I for "or naval."

b. The words "or His Majesty's Indian Marine Service" were repealed by the Amending Act, 1934, Section 2 and Schedule.

**Local Amendments****ALLAHABAD**

Add the following note :

"*Note to Order 5 Rule 27.*—(1) A list of heads of offices to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in Appendix II of the General Rules (Civil).

(2) In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order 16, simultaneously with the issue of summons, notice shall be sent to the head of the office in which the person concerned is employed, in order that arrangements may be made for the performance of the duties of such persons.

**Illustration**

If the Court sees fit to issue a summons to a *Kanungo* or *Patwari* it shall inform the Collector of the district, and if to a Sub-Registrar it shall inform the District Registrar to whom the Sub-Registrar is subordinate."

**MADRAS**

After the words "send it" insert the words "by registered post pre-paid for acknowledgment."

**RANGOON**

Delete the words "or His Majesty's Indian Marine Service."

**Synopsis**

1. Legislative changes.
2. Scope of the Rule.
3. Officer of His Majesty's naval or air forces —  
How served. See Rule 28.

**1. Legislative changes.** — For the words "or naval" the words "naval or air" have been substituted by Act X of 1927, Schedule I.

**2. Scope of the Rule.**— This rule is only permissive. Non-compliance with the provisions of this rule is *per se* no ground for setting aside an *ex parte* decree.<sup>1</sup>

**O. 5 R. 27**  
**Notes 2-3**

**3. Officer of His Majesty's naval or air forces — How served.** — See Rule 28 *infra*.

**R. 28.** [S. 468] Where the defendant is a soldier, *sailor* <sup>Service on soldiers, sailors or airmen.</sup> *or airman*, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

**O. 5 R. 28**

[1877, S. 468; 1859, S. 62.]

a. Inserted by the Amending Act, 1934, Section 2 and Schedule.

b. Inserted by the Repealing and Amending Act, 1927, Section 2 and Schedule I.

#### Local Amendments

##### ALLAHABAD

The present Rule 28 shall be *numbered* 28 (1).

Add the following as Rules 28 (2), (3), (4) and (5) :

"(2) Where the address of such Commanding Officer is not known, the Court may apply to the Officer commanding the station in which the defendant was serving when the cause of action arose to supply such address, in the manner prescribed in sub-rule (4) of this rule.

(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable, service shall be made on the defendant in person.

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and signature of the Court to the Officer commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the Officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address.

(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post."

##### MADRAS

After the words "shall send" insert the words "by registered post pre-paid for acknowledgment."

##### UDH

Add the following as 28 (a) and re-number the present rule as (b) :

"28 (a). Where the defendant is an officer in His Majesty's Military, naval or air forces, the Court shall send the summons direct to him for service together with a copy to be retained by him."

**O. 5 R. 28(a)**  
**(Oudh)**

##### RANGOON

In Rule 28, as amended (by a prior amendment the word 'sailor' was inserted after the word 'soldier'), for the words "soldier, sailor or airman," substitute the words "member of His Majesty's military, naval or air forces."

#### Order 5 Rule 27 — Note 2

1. ('16) AIR 1916 Pat 25 (26).

('32) AIR 1932 Oudh 326 (327). (Service under

this rule is discretionary—Discretion is not taken away by R. 188, Oudh Civil Rules.)

O. 5 R. 28  
Notes 1-2

### Synopsis

1. Amendments after 1908.
2. Service on soldiers.

**1. Amendments after 1908.** — By the Repealing and Amending Act, 1927 (X of 1927), the words "or airman" were inserted after the word "soldier." See also foot-notes to the text of the Rule.

**2. Service on soldiers.** — When a summons is sent to a Commanding Officer for service on a soldier under him, he is bound to cause the summons to be served upon him.<sup>1</sup> He cannot refuse to have the same served, on the ground that under Section 144 of the Army Act of 1881 (44 & 45 Vict., Ch. 58) the soldier was entitled to protection, the debt sued upon being less than £30.<sup>2</sup>

A soldier, not serving in the army, but serving in the civil department, and residing beyond the military cantonments will be amenable to the ordinary civil jurisdiction of the Court.<sup>3</sup>

Similarly, a mechanic serving in the Indian marine is subject exactly to the same rules as every other person under the Code as regards service.<sup>4</sup>

When notice of an appeal was accepted by a sepoy in service, and received without demur, he cannot subsequently urge in an application to set aside an *ex parte* decree that he was not duly served as the same was not sent through the Commanding Officer.<sup>5</sup>

See in this connection Note 17 to Section 60 *ante*.

O. 5 R. 29

## R. 29. [Ss. 87, 88, 468.] (1) Where a summons is deli-

Duty of person to whom  
summons is delivered or  
sent for service.

vered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

[1877, S. 468 ; 1859, S. 62.]

### Local Amendments

#### ALLAHABAD

In sub-rule (1), line 3, for the word and figures "Rule 28" read "Rule 28 (1)".

#### MADRAS

Insert as Rule 29A —

O. 5 R. 29A  
(Madras)

"29A. Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval Forces

### Order 5 Rule 28 — Note 2

- |                            |  |
|----------------------------|--|
| 1. ('88) 11 Mad 475 (477). | 3. '70) 14 Suth W R 281 (282).                   |
| ('87) 10 Mad 819 (822).    | 4. '14) AIR 1914 Cal 845 (845, 846) : 42 Cal 67. |
| 2. ('88) 11 Mad 475 (477). | 5. '12) 13 Ind Cas 318 (318) (Lah).              |

or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

**O. 5 R. 29A**  
(Madras)

**R. 30.** [Ss. 91, 92.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

**O. 5 R. 30**

*Substitution of letter  
for summons.*

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

[1877, Ss. 91, 92; 1859, Ss. 64, 65.]

### Local Amendments

#### ALLAHABAD

*Insert the following as Rules 31 and 32 :*

"31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court."

**O. 5 R. 31**  
(Allahabad)

"32. Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court Vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

**O. 5 R. 32**  
(Allahabad)

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation."

#### SIND

*Add the following as Rule 31 :*

"31. If a summons issued to a defendant residing in British India is returned unserved, the Court may, while issuing a fresh summons for personal service or ordering substituted service of summons, also order that a copy of the summons addressed to the defendant at the place where he is residing be sent to him by registered post, if there is postal communication between such place and the place where the Court is situate."

**O. 5 R. 31**  
(Sind)

# ORDER VI.

## PLEADINGS GENERALLY

O. 6 R. 1

Pleading.

**R. 1. [New]** "Pleading" shall mean plaint or written statement.

[*Cf.* Jud. Act, 1873, S. 100.]

### Synopsis

1. Scope and object of the Order.

2. Purpose of pleading.

3. Counter-claim by defendant.

See Order 8 Rule 6.

**1. Scope and object of the Order.**—The whole of this Order except Rules 14 and 15 is new and has been based upon the system of pleading introduced by the Judicature Act in England which is generally admitted to be the best form of pleading in civil suits. The object of introducing this Order is, as is observed by the Select Committee in their Statement of Objects and Reasons, that : "It is most necessary that litigants in this country should come to trial with all issues *clearly defined* and that cases should not be expanded or grounds shifted without reference to the true facts."

In their Notes on Clauses, the Select Committee also observe that they have, however, endeavoured to modify the rigour of the English rules by providing in accordance with Section 55 of the Indian Evidence Act, 1872, that the Court may, notwithstanding the absence of a specific denial, require any fact to be proved by the party who relies upon it. This modification of the rigour of the English rules gives effect to the view that had been taken under the old Code that the strict rule that averments not traversed must be taken to be admitted is not applicable to India.<sup>1</sup>

"Pleading" means plaint or written statement. Thus, an application to sue as *pauper* is not a pleading inasmuch as it becomes a plaint only after it is granted.<sup>2</sup> Similarly, a statement by a pleader<sup>3</sup> or a petition for leave to execute the decree<sup>4</sup> is not a pleading. A defendant's pleading is the written statement. A plaintiff's pleading may be either a plaint or a written statement. Thus, where the defendant in his written statement pleads a set-off, the plaintiff can file a *written statement* in answer thereto, under O. 8 R. 8. The *parties* may, subsequent to the written statement of the defendant, also file written statements or *additional written statements*, by leave of the Court or under orders of the Court, under Order 8 Rule 9.

**2. Purpose of pleading.**—The object of pleadings is to narrow the parties to *definite issues* and to diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.<sup>1</sup> In *Sayad Muhammad v. Fattah Muhammad*,<sup>2</sup> Lord Halsbury delivering the opinion of the Privy Council observed :

"Whatever system of pleading may exist, the sole object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues."

#### Order 6 Rule 1 — Note 1

1. ('07) 34 Cal 57 (64).
2. ('14) AIR 1914 Mad 256 (258). ('32) AIR 1932 Lah 548 (549). (But the provisions of O. 6, relating to amendments apply to applications in *forma pauperis*—*Obiter*.)
3. ('29) AIR 1929 Oudh 204 (206).
4. ('16) AIR 1916 Pat 89 (41) : 2 Pat L Jour 24.

#### Note 2

1. (1876) 3 Ch D 637 (639), *Thorp v. Holdsworth*. [See ('18) 20 Ind Cas 792 (798) (Mad).]
2. ('94) 22 Cal 324 (331).  
See also the following cases :  
(15) AIR 1915 Mad 770 (770).  
(14) AIR 1914 Oudh 52 (92).  
6 E and I 484 (458), *Brown v. MacIntosh*.  
(29) AIR 1929 Oudh 204 (206).



A plaintiff who is purposely vague ought to be carefully examined and tied down to definite pleadings.<sup>3</sup>

O. 6 R. 1  
Notes 2-3

3. Counter-claim by defendant. — See Order 8 Rule 6.

**R. 2.** [New] Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

O. 6 R. 2

Pleading to state material facts and not evidence.

[R. S. C., O. 19, R. 4. Cf. S. 114, 1882.]

### Synopsis

- |   |   |
|---|---|
| 1. Scope of the Rule.                                       | 6. Matters affecting damages.   |
| 2. Pleadings must state only facts and not law.             | 7. Pleadings should not state the evidence by which the facts are to be proved. |
| 3. The facts stated must be material facts.                 | 8. The facts should be stated in a concise form.                                |
| 4. Facts to anticipate opponent's answer not to be pleaded. | 9. Variance between pleading and proof.   |
| 5. Alternative and inconsistent allegations.                | 10. Construction of pleadings.  |

### Other Topics (miscellaneous)

Facts not material at the stage of the pleading. See Note 4.  
General and fundamental rules of pleading and special applications thereof. See Note 1.

**1. Scope of the Rule.** — This is the main rule laying down the fundamental principles of pleading. It lays down —

1. *Affirmatively*, that a pleading shall contain and contain only, *material facts* on which the party pleading relies.
2. *Negatively*, that it shall not contain *facts which are only evidence* by which such material facts are to be proved.

The other rules in this Order are all special applications of the general rule laid down in this rule. It will here be convenient to summarise and refer to the other rules as to what the pleadings should or should not contain.

1. All *necessary particulars* must be stated in the pleadings (O. 6 Rr. 4 and 5).
2. The *performance* of conditions precedent need not be alleged but the *non-performance* of such conditions, if relied on, must be pleaded (O. 6 R. 6).
3. No pleading shall, except by way of amendment, raise any *new ground* of claim or allege any fact inconsistent with previous pleadings of the party pleading the same (O. 6 R 7).
4. A *bare denial* of a contract alleged by the opposite party shall not be construed as a denial of the *legality* or *sufficiency* in law of such contract (O. 6 R. 8).

**O. 6 R. 2**  
**Notes 1-8**

5. *Documents* need not be set out at length unless the precise words are material (O. 6 R. 9).
6. *Conditions of the mind* such as malice, knowledge, etc., may be alleged as a fact without setting out the circumstances from which the same is to be implied (O. 6 R. 10).
7. *Notice* may be alleged as a fact without setting out the form, or the precise terms of such notice, or the circumstances from which it is to be inferred (O. 6 R. 11).
8. *Implied contracts or relations between persons* may be alleged as a fact and the series of letters, conversations or circumstances from which the contracts are to be inferred, need only be set out generally and not in detail (O. 6 R. 12).
9. Facts which the law presumes in a party's favour or as to which the burden of proof lies on the other side need not be pleaded unless first denied (O. 6 R. 13).

**2. Pleadings must state only facts and not law.** — A pleading must state only *facts* and not *law*.<sup>1</sup> The reason is that it is for the *Court itself* to find out and examine all pleas of law that may apply to the facts,<sup>2</sup> and the parties can urge them at any time before judgment is pronounced.<sup>3</sup> It is not enough to plead *merely* that a right or liability exists, or that an act was unlawful or wrongful, or that the defendant is guilty of negligence,<sup>4</sup> or that the plaintiff is entitled as the heir-at-law to certain properties,<sup>5</sup> or that there was a *donatio mortis causa*.<sup>6</sup> The *facts* which establish these pleas must be stated in each case. But it is not necessary to state the *legal effect* of the facts stated.<sup>7</sup> Nor is it necessary to reply to a plea of limitation that "the statute does not apply" or "that the case has been taken out of the statute."<sup>8</sup> If a person sues for recovery of land, he must state the nature and particulars of his title.<sup>9</sup> In regard to an allegation that the defendant did an act "wrongfully, unlawfully and improperly" or "without any justification therefor or right so to do" without setting out the facts from which such conduct is to be inferred, it was said: "These epithets under the present system of pleadings are useless and redundant. They add nothing whatever to the plaintiff's case. They are merely now epithets of abuse. They were formerly in declarations essential, because under that form of pleading, legal rights were stated for facts; but facts alone are stated now."<sup>10</sup>

**3. The facts stated must be material facts.** — The words "material facts" mean —

1. All facts upon which the plaintiff's *cause of action* or the defendant's *defence*

**Order 6 Rule 2 — Note 2**

1. ('80) AIR 1980 Bom 511 (512).  
(88) AIR 1988 Sind 108 (109).  
(91) 1891 Pun Re No. 11, p. 85.  
(87) 8 Suth WR 295 (297, 299). (Pleadings unnecessarily prolix, argumentative and full of matter wholly irrelevant are not in accordance with O. P. C.)  
(1882) 1 Ind Jour O C 12. (Plaint is to be a statement of facts, not merely a prayer for reliefs.)  
(86) AIR 1986 Oudh 324 (325) : 12 Luck 279.
2. ('26) AIR 1926 Nag 265 (265).  
(28) AIR 1928 Nag 206 (207).  
(80) AIR 1980 Rang 264 (264).  
(86) AIR 1986 Oudh 324 (325) : 12 Luck 279. (Failure of plaintiff to plead the law cannot prejudice the defendant.)

3. ('26) AIR 1926 Nag 265 (265).
4. (1867) LR 2 C P 371 (374), Gaurat v. Egerton.  
(1905) 2 K B 391 (400), West Rand Central Gold Mining Co. v. Rex.  
(1878) 10 Ch D 294 (302), Day v. Brownrigg.
5. (1892) L R 1 Q B 819 (820), Palmer v. Palmer.
6. (1882) 45 L T 755, Townsend v. Parton.
7. (1928) 1 K B 421 (427), Kona Kier v. B. Goodman Ltd.
8. (1852) 8 Exch 847 (350) : 155 E R 1880 (1881, 1882), Farayth v. Bristows.
9. (1884) 26 Ch D 778 (788), Davis v. James.  
(1896) L R 1 Q B 554 (561), Darbyshire v. Leigh.
- (1878) 89 L T 644, Hodgins v. Hickson.
10. (1878) 10 Ch D 294 (302), Day v. Brownrigg.

depends; in other words, all those facts which must be proved in order to establish the existence of a cause of action or defence;<sup>1</sup> and

**O. 6 R. 2**  
**Note 3**

2. All facts which, though not necessary to establish the cause of action or defence, but which the party pleading them is *entitled to prove at the trial* are also material facts. Thus, in a suit for damages for breach of a contract, the cause of action consists in the making of the contract and of its breach. A fact which is necessary to fix the *quantum* of damages may be proved by the parties at the trial, though the cause of action or the defence does not depend upon it. Such a fact is, therefore, also a material fact and must be pleaded in the pleading.<sup>2</sup>

It is essential that *all* the material facts should be stated<sup>3</sup> so as not to embarrass the opposite party and so as to put him on his guard and tell him what he has to meet when the case comes on for trial.<sup>4</sup> Thus, a plaintiff suing on his title is bound to state the nature of the deeds on which he relies in deducing his title.<sup>5</sup> Similarly, a party relying upon the fact that notice of dishonour is not necessary<sup>6</sup> or that the ordinary age of minority of the party has been prolonged up to 21<sup>7</sup> or that a property admittedly purchased by A in the name of B was for B's advancement<sup>8</sup> or that a woman claiming maintenance has lost her right on account of her incontinence,<sup>9</sup> is bound to allege those facts in his pleading.

### Note 3

1. (1896) LR 1 QB 554 (557), *Darbyshire v. Leigh*. ('16) AIR 1916 Cal 658 (659). (Plaint must state those facts which will put the defendant on his guard and tell him what he will have to meet when the case comes for trial.)
- (1879) 11 Ch D 86 (43), *Re Rica Gold Washing Co.* ('73) 10 Bom H C R 414 (415). (Plaint under S. 19 of Act 20 of 1864—One or more acts of misconduct on the part of the administrator to be specified.)
- ('81) 7 Cal 560 (563). (Title by adverse possession must be raised.)
- ('77) 2 Cal 418 (424). (Do.)
- ('88) AIR 1933 Nag 29 (31); 28 Nag L R 320. (Matters in aggravation of damages must be specifically pleaded.)
- ('24) AIR 1924 P C 216 (217); 51 Ind App 357; 48 Bom 613 (P C). (Only where a right that could be decreed exists and is taken away by Act of State the plea of Act of State need be put forward.)
- ('31) AIR 1931 Cal 25 (25); 57 Cal 796. (Alternative reliefs prayed—Facts entitling the plaintiff to such reliefs must be stated.)
- ('07) 17 Mad L Jour 421 (422). (Suit for declaration and injunction—Allegation of disturbance of plaintiff's title to be stated.)
- ('78) 2 Mad 346 (350). (Notice to quit is an essential element of the plaintiff's title in ejectment and should be pleaded.)
- ('71) 8 N W P H C R 262 (268). (Suit for declaration—Grounds of title and the circumstances necessitating a declaration should be stated.)
- ('27) AIR 1927 Mad 1007 (1008). (It is desirable that parties should be allowed to state their pleas whenever possible, provided no further delay is caused by such indulgence.)
- ('17) AIR 1917 Ondh 197 (198).
- ('34) AIR 1934 All 11 (18). (Suit for recovery of deposit—Plaintiff's case *prima facie* within time—Defendant must plead and prove that particular demand was made and refused beyond

period of limitation.)

[See also ('27) AIR 1927 Cal 806 (807). (Form of plaint can be disregarded if in substance the points of controversy are substantially raised in the plaint.)]

2. (1880) 6 Q B D 190 (196), *Millington v. Loring*. (1890) 24 Q B D 630 (631), *Whitney v. Moignard*. (1884) 49 L T 772 (774), *Lumb v. Beaumont*.
3. ('39) AIR 1939 Rang 189 (192); 1939 Rang L R 1. (Only material facts should be pleaded—All material facts must be pleaded, but they should be pleaded concisely.)
4. (1878) 4 Q B D 127 (132, 138, 139), *Phillips v. Phillips*. (1876) 8 Ch D 376 (379), *Cashim v. Cradock*. (1878) 7 Ch D 473 (486, 487, 489), *Davy v. Garret*. ('88) AIR 1933 Sind 304 (304). (Fraud must be specifically pleaded.)
- ('86) 9 All 191 (200, 201, 205); 13 Ind App 184 (PC). ('16) AIR 1916 Cal 658 (659).
- ('88) AIR 1938 PC 121 (123); 32 Sind L R 462 (PC). (The object of pleading is to give fair notice to each party of what his opponent's case is.)
- [See ('86) AIR 1936 Pat 194 (197). (Limitation—Plea not raised in plaint—Pleadings clear to show that money became due to minors during their minority—Issue of minority not depending on any issue of fact—Plea is not surprise and can be decided by Court.)
- ('89) AIR 1939 Cal 518 (516).]
5. ('16) AIR 1916 Cal 658 (659).
6. ('08) 26 Mad 526 (531).
7. ('08) 25 All 407 (416, 417).
8. ('08) 27 Bom 103 (112).
- [See also ('24) AIR 1924 Mad 174 (175). (Allegation of use of tarwad money for purchase of property in name of a daughter—No allegation of benami or gift—No prejudice to daughter in trial.)]
9. ('08) 27 Bom 485 (491).

**O. 6 R. 2**  
**Notes 3-5**

If a party *omits* to state a material fact he will not be allowed to give evidence of that fact at the trial unless the pleading is amended under Rule 17 *infra*.<sup>10</sup> If, however, a party states facts which are not material, then, unless such statements are embarrassing or ambiguous, the Courts will not, as a rule, inquire very closely into the materiality thereof.<sup>11</sup> Thus, where the particulars of a claim are given with reasonable precision, an incorrect description of one particular fact would not be fatal to the claim.<sup>12</sup> Similarly, in a suit for restitution of conjugal rights the plea of denial of marriage was held to include the denial of the *validity of marriage*.<sup>13</sup> But a plaint which is unnecessarily prolix, argumentative, and full of irrelevant matter should either be rejected or returned for striking out the unnecessary matter.<sup>14</sup>

**4. Facts to anticipate opponent's answer not to be pleaded.**—It is no part of the pleading to *anticipate* the opponent's pleading and to state facts in answer thereto. In other words, a party should not plead to facts which *have not become material* at the stage of filing his pleading.<sup>1</sup> Thus, in an action for libel or slander by publishing particular words, the defendant should not plead that he used other words than those complained of, and that such words were justified in law.<sup>2</sup>

**5. Alternative and inconsistent allegations.**—In construing O. 19 R. 4 of the English rules corresponding to this rule, Lindley, L. J., observed in *In re Morgan; Owen v. Morgan*<sup>1</sup> as follows :

"Now I cannot myself construe that order as prohibiting inconsistent pleadings. One sees perfectly well what is meant by it, *vis.*, that each party is to state succinctly and concisely and in a summary form, the material facts on which he relies. Now a person may rely upon one set of facts if he can succeed in proving them and he may rely upon another set of facts if he can succeed in proving them."

It was held by Mullick, J., of the Patna High Court in the undermentioned case<sup>2</sup> that the scope of the Code is more limited in India and forbids a party *who is not a stranger to the transaction and who has personal knowledge of the true state of facts* from pleading inconsistent facts. And in the undermentioned cases<sup>3</sup> it was held that a party can plead inconsistent facts, *at any rate where he is a stranger to the transaction*, thus appearing to suggest that he cannot do so if he was not a stranger to the transaction. This view, it is submitted, is not correct and is distinctly opposed to

10. (1886) 12 P D 19 (20), *Brock v. Brock*.  
(1903) 5 Bom L R 991 (995). (Good faith not raised in pleadings.)

(1968) 5 Bom H C R A C 217 (219, 220). (Right as reversioner not raised in pleading.)

(1916) AIR 1916 Cal 658 (659).

(1972) 17 Suth W R 106 (107). (Suit to set aside sale for want of legal necessity—In appeal want of consideration cannot be urged.)

(1914) AIR 1914 Lah 102 (104).

(1912) 1912 W N 198 (198); 56 Sol Jo 735, *Ayere v. Hanson*.

(1908) 1 Ch 167 (171), *Hyman v. Vanden Bergh*.  
(1883) 9 P D 82 (88), *The Hardwicke*.

11. (1888) 38 Ch D 269 (270, 271), *Knowles v. Roberts*.

12. ('28) AIR 1928 Mad 940 (941).

[See also ('68) 10 Suth W R 460 (460). (Ought not to have dismissed the suits simply with reference to deficiencies.)]

13. ('21) AIR 1921 Lah 291 (292).

14. ('67) 8 Suth W R 295 (297, 298).

(1969) 3 Beng L R App 12 (12, 13). (Irrelevant and improper matters ordered to be taken off the file.)

(1878) 7 Ch D 478 (485, 486, 487), *Davy v. Garret*.

(1876) 8 Ch D 876 (878, 879), *Cashim v. Craddock*.

**Note 4**

1. ('29) AIR 1928 Lah 475 (476.)

2. (1899) 1 Q B D 571 (575, 576), *Rassam v. Budge*.

**Note 5**

1. (1887) 85 Ch D 492 (499).

2. ('25) AIR 1925 Pat 674 (675).

3. ('12) 15 Ind Cas 392 (382) (Mad).

(1928) AIR 1928 All 582 (584) : 51 All 386.

(191) 14 Mad 172 (174).

(198) 16 Mad 121 (124).

[See also ('86) AIR 1986 Pat 474 (476) : 15 Pat 448. (Rule against joinder of inconsistent and alternative title is not absolute—Plaintiff in honest doubt as to nature of relief may make inconsistent or alternative claims.)]

the general trend of decisions of all the High Courts.<sup>4</sup> A perusal of O. 1 R. 3 (Joinder of defendants), O. 2 R. 3 (Joinder of causes of action) and O. 7 Rr. 7 and 8 (Reliefs that may be stated by the plaintiff) will clearly show that inconsistent sets of facts may be pleaded and relief claimed in the alternative. The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation, to dispose of the same controversy or the subject-matter of the same relief though the ground upon which the relief is claimed may be different.<sup>5</sup> In *Bhutan Mohini Dasi v. Kumud Bala Dasi*,<sup>6</sup> their Lordships of the Calcutta High Court observed as follows :

"It may be conceded that the Code of Civil Procedure does not prohibit inconsistent pleadings and that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. A plaintiff may rely upon several different rights alternatively, although they may be inconsistent; so a defendant may raise by his statement of defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper."

The following inconsistent pleas have accordingly been held not to be prohibited by the Code —

1. A plea of forgery and a plea of execution under undue influence or fraud, or a plea of want of consideration.<sup>7</sup>

4. ('25) AIR 1925 Oudh 120(122): 27 Oudh Cas 175.  
(24) AIR 1924 Cal 467 (472).

('12) 18 Ind Cas 128 (130) (Cal). (Inconsistent defences may be raised.)

('07) 34 Cal 51 (54, 56). (Ownership and easement alternatively claimed—16 Suth W R 198, Overruled.)

('08) 8 Cal L Jour 289(291). (Ownership and easement set up as defences in the alternative.)

('33) AIR 1933 Nag 257 (258) : 29 Nag L R 330.

('08) 7 Cal W N 294 (296). (Tenancy and limitation pleaded in defence in the alternative.)

('70) 14 Suth W R 49 (50).

('10) 5 Ind Cas 745 (746, 747) : 6 Nag L R 33.

('09) 4 Ind Cas 801(803) : 5 Nag L R 189. (Inconsistent defences allowed.)

('98) 1 Oudh Cas 88 (90). (Plaint consisting of inconsistent allegations is not liable to be dismissed.)

('21) AIR 1921 Pat 326 (327, 328).

('26) AIR 1926 Sind 154(156). (Alternative defences by a partner.)

(1878) 4 Q B D 127 (184), Phillips v. Phillips.

('83) 7 Bom 96 (99). (Tenancy and limitation pleaded in defence in the alternative.)

('99) 3 Cal W N cxliii (cxliv).

('30) AIR 1930 Cal 53 (54) : 56 Cal 704. (It has ceased to be the province of procedure to exclude defences.)

('78) 4 Cal 699(708). (Title and adverse possession may be claimed together.)

('74) 21 Suth W R 70 (74). (Tenancy and limitation pleaded as alternative defences.)

('24) AIR 1924 Pat 280 (282).

('96) 18 All 125 (127). (13 Mad 549, Dissented.)

('35) 39 Cal W N 722 (724). (Alternative defences can be raised.)

('38) AIR 1938 Mad 865 (878).

[See also ('30) AIR 1930 Lah 105 (106).

(1878) 3 Ex D 251 (258), Bardon v. Greenwood.

('31) AIR 1931 Cal 458 (461) : 58 Cal 418.

('14) AIR 1914 All 271(272) : 36 All 476. (Owner-

ship or pre-emption in the alternative.)

('32) AIR 1932 All 469 (470).]

See however the following cases :

('87) 1887 Pun Re No. 109, p. 250. (Though alternative claims based on different sets of facts can be made, contrary sets of facts cannot be alleged.)

('04) 6 Bom L R 790 (794, 795) : 30 Bom 173. (Party having taken advantage under one set of facts not to set up inconsistent facts — This rule inapplicable if it is due to fraud of other side.)

('10) 5 Ind Cas 946(947)(Bom). (Gift and adverse possession are contradictory—Defendant to make election.)

('11) 10 Ind Cas 890 (891) : 35 Bom 297. (Inconsistent titles cannot be set up.)

('94) 19 Bom 323(327, 328). (Inconsistent assertions of facts not allowed.)

('31) AIR 1931 Nag 57 (60) : 26 Nag L R 367.

('92-1900) 1892-1900 Low Bur Rul 337.

('16) AIR 1916 Cal 658 (660). (Two absolutely inconsistent statements each of which is destructive of the other cannot be made.)

('86) AIR 1986 Pesh 133 (134).

5. ('18) AIR 1918 Oudh 468(464) : 20 Oudh Cas 192.

6. ('24) AIR 1924 Cal 467 (472).

[See also ('35) 39 Cal W N 722(724). (A defendant is not precluded from urging an alternative defence simply because he cannot support his other defence by credible evidence or attempts to support it by false evidence.)

7. ('10) 7 Ind Cas 166 (168, 169) (Cal).

In the following cases it was held that the pleas were not necessarily inconsistent :

('10) 8 Ind Cas 845 (845) (Mad). (Forgery and fraudulent inducement—13 Mad 549, Not approved.)

('17) AIR 1917 Oudh 389(390). (Forgery and undue influence.)

('11) 9 Ind Cas 469 (470) : 5 Low Bur Rul 251. (Denial of execution and want of consideration.)

**G. S. R. 2**  
**Notes 5**

2. A claim of ownership and right of easement.<sup>8</sup>
3. Claim as a *shebait* or in the alternative as an *owner*.<sup>9</sup>
4. Denial of contract of fire insurance and if there was a contract the nonfulfilment of the conditions precedent to the attaching of liability in the alternative.<sup>10</sup>
5. Plea of grant of perpetual tenancy or in the alternative acquisition of such tenancy by adverse possession.<sup>11</sup>
6. Plea of discharge of mortgage debt or in the alternative plea of right to redeem it.<sup>12</sup>
7. Plea that land is not *service inam* and, if it is found against, that the party is willing to perform the service.<sup>13</sup>
8. Pre-emptor claiming to pre-empt half on the ground that the vendor had no title to half and alternatively claiming to pre-empt the whole if the vendor was found entitled to the whole.<sup>14</sup>

But the right to plead inconsistent sets of facts is subject to the provision in Rule 16 *infra* which provides that the Court may strike out any matter which may tend to *prejudice or embarrass the fair trial* of the suit. If, therefore, the inconsistent pleas will lead to the prejudice and embarrassment of the trial, they cannot be allowed.<sup>15</sup> Mere inconsistency of the pleas, however, will not necessarily lead to the embarrassment of the trial.<sup>16</sup> In order to avoid embarrassment in cases where inconsistent pleas are set up, the facts ought not to be mixed up leaving the other party to pick out the facts applicable to each case; they should be distinctly stated so as to show on what alternative facts each of the reliefs sought is founded.<sup>17</sup>

It may, however, be observed that the litigant who avails himself of the right to press inconsistent cases before the Court and endeavours to establish both by contradictory oral testimony, plainly places himself in peril and may find himself entangled in inextricable difficulty, for evidence adduced in support of two absolutely inconsistent cases which are mutually destructive can hardly be expected to secure confidence.<sup>18</sup>

A claim for work done and a claim for reimbursement for expenses incurred in

8. ('24) AIR 1924 All 97 (97).
- ('22) AIR 1922 Bom 199 (200) : 46 Bom 200.
- ('24) AIR 1924 Cal 869 (869).
- ('10) 8 Ind Cas 886 (886) (Cal).
- ('07) 84 Cal 51 (53, 56) (FB). (Overruling 16 Suth W R 198.)
- ('30) AIR 1930 All 877 (879) : 58 All 16. (Alternative reliefs claimed upon ownership and right of easement — This action of the plaintiff must be condemned but he should not be penalised by dismissal of his suit.)
- ('33) AIR 1933 Bom 122 (123).
- ('39) AIR 1939 Bom 149 (150) : ILR (1939) Bom 140. (Merely setting up a claim to ownership of land does not prevent a party from establishing a right to an easement in respect of that land.) [See also ('20) AIR 1920 Cal 940 (940). (First suit as owner—Second suit for easement—Not fatal as inconsistent — Facts proved establishing easement — Decreed.)
9. ('18) AIR 1918 Cal 870 (874).
10. ('24) AIR 1924 Rang 817 (818) : 2 Rang 144.
11. ('25) AIR 1925 Pat 216 (221, 227) : 4 Pat 189.
12. ('01) 24 Mad 408 (411).
13. ('12) 15 Ind Cas 882 (882) (Mad).

14. ('29) AIR 1929 All 898 (899).
15. (1878) 3 Ex D 251 (255), *Berdon v. Greenwood*.
- ('31) AIR 1931 Nag 189 (190) : 27 Nag L R 218. (Rights of private and public way cannot be pleaded together.)
- ('12) 17 Ind Cas 986 (940) (Cal).
- ('17) AIR 1917 Pat 580 (580).
- ('12) 17 Ind Cas 884 (887) (Oudh). (Inconsistent pleas are not barred unless they cause confusion and embarrassment.)
- ('29) AIR 1929 Cal 547 (548). (Misrepresentation by one party and mutual mistake are inconsistent pleas and the latter plea cannot for the first time be raised in second appeal.)
- ('80) AIR 1980 Mad 814 (816).
16. (1887) 85 Ch D 492 (499), *In re Morgan*. (1877) 5 Ch D 695 (701, 702), *Child v. Stenning*.
17. ('30) AIR 1920 Cal 98 (95).
- (1878) 3 Ex D 251 (255), *Berdon v. Greenwood*.
18. ('24) AIR 1924 Cal 467 (473).
- [See also ('15) AIR 1915 Bom 115 (190) : 89 Bom 715.
- ('29) AIR 1929 P C 95 (99) (PC).]

being ready for other work are not inconsistent with each other.<sup>19</sup> Where a party has once taken up a certain position and the Court has passed a decision on the footing of such position being correct, the party cannot subsequently take up an inconsistent position with regard to the same matter.<sup>20</sup>

**O. 6 R. 2**  
**Notes 5-7**

**6. Matters affecting damages.** — It has already been observed in Note 3 above that all facts which the party pleading is entitled to *prove at the trial* must be stated in the pleadings. Thus, it has been held in England that matters in aggravation of damages (*i. e.*, facts which tend to *increase* the damages) are material facts which must be pleaded.<sup>1</sup> In *Wood v. Durham*,<sup>2</sup> however, it was held that facts, relied upon by the defendant, not as constituting his defence, but in *mitigation* of damages, are not material. The view seems to have turned upon the construction of O. 21 R. 4 of the English rules. It is submitted that, under the present Code, there is no room for any difference in the materiality of facts in aggravation and facts in mitigation of damages, as that rule has not been reproduced in the Code. In collision cases the plaint should be so framed as to set out the circumstances of the collision with clearness and accuracy in order to enable the adversary to know the case he has to meet.<sup>3</sup> Similarly, where special damages are claimed, the plaint should give full particulars showing its nature and extent, and showing with dates and items how the amount claimed is made up.<sup>4</sup> However, general damages can be claimed in a lump sum without giving particulars.<sup>5</sup>

**7. Pleadings should not state the evidence by which the facts are to be proved.**—As has been seen in Note 1 above, a pleading should not contain facts which are merely *evidence* to prove the material facts.<sup>1</sup> Thus, when the plaintiff alleged that certain of his windows were ancient, the defendant should not plead that in a previous suit the plaintiff had admitted that the windows were not ancient, inasmuch as that fact is only *evidence* disproving the plaintiff's case.<sup>2</sup>

19. ('93) AIR 1933 Cal 165 (168).

20. ('36) AIR 1936 Pat 10 (10). (Where a party adopts a certain plea in a suit and obtains a decision on a point in his favour on the strength of that plea, he cannot in another suit in which the same point is raised be heard to adopt a plea inconsistent and contrary to the one relied on in the former suit.)

('85) AIR 1935 Mad 367 (368). (A party cannot both approbate and reprobate — Where a person alleged in the previous suit that the village in question was not an estate and obtained a decision in his favour on that point he cannot turn round and say that the land is an estate and on the strength of that assertion invoke the special jurisdiction of the Revenue Courts—A I R 1933 P C 167, Followed.)

('36) AIR 1936 Cal 590 (592). (Contending that S. 52, T. P. Act, did not apply and obtaining decision in his own favour on the basis of that and subsequently contending that the decision is wrong — Not allowed.)

('36) AIR 1936 Lah 18 (20).

[See also ('85) AIR 1935 Oudh 515 (517) : 11 Luck 485. (Suit for ejectment instituted treating defendant as tenant—Plaintiff cannot shift his grounds and again sue defendant as trespasser.)

('85) AIR 1935 Lah 96 (97). (Litigants cannot be allowed to blow hot and cold—Hence when a person who got execution Court to hold that

a certain decree was a declaratory one cannot subsequently take the plea that the decree is one for possession and is capable of execution.)]

#### Notes 6

1. (1880) 6 Q B D 190 (194), *Millington v. Loring*. (1890) 24 Q B D 630 (631), *Whiteney v. Moignard*. [See also ('33) AIR 1933 Nag 29 (31) : 28 Nag L R 320.]

2. (1888) 21 Q B D 501 (507).

3. ('21) AIR 1921 Cal 543 (544).

4. (1892) 2 Q B 524 (528, 529), *Ratcliffe v. Evans*.

5. ('33) AIR 1933 Nag 29 (31) : 28 Nag L R 320.

#### Notes 7

1. ('25) AIR 1925 Pat 410 (412).

('16) AIR 1916 Cal 658 (659).

(1879) 12 Ch D 787 (793), *Williamson v. L. & N. W. Ry. Co.*

(1878) 4 Q B D 127 (133), *Phillips v. Phillips*.

(1876) 45 L J C P 663 (666, 667), *Blake v. Albion Life Assurance Society*.

[See also ('31) AIR 1931 Cal 458 (460, 461) : 58 Cal 418.]

2. (1884) 49 L T 772, *Lumb v. Beaumont*.

[See also (1878) 7 Ch D 478 (487), *Davy v. Garrett*.

('21) AIR 1921 Sind 159 (162) : 16 Sind L R 207. (Estoppel by admission cannot be properly set out in plaint as it is a rule of evidence.)]



**O. 6 R. 2**  
**Notes 7-9**

An offer without prejudice should not be pleaded in the pleadings.<sup>3</sup>

See also the undermentioned case.<sup>4</sup>

**8. The facts should be stated in a concise form.**—Pleadings must be drafted with sufficient definiteness to enable the opposite party to understand the case he is called upon to meet.<sup>1</sup> The material facts must be stated precisely and coherently<sup>2</sup> and as briefly as is consistent with clearness.<sup>3</sup>

The forms of pleadings appended to the Code may, as specified in the next rule, be adopted with advantage whenever possible, to avoid objections on the score of prolixity.

The Code contemplates that pleadings must be in *writing*.<sup>4</sup>

See also Rule 4 *infra* as to certainty in pleadings.

**9. Variance between pleading and proof.**—A party's case may be disclosed—

- (1) by his allegations in his pleading,
- (2) by his answers to interrogatories delivered to him by the opposite party in the suit,
- (3) by allegations made on oath by him or by any persons present on his behalf, or made by his pleaders, and
- (4) by the contents of documents produced by him.<sup>1</sup>

Issues are framed on the case of the parties so disclosed, and evidence is directed at the trial to the proof of the case so set up and covered by the issues framed thereon. A party is expected and is bound to prove the case *as alleged by him and as covered by the issues framed*. This is in accordance with the main principle of practice that a party can only succeed according to what was alleged and proved: *secundum allegata et probata*.<sup>2</sup> He will not be allowed to succeed on a case not so set

[But see ('26) AIR 1926 Mad 1052 (1052). (Plea of estoppel by conduct.)

('88) AIR 1938 Mad 48 (46). (Estoppel whether as a rule of evidence or a part of substantive law must be specifically pleaded.)]

3. ('74) 12 Beng L R App 19 (20).

4. ('86) 89 Cal W N 910 (912). (Though under Rule 5 of the Election Rules framed under the Bengal Municipal Act, the procedure for suits under the Civil Procedure Code is applicable, that has to be read along with the other provisions in the rules, and particularly Rule 2, which requires that an election petition shall contain, among others, the particulars of the corrupt practice alleged.)

**Note 8**

1. ('92) 19 Cal 507 (512) : 19 Ind App 90 (P C). ('25) AIR 1925 Pat 168 (172). (Pleas should be definitely taken.)

('82) AIR 1932 All 467 (467). (General and vague charge of immorality — Struck out with costs.) ('78) 20 Suth W R 147 (148). (Plaint intentionally indistinct and obscure — Rightly dismissed.) ('85) AIR 1935 All 208 (204).

[See also ('69) 11 Suth W R 278 (275). (Vague allegations of collusion or fraud insufficient.)]

2. ('72) 5 N W P H C R 25 (28).

3. (1875) 1875 W N 288 (288), *Askew v. N.E.Ry.Co.* (1878) 7 Ch D 473 (486, 487), *Davy v. Garrett*. ('81) AIR 1931 Cal 458 (460) : 58 Cal 418. (Particulars too voluminous — Procedure.)

(1862) 1 Hyde 147 (148).

('89) AIR 1939 Rang 189 (192) : 1939 Rang L R 1. (All material facts should be stated concisely.)

[See also ('70) 18 Suth W R 48 (49).]

4. ('35) AIR 1935 All 268 (269).

**Note 9**

1. See Order 14 Rule 3.

2. ('17) AIR 1917 Low Bur 156 (157).

('29) AIR 1929 Lah 165 (167). (Minority not raised — Court not to refuse to uphold a contract by minor.)

('96) 18 All 408 (405, 410). (Decree should not be given on a cause of action different from that pleaded in the plaint.)

('09) 1 Ind Cas 456 (457) : 88 Bom 85. (A litigant can only succeed *secundum allegata et probata*.)

('82) 8 Cal 975 (980).

('68) 1 Mad H C R 471 (477). (Court should confine itself to granting only the reliefs claimed in the plaint.)

('08) 6 Oudh Cas 247 (250). (Case not set up in the plaint should not be allowed to be raised.)

('24) AIR 1924 All 150 (152) : 45 All 571. (Plaintiff's case was found disproved on evidence taken — Then plaintiff cannot ask for a decree against one of the defendants who had not expressly denied a fact in issue.)

('89) AIR 1939 Cal 513 (516).

('16) AIR 1916 Oudh 95 (98). (A custom different from the one pleaded sought to be set up at a last stage of the proceedings.)



up by him<sup>3</sup> and cannot be allowed at the trial to *change* his case or set up a case *inconsistent* with what he has alleged in his pleading, except by way of amendment of

**O. 6 R. 2**  
**Note 9**

3. ('09) 8 Ind Cas 408 (414) (Cal).
- ('14) AIR 1914 P C 84 (85) : 87 All 45 (PC). (Case that cannot be spelt out of the pleadings not to be allowed.)
- ('81) 1881 All W N 158 (158). (No decree to be given on grounds not stated in the plaint.)
- ('70) 2 N W P H C R 182 (188). (Lower Appellate Court of its own accord granted relief—*Held* by the High Court, that it was not at liberty to decree a relief that was not claimed.)
- ('09) 2 Ind Cas 146 (148) : 84 Bom 244. (After arguments an Appellate Court will not allow amendment of a plaint so as to convert a suit of one character into that of another.)
- (1864) 2 Bom H C R 176 (178). (A question not raised in the plaint ought not to be decided.)
- ('25) AIR 1925 Cal 949 (950). (Court is not entitled to make a case inconsistent with pleadings.)
- ('09) 1 Ind Cas 657 (659) (Cal). (The common form of prayer should not be used to give an alternative relief not asked for in the plaint.)
- (1900) 27 Cal 239 (242). (Suit for rent — Alternative relief of damages for use and occupation should not be given if not prayed for.)
- ('87) 14 Cal 420 (428). (Suit on a written agreement — Suit not to be decreed on an oral agreement not pleaded.)
- ('75) 23 Suth W R 404 (406). (Court not to make a new case for the defendant.)
- ('81) AIR 1931 All 229 (232). (Neither party putting forward case of wagering contract — Court should not base judgment on such hypothesis.)
- ('82) AIR 1932 Lah 570 (571).
- ('74) 22 Suth W R 216 (219). (Adverse possession not pleaded cannot be raised in appeal.)
- ('74) 21 Suth W R 132 (133). (Judge not bound to decide a question not raised by the plaintiff.)
- ('71) 15 Suth W R 868 (864).
- ('71) 15 Suth W R O C 7 (15).
- ('70) 14 Suth W R 886 (887). (Plaintiff not to raise a new ground of relief in appeal.)
- ('70) 13 Suth W R 464 (465). (Court not competent to set up a defence not made by the defendant.)
- ('69) 12 Suth W R 204 (206).
- ('69) 11 Suth W R 133 (133). (New case in special appeal not allowed.)
- ('69) 12 Suth W R 248 (249). (When the plaintiff in a suit asks for one thing the Court ought not to give him a decree because he proves that he is entitled to another.)
- ('68) 10 Suth W R 243 (244).
- ('27) AIR 1927 Lah 802 (804). (Findings not based on pleadings and inconsistent with them — Retrial was ordered.)
- ('27) AIR 1927 Lah 96 (96). (Court not to decide case on points not raised by parties.)
- ('20) AIR 1920 Lah 105 (105, 106).
- ('11) 9 Ind Cas 86 (86) (Lah). (Pre-emption on town basis — Not claimable on village basis in second appeal.)
- ('33) AIR 1933 Lah 61 (69) : 14 Lah 137. (Plea of mutual, open and current account should be clearly raised.)
- ('79) 1879 Pun Re No. 86, p. 100. (Court not competent to change form of the suit.)
- ('12) 17 Ind Cas 106 (110, 111) (Mad).
- ('08) 31 Mad 531 (532).
- ('27) AIR 1927 Nag 410 (411).
- ('81) AIR 1931 Mad 300 (301) : 54 Mad 671. (Suit for account against agent not to be converted into a suit between partners.)
- ('09) 2 Ind Cas 241 (242) : 5 Nag L R 67.
- ('28) AIR 1928 Oudh 114 (115) : 27 Oudh Cas 64.
- ('21) AIR 1921 Oudh 259 (259).
- ('16) AIR 1916 Oudh 255 (257). (General prayer does not include an alternative claim not prayed for.)
- ('20) AIR 1920 Upp Bur 5 (5) : 3 Upp Bur Rul 201.
- ('12) 17 Ind Cas 900 (901) : 6 Low Bur Rul 71. (Suit by servant—A case of wrongful dismissal not set up by him should not be raised.)
- ('09) 8 Ind Cas 719 (719) : 5 Low Bur Rul 76.
- ('81) AIR 1931 Lah 595 (597). (Court not to go behind pleadings.)
- ('27) AIR 1927 Sind 219 (220) : 20 Sind L R 220.
- ('68) 10 Suth W R 261 (263). (Joint claim, title in one alone—Not to be decreed.)
- ('73) 20 Suth W R 364 (365). (Do.)
- ('35) AIR 1935 All 303 (306).
- ('37) 172 Ind Cas 631 (631) (P C). (New case set up by defendant in witness-box—Plaintiff having no opportunity of meeting the case — *Held* parties should be kept to their pleadings.)
- ('35) AIR 1935 Cal 263 (265).
- ('37) AIR 1937 Mad 122 (123). (The Court has no power to set up an entirely new case for the plaintiff to that which the plaintiff put forward in his plaint ; nor could the plaintiff be allowed to put forward as creating rights a document on which he had not in terms sued.)
- ('86) AIR 1936 Nag 295 (296). (Cases must be decided on facts pleaded—Judges have no power to ignore what is pleaded and then set up a totally different set of facts which was never in the contemplation of either side.)
- ('32) AIR 1932 Sind 78 (80).
- ('35) 18 Nag L Jour 291 (292).
- ('36) AIR 1936 Pat 442 (443). (Court cannot set up for a party a ground not pleaded by him.)
- ('85) AIR 1935 Oudh 165 (167) : 152 Ind Cas 977 (979).
- ('86) AIR 1936 Lah 887 (888). (The Judge has no justification whatever under the law to raise a point against a plaintiff which is never pleaded nor proved, and which is a mere probability and not a fact as established by legal evidence.)
- ('86) AIR 1936 Cal 465 (468). (Plaintiff cannot ask for relief on the footing of a new case inconsistent with case in plaint. The principle governing such cases is whether defendant will be taken by surprise—AIR 1916 Cal 829, Followed.)
- ('85) AIR 1935 All 308 (308).

See also Foot Note 4 below.

**O. 6 R. 2**  
**Note 9**

the pleading under O. 6 R. 17.<sup>4</sup> In *Eshenchunder Singh v. Shamacharan*,<sup>5</sup> Lord Westbury in delivering the judgment of the Board observed as follows:

"The case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause

4. ('92) AIR 1932 Cal 497 (500) : 59 Cal 557. (Plea not raised in written defence, but raised in argument before trial Court.)
- ('80) AIR 1930 P C 57 (57) : 24 Sind L R 188 (PC). (Defendant not to lead evidence on a case not set up in the written statement.)
- ('82) AIR 1932 Pat 332 (333).
- ('96) 18 All 403 (405).
- ('83) 5 All 456 (459).
- ('08) 10 Bom L R 494 (495, 496). (Defence that deed is not genuine—Undue influence not to be pleaded later on.)
- ('24) AIR 1924 Cal 600 (607). (Doctrine that a party cannot be permitted to assume inconsistent positions applies not only to the successive stages of the same suit, but also to another suit than the one in which the position was taken up provided that the second suit grows out of the judgment in the first.)
- ('30) AIR 1930 Cal 32 (33, 34) : 56 Cal 581.
- ('15) AIR 1915 Cal 527 (527).
- ('33) AIR 1933 Sind 119 (120).
- ('16) AIR 1916 Cal 658 (660).
- ('30) AIR 1930 Cal 748 (749).
- ('14) AIR 1914 Cal 143 (145) : 41 Cal 69. (A litigant cannot be allowed to approbate and reprobate.)
- ('12) 13 Ind Cas 705 (706) : 39 Cal 568.
- ('29) AIR 1929 P C 77 (81) (PC).
- ('09) 3 Ind Cas 382 (384) : 36 Cal 780 : 36 Ind App 103 (PC). (New issue—Raising of, before argument—Issue depending on evidence.)
- ('29) AIR 1929 Mad 353 (358, 359).
- ('06) 8 Cal L Jour 316 (331).
- ('04) 8 Cal W N 171 (172) : 31 Cal 195. (Ground of exemption from the law of limitation not set up in the plaint—Not to be relied on.)
- ('99) 3 Cal W N 325 (328). (Fraud set up by plaintiff not proved—He cannot seek to redeem defendant.)
- ('69) 11 Suth W R 10 (11). (No new case in appeal.)
- ('67) 7 Suth W R 478 (478, 479).
- ('67) 7 Suth W R 306 (307). (Alternate plea not raised not to be allowed.)
- ('25) AIR 1925 Lah 345 (346). (New plea raised at the time of arguments.)
- ('23) AIR 1923 Lah 628 (629). (No decree on point not raised, without amendment.)
- ('13) 18 Ind Cas 553 (554) (Lah). (Plaintiff not to be allowed to make a statement contrary to his claim.)
- ('09) 1 Ind Cas 478 (478) (Lah). (New point not allowed in arguments.)
- ('27) AIR 1927 Mad 1116 (1116).
- ('26) AIR 1926 Mad 281 (281).
- ('24) AIR 1924 Mad 845 (845). (No new plea in appeal.)
- ('10) 8 Ind Cas 385 (385) (Mad).
- ('99) 2 Oudh Cas 209 (218) (PC).
- ('17) AIR 1917 P C 197 (200) (PC). (New plea not allowed before the Privy Council for first time—

See also Section 112, Note 7.)

- ('28) AIR 1928 P C 93 (94) (PC). (Do.)
- ('21) AIR 1921 P C 27 (28, 29) (PC). (Do.)
- ('20) AIR 1920 P C 4 (7) : 43 Mad 650 : 47 Ind App 99 (PC). (Do.)
- ('19) AIR 1919 P C 11 (12) : 47 Cal 1 : 46 Ind App 181 : 1919 Pun Re No. 81 (PC). (Do.)
- ('28) AIR 1928 P C 189 (191) : 50 Ind App 230 : 50 Cal 929 (PC). (Do—Issues abandoned in lower Court.)
- ('28) AIR 1928 P C 165 (171) : 24 Nag L R 186 (PC). (Do.)
- ('16) AIR 1916 P C 245 (246) (PC). (Do.)
- ('11) Ind Cas 497 (498) : 38 Cal 629 : 38 Ind App 140 : 6 Low Bur Rul 18 (PC). (Do—Not allowed except on terms.)
- ('01) 4 Oudh Cas 347 (351). (Want of consideration pleaded—Want of necessity cannot be set up in arguments.)
- ('31) AIR 1931 Oudh 400 (401). (Do.)
- ('25) AIR 1925 Cal 521 (521). (Case in plaint disbelieved—New case in evidence—Dismissal or amendment.)
- ('71) 13 Moo Ind App 346 (352) (PC). (Plaint case not proved—New case—Not allowed.)
- ('31) AIR 1931 Oudh 378 (380) : 7 Luck 94.
- ('99) AIR 1939 All 348 (355). (Where a claim has never been made in the defence presented, no amount of evidence can be looked into upon a plea which was never put forward.)
- ('36) AIR 1936 P C 27 (29) (PC). [It is *passim* *exemplis* to admit a new head of claim without a proper amendment of the pleadings.]
- [See also ('93) 16 Mad 121 (125). (Suit for declaration of right to redeem—Redemption not to be decreed—*Quare*.)]
- See also Foot-Note 8 above.
- [See however ('80) AIR 1930 All 877 (879) : 53 All 16. (Reliefs inconsistent to each other allowed being in the alternative.)
- ('27) AIR 1927 Cal 49 (50). (Court is entitled to draw inference inconsistent with case of either party.)]

5. ('66) 11 Moo Ind App 7 (20, 23, 24) (PC).

See also the following cases :

- ('86) 10 Bom 461 (467, 468) : 18 Ind App 66 (PC). (Decree on mortgage that the mortgagor might make a tender of mortgage amount and ask for conveyance of property—In a suit to redeem on the basis of the decree he cannot seek to redeem the original mortgage.)
- ('88) 5 All 456 (459). (Sub-agent pleaded to be appointed by agent without authority—Relief not to be given that the appointment of sub-agent was not prudent.)
- ('75) 1 Bom 209 (214). (Defence on title—At trial adverse possession should not be allowed to be set up.)
- ('28) AIR 1928 Cal 570 (572). (Averment and proof should harmonise.)

should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made . . . . . It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove . . . . . They desire to have the rule observed that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from."

*Illustrations*

1. A, a riparian proprietor, sues the Government, for the proprietary possession of an area of dry land in midstream on the allegation that it is a gradual accretion upon an already existing *lanka* or alluvial land which belonged to him. Failing to prove this case, he cannot urge at the hearing that he is the owner of the whole bed of the river and therefore of every formation including the area in suit: *Bulusu Ramalakshamma v. Collector of Godavery District*, I. L. R. 22 Madras 464 (P. C.).

2. A sues B for the cancellation of a mortgage document executed by A's father to B, on the ground that A's father was *insane* and that B fraudulently obtained the document from him. Failing to prove this case, he cannot be allowed to succeed on the ground that A's father, though not insane, was helpless and weak in mind, when the type of insanity connoted in the evidence was something quite different: *Durga Buksh v. Muhammad Ali*, I. L. R. 27 Allahabad 1 (P. C.); *Ismail Mussajee Mookerdam v. Hafis Boo*, I. L. R. 38 Calcutta 773 (P. C.).

For other instances in which a party was not allowed to change his case and get relief on that basis, see the undermentioned cases.<sup>6</sup>

- ('19) AIR 1919 Cal 586 (587). (Suit in ejectment—Defendant setting up tenancy from plaintiff's landlord—Defendant cannot succeed on tenancy from plaintiff's tenant.)
- ('10) 8 Ind Cas 713 (714) (Cal).
- ('09) 3 Ind Cas 408 (414) (Cal).
- ('87) 14 Cal 801 (806): 14 Ind App 168 (PC).
- ('82) 8 Cal 975 (980).
- ('82) 8 Cal 871 (875). (Suit as purchaser—Appellate Court not to give a decree for partition on the ground that plaintiff was a coparcener.)
- ('75) 2 Ind App 87 (107) (PC). (New pleas not to be taken in special appeal.)
- ('81) AIR 1931 Rang 177 (177).
- 6. ('13) 21 Ind Cas 64 (65) (All).
- ('88) AIR 1933 Nag 29 (31): 28 Nag L R 320. (Plea of aggravated damages not to be allowed in appeal.)
- ('86) 10 Bom 451 (452). (Suit on lease—Not to be changed for partition.)
- ('72) 9 Bom H C R 1 (6) (F B). (Suit in ejectment—Defendant's tenancy not proved—Plaintiff cannot succeed on his general title.)
- ('28) AIR 1923 Cal 296 (296). (Mortgage challenged to be fraudulent—On failure of proof plaintiffs not to be allowed to redeem.)
- ('09) 4 Ind Cas 547 (548, 549) (Cal). (Suit on the allegation that plaintiff was in possession—Decree for recovery of possession should not be given.)
- ('04) 81 Cal 819 (891).
- (1900) 27 Cal 289 (242). (Suit for rent on basis of tenancy—Tenancy not proved—Damages for use and occupation cannot be decreed.)
- ('97) 24 Cal 438 (435). (Suit for arrears of rent at a particular rate—What was fair rate is not to be decided.)
- ('95) 22 Cal 752 (756). (Suit for rent—Decree for use and occupation not to be given.)
- ('78) 2 Cal L Rep 538 (542). (Suit for confirma-

- tion of right cannot be changed into one for possession.)
- ('76) 25 Suth W R 448 (448). (Suit to eject tenant—In appeal no decree can be given on the ground of defendant being trespasser.)
- ('74) 22 Suth W R 346 (347). (Suit for rent—No specific contract—Not entitled to demand fair compensation for use and occupation.)
- ('74) 21 Suth W R 208 (209) (F B).
- ('73) 20 Suth W R 75 (76). (Suit for patta on one claim—Patta should not be granted on another claim.)
- ('67) 7 Suth W R 163 (163).
- (1862) 1 Hay 234. (Suit for rent on kabuliati—Decree on the basis of payment for number of years not to be given.)
- ('19) 21 Ind Cas 560 (560) (Mad). (Suit in ejectment based on tenancy—Tenancy not proved—Proof of title to eject as trespasser not permissible.)
- ('06) 16 Mad L Jour 5 (6). (Plaintiff challenging a mortgage cannot subsequently rely on it.)
- ('02) 5 Oudh Cas 222 (224).
- ('78) 2 Bom 116 (119). (Suit against a firm cannot be converted into a suit against a partner of the firm.)
- ('20) AIR 1920 Cal 290 (290).
- ('71) 15 Suth W R PC 7 (8) (P C).
- ('33) AIR 1933 Bom 101 (104).
- ('76) 1876 Pun Re No. 32. (Suit on bond only—No relief on original cause of action could be given.)
- ('19) AIR 1919 Mad 875 (875). (Suit on usufructuary mortgage—In appeal plaintiff cannot claim right of subrogation.)
- ('15) AIR 1915 Mad 962 (971). (Suit on one mortgage—Decree on another cannot be granted without amendment.)
- ('81) AIR 1931 Rang 139 (142): 9 Rang 56. (As to when decree on the original cause of action could be given.)

O. S. R. 2-  
Note 9

The rule of *secundum allegata et probata* is based mainly on the principle

- (‘98) 15 All 412 (418). (Suit for exclusive possession—When joint possession can be decreed.)
- (‘82) 1882 All W N 57 (57). (Suit for possession and compensation for trespass — Decree for compensation by way of rent will not be given.)
- (‘21) AIR 1921 Pat 435 (436). (Suit for fair and equitable rent cannot be converted into suit for enhancement of rent.)
- (‘92) AIR 1932 PC 95 (97) (PC). (Negligence of one kind alleged—Negligence of another kind not to be found.)
- (‘10) 6 Ind Cas 829 (830) (Cal). (Mortgagee of undivided share claiming that partition was fraudulent cannot in appeal urge that his mortgagor was negligent in the partition suit.)
- (‘78) 2 Cal L Rep 292 (293, 294). (Suit for possession against trespasser should not be decreed on the basis of defendant being a tenant.)
- (‘67) 8 Suth W R 385 (386). (Suit for possession on the ground of dispossession by defendant should not be decreed on the ground of defendant’s possession being permissive.)
- (‘72) 17 Suth W R 98 (99). (Suit for possession of property as a part of joint family property sold by widow without authority cannot be changed into a suit by reversioner to declare the alienation by the widow void.)
- (‘72) 18 Suth W R 507 (507). (Claim to khas possession cannot be changed into claim for proprietary right to portion.)
- (‘89) 12 Mad 292 (293). (Suit based on partition — Partition should not be decreed.)
- (‘11) 9 Ind Cas 429 (430) (Oudh).
- (‘30) AIR 1930 Sind 818 (824) : 25 Sind L R 39.
- (‘29) AIR 1929 Bom 1 (5) : 53 Bom 75. (One kind of fraud alleged — No decree on another kind of fraud.)
- (‘69) 12 Suth W R 69 (69). (Suit on one title cannot be converted into suit on another title.)
- (‘15) AIR 1915 P C 168 (169) (P C). (Transferee holding property in trust for transferor—Transferor cannot get transfer set aside on equitable grounds.)
- (‘87) 15 Ind App 81 (86) : 15 Cal 685 (PC). (Claim to set aside document as forgery—Claim to set it aside on ground of influence.)
- (‘97) 21 Bom 110 (115). (Different custom set up.)
- (‘21) AIR 1921 Cal 569 (571). (Suit on prescriptive right — No decree to be given on a customary right.)
- (‘69) 12 Suth W R 487 (488). (Claim as heir impugning adoption—Plaintiff not to be allowed to continue suit as heir of adopted son.)
- (‘25) AIR 1925 Lah 571 (572). (Claim through one cannot be converted into a claim through another.)
- (‘15) AIR 1915 Lah 115 (116) : 1915 Pun Re No. 67.
- (‘13) 18 Ind Cas 807 (809) (Lah). (Suit for property as owners—Decree as managers of a wakf should not be given.)
- (‘26) AIR 1926 Mad 880 (881). (Suit based upon customary right—Plaintiff cannot be given relief on common law right.)
- (‘09) 4 Ind Cas 87 (87) (Mad). (Suit for possession as purchaser cannot be converted into one for possession as mortgagee.)
- (‘28) AIR 1928 Pat 481 (488). (Claim under gift cannot be changed into one under inheritance.)
- (‘08) 14 Bur L R 65. (Suit on the basis of custom or agreement cannot be converted into a claim under law or under a different custom, and vice versa.)
- (‘78) 1 All 568 (564). (Suit on agreement — Custom set up.)
- (‘78) 1 All 567 (568). (Do.)
- (‘69) 3 Beng L R App 142 (142). (Right of pre-emption claimed as co-partner—New case on ground of vicinage.)
- (‘69) 11 Suth W R 169 (170). (Do.)
- (‘15) AIR 1915 All 375 (375). (Suit for sale of mortgaged property — Mortgage not proved — Simple money decree could not be given.)
- (‘10) 5 Ind Cas 350 (351) (All). (Suit on the basis of a lease for a term not to be converted into one on a lease not for a term.)
- (‘04) 26 All 831 (334).
- (‘08) 27 Bom 485 (491) : 30 Ind App 127 (PC). (Defendant not to raise a new and inconsistent case after the plaintiff closes his case.)
- (‘03) 27 Bom 103 (112). (Doctrine of advancement not to be allowed without its being raised in the pleadings.)
- (‘98) 17 Bom 772 (774). (Suit on the basis of defendant being owner of a property—Decree not to be given on the basis of his being a permanent tenant thereof.)
- (‘24) AIR 1924 Cal 461 (462). (Suit based on a completed contract evidenced by a deed — On failure of proof of execution of the deed plaintiff will not be allowed to spell out a contract from the correspondence.)
- (‘33) AIR 1933 Lah 25 (27) : 13 Lah 677.
- (‘03) 7 Cal W N 596 (597, 598). (Denial of execution of kabuliat by tenant defendant—He cannot be permitted to prove that the plaintiffs are not the true landlords.)
- (‘97) 1 Cal W N 710 (711). (Suit on hatchitta—Decree not to be on the original debt.)
- (‘75) 24 Suth W R 355 (355). (Pre-emption on the basis of shufeh khulcet not to be decreed on the basis of shufeh jah.)
- (‘67) 8 Suth W R 369 (369). (Suit for possession on the ground that mortgage was paid up—Decree for redemption cannot be given on failure to establish discharge.)
- (‘15) AIR 1915 Lah 167 (168) : 1915 Pun Re No. 76. (Suit against persons in their individual capacity — Plaintiff cannot, on failure to prove his case, ask for a decree on the basis of their being partners.)
- (‘13) 21 Ind Cas 737 (739) (Mad). (Suit for adoption cannot be treated as a suit for partition.)
- (‘13) 18 Ind Cas 686 (686) (Mad).
- (‘11) 10 Ind Cas 98 (102, 108) (Mad). (Suit for vendor’s lien not to be treated as a suit for an account on the basis of agency.)
- (‘98) 21 Mad 288 (291). (Suit for ejectment—Not to be turned into one for a declaration of reversionary title.)
- (‘22) AIR 1922 Pat 184 (186). (Execution of document admitted and fraud, etc., not set up—

that no party should be taken by *surprise* by the change of case introduced by the opposite party.<sup>7</sup> In *Nabadwipendra v. Madhu Sudan*,<sup>8</sup> it was observed as follows :

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Note 9**

"The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to appraise the defendant, distinctly and specifically, of the case he is called upon to answer, so that, he may properly make his defence and may not be taken by surprise; *and, secondly*, to preserve an accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations."

Therefore, the test, when an objection of this kind is taken, is to see whether the party aggrieved *has really been taken by surprise, or is prejudiced* by the action of the opposite party.<sup>9</sup> In applying this test the whole of the circumstances must be taken into account, and carefully scrutinised to find out whether there has been such surprise or prejudice as will disentitle a party to relief.<sup>10</sup> Every variance, therefore, between pleading and proof is not necessarily fatal to the suit or defence<sup>11</sup> and the rule of *secundum allegata et probata* will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby.<sup>12</sup> Thus, where a ground

Court cannot find that party was not aware of the contents.)

('29) AIR 1929 Oudh 204 (208). (Suit based on one custom—Different custom cannot be set up at the trial.)

('05) 8 Oudh Cas 116 (117). (One consideration pleaded—Another consideration cannot be set up at the trial.)

('03) 6 Oudh Cas 119 (125). (Variance as to date of tenancy not allowed.)

('27) AIR 1927 Rang 118 (118, 119). (Suit for share in partnership—Claim based on plaintiff's being a partner — Plaintiff found to be assignee — Not entitled to a decree.)

('95) 18 Mad 462 (463). (Suit to redeem a specified mortgage — The plaintiff was not allowed to redeem a different one.)

('84) 8 Bom 543 (546). (Do.)

('99) 3 Cal W N 497 (499). (Suit on title—Decree on basis of long possession.)

('98) 3 Cal W N 158 (160). (Do.)

('17) AIR 1917 Oudh 406 (410). (Ejectment suit — Redemption not allowable.)

('81) AIR 1931 Mad 140 (145) : 54 Mad 163. (A plea not taken will be deemed to have been waived.)

('80) 5 Cal 246 (250).

('26) AIR 1926 Mad 880 (882).

('27) AIR 1927 All 63 (66).

('80) AIR 1930 Lah 325 (327). (Party alleging contract of particular date cannot be allowed to prove contract of different date.)

('69) 12 Suth W R 487 (488). (Plaintiff cannot prove a different title from that which he alleged in the plaint.)

('76) 25 Suth W R 315 (316). (Do.)

('75) 24 Suth W R 444 (445). (Do.)

('71) 15 Suth W R 84 (85). (Do.)

('69) 11 Suth W R 550 (551). (Do.)

('69) 12 Suth W R 80 (81). (Do.)

('35) AIR 1935 Oudh 165 (167). (Defendant in written statement denying signatures on receipt and pro-note—Admission of execution in witness-box and new case set up.)

[See ('25) AIR 1925 Rang 87 (88).]

[See also ('28) AIR 1928 Mad 1189 (1140).

('32) AIR 1932 Mad 693 (694).]

7. ('09) 3 Ind Cas 408 (414, 415) (Cal).

8. ('12) 16 Ind Cas 741 (742) (Cal).

[See also ('23) AIR 1923 Cal 142 (145) : 50 Cal 292.

('20) AIR 1920 Cal 26 (32).

('11) 11 Ind Cas 540 (541) (Cal).]

9. ('22) AIR 1922 Cal 254 (255).

('33) AIR 1933 Lah 342 (343).

('10) 8 Ind Cas 41 (43, 44) (Cal).

('36) AIR 1936 Cal 465 (468).

('35) AIR 1935 Oudh 165 (167).

10. ('15) AIR 1915 P C 89 (91, 92) (P C).

('09) 2 Ind Cas 85 (88) (Cal).

('17) AIR 1917 Oudh 254 (257).

('27) AIR 1927 Sind 248 (250).

[See also ('02) 25 All 169 (161). (Defendant putting plaintiffs to proof of consideration—Only a portion found binding—Mortgagor defendant though estopped by previous statements can get benefit of the said finding).]

11. ('20) AIR 1920 Cal 26 (32).

('32) AIR 1932 Lah 570 (571).

('24) AIR 1924 All 831 (831).

('38) AIR 1938 Pesh 37 (37).

('23) AIR 1923 Cal 142 (145) : 50 Cal 292.

('12) 16 Ind Cas 741 (742) (Cal).

('12) 17 Ind Cas 296 (298) (Oudh).

('11) 11 Ind Cas 540 (541) (Cal).

('16) AIR 1916 Cal 341 (342).

12. ('87) 14 Cal 592 (597, 598).

('03) 25 All 498 (506) (FB). (Overruling 15 All 186.)

('03) 25 All 256 (260) (FB).

('68) 3 Agra 218 (218). (Obvious mistake in the plaint.)

('93) 17 Bom 648 (656).

('06) 4 Cal L Jour 56 (60, 61).

('30) AIR 1930 P C 205 (208) (P C). (Court must look to the substance of pleadings and issues settled.)

('31) AIR 1931 Nag 63 (64) : 27 Nag L R 19. (Relief on undue influence can be given in spite of inartistic pleadings.)

('07) 10 Oudh Cas 17 (20).

**O. 6 R. 2**  
**Note 9**

though not raised in the pleadings is expressly *put in issue*,<sup>13</sup> or where the new claim set up is *not inconsistent* with the allegations made in the pleadings and is based on facts alleged therein,<sup>14</sup> there is no question of surprise to the opposite party. Similarly, where the defendant makes an *admission*, a finding in favour of the plaintiff based on such admission is not incompetent even though it is at variance with the case set up by the plaintiff in his pleading, inasmuch as there could be no surprise or prejudice to the defendant in such a case.<sup>15</sup> But a party cannot be allowed to abandon his own case, adopt that of the defendant and claim relief on that footing where the latter is prejudiced by such a course.<sup>16</sup>

*Illustrations*

1. *A* and *B* jointly execute a bond in favour of *C* for a certain sum of money. *A* is compelled to pay off the whole amount to *C* and after so paying it, he brings a suit against *B* for the recovery of the *whole* amount on the ground that he (*A*) was only a surety for *B*. It is established that *A* was not a surety but that he and *B* were equally liable under the bond. In such a case a decree can be given for *A* for *contribution* of the amount paid by *A* for *B* also. Their Lordships said: "the plaintiff . . . . . ought not, by reason of his having claimed too much, to be precluded from recovering the proportionate amount of what he actually paid, to which he is undoubtedly entitled, a claim which the pleadings are wide enough to cover."<sup>17</sup>

2. *A* sues *B* for rent on the basis of lease-deed. It is found that the lease deed is, for some reason, not admissible in evidence; in such a case a decree can be given on the basis of use and occupation by the defendant.<sup>18</sup>

For other instances in which relief could be given to the parties on grounds different from those set up in the pleadings, see the undermentioned cases.<sup>19</sup>

('16) AIR 1916 Cal 341 (343).

('36) AIR 1936 Cal 382 (384). (Pleadings should not be construed too narrowly.)

[See ('11) 9 Ind Cas 32 (33) (Mad). (Discrepancies between the terms of the pro-notes and their description in the plaint).]

13. ('04) 1904 Pun Ra No. 78, page 263.

('80) AIR 1930 P C 205 (208) (P C).

('14) AIR 1914 All 479 (481). (Both parties understanding the points in issue and letting in evidence on them.)

('05) 27 All 634 (650) : 32 Ind App 203 : 8 Oudh Cas 317 (P C). (Issues wide enough to cover the case newly set up before Privy Council.)

('23) AIR 1923 Bom 321 (331, 332) : 47 Bom 843 (FB).

('15) AIR 1915 P C 2 (4) : 39 Bom 399 : 42 Ind App 103 (PC). (Point on which parties have been allowed to go to proof can be decided.)

('96) 20 Bom 569 (570).

('28) AIR 1928 Mad 703 (704). (Plea not specifically raised but trial and first Appellate Court discussing it as if raised.)

('13) 20 Ind Cas 570 (571) : 7 Sind L R 23. (Suit for rent based on title—Title denied—Issue as to title raised and tried.)

('36) AIR 1936 Cal 382 (384).

('39) AIR 1939 Lah 330 (335).

14. ('08) 10 Bom L R 346 (348).

('25) AIR 1925 Cal 257 (258, 259).

('81) 7 Cal L Rep 103 (106).

('32) AIR 1932 Nag 23 (26) : 27 Nag L R 327.

('81) AIR 1931 Nag 63 (65) : 27 Nag L R 19.

('25) AIR 1925 Oudh 617 (618) : 28 Oudh Cas 397. (Court to take notice of truth as revealed by evidence in the case.)

('21) AIR 1921 Oudh 176 (186).

('12) 18 Ind Cas 568 (570) : 1 Upp Bur Rul 141.

15. ('88) 11 Mad 367 (370).

('30) AIR 1930 Nag 8 (9) : 26 Nag L R 130.

('30) AIR 1930 Nag 273 (278) : 26 Nag L R 277.

('21) AIR 1921 Bom 307 (309) : 45 Bom 535.

(Facts not pleaded in the plaint but admitted by the defendant can be relied on.)

('74) 20 Suth W R 64 (64).

('69) 12 Suth W R 317 (317).

('84) 7 Mad 226 (232).

('69) 4 Mad H C R 359 (366).

('25) AIR 1925 Nag 434 (434).

16. ('80) 5 Cal 602 (605).

('13) 19 Ind Cas 401 (403) (Bom). (Suit in ejectment.)

('15) AIR 1915 Cal 339 (341) : 43 Cal 103.

('23) AIR 1923 Pat 481 (483).

17. ('06) 28 All 482 (487) : 33 Ind App 61 (PC).

('16) AIR 1916 Cal 341 (342, 343).

('74) 22 Suth W R 456 (456).

('16) AIR 1916 Mad 39 (41). (Decree for one share may be granted in suit for possession of whole estate.)

('09) 1 Ind Cas 530 (532) (Cal). (Larger relief claimed — Smaller relief can be given.)

('88) 11 Mad 94 (97). (Do.)

('18) AIR 1918 PC 287 (291) (PC). (Do.)

('12) 15 Ind Cas 665 (666) (Mad). (Suit for exclusive possession of property — Plaintiff found to be entitled only to joint possession — Court may give plaintiff a decree for joint possession.)

('90) 12 All 556 (558). (Do.)

18. ('24) AIR 1924 Oudh 97 (98).

19. *Suit based on custom—General law may be relied on :*

('26) AIR 1926 Lah 551 (551).



The rule of *secundam allegata et probata* is applicable only to questions of fact and not to pure questions of law arising out of the facts alleged and proved.<sup>20</sup> A question of law based on such facts can be taken at any time<sup>21</sup> except where the plea

('02) 4 Bom L R 855 (857). (Plaint alleging that widow is entitled to right of residence by custom — The provision of Hindu law recognizing it may be relied on.)

*Suit alleging dispossession on a particular date — Date found to be wrong — It is not sufficient ground for dismissing suit :*

('71) 15 Suth W R 178 (179).

('75) 24 Suth W R 357 (358).

('79) 8 Cal L Rep 105 (110).

*Suit for ejectment allowed to be changed into suit for redemption :*

('23) AIR 1923 Lah 675 (677).

('11) 12 Ind Cas 387 (389) (Bom).

('96) 20 Bom 196 (197).

('18) AIR 1918 Nag 177 (177).

*Claim for easement on ground of prescription — Decree on basis of lost grant :*

('81) 6 Bom 20 (23).

('81) 7 Cal 132 (136).

('80) 6 Cal 394 (404) : 7 Ind App 240 (PC).

*Miscellaneous :*

('18) AIR 1918 Cal 144 (145). (Suit on title — Prescriptive title—Relief on.)

('27) AIR 1927 Mad 1039 (1041). (Relief asked for by plaintiff likely to lead to unnecessary litigation — Court can consider equities without prejudicing rights of parties.)

('90) 14 Bom 31 (33). (Suit for partition as coparcener can be amended by adding a claim on the basis of a compromise.)

('03) 13 Mad L Jour 7 (9).

('07) 30 Mad 406 (407). (Gift, relief on in plaintiff — Right by inheritance can be set up.)

('07) 30 Mad 388 (390). (Plaint mortgage not proved — Decree on mortgage admitted by defendant.)

(See Foot Note 6 for cases which decide to the contrary.)

('74) 21 Suth W R 121 (122). (Ryots suing for possession on the ground that zamindar granted them pattas—When this failed, the Court allowed them to prove their occupancy rights.) (1865) 3 Suth W R 208 (209). (Do.)

('21) AIR 1921 P C 8 (10): 48 Cal 509: 48 Ind App 127 (PC). (Mortgage suit — Mortgage found invalid — Alternative claim for personal decree allowed to be established, though not claimed specifically.)

('93) 20 Cal 1 (6) : 19 Ind App 221 (PC). (Suit by reversioner—Status of reversionership denied at late stage — Agreement with real heir by plaintiff allowed.)

('31) AIR 1931 Mad 140 (144) : 54 Mad 163. (Mortgages not claiming on the personal covenant might be given a decree.)

('24) AIR 1924 All 862 (864).

('82) 4 All 245 (247). (Suit by usufructuary mortgagee for breach of covenant to give possession — Compensation for such breach though not asked for can be given.)

('22) AIR 1922 Bom 199 (200) : 46 Bom 200. (Claim on basis of title—Easement allowable after amendment.)

('26) AIR 1926 Cal 647 (647, 648). (Plaintiff alleging right of easement in himself and others and proving easement in his favour alone is entitled to succeed.)

('06) 4 Cal L Jour 56 (61).

('95) 22 Cal 589 (596).

('74) 22 Suth W R 390 (391). (Suit on title—Decree on possession.)

('73) 19 Suth W R 195 (196). (Plaintiff's precise claim not proved but his case was substantially proved.)

('24) AIR 1924 Mad 354 (355). (Partible property other than that included in the plaint can be partitioned.)

('10) 8 Ind Cas 64 (64) (Mad). (Suit for cancellation of sale deed for failure of consideration — Court may grant decree for the amount of purchase money not paid.)

('12) 14 Ind Cas 512 (512) : 1912 Pun Re No. 18. (Suit on hundi—Hundi inadmissible in evidence for non-cancellation of stamp — Suit may be decreed on the basis of original consideration. But where the execution is not proved he cannot get relief on original cause of action ; there must be a plea to that effect.)

('93-1900) 1893-1900 Low Bur Rul 130.

('75) 23 Suth W R 369 (371) (PC).

('30) AIR 1930 All 734 (736).

('81) 8 Cal 79 (87, 88). (Suit for khas possession allowed to be changed into suit for redemption— But see AIR 1931 Oudh 378 (380).)

('20) AIR 1920 Oudh 265 (267) : 23 Oudh Cas 238. (Plaintiff suing for possession as vendee—Found entitled as mortgagee — Defendant allowed to redeem in the same suit.)

('14) AIR 1914 All 463 (463) : 36 All 673. (Pre-emption suit based on Mahomedan law can be decreed on the basis of custom.)

('93) 20 Cal 834 (842, 843) : 20 Ind App 99 (PC).

('37) AIR 1937 All 783 (785). (Partition suit — Plaintiff incidentally mentioning weight and value of ornaments mentioned in plaint — Commissioner coming to different conclusion — Plaintiff held was free to accept Commissioner's report as correct as his incidental mention was not conclusive or irrebuttable.)

20. ('10) 8 Ind Cas 41 (43, 44) (Cal). (Plea of adverse possession.)

('13) 18 Ind Cas 866 (866) (Cal). (Suit for partial partition — Apparent from the plaint — Objection allowed.)

21. ('17) AIR 1917 Cal 82 (83).

('80) AIR 1930 Bom 511 (512).

('21) AIR 1921 P C 228 (229) (P C). (Interpretation of statutes.)

('30) AIR 1930 Oudh 54 (54) : 5 Luck 489.

('13) 19 Ind Cas 340 (343) : 35 All 273 : 40 Ind App 86 : 16 Oudh Cas 186 (P C). (Defect in plaintiff's title apparent from deeds filed — Duty

**O. 6 R. 2** necessitates the taking of *further evidence* or depends upon *new facts* not alleged and  
**Notes 9-10** proved.<sup>22</sup>

It has been held by the High Court of Bombay in the undermentioned case<sup>23</sup> that suits relating to agreements entered into by persons who stand to each other in the relationship of mortgagor and mortgagee or trustee and *cestui que trust*, are exceptions to the applicability of the rule that parties ought to be kept to their pleadings. In such cases the Court was held to be bound to examine the nature of such agreements where, on the face of them, or having regard to surrounding circumstances, the Court finds *prima facie* grounds to suspect that the transaction is oppressive or unconscionable.

See also Note 5 above.

**10. Construction of pleadings.** — It has been uniformly held that pleadings in India,<sup>1</sup> especially those in the moffussil,<sup>2</sup> should not be construed very strictly. Courts in India have no power to non-suit the plaintiff merely because the pleadings are not in proper form<sup>3</sup> or the claim is wrongly described<sup>4</sup> or the Section wrongly given.<sup>5</sup> But, where a technical defence is set up against a just claim, the defence so set up must be strictly established and hence, the pleadings must be strictly construed.<sup>6</sup> The *substance* of the case should be kept in view and not merely the words used in the

of Privy Council to dismiss, though point not clearly raised.)

('04) 27 All 266 (270). (Illegality of consideration.)

('03) 30 Cal 1 (12). (Plea of non-service of notice of proclamation of sale can be taken even in appeal.)

('25) AIR 1925 Oudh 182 (189). (Plea of adverse possession — Court bound to raise *suo motu*.)

*Note.*—See the authorities to the contrary in Foot note 6 above.

[See also ('81) AIR 1931 All 670 (672).

('27) AIR 1927 Mad 273 (274). (Pleas of limitation and *res judicata* are raisable though abandoned previously.)]

22. ('13) 20 Ind Cas 523 (525) : 7 Sind L R 11.

('09) 4 Ind Cas 569 (570, 571) (Bom). (Plea of jurisdiction, though a question of law, not allowed after close of plaintiff's side.)

('16) AIR 1916 Cal 924 (925). (Plea of estoppel.)

('04) 31 Cal 195 (201). (Ground of exemption from the law of limitation not specifically pleaded cannot be relied on.)

('24) 20 Mad L W 564 (565).

23. ('10) 7 Ind Cas 977 (978) (Bom).

#### Note 10

1. ('84) 6 All 406 (413).

(1840) 2 Moo Ind App 344 (349, 350) (PC). (Essential justice of the case should be looked to and not the observance of forms.)

('32) AIR 1932 Lah 401 (411) : 18 Lah 618 (F B).

('09) 4 Ind Cas 168 (169) (Cal).

('74) 21 Suth W R 59 (60).

('70) 13 Suth W R 248 (249).

('67) 7 Suth W R 39 (40).

('15) AIR 1915 Mad 770 (772).

('33) AIR 1933 Cal 199 (202). (Unless one must do so for some very good reason.)

('17) AIR 1917 Pat 530 (531).

('86) AIR 1936 Cal 135 (137). (Pleadings in India cannot be regarded with the same meticulous care with which they are scrutinised in the

English Courts.)

('36) AIR 1936 Cal 382 (384).

('35) AIR 1935 Lah 441 (442).

[See also ('30) AIR 1930 Pat 455 (461) : 9 Pat 885. (Omission to mention certain facts in pleadings—Adverse inference against the party not conducive to justice as pleadings in this country are generally defective and carelessly drawn.)]

2. ('09) 8 Ind Cas 723 (724) (Mad).

('32) AIR 1932 Bom 529 (531).

('26) AIR 1926 P O 29 (29) : 4 Rang 513 (P C).

('31) AIR 1931 Pat 179 (181).

('04) 28 Bom 567 (572).

('15) AIR 1915 Cal 804 (805).

('16) AIR 1916 Nag 84 (86) : 12 Nag L R 90.

('33) AIR 1933 Cal 215 (216).

('35) AIR 1935 Cal 744 (745).

('86) AIR 1936 Lah 37 (39).

('38) AIR 1938 Nag 335 (342) : I L R (1938) Nag 1 (F B).

('37) AIR 1937 Nag 345 (350) : I L R (1938) Nag 308.

3. ('87) 9 All 690 (697).

('24) AIR 1924 Mad 174 (175). (Allegations not specific — No prejudice caused however — No reason to interfere with judgment.)

('16) AIR 1916 Mad 680 (680).

('13) 18 Ind Cas 568 (570) : 1 Upp Bur Rul 141.

('70) 14 Suth W R 181 (182).

('67) 7 Suth W R P O 8 (9) : 3 Moo Ind App 383 (PC).

4. ('17) AIR 1917 All 321 (322).

('35) AIR 1935 Cal 744 (745). (Prayer for declaration of custom, real relief sought being declaration of right based on custom—*Held*, real relief meant should be granted.)

5. ('09) 4 Ind Cas 258 (254) : 33 Bom 698.

('31) AIR 1931 Mad 753 (758).

6. ('34) AIR 1934 Rang 278 (280).



pleading.<sup>7</sup> For this purpose the pleadings must be read as a whole.<sup>8</sup> A pleading "not known" is not tantamount to a pleading "not admitted."<sup>9</sup>

**O. 6 R. 2  
Note 10**

**R. 3.** [New.] The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

**O. 6 R. 3**

[R. S. C., O. 19 R. 5.]

**1. Appendix A.** — As regards the imperfect character of the forms in Appendix A, see the observations in *Ramprasad v., Hazarimull*.<sup>1</sup>

**R. 4.** [New.] In all cases in which the party pleading relies on any misrepresentation,<sup>4</sup> fraud,<sup>2</sup> breach of trust,<sup>3</sup> wilful default, or undue influence,<sup>5</sup> and in all other cases in which particulars may be necessary<sup>6</sup> beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

**O. 6 R. 4**

[R. S. C., O. 19 R. 6.]

### Synopsis

1. Scope and object of the Rule.
2. Fraud.
3. Breach of trust.
4. Misrepresentation.
5. Undue influence and coercion.
6. "Other cases in which particulars may be necessary."
7. Accounts.
8. Contract.

9. Defamation.
10. Claim for a lump sum.
11. Malicious prosecution.
12. Misconduct.
13. Negligence — Nuisance.
14. Recovery of land.
15. Public highway and private right of way.
16. Particulars of defence.

7. ('71) 16 Suth W R 27 (28, 29). (Suit for confirmation of possession stating circumstances of dispossession, should be treated really as one for recovery of possession.)

('85) 7 All 1 (11):11 Ind App 149 (PC). (When plaintiff sued to succeed to an impartible estate under custom and failed to prove it he was allowed to succeed on the general law.)

('92) 19 Ind App 90 (98) : 19 Cal 507 (PC).

('82) 11 Cal L Rep 448 (460).

('82) 11 Cal L Rep 451 (458).

(1900) 1900 Pun Re No. 111, p. 492.

('19) AIR 1919 Mad 928 (925).

('16) AIR 1916 Mad 89 (41). (It is not desirable to pin down both the parties to the precise form of the pleadings, though they should allege a custom with distinctness and certainty.)

('81) AIR 1981 Pat 179 (181).

('86) AIR 1986 P C 121 (128) : 32 Sind L R 462 (PC). (A plaint may be inartistically drawn and seek to rest a justifiable claim upon an unjustifi-

able basis. But the Court should hesitate to give more importance to form than to substance.)

('88) AIR 1988 Nag 835 (342) : I L R (1989) Nag 1 (FB).

[See also ('07) 11 Cal W N 85 (92).]

8. ('26) AIR 1926 Nag 60 (60).

('81) AIR 1981 Lah 748 (749).

('86) AIR 1986 Lah 87 (89).

('86) AIR 1986 Lah 35 (86). (Plaintiff merely alleging in plaint that he has right of pre-emption without specifying grounds of his claim—Grounds specified in replication—Pleading taken as whole discloses cause of action with sufficient clearness.)

('84) AIR 1984 Cal 824 (825).

9. ('81) AIR 1981 All 428 (424).

### Order 6 Rule 3 — Note 1

1. ('81) AIR 1981 Cal 458 (459) : 58 Cal 418.

[See also ('86) AIR 1986 All 658 (655). (The exemplar in Appendix A, Sch. 1 relating to

O. 6 R. 4  
Note 1

## Other Topics (miscellaneous)

Acknowledgment for saving limitation. See Notes 2, 7 and 10; see also O. 7 R. 6, Notes. Bonds. See Notes 7 and 8. Custom. See Note 6.

Infringement of trade-mark. See Note 4.

Omission or insufficiency of particulars. See Note 1.

**1. Scope and object of the Rule.** — O. 6 R. 2 requires, as has been seen already, that a pleading should contain *material facts* on which the party relies for his claim or defence. This rule requires that, wherever necessary, *particulars* of such material facts shall also be given. "*Particulars*" may be described as the *details of the case set up*.<sup>1</sup> The object of particulars is two-fold —

- (1) to enable the opposite party to know *what case he has to meet* and thus to *prevent a surprise* at the trial,<sup>2</sup> and
- (2) to limit the generality of the pleadings and so to *define and limit the issues* to be tried and thus save unnecessary expense.<sup>3</sup>

It must depend upon the facts of each case as to what *degree* of particularity is required.<sup>4</sup> It may, however, be stated as a general rule that such certainty and particularity will be insisted upon as is reasonable having regard to the circumstances and the nature of the acts themselves. "To insist upon less," as was said in *Ratcliff v. Evans*,<sup>5</sup> "would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

Particulars must be distinguished from *evidence* and no party need state anything for the purpose of enabling the opposite party to ascertain the *evidence* by which he proposes to prove his case. The Courts have uniformly endeavoured to prevent the plaintiff or the defendant from prying into the brief of his opponent for finding out what is to be the evidence which is to be produced at the trial. On the other hand, the Courts have uniformly held that the plaintiff or the defendant is entitled to be told any and every particular which will enable him properly to prepare his case for the trial so that he may not be taken by surprise.<sup>6</sup> Thus, one party is not entitled to know the names of the witnesses of the other party for that will be knowing the particulars of evidence. But where the names of witnesses constitute a material fact in a party's case, he is bound to state them. Thus, where plaintiff sues for infringement of his trade-mark by the defendant, and alleges that on account of the infringement "diverse persons" were induced to buy defendant's goods as plaintiff's, the names of "diverse persons"

suit by shebaita is only intended to show that the shebait of an idol may bring a suit as prescribed therein. There is nothing in the exemplar that it is the only way in which the suit can be brought on behalf of the idol. A shebait is entitled to bring a suit in his own name—82 Cal 129 (PC) Ref.]]

## Order 6 Rule 4—Note 1

1. (1882) 7 P D 117 (121), *The Rory*.
2. (1907) 24 T L R 73 (74), *Young & Co. v. Scottish Union and National Insurance Co.* (Per Buckley, L. J.)
- (1888) 57 L J Q B 594, *Hennessy v. Wright*.
- (1887) 84 Ch D 88 (93, 94), *New Port Shipway v. Paynter*. (Per Cotton, L. J.)
- (1882) 7 P D 117 (121), *The Rory*.
- (1888) 88 Ch D 410 (418), *Spedding v. Fitzpatrick*. (Per Cotton, L. J.)
- (1898) 77 L T 67 (68), *Duke & Sons v. Wright & Co.* (Per Lindley, L. J.)
- [See ('86) 40 Cal W N 918 (918). (The Court,

under its inherent jurisdiction, is entitled to interfere and direct particulars if it considers that a litigant is substantially embarrassed owing to lack of precision in a petition or affidavit—A party disregarding his opponent's request for particulars will be doing so at his own risk. Any relevant statement which could have been incorporated in the petition or furnished by way of particulars will not, on failure to furnish particulars, be allowed to be imported in an affidavit in reply at the hearing of the petition.]]

3. (1895) 2 Q B 148 (152), *Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington*.
- (1877) 7 Ch D 435 (451), *Saunders v. Jones*. (Per Thesiger, L. J.)
- (1888) 88 C D 410 (418), *Spedding v. Fitzpatrick*.
4. (1878) 4 Q B D 127 (139), *Phillips v. Phillips*.
5. (1892) 2 Q B 524 (532, 533).
6. (1888) 89 Ch D 693 (695), *Humphries & Co. v. The Taylor Drug Co.* (As to when names of persons become necessary particulars.)

constitute a material fact in the statement of the plaintiff's case and must be revealed though such "diverse persons" might be coming as witnesses for the plaintiff.<sup>7</sup>

**O. 6 R. 4**  
**Notes 1-2**

Where a party omits to give particulars, or the particulars furnished are insufficient, the opposite party may apply under Rule 5 for a further and better statement of particulars,<sup>8</sup> and, if an order under that rule for particulars is disobeyed, then, if the plaintiff is in default, the action should be stayed, and, if the defendant is in default, his defence should be struck out.<sup>9</sup> When a party fails to ask for particulars at the proper time, he cannot afterwards be heard to say that he was taken by surprise.<sup>10</sup>

Where a plaint contains averments indicating with reasonable definiteness what the nature of the claim is, the claim will not be defeated by a small error in one particular. Thus, where *A*, as receiver of the properties of *B*, sues *C* on a promissory note executed by *C* to *B*, and the plaint correctly states the names of the promisor and the promisee and the date of the promissory note, but the amount is mentioned as Rs. 6000 instead of Rs. 5892 and this was due to the fact that *A* was not in possession of the promissory note, it cannot be said that the defendant is taken by surprise or that he was not aware of what the plaintiff was suing on and therefore the plaintiff should not fail by reason of such error.<sup>11</sup>

**2. Fraud.** — In suits on the basis of fraud, the allegation of fraud must be clear, definite, and specific.<sup>1</sup> General allegations of fraud, however strong the words in which they are stated may be, if unaccompanied by particulars, are insufficient to

7. (1888) 39 Ch D 693 (695), *Humphries & Co. v. The Taylor Drug Co.*

[See also (1900) 1 Ch 376 (383), *Milbank v. Milbank*. (Defendant referring to documents in his pleading—He may be ordered to give particulars of documents even though he claims privilege from production.)

(1886) 17 QBD 154 (161, 162), *Marriott v. Chamberlain*. (Action for libel.)]

8. [See also ('32) AIR 1932 Pat 355 (356): 11 Pat 624.

(1900) 1 Ch D 376 (385), *Milbank v. Milbank*.]

9. ('24) AIR 1924 All 17 (19): 45 All 624.

10. ('30) AIR 1930 Cal 621 (622). (Fraud).

[See also ('29) AIR 1929 Cal 654 (656). (Plaintiff at hearing setting up case at variance from that set out in plaint — Defendant waiving right of adjournment to rebut that case—Decree passed is not wrong.)

('16) AIR 1916 All 226 (227). (Acquiescence that pleading is right.)]

11. ('28) AIR 1928 Mad 940 (941).

#### Note 2

1. ('16) AIR 1916 All 356 (357): 38 All 126.

('38) AIR 1938 Sind 304 (304). (Fraud relied upon for the purpose of vacating a decree.)

('35) AIR 1935 Rang 78 (76): 13 Rang 175.

('28) AIR 1928 P O 261 (263) (P C).

('33) AIR 1933 Rang 169 (172).

('30) AIR 1930 All 427 (428). (Suit to set aside decree — General allegations of fraud are not sufficient.)

('23) AIR 1923 All 566 (567). (Suit to set aside a compromise decree.)

('16) AIR 1916 All 128 (130). (Plaintiff not alleging fraud in suit for accounts will not be entitled to let in evidence of fraud.)

('10) 5 Ind Cas 179 (180) (All). (Cannot be presumed from inadequacy of consideration.)

('87) 11 Bom 620 (648): 14 Ind App 111 (P C). (Fraud different from the one alleged cannot be proved.)

('82) 6 Bom 309 (314, 315).

('33) AIR 1933 Cal 866 (371): 60 Cal 262. (Court will insist on allegations of fraud to be made promptly and precisely.)

('30) AIR 1930 Cal 22 (28): 56 Cal 868.

('22) AIR 1922 Cal 203 (215).

('33) AIR 1933 Rang 153 (153). (Court should insist that there should be some definite allegation of what the fraud is.)

('20) AIR 1920 Cal 159 (160).

('17) AIR 1917 Cal 399 (401).

('16) AIR 1916 Cal 120 (122). (Case-law discussed.)

('16) AIR 1916 Cal 288 (289). (Suit to set aside rent decree.)

('14) AIR 1914 Cal 396 (401): 40 Cal 898 (S B). (Suit for damages for malicious arrest, prosecution and pretended search.)

('13) 20 Ind Cas 753 (754) (Cal). (Must be stated at the earliest opportunity.)

('14) AIR 1914 Cal 335 (338): 20 Ind Cas 679 (682): 41 Cal 148. (Allegation of fraud not taken in the lower Court—Allegation not allowed to be taken in second appeal.)

('09) 4 Ind Cas 495 (499) (Cal).

('86) 28 Cal 483 (492): 23 Ind App 8 (PO). (Collusion must be specifically pleaded.)

('15) AIR 1915 Lah 174 (175).

**O. 6 R. 4**  
**Note 2**

amount to an averment of fraud of which any Court ought to take notice.<sup>3</sup> A plaintiff seeking relief on the ground of fraud but omitting to give particulars does not disclose a cause of action<sup>3</sup> and should be rejected or returned for amendment but the suit should not be dismissed.<sup>4</sup> Fraud may be inferred from the surrounding circumstances,<sup>5</sup> but neither the fact that there are allegations in the written statement from which a plea of this kind can be spun out<sup>6</sup> nor the fact that the defendant himself has told an untrue story<sup>7</sup> is enough to relieve a plaintiff from his obligation to give particulars of the fraud pleaded by him. In the undermentioned case<sup>8</sup> where the plaintiff alleged that certain deeds were executed by a certain person in contravention of the terms of a family settlement, and were, therefore, not binding on him, and there were in the interval, circumstances of a fraudulent design to circumvent the provisions of the settlement, it was held that it was not necessary, in order to take such circumstances into consideration, that the plaintiff should have given particulars of the fraud.

A plaintiff seeking to avoid the statute of limitation on the ground of fraud

('26) AIR 1926 Lah 96 (98): 6 Lah 512. (Ex parte decree based on false claim cannot be re-opened except on ground of fraud.)

('80) AIR 1930 Mad 78 (79).

('28) AIR 1928 Mad 759 (760).

('17) AIR 1917 Mad 333 (334). (Must not be allowed to be made at a subsequent stage of the suit.)

('30) AIR 1930 Pat 357 (361, 366). (Suit for declaring lease void on ground of fraud.)

('21) AIR 1921 Pat 145 (147): 6 Pat L Jour 319. (Application to set aside execution sale on the ground of fraud.)

('05) 8 Oudh Cas 210 (222).

('83) AIR 1933 Rang 123 (124). (Suit to set aside decree on ground of fraud.)

('81) AIR 1931 Rang 212 (218): 9 Rang 135.

('81) 138 Ind Cas 867 (868) (Lah).

('25) AIR 1925 Rang 275 (277): 3 Rang 275.

('19) AIR 1919 Upp Bur 33 (34): 3 Upp Bur Rul 69.

('15) AIR 1915 Low Bur 86 (87): 8 Low Bur Rul 185.

('30) AIR 1930 Sind 298 (298): 24 Sind L R 232.

('14) AIR 1914 Sind 28 (30): 8 Sind L R 3.

(1900) 5 Cal W N 91 (103).

('87) AIR 1937 P O 146 (147): 64 Ind App 143: 31 Sind L R 306: I L R (1937) All 566 (P O). (Precise and specific details of fraud to be given.)

('88) AIR 1938 Nag 546 (547). (To call a deed both 'fraudulent' and 'bogus' is not a clear piece of pleading. Though fraud may be present in both cases, a deed may be fraudulent without being bogus and hence it is better to keep the two distinct.)

[But see ('21) AIR 1921 All 327 (330, 331). (Property deliberately sold as unencumbered in execution—Suit to set aside sale—No fraud alleged against any particular person—Suit maintainable.)]

2. (1880) 5 App Cas 685 (697), Wallingford v. Mutual Society.

('15) AIR 1915 P O 7 (18): 39 Bom 441: 42 Ind App 185 (P O).

('88) 15 Cal 583 (587): 15 Ind App 119 (P O).

('30) AIR 1930 Pat 768 (769). (Suit to set aside an ex parte decree on the ground of fraud.)

('30) AIR 1930 All 427 (428).

('12) 14 Ind Cas 53 (54) (Cal).

('28) AIR 1928 Pat 112 (113).

('37) AIR 1937 P O 146 (148): I L R (1937) All 566: 64 Ind App 143: 31 Sind L R 306 (P O).

('35) AIR 1935 Oudh 16 (18). (But transaction speaking for itself and furnishing internal proof of well thought out design—Omission to set out particulars leading to fraud does not contravene O. 6 R. 4.)

('37) AIR 1937 Cal 129 (136): I L R (1937) 1 Cal 203. (It is not necessary that plaintiff should disclose the evidence by which fraud is to be established. It is enough if such particulars as are necessary to sustain fraud, are given in the plaint.)

[But see ('17) AIR 1917 Nag 139 (140). (The Court is bound to consider a plea of fraud distinctly raised, though the allegations on which it is based are not set out in detail.)]

3. ('95) 19 Bom 593 (601, 602).

4. ('88) 15 Cal 583 (587): 15 Ind App 119 (P O).

('94) 18 Bom 144 (146).

('85) 9 Bom 358 (361, 364). (The plaint should have been returned for amendment.)

('09) 1 Ind Cas 784 (785): 36 Cal 134. (The plaint should be rejected and taken off the file.)

('21) AIR 1921 Pat 193 (200): 6 Pat L Jour 373 (F B). (The plaint should have been rejected.)

('11) 10 Ind Cas 922 (923) (Low Bur). (The plaint ought to have been returned for amendment.)

('08) 32 Bom 255 (257, 258). (Nor an issue should be framed on the question of fraud—The plaint ought to have been returned for amendment.)

[See also ('27) AIR 1927 Mad 588 (542): 50 Mad 357. (Fraud not alleged not to be gone into.)

('30) AIR 1930 Pat 357 (366).

('14) AIR 1914 P O 184 (188, 189) (P O). (Ingredients of fraud indicated—Particulars to be given in pleadings.)]

5. ('13) 21 Ind Cas 69 (70) (Oudh).

6. ('09) 1 Ind Cas 221 (224): 32 Mad 242.

[See also ('16) AIR 1916 Mad 940 (941, 943).]

7. ('94) 21 Cal 612 (621). (Suit to set aside a decree on ground of fraud.)

8. ('85) AIR 1935 Oudh 16 (18, 19).

must specifically state the particulars as to how he was *kept out of knowledge* of his rights by the fraudulent acts of the defendant, and the *time when he discovered it*.<sup>9</sup>

**O. 6 R. 4**  
**Notes 2-4**

Allegations of fraud must be *substantially proved* by the party making the same<sup>10</sup> though it does not mean that every puzzling artifice or contrivance resorted to by the opposite party, should be unravelled.<sup>11</sup> When one kind of fraud is alleged, another kind of fraud cannot, on failure of proof of the fraud alleged, be substituted for it.<sup>12</sup> And even if the Court finds that fraud was practised, if such fraud is other than that alleged by the plaintiff, the defendant is entitled to have the suit dismissed.<sup>13</sup> This general rule, however, is not applicable where a *pardanashin* lady is concerned. The obtaining of property, or of any benefit, from such a lady, through the undue and unconscionable abuse of influence by a person in whom trust and confidence are placed, has always been treated as fraud of the gravest character; and if such frauds are alleged and proved, the allegation that they were parts of a scheme very early conceived and deliberately carried out is, whether it be made out or not, of no material consequence in such a suit.<sup>14</sup>

A person cannot be allowed to plead the fraud of his own predecessors in order to avoid the legal consequences of their transactions,<sup>15</sup> nor can a party plead his own fraud against one not a party thereto.<sup>16</sup>

A party who is not aware that a fraud has been committed and does not set up the plea in his pleadings is not estopped from doing so as soon as he becomes aware of the facts which show that a fraud has been committed.<sup>17</sup>

**3. Breach of trust.** — Particulars of the *specific acts constituting* the breach of trust must be given so as to entitle a plaintiff to get relief.<sup>1</sup>

**4. Misrepresentation.** — When misrepresentations are alleged, the party pleading them should state as to each misrepresentation, its date, and whether it was made in writing or verbally, and as to each verbal misrepresentation, the occasion thereof.<sup>1</sup> Where a suit is brought for damages for infringement of a trade-mark,

9. ('16) AIR 1916 Cal 120 (129).

(27) AIR 1927 All 437 (439).

(1890) 15 App Cas 210 (213, 214), *Lawrance v. Norreys*. (Statement of claim disclosing concealed fraud in barest fashion—Claim dismissed.)

(1887) 3 Times Law Rep 329, *Riddell v. E. Strathmore*.

(1898) 2 Ch 545 (549, 550), *Willis v. Earl Howe*. [See (1895) 2 Ch 474 (478, 479), *Betjemann v. Betjemann*.]

10. ('36) AIR 1935 Bom 144 (146).

('35) AIR 1935 Rang 73 (76): 13 Rang 175. (A party who relies on plea of fraud or misrepresentation must establish these charges.)

11. ('23) AIR 1923 P C 73 (76). (P C).

[See also ('18) AIR 1918 Cal 453 (456).

('23) AIR 1923 Pat 327 (329). (Evidence consistent with the case of both sides—Fraud not established.)]

12. 18 Ves Jun 302 (314), *Mantesauin v. Sandys*.

('87) 11 Bom 620 (643): 14 Ind App 111 (P C).

('29) AIR 1929 Bom 1 (5): 53 Bom 75.

('20) AIR 1920 Cal 26 (32).

('11) 10 Ind Cas 922 (923) (Rang).

('16) AIR 1916 Cal 876 (878). (Suit to set aside *ex parte* decree and a sale thereunder on the ground of fraud.)

('95) AIR 1935 Lah 222 (224).

('35) AIR 1935 Bom 144 (146).

13. ('22) AIR 1922 Cal 203 (217). (The application of this principle was modified by rules applicable to *pardanashin* ladies.)

14. ('22) AIR 1922 Cal 203 (216, 217). (Note the several cases referred to in this case.)

15. ('11) 12 Ind Cas 583 (584): 37 Bom 217.

16. ('29) AIR 1929 All 237 (238).

[See ('35) AIR 1935 Bom 144 (146, 147).]

17. ('16) AIR 1916 Oudh 148 (150). (Fraud pleaded at the appellate stage.)

('18) AIR 1918 Oudh 105 (106, 107).

#### Notes 3

1. (1908) 1 Ch 789 (799): *In re Wrightson, Wrightson v. Cooke*. (Cited in AIR 1915 Mad 1044—Relief is given in respect of those specific breaches of trust which are proved.)

(1885) 33 W R (Eng.) 587, *Re Austiee*.

('30) AIR 1930 Mad 78 (79).

[See ('36) AIR 1936 Bom 30 (33). (Breaches of trust must be pleaded at the outset unless the trustee has refused to show the trust account.)]

#### Notes 4

1. (1884) 1884 W N 98 (98), *Seligmann v. Young*. [See also ('26) AIR 1926 Bom 33 (34).]

**O. 6 R. 4**  
**Notes 4-6**

particulars of the persons alleged to have been deceived by the inducement of the defendant should be given.<sup>2</sup> The party setting up the plea of misrepresentation must prove it.<sup>3</sup>

**5. Undue influence and coercion.** — Undue influence being a species of fraud must be pleaded with precision and unless it is supported by particulars it will not be investigated by Courts.<sup>1</sup> Thus, where a particular transfer of property was challenged on the ground of unsoundness of mind of the transferor, but no case of undue influence was raised in the pleadings, it was held that the question could not be properly discussed.<sup>2</sup> The person alleging it must prove that another person was in a position to dominate his will and exercise influence and that he actually exercised such influence.<sup>3</sup> A mere suspicion or probability will be insufficient to prove coercion.<sup>4</sup> Similarly, if there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically is not fatal to the plaintiff being entitled to relief on that ground;<sup>5</sup> all that the Court has to see is that there is no surprise to the defendant.<sup>6</sup>

**6. "Other cases in which particulars may be necessary."** — As a general rule where the *onus* of establishing a positive or negative allegation lies on the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation.<sup>1</sup> In other cases, the necessity for particulars depends upon the facts and circumstances of each case. Thus, where a custom is set up, the particulars of the custom with the essential requisites to its validity and binding effect must be stated.<sup>2</sup> Similarly, where in a suit on a bond the illegality of the consideration is raised as a defence, it must be definitely pleaded and particulars given.<sup>3</sup> So also a plea of waiver must be specifically raised.<sup>4</sup>

Any attack on the validity of the proceedings of a statutory body such as a municipal committee must be clearly defined and proved and particulars of the matters complained of must be given.<sup>5</sup>

The plaint in a suit under the Fatal Accidents Act should not only give full

('24) AIR 1924 PC 186 (187) (PC). (Misrepresentation — Allegation and proof of representation essential — Mere proof of statement before Sub-Registrar by executant as to his execution of previous deed under a certain belief is no evidence of representation to that effect.))

2. (1888) 39 C D 698 (695), *Humphries & Co. v. The Taylor Drug Co.*

3. ('85) AIR 1935 Rang 73 (76) : 13 Rang 175.

**Note 5**

1. ('21) AIR 1921 Pat 48 (49) : 5 Pat L Jour 744. (Suit on a mortgage where it was contended that compound interest was stipulated by undue influence—The question of undue influence is a question of fact.)

('15) AIR 1915 Bom 68 (70, 71) : 39 Bom 140. (Coercion.)

('19) AIR 1919 Cal 1033 (1038).

('28) AIR 1928 Oudh 330 (332, 333).

('38) AIR 1938 Nag 391 (392).

[See also ('32) AIR 1932 Pat 105 (117) : 11 Pat 50. (Undue influence is not the same as fraud.)]

2. ('06) 33 Cal 773 (783, 784) : 33 Ind App 186 (PC). (Pardanashin lady—The mere relation of daughter to mother does not suggest undue influence.)

3. ('24) AIR 1924 Bom 457 (458)

('88) AIR 1938 Nag 391 (392).

4. ('15) AIR 1915 Bom 68 (70) : 39 Bom 149.

5. ('16) AIR 1916 Bom 275 (277). (Plaint allowed to be amended so as to raise a plea of undue influence.)

('35) AIR 1935 Mad 726 (729) : 58 Mad 454.

(Where in a written statement all material facts are set out then the claim to relief must be decided with reference to them independently of their being labelled as fraud or undue influence : *Smith v. Kay*, 11 E R 307, Followed.)

6. ('81) AIR 1931 Nag 63 (64) : 27 Nag L R 19.

**Note 6**

1. ('21) AIR 1921 Sind 106 (108) : 17 Sind L R 9.

2. ('16) AIR 1916 Mad 89 (41).

('34) AIR 1934 Rang 61 (63) : 12 Rang 7.

('81) AIR 1931 All 588 (584). (Usage contrary to Contract Act must be clearly and precisely pleaded.)

('21) AIR 1921 Cal 569 (571). (Plaintiff setting up prescriptive right cannot be allowed to succeed on basis of customary right.)

3. ('25) AIR 1925 Lah 345 (346).

[See also ('32) AIR 1932 All 467 (467). (General charge of immorality not sufficient.)]

4. ('83) AIR 1933 Bom 46 (48).

5. ('89) AIR 1939 Pat 236 (238). (AIR 1934 PC 62, Followed.)

particulars of the person or persons for whom or on whose behalf the action is brought, but also particulars of the nature of the loss for which damages are claimed.<sup>6</sup>

**O. 6 R. 4**  
**Notes 6-9**

**7. Accounts.**—Where a claim is for a *general account*, particulars as to the items need not be given.<sup>1</sup> But when a *definite sum* made up of several items is claimed, particulars of the items will be necessary.<sup>2</sup>

Where the plaintiff impeaches accounts which have been settled on the ground of errors, the errors must be specifically set out. But where no objection was taken to the frame of the suit on the ground that no particulars were given and no prejudice was caused to the defendants, the omission to give particulars becomes immaterial.<sup>3</sup>

In the case of suits on instalment bonds, particulars as to the payments must be alleged and the precise words of the bond should also be stated to show how the bar of limitation is got over.<sup>4</sup>

**8. Contract.**—Where a contract or agreement is relied upon, particulars should be given, stating its date and showing whether it is in writing, or is verbal, or implied, or partly one and partly the other. If it is in writing the document or documents must be identified and described, and if it is implied, the circumstances from which the implication arises must be stated.<sup>1</sup>

**9. Defamation.**—In an action for defamation the plaintiff should give particulars of as to when and where the libel or slander, as the case may be, was published, and the persons to whom it was published.<sup>1</sup> If, however, all the persons to whom the publication was made were not known to the plaintiff, he may plead that he is unable to give particulars until after discovery.<sup>2</sup>

As the defendant is entitled to know the precise charge against him, the *exact words* constituting the libel must be set out.<sup>3</sup> If they are contained in letters or articles in newspapers, all the letters or articles should be produced.<sup>4</sup> A plea of *innuendo* must be clearly brought out, and it must be shown how the words were capable of bearing a libellous meaning.<sup>5</sup>

6. ('95) AIR 1985 Bom 393 (395). (AIR 1994 Cal 655, Referred.)

**Note 7**

1. (1885) 28 Ch D 119 (122), *Blackie v. Osmaston*. (1901) 18 T L R 206, *Car v. Anderson*. (1880) 16 Ch D 13 (18), *Augustinus v. Norineckx*. (Cited in 14 Cal W N 147.) [See also ('92) AIR 1932 Mad 284 (285, 286): 55 Mad 704.]
2. (1887) 36 Ch D 505 (507), *Kemp v. Goldberg*. See also the cases in Foot-Note 1 above.
3. ('09) 3 Ind Cas 241 (245, 246) (Cal).
4. ('19) 18 Ind Cas 690 (691) (All). (Waiver by plaintiffs to collect the entire amount on default in instalments not pleaded.)
- ('19) 20 Ind Cas 983 (984) : 35 All 455.

**Note 8**

1. (1879) 48 L J Q B 703 (704), *Turquand v. Feuron*. (1898) 104 L T 268, *Abbs v. Mathewson*. (1876) 1876 W N 55, *Smith v. West*. (1893) 9 T L R 819, *Temperton v. Russell*. [See also ('88) AIR 1938 Nag 580 (581). (Where the breach of certain conditions of an agreement forms the subject-matter of the plaintiff's complaint, the defendant is entitled to know the conditions and the exact manner in which

*they have been violated*.)]

**Note 9**

1. ('26) AIR 1926 All 672 (673). (1896) 2 I R 35, *Roche v. Meyler*. (Action for slander of title.) (1887) 36 W R (Eng) 125, *Williams v. Ramsdale*. (Words spoken in public room—Names of those present must be given.) (1893) 1 Q B 185 (188), *Davey v. Bentinck*. (The particulars of the names of persons to whom the alleged slander was uttered.) (1886) 16 Q B D 656 (657), *Roselle v. Buchanan*. (Do.) (1883) 12 Q B D 94 (95), *Bradbury v. Cooper*. (Do.) ('04) 6 Bom L R 131 (151).
2. (1908) 52 Sol Jo 580, *Russell v. Stubbs*.
3. (1795) 6 T R 162 (163), *Zenobio v. Axtell*. (If the words are in a foreign language they should be set out in that language.) (1879) 4 O P D 125 (128), *Harris v. Warre*. (1870) 8 Bl & Al 508 (506), *Wright v. Clements*.
4. [See (1846) 8 Q B 823, *Soloman v. Lawson*.] [See also (1822) 5 Bl & Al 615, *Cartright v. Wright*.]
5. (1882) 7 App Cas 741 (748), *Capital & County Bank v. Henty*.



**O. 6 R. 4**  
**Notes 9-12**

A defendant relying on the *plea of justification* must similarly give particulars of the specific instances on which he intends to rely.<sup>6</sup> The defence should show whether the justification is as to the whole or part of the matter published.<sup>7</sup> Where the libellous words are capable of two meanings, the defendant must state whether the plea applies to both meanings or to one only and, in the latter case, to which one.<sup>8</sup>

A defendant who pleads *fair comment* is bound to give particulars of the facts on which he commented and that they are true and fair and made in the interests of the public.<sup>9</sup> Where the plea of justification is made in the form of a *rolled up plea*<sup>10</sup> and the plea indicates the materials on which the comment is based, particulars of those materials will not be ordered. If the materials are not indicated such particulars may be ordered.<sup>11</sup>

**10. Claim for a lump sum.**—Where a lump sum is claimed for money paid on several occasions, particulars as to when and to whom it was paid and the items composing such sum must be given,<sup>1</sup> so that defendant may see whether he may or may not plead a set-off or limitation.<sup>2</sup>

**11. Malicious prosecution.**—A defendant simply denying the want of reasonable and probable cause will not be asked to furnish particulars thereof inasmuch as the *onus* lies on the plaintiff to show want of reasonable and probable cause.<sup>1</sup> Where, however, reasonable and probable cause is *affirmatively* pleaded, particulars thereof may be ordered.<sup>2</sup>

**12. Misconduct.**—General allegations of misconduct are not sufficient. Where the defendant justifies his action on the ground of misconduct of the plaintiff, the specific acts of misconduct should be given.<sup>1</sup> The particulars must give full information as to what facts are relied on and the nature of the charge with sufficient detail to prevent the defendant from being taken by surprise at the trial.<sup>2</sup> Where, however, specific evidence on the point in dispute is exclusively in the hands of one party, it is not reasonable to insist upon the other party giving definite particulars of misconduct which an examination of that evidence alone will disclose.<sup>3</sup>

6. (1893) 2 Q B 183 (186, 187), Zierenberg v. Labouchere.

(1926) 2 K B 273 (280), Godman v. Times Publishing Co.

(1891) 7 T L R 408, Gorden Cumming v. Green. (But not if the libel consists of only one specific charge.)

(1891) 2 Q B 582 (583, 584), Devereux v. Clarke & Co.

7. (1889) 23 Q B D 388 (392, 393), Fleming v. Dollar.

8. (1888) 57 L J Q B 594 (596), Hennessey v. Wright.

9. [See (1890) 7 T L R 1, Penrhyn v. Licensed Victuallers Mirror.]

10. *That is, a plea as follows*:—"In so far as the said words consist of allegations of fact the said words are in their nature and ordinary meaning true in substance and in fact, and in so far as the said words consist of expression of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest."

11. (1924) 1 K B 675 (680), Aga Khan v. Times Publishing Co.

**Note 10**

1. (1878) 4 Q B D 127 (131), Philipps v. Philipps. (1891) 7 T L R 280, Gunn v. Tucker.

(1879) 5 C P D 17 (18, 19), Godden v. Corsten. (Also when credit is given up to a certain amount and balance claimed.)

92 L T J 837, Hall v. Symons. (Do.)

2. (1887) 86 Ch D 505 (507), Kemp v. Goldberg. (Suit for a lump sum—Defendant pleading set-off—Defendant should give particulars of set-off.)

**Note 11**

1. ('95) 19 Bom 717 (721).

('99) 21 All 26 (28, 29).

('33) AIR 1933 Mad 429 (430) : 56 Mad 641.

2. (1918) 1 Ch D 133 (140), Weinberger v. Ingles. (Per Astbury, J.)

(1912) 28 T R 573, Green v. Garbutt.

**Note 12**

1. (1877) 7 Ch D 435 (448), Saunders v. Jones. (Dismissal of a servant.)

2. (1891) 7 T L R 408, Gorden Cumming v. Green.

[See also (1873) 10 Bom H O B 414 (415). (Suit under S. 19 of Act 20 of 1864—Acts of misconduct to be specified.)]

3. ('32) AIR 1932 Mad 284 (285) : 55 Mad 704.



**13. Negligence — Nuisance.** — In an action for negligence, the plaintiff must give full particulars of the negligence complained of, and of the damage he has sustained.<sup>1</sup> Thus, in a case of collision the plaintiff must state when and where the accident took place and the particular act of negligence and give details of the loss and expenses incurred.<sup>2</sup> The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged.<sup>3</sup> The same principles apply to cases of contributory negligence.<sup>4</sup> In a suit against a railway company for damages on account of the negligence of the company, no particulars of negligence were given nor were such particulars asked for. But at the trial the railway company understood the particular ground of negligence sought to be proved and led rebutting evidence. It was held that the railway company could not later on complain of want of particulars.<sup>5</sup>

But it is not open to the plaintiff to allege and seek to prove one kind of negligence and then ask the Court of Appeal to find negligence of another kind.<sup>6</sup>

Where in an action for public nuisance special damages are necessary to be proved, the plaint should state the full particulars of such damages.<sup>7</sup>

**14. Recovery of land.** — In an action for recovery of land, the plaintiff must give the nature and particulars of his title,<sup>1</sup> and must show that he has got a right to immediate possession.<sup>2</sup> If he claims as heir, he must show how he claims to be heir, and must set out the links of relationship through which he claims,<sup>3</sup> and if he claims as an assignee, the steps by which the estate became assigned to him.<sup>4</sup> A general statement that by virtue of certain deeds he got title will be struck out as being embarrassing.<sup>5</sup> He must state the effect of the deeds and documents<sup>6</sup> though the *precise words* are unnecessary.<sup>7</sup>

In a suit by a lessor against a lessee for possession, the lessor need not allege anything more than the lease.<sup>8</sup> A *defendant* in an action for the recovery of land, who is in possession of the land is not compelled to give particulars, but a defendant in an action to establish title to land who sets up a plea of purchase *bona fide* should give particulars.<sup>9</sup>

#### Note 13

1. (1867) L R 2 CP 371 (374), *Gautret v. Egerton*. ('22) AIR 1922 Pat 17 (18). (Suit against a Railway Company for damages for loss of goods lost by neglect).
2. (1886) 8 T L R 273, *Watson v. North Metropolitan Tramways Co.* ('21) AIR 1921 Cal 543 (544, 545).
3. (1867) L R 2 CP 371 (374), *Gautret v. Egerton*. (1905) 2 K B 391 (400), *West Rand & Co., v. Rex*.
4. (1906) 2 I R 120, *Martin v. M'Taggart*. (1909) 2 I R 181, *Tappin v. Belfast Corporation*.
5. ('29) AIR 1929 Cal 654 (656).
6. ('32) AIR 1932 P C 95 (97) (P C).
7. (1887) 8 T L R 273, *Watson v. North Metropolitan Tramways Co.* ('26) AIR 1926 Cal 549 (550).

#### Note 14

1. (1878) 4 Q B D 127 (129), *Phillips v. Phillips*. ('89) 11 All 488 (448, 444). (Suit for redemption and possession.) ('29) AIR 1929 P O 808 (804) (P C). (Flaw in title appearing from the pleadings of the person bound to prove it—Objector can rely on such flaw.) ('08) 81 Mad 581 (581, 582). (A plaintiff who

comes into Court alleging title under a sale deed cannot be allowed to succeed on the basis of title by adverse possession not pleaded.)

[See also ('71) 3 N W 1<sup>st</sup> H C R 262 (263). (Declaratory suit.)

('33) AIR 1933 Lah 25 (27) : 13 Lah 677.]

2. ('98) 21 Mad 288 (289, 290). [See also ('01) 26 Bom 360 (362). (Suit in ejectment — Particulars as to notice to quit essential.)]
3. (1893) 1893 W N 112 (113), *Blackledge v. Anderton*. (1892) 1 Q B 319 (320), *Palmer v. Palmer*.
4. (1884) 26 Ch D 778 (782, 783), *Davis v. James*.
5. (1878) 4 Q B D 127 (136), *Phillips v. Phillips*.
6. (1887) 8 T L R 329 (330), *Riddell v. Strathmore*. (Per Cotton, L. J.)
7. (1896) 1 Q B 554 (557, 558), *Darbyshire v. Leigh*. (The mere mention that title was obtained by a will was held enough.) [See also (1905) 74 L J Ch 357 (358, 359), *Pledge v. Pomtret*.]
8. (1860) 6 H & N 185 (189), *Cuthbertson v. Irving*.
9. (1900) 1 Ch 376 (388), *Milbank v. Milbank*.

O. 6 R. 4  
Notes 13-14.

**O. 6 R. 4**  
**Notes 15-16**

**15. Public highway and private right of way.** — Where a *public right of way* is pleaded, the *termini* need not be set out because the public have a right to use the way for all purposes at all times. In the case of private rights of way the *termini* of the way and the course which it takes must be shown with reasonable precision.<sup>1</sup>

In a suit in respect of a right of way the plaintiff should state specifically the manner in which he claims title whether by grant (actual or lost) or prescription at common law or under the statute.<sup>2</sup>

**16. Particulars of defence.** — Any party to a suit, be he the plaintiff or defendant, will have to give particulars of the circumstances on which he relies as the basis of his plea. The defendant also is subject to this rule.<sup>1</sup> But ordinarily, if a defendant merely denies the plaintiff's allegations, the defendant will not be required to give particulars as the plaintiff will have to establish his case.<sup>2</sup> Particulars may be however ordered in regard to positive allegations<sup>3</sup> as where justification is pleaded in an action for libel.<sup>4</sup>

**O. 6 R. 5**

**R. 5. [New.]** A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

[R. S. C., O. 19 R. 7.]

**Synopsis**

1. Scope and object of the Rule.
2. Application for particulars—When to apply.
3. Discovery before particulars.
4. When particulars need not be given.

5. "Upon such terms, as to costs and otherwise, as may be just."
6. Failure to give particulars after order.
7. Amendment of further particulars.

**1. Scope and object of the Rule.** — If a party omits to give in his pleading any particulars which he ought to have given according to Rule 4, the other party may apply under this rule for further and better particulars of any matter stated in the

**Note 15**

1. ('20) AIR 1920 Pat 256 (257). (1882) 22 Ch D 481 (483), *Harris v. Jenkins*. (Case of private right of way.)
2. ('83) AIR 1933 Cal 215 (217). (Gale on Easements, 9th edition, page 521, cited.)

**Note 16**

1. ('26) AIR 1926 PC 109 (109) (PC). (A contract sale was challenged on the ground of forgery or fraud.) ('09) 4 Ind Cas 495 (499) (Cal). (To avoid the contract on the ground of fraud or undue influence.) ('09) 1 Ind Cas 221 (224) : 82 Mad 242 (F B). (Plea of fraud in a suit for possession of the property at the court sale.) ('81) AIR 1981 Lah 246 (248).
2. (1918) 1 Ch D 133 (140, 141), *Weinberger v. Inglis*. (Particulars will not be ordered except on very special grounds.)

(1890) 6 T L R 172, *Roberts & Owen*. (Where defendant in an action for malicious prosecution simply denied want of reasonable and probable cause particulars were refused.)

(1811) 4 Taunt 84 (43), *Mure v. Kaye*. (See however that want of reasonable and probable cause was pleaded affirmatively by defendant.)

3. (1920) 1920 P 439, *Maelulich v. Maelulich*.

4. (1891) 7 T L R 408, *Gordon Cumming v. Green*.

('81) AIR 1981 Lah 246 (248).

(1913) 3 K B 499 (503), *Wootton v. Sivier*. (Question as to the adequacy of particulars.)

(1907) 1 K B 502 (509), *Digby v. The Financial News Ltd.* (Suit for libel—Plea of fair comment—Particulars will not be ordered.)

(1898) 2 Q B 183 (186), *Zierenberg v. Labouchere*. (In the plea of justification, the specific instances of misconduct of the plaintiff must be stated.)

pleading. The object of obtaining particulars is, as has been seen in Note 1 to Rule 4 above, to enable the opposite party to know what case he has to meet and to prevent a surprise at the trial so that he may not have to go to trial embarrassed by the obscurity or the incompleteness of the case which he has to meet.<sup>1</sup> Furnishing particulars of what has been pleaded insufficiently or vaguely is not a discretionary matter at all. It is ordering one of the parties to give the other his dues.<sup>2</sup> It is the duty of the Court as well to see that parties plead their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met. If the pleadings are not definite the Court will have difficulty in excluding much irrelevant evidence and consequently much public time may be wasted.<sup>3</sup> The proper course in such cases would be, not to take the case off the file, but to order particulars to be given or to direct amendment of the plaint.<sup>4</sup>

The rule does not permit the submission of new material based on an entirely different cause of action.<sup>5</sup>

The rule permits a better statement of the claim being put in when it is ordered by the Court.<sup>6</sup>

**2. Application for particulars—When to apply.**—An application under this rule should specify the particulars or the further and better particulars required and should ask for the costs of the application also.<sup>1</sup> Though there is no time-limit for applying for particulars,<sup>2</sup> it should as a rule be applied for, within a reasonable time after the necessity arises; otherwise, if there is undue delay, the application may be refused.<sup>3</sup> But a defendant does not waive his right to apply for particulars by delivering a defence.<sup>4</sup> There will however be no necessity for amendment by giving particulars when the Court has already come to a definite finding on a point.<sup>5</sup> If a party having a right to apply for particulars, does not do so in the trial Court, he cannot complain of want of particulars in the appellate Court, for his failure to apply operates as an estoppel.<sup>6</sup>

**3. Discovery before particulars.**—In some cases like suits by a principal against his agent, when the defendant applies for particulars and the plaintiff does not know the facts necessary to enable him to give particulars and the defendant knows them, the practice is to order the defendant to give discovery and to postpone the application for particulars till then.<sup>1</sup> "It is good practice and good sense, that when the

**Order 6 Rule 5 — Note 1**

1. ('80) AIR 1930 Mad 473 (476) : 53 Mad 645.
2. ('15) AIR 1915 Mad 984 (986-988).
3. ('24) AIR 1924 All 17 (18, 19) : 42 All 624.  
[See ('11) 9 Ind Cas 765 (766) : 35 Bom 182.]  
[See also ('32) AIR 1932 All 467 (467). (General and vague charge of immorality in pleading should be struck out with costs.)]
4. ('31) AIR 1931 Cal 659 (661) : 58 Cal 539.
5. ('81) AIR 1931 Pat 185 (185). (Plaint not specifying particulars—Defendant should ask for them—Suit not to be dismissed.)
5. ('37) AIR 1937 Lah 795 (796).
6. ('39) AIR 1939 Lah 886 (888). (Where a replication giving further particulars of the plaintiff's claim was filed in Court several months after the issues were framed when it was not in fact called for and the Court in its discretion rejected the same, it was held that the rejection of the replication could not be said to have prejudiced the plaintiff as it was open to him to prove the allegations made in the replication at the hearing.)

**Note 2**

1. ('30) Annual Practice, page 288.
2. (1882) 47 L T 700, Thompson v. Birkley.
3. (1888) 37 WR (Eng) 265, Gourand v. Fitzgerald.
4. (1887) 37 Ch D 295 (302), Sachs v. Spielman.  
(Because the defence had been put in it does not mean that the defendant has waived his right of demanding particulars.)
- (1886) 3 T L R 273, Watson v. North Metropolitan Tramway Co.
5. ('23) AIR 1923 Mad 245 (246). (Finding as to gross negligence.)
6. ('20) AIR 1920 Pat 678 (680).
- ('30) AIR 1930 Cal 621 (621, 622). (Such party cannot afterwards be heard to say that he was taken by surprise.)
- ('37) AIR 1937 Cal 51 (54) : I L R (1937) 1 Cal 491.
- [See ('39) AIR 1939 Nag 69 (69) : 171 Ind Cas 121 (122) : I L R (1938) Nag 21.]

**Note 3**

1. (1884) 26 Ch D 717 (721, 722), Whyte v. Ahrens.  
(Per Cotton, L. J.)

**O. 6 R. 5  
Notes 3-6**

defendant knows the facts and the plaintiffs do not, the defendant should give discovery, before the plaintiffs deliver particulars."<sup>2</sup> But no hard and fast rule can be laid down to determine when particulars should precede discovery, or discovery should precede particulars. Each case will depend upon its own circumstances.<sup>3</sup> In a suit for libel characterising the plaintiff as an "imposter" and "a charity swindler," the defence was of justification. Plaintiff asked for particulars of the charge, but the defendant wanted inspection of the plaintiff's account books. The Court refused to allow the defendant inspection of plaintiff's accounts and Kay, L. J., said :

"To apply this practice to the case of a libel would be to sanction the publication of a libel, when the libellor knew no facts justifying the libellous statement, because he believed he could by the process of discovery, elicit such facts."<sup>4</sup>

From this case it is clear that discovery before particulars will not be ordered, where the particulars are within the knowledge or ought to be within the knowledge of the person applying for particulars.

**4. When particulars need not be given.**—All particulars delivered should be the best that the party delivering them can give. In some cases where the party is, or states he is, unable at the time, to give the particulars required, an order is made for the best particulars he can give, reserving him leave to deliver amended particulars (not less than a fixed time before trial of the suit.) A party will not, as a rule, be ordered to give particulars of facts or matters which the other party has to prove or as to which he merely traverses the allegations of his opponent.<sup>1</sup>

**5. "Upon such terms as to costs and otherwise as may be just."**—When ordering delivery of particulars, the Court may order the party in default to pay a specified sum to the other side for the costs occasioned by the application, such payment to be made on or before the delivery of particulars.<sup>1</sup>

**6. Failure to give particulars after order.**—When an order for delivery of particulars under this rule is not obeyed, if the plaintiff is in default the suit may be stayed, or, the defence may be struck out under Rule 16 *infra*, if the defendant is in default.<sup>1</sup> It has also been held that the Court has even got the power to dismiss a suit in the case of default of a plaintiff to obey the order of the Court.<sup>2</sup> The Court has got the power to stay a suit or to strike out a defence even if such a condition is not added to the original order for delivery of particulars, and this power is a discretionary one.<sup>3</sup>

(1886) 31 Ch D 374 (377, 379), *Leitch v. Abbott*.  
(182) AIR 1932 Mad 284 (285, 286) : 55 Mad 704.

(In this case the plaintiff was a commission agent—Suit to recover money from his principal—Plaintiff was ordered to give discovery.)

2. (1888) 38 Ch D 110 (112), *Millar v. Harper*. (Per Bowen, L. J. — Suit by wife's executor against husband for recovery of furniture purchased with wife's income and included in an inventory of all the furniture in husband's house — Husband not entitled to particulars till he declares by affidavit which of the furniture in the inventory belonged to his wife.)

3. (1896) 1 Ch 29 (35), *Waynes Merthyr Co. v. D. Radford & Co.* (Suit by colliery company against coal merchant for passing of some other coal as the coal of the plaintiff's mines—Plaintiff gave one instance of such fraudulent sale and complained of such fraud "on divers other occasions"—Defendant not entitled to particulars of occasions till he gives inspection of his

books to the plaintiff.)

4. (1893) 2 Q B 183 (190), *Zierenberg v. Labouchere*.

**Note 4**

1. (1918) 1 Ch 133 (141), *Weinberger v. Inglis*.

**Note 5**

1. ('24) AIR 1924 All 17 (18, 19) : 45 All 624.

**Note 6**

1. ('24) AIR 1924 All 17 (19) : 45 All 624.

2. ('31) AIR 1931 Pat 135 (136). (Plaintiff failed to supply particulars required under S. 148 of the Bengal Tenancy Act.)

('32) AIR 1932 Mad 816 (818). (Order in substance under this rule and not O. 11 R. 21—Not appealable.)

(1893) L R 1 Q B 185 (188) : 62 L J Q B 114, *Davey v. Bentinck*. (Cited in AIR 1930 Mad 478.)

3. ('80) AIR 1930 Mad 478 (475, 476) : 53 Mad 645. [See also ('31) AIR 1931 Pat 135 (136).]

See also the undermentioned decision.<sup>4</sup>

**O. 6 R. 5**  
**Notes 6-7**

**7. Amendment of further particulars.** — A party having delivered particulars in an action cannot withdraw, add to, or amend, them without leave of Court.<sup>1</sup> As a rule, however, leave will be granted when the amendment will cause no injury to the opposite party, but the applicant will be ordered to pay the costs of his opponent in any event.<sup>2</sup>

**R. 6. [New.]** Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

**O. 6 R. 6**

Condition precedent.

[R. S. C., O. 19 R. 14.]

### *Synopsis*

**1. Scope of the Rule.**

**2. Specification, where necessary, must be distinct.**

**1. Scope of the Rule.** — This rule is new and is identical with O. 19 R. 14 of the Rules of the Supreme Court of England.

It is not necessary for a party to plead expressly the performance of a condition precedent. It will, under this rule, be implied in his pleading. It is for the other party, if he contends that there was a condition precedent and that it has not been duly performed, to say what that condition is and to plead its non-performance. Otherwise, its due performance will be presumed.<sup>1</sup> Thus, where a demand for payment to be made at Lloyd's Bank was a condition precedent, and it was not pleaded that such demand has been made, it was held that this rule applied.<sup>2</sup> Where there was a question of service on a lessee of the notice required by S. 14 of the Conveyancing Act (1881), it was held that the statement of claim must be read as if it contained an allegation that the plaintiffs had given the necessary notice before the commencement of the action.<sup>3</sup> See also the undermentioned cases.<sup>4</sup> If any party contests the performance of a

4. ('37) AIR 1937 Nag 376 (378) : I L R (1937) Nag 498. (Court offering defendant opportunity to make detailed statement under O. 6 R. 5 on payment of adjournment costs—Defendant refusing conditional offer — Formal amendment of plaint subsequently allowed — On such amendment, held no case for further pleadings arose and Court rightly refused to accept defendant's belated statement.)

#### **Note 7**

1. (1895) L R 2 Q B 148 (152), *Yorkshire Provident Life Assurance Co. v. Gilbert*.
2. (1884) 32 W R (Eng) 262, *Clarapode Co. v. Commercial Union Association*. (Leave may be granted at any stage.)

#### **Order 6 Rule 6 — Note 1**

1. ('24) AIR 1924 Pat 205 (206).  
[But see ('33) AIR 1933 Cal 632 (635) : 60 Cal 793. (AIR 1924 Pat 205, Distinguished.)]
2. (1914) 1 Ch 920(925), *Haris Calculating Machine Co., In re*.
3. (1920) 1 Ch 567 (570), *Gates v. Jacobs*. (Cited in AIR 1924 Pat 205.)
4. ('38) AIR 1938 Lah 96 (96). (Suit by firm — Plaintiff need not expressly note that firm is registered.)  
(('37) AIR 1937 Nag 345 (348, 350) : I L R (1938) Nag 308. (Suit by seller against buyer for failure to take delivery of goods—Objection that plaint did not contain averment as to readiness and

**O. 6 R. 6**  
**Notes 1-2**

condition precedent, then the other party must prove the performance of the condition.<sup>5</sup>

A condition precedent does not form *part* of the cause of action. It is some formality attached to the cause of action, until the performance of which the right of action is suspended. But, whenever a condition precedent goes to the root of the matter, it is proper and safer to allege performance of it in the plaint. For instance, in the case of a claim on a cheque, an allegation of notice of dishonour or of facts excusing such notice was held essential.<sup>6</sup>

The allegation contesting the performance of a condition precedent must not be vague or general but must be specific.<sup>7</sup>

**2. Specification, where necessary, must be distinct.** — Under the present rule an averment of the due performance of all conditions precedent is *implied* in every pleading and the opposite party must specify *distinctly* any conditions, the performance or occurrence of which he intends to contest.<sup>1</sup>

**O. 6 R. 7**

**R. 7. [New]** No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

[R. S. C., O. 19 R. 16. See Ss. 33 & 100; O. 3 Rr. 8 & 9; O. 41 R. 2.]

*Synopsis*

1. Scope and object of the Rule.
2. New ground of claim.
3. Inconsistent allegations.

**1. Scope and object of the Rule.** — It has been seen in Note 1 to Rule 1 *ante*, that the parties may, subsequent to the written statement of the defendant, file subsequent pleadings with the leave of the Court under the provisions of O. 8 R. 9, *infra*. It is at the stage of such subsequent pleadings that the provisions enacted in this rule against what is called "a departure in pleading" apply for the first time. A departure takes place when in any pleading the party deserts the ground that he took up in his preceding pleading and resorts to another and different ground. The object of this rule is to prevent such a "departure." A statement made by a party to the Court is in the nature of a supplementary pleading for the purposes of this rule.<sup>1</sup>

The provisions of this rule apply also to minors. Hence, when a guardian *ad litem* representing a minor defendant files a written statement and the minor

willingness — Objection held not fatal in the circumstances of the case.)

5. ('26) AIR 1926 Lah 318 (319); 7 Lah 442.

[See also ('02) 24 All 402 (413, 416, 419.)]

6. (1892) 61 L J Q B 717 (718), *Fruhauf v. Grosvenor*.

7. (1914) 1 Ch 920 (925), *Harris Calculating Machine Co., In re*.

carriage—It is not necessary for the plaintiff to expressly state in plaint that notice under S. 10 has been issued — Such averment is implied under O. 6 R. 6, O. P. C. — Defendants must raise plea of absence of notice—Defendants failing to do so — Onus is on them to show that they were not negligent.)

**Note 2**

1. ('88) AIR 1938 Rang 437 (438, 439). (Suit against persons alleged to be common carriers for loss and injury to goods entrusted to them for

**Order 6 Rule 7 — Note 1**

1. ('29) AIR 1929 Lah 165 (166).

('19) AIR 1919 Mad 471 (471). (New case set up by the defendant in his evidence.)

attains majority during the pendency of the suit, he cannot claim to file a fresh written statement so as to supersede that filed by his guardian *ad litem*.<sup>2</sup>

**O. 6 R. 7**  
**Notes 1-3**

**2. New ground of claim.** — Where a plaint is defective, it cannot be supplemented by a subsequent statement.<sup>1</sup> A claimed one-half of £500 alleging that B the defendant, had received it as trustee for himself and the plaintiff A in equal shares. B pleaded that he received only £311, half of which he paid into Court. A thereupon replied that B *ought to have* received the full £500, and that having wrongfully compromised with the debtor, is liable for half of £500. It was held that this was a new ground of claim which could not be allowed.<sup>2</sup>

**3. Inconsistent allegations.** — A party cannot in subsequent pleading make any allegation inconsistent with what he has alleged originally.<sup>1</sup> Thus, if a statement of claim (*i. e.*, plaint) alleges merely a negligent breach of trust, the reply must not assert that such breach of trust was fraudulent.<sup>2</sup> If such inconsistent allegations are made in a subsequent pleading without obtaining leave to amend, the Court will be justified in ignoring it, and the fact that a formal order rejecting it is not passed will not be a ground for remanding the case for retrial.<sup>3</sup> But where both parties understand the real point in issue and give evidence, the fact that a pleading subsequent to the plaint and the evidence is at variance with the original pleading is immaterial.<sup>4</sup>

## **R. 8. [New.]** Where a contract is alleged in any pleading,

**O. 6 R. 8**

**Denial of contract.**

a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

[R. S. C., O. 19 R. 20.]

**1. Denial of contract.** — Where the defendant disputes the legality or sufficiency in point of law of the contract set up by the plaintiff, he must plead specifically

(16) AIR 1916 Mad 903 (905).

(29) AIR 1929 Oudh 204 (206, 207).

(28) AIR 1928 Sind 103 (104) : 23 Sind L R 970. (Change of case at last moment without amendment—Disallowed.)

2. ('37) AIR 1937 Pat 625 (626). (AIR 1935 Mad 117, Relied on.)

### **Note 2**

1. ('02) 1902 All W N 35 (38).

[See ('36) AIR 1936 P C 27 (29) (P C). (It is *per se* *exempli* to admit a new head of claim without a proper amendment of pleadings.)]

2. (1876) 8 Ch D 254 (259), *Earp v. Henderson*.

### **Note 3**

1. (1851) 5 Moo Ind App 271 (290) (PC).

(32) AIR 1932 Pat 332 (333). (Court should not allow parties to make a new case at a late stage in the suit.)

(18) AIR 1918 Lah 186 (187).

(13) 18 Ind Cas 553 (554) (Lah).

(36) AIR 1936 Cal 465 (468).

(37) AIR 1937 Lah 795 (796).

[See ('37) AIR 1937 All 783 (785). (Partition suit — Plaintiff mentioning weight and value of ornaments listed with plaint—In such case, such mention cannot be considered conclusive or irrebuttable.)]

[See also ('39) AIR 1939 Sind 137 (142) : I L R (1939) Kar 330. (New defence raised which cuts at the root of proceedings and which does not arise from pleadings—Pleadings should be amended and proceedings conducted in fair and proper manner.)]

[But see ('13) 21 Ind Cas 81 (82) (All). (Inconsistency in the defence not considered.)]

2. (1892) 29 L R Ir. 364, *Kingston v. Corker*.

3. ('20) AIR 1920 Nag 147 (149).

4. ('14) AIR 1914 All 479 (481).

[See also ('36) AIR 1936 Posh 183 (184).]

**O. 6 R. 8  
Note 1**

the grounds of his objection ; it is not sufficient merely to traverse any allegation the plaintiff may have made.<sup>1</sup> Thus, where in a suit on a contract of mortgage the defendant denied the consideration for the mortgage, it was held that he could not at the trial contend that the mortgage was not *duly* attested, and was therefore invalid.<sup>2</sup> But no Court will enforce an *illegal contract*, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality ; it matters not whether the defendant has or has not pleaded the illegality.<sup>3</sup> The reason is that a Court will not assist a plaintiff where his own case discloses the illegality of the transaction.

**O. 6 R. 9**

**R. 9. [New.]** Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Effect of document to be stated.

[ R. S. C., O. 19 R. 21.]

### Synopsis

#### 1. Scope of the Rule.

#### 2. Precise words, when necessary.

**1. Scope of the Rule.** — Rule 2 of this Order provides that every pleading shall contain a statement in a concise form of the material facts on which the party pleading relies. Where such a material fact is mentioned in a *document*, it is sufficient under this rule to state the *effect* of the document as briefly as possible without setting out the whole or any part thereof. Thus, in an action brought by the devisee of land under a will, for the recovery of the land devised, it was held that it was not necessary to set out the precise words of the will.<sup>1</sup> A party is, however, bound to state the nature of the deeds on which he relies in deducing his title from the person under whom he claims.<sup>2</sup> It is not enough for him to say simply that by virtue of a certain deed he is entitled to the property claimed by him.<sup>3</sup>

**2. Precise words, when necessary.** — In an action for libel or slander the precise words complained of are material, and should always be set out *verbatim*.<sup>1</sup>

#### Order 6 Rule 8 — Note 1

1. ('32) AIR 1932 All 199 (202, 203) : 53 All 963. (Suit on unconditional acknowledgment—Limitation must be specifically pleaded in regard to the acknowledgment.)

[See also ('31) AIR 1931 All 229 (232). (Neither party raising the plea of wagering contract — Court not to go into it.)]

2. ('23) AIR 1923 Bom 90 (92) : 47 Bom 137. [See ('29) AIR 1929 Pat 422 (423) : 8 Pat 450.]

3. (1900) 2 Q B 214 (219), Godge v. Roynl Exchange Assurance Co. ('38) AIR 1938 Mad 187 (189). (This is based on the ground of public policy.)

('04) 27 All 266 (270, 271). (Facts showing illegality elicited in cross-examination of defendant by plaintiff's pleader.)

(1892) 2 Q B 724 (731, 732), Scott v. Brown.

#### Order 6 Rule 9 — Note 1

1. (1896) 1 Q B 554 (558), Darbyshire v. Leigh.

2. ('16) AIR 1916 Cal 658 (659).

3. (1878) 4 Q B D 127 (135, 136), Phillips v. Phillips.

#### Note 2

1. (1879) 4 C P D 125 (128, 129), Harris v. Wares. [See also (1882) 7 App Cas 741 (772), Capital and Counties Bank v. Henty.]



**R. 10.** [New.] Wherever it is material to allege malice, **O. 6 R. 10**  
 fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

[R. S. C., O. 19 R. 22. See Rr. 2 and 4 above.]

### Synopsis

- |                       |                         |
|-----------------------|-------------------------|
| 1. Scope of the Rule. | 3. Fraudulent intention |
| 2. Malice.            | 4. Knowledge.           |

**1. Scope of the Rule.** — The circumstances from which malice, fraudulent intention or other condition of the mind is to be inferred, constitute really the *evidence* in proof of such condition of mind, and need not therefore be pleaded, in accordance with the rule enacted in Rule 2 *ante* that only the material *facts* should be pleaded, but not the *evidence* by which they are to be proved. But, where a certain condition of mind such as insanity is relied on by a party for his claim or defence, he must allege it as a fact in his pleading and where he does not do so, and the fact of the existence of such state of mind is only brought out in the evidence, the Court should not act on such fact.<sup>1</sup>

**2. Malice.** — Where malice is a material ingredient of the plaintiff's case as being a necessary part of his cause of action, as in suit for damages for slander or malicious prosecution, it should be alleged specifically in the plaint.<sup>1</sup> Similarly, where a mistaken *bona fide* belief and good faith are the grounds for applying the rule of equitable subrogation, they must be distinctly alleged in the pleadings and proved.<sup>2</sup>

**3. Fraudulent intention.** — See O. 6 R. 4 Note 2 *ante*. Where there is fraud there is no room for the doctrine of acquiescence to operate which is only a form of estoppel.<sup>1</sup> As to the requisites of an acquiescence, see the undermentioned case.<sup>2</sup>

**4. Knowledge.** — If knowledge or the absence of it is a material factor in the case, it should be expressly alleged.<sup>1</sup> Thus, where insanity is set up as a defence to an action for breach of contract, it must be alleged and proved that, at the time of the contract, the plaintiff had knowledge of such insanity.<sup>2</sup>

#### Order 6 Rule 10 — Note 1

1. ('38) AIR 1938 Nag 204 (208). (Plea of insanity to avoid the effect of a deed — Circumstances from which insanity at the time of the execution of the deed is inferred need not be set out — But insanity must be alleged in the pleading.)

#### Note 2

1. ('04) 6 Bom L R 704 (720, 721).  
 ('01) 28 Cal 591 (593).  
 (1838) 5 B & Ad 588 (596), *Mitchell v. Jenkins*.  
 [See also (1881) 8 Q B D 167 (170), *Hicks v. Faulkner*.  
 ('07) 81 Bom 87 (45). (Suit for damages against Election Officer for refusal to receive nomination paper — Malice necessary to be alleged.)]  
 2. ('31) AIR 1931 Mad 110 (113).

#### Note 3

1. ('30) AIR 1930 Cal 678 (684).  
 2. ('30) AIR 1930 Oudh 235 (243).

#### Note 4

1. (1884) 13 Q B D 259 (261), *Griffiths v. London & St. Katherine Dock*. (Action of negligence by servant against his master for personal injury resulting from unsafe condition of the premises where the servant is employed — Knowledge of master and ignorance of servant must be alleged.)  
 (1896) 2 Q B 109 (111), *Osborne v. Checcquell*. (In a suit for damages on account of the biting of a dog, the owner's knowledge of its ferocious nature towards mankind must be alleged.)  
 2. (1892) 1 Q B 599 (603), *Imperial Loan Co. v. Stone*.

O. 6 R. 11

**R. 11.** [New.] Wherever it is material to allege notice**Notice.**

to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

[R. S. C., O. 19 R. 23. See S. 80.]

**1. Notice.** — Wherever the giving of a notice is a condition precedent to the exercise of the right of suit, the plaintiff must plead and prove that the notice had been given and the condition precedent fulfilled.<sup>1</sup>

O. 6 R. 12

**R. 12.** [New.] Whenever any contract or any relation**Implied contract,  
or relation.**

between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

[R. S. C., O. 19 R. 24.]

**1. Implied contract or relation.** — In an action brought on a contract, the contract and the breach thereof must be alleged and proved.<sup>1</sup> If the contract is an implied contract, the facts should be stated from which the plaintiff contends that a contract is to be implied. This rule enacts that where the contract is to be implied from a series of letters, or conversations or from a number of circumstances, such letters, conversations or circumstances need be referred generally and not in detail.

O. 6 R. 13

**R. 13.** [New.] Neither party need in any pleading allege**Presumptions of law.**

any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*e. g.*, consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

[R. S. C., O. 19 R. 25.]

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**Order 6 Rule 11 — Note 1****1.** ('24) AIR 1924 Nag 162 (163).**Order 6 Rule 12 — Note 1****1.** ('24) AIR 1924 All 449 (450) : 46 All 35. (Pre-emption suit.)

**1. Presumption of law.** — As to the presumption in the case of a bill of exchange, see Section 118 of the Negotiable Instruments Act (XXVI of 1881).

**O. 6 R. 13  
Note 1**

Where the plaintiff is or was in possession of any land, it is sufficient as against a wrongdoer, to aver possession only ; he need not set out his title as the same will be presumed, in accordance with the maxim *omnia præsumuntur contra spoliatores*—every presumption is made against a wrongdoer.<sup>1</sup>

**R. 14.** [Ss. 51, 115.] Every pleading shall be signed by the party and his pleader (if any): Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

**O. 6 R. 14**

[1877, S. 51 ; 1859, S. 27. See S. 2, cl. 20.]

### Synopsis

1. Pleading to be signed.
2. Signature by persons duly authorized.
3. Omission to sign pleadings — Effect.

### Other Topics (miscellaneous)

"Absence or other good cause." See Note 2.  
Duty of Court to see to signature of parties. See Note 1.  
Signature by mukhtear. See Note 2.

**1. Pleading to be signed.**—The object of requiring every pleading to be signed by the party is to prevent, as far as possible, disputes as to whether a suit was instituted with the plaintiff's knowledge and authority.<sup>1</sup> Judges are bound to see that the pleadings are signed properly.<sup>2</sup> In cases where the plaint contains allegations of fraud which must be false or true to the knowledge of the plaintiff, the defendant can insist on the plaintiff himself signing the plaint.<sup>3</sup> There is no difference between vakalats, affidavits and pleadings as to the procedure by which they can be signed.<sup>4</sup>

This rule is made applicable to proceedings under the undermentioned local Acts.<sup>5</sup>

**2. Signature by persons duly authorized.** — Under the corresponding Sections of the Codes of 1859 and 1877, there were no provisions for the signing and verification of the pleading by the authorized agent of the party, but it was held, by applying Section 36 of the Code of 1877 (now O. 3 R. 1), that an authorized agent could validly sign the pleading on behalf of the party.<sup>1</sup> In view of these decisions the

#### Order 6 Rule 13 — Note 1

1. 1 Sm LC (12th Edn.) 896, *Armory v. Delamirie*.

#### Order 6 Rule 14 — Note 1

1. ('25) AIR 1925 Sind 275 (278).
2. ('14) AIR 1914 Low Bur 198 (199).
3. ('87) 9 All 505 (507, 508).
4. ('28) AIR 1928 Mad 175 (176) : 51 Mad 242.
5. The Bengal Tenancy Act VIII of 1885, S. 143, clause (2).

The Orissa Tenancy Act II of 1913, Ss. 70 (2), 156 (2) and 211 (4).

The Bengal Drainage Act VI of 1880, S. 51 B, Sub-s. (3), cl. (g).

#### Note 2

1. ('79) 3 Cal L Rep 579 (580).
- ('80) 4 Bom 468 (471).
- ('79) 3 Cal L Rep 15 (16).
- ('66) 6 Suth W R 213 (215).

**O. 6 R. 14  
Notes 2-3**

Legislature expressly added a proviso in Section 51 of the Code of 1882 (now O. 6, R. 14), under which an authorized agent may validly sign a pleading under certain circumstances, namely, where the party pleading is by reason of *absence* or for *other good cause* unable to sign the pleading.<sup>2</sup> The absence must be of such a kind as makes it impossible for the party to sign the pleading, *e. g.*, absence on a sea cruise or a journey into unknown regions where communication is impracticable; the words "other good cause" are, however, of wider significance and leave the matter entirely to the discretion of the Court.<sup>3</sup>

The question as to when a person can be said to be duly authorized by the party depends upon the circumstances of each case.<sup>4</sup> A pleading signed by an unauthorized person is not valid;<sup>5</sup> but, in such a case, the Court may permit the party himself to sign it later,<sup>6</sup> or, if the person signing it is subsequently authorized, treat the original plaint itself as valid, provided there is no question of limitation.<sup>7</sup>

As to the signing and verification of pleadings in suits by or against corporations, see O. 29 R. 1 Note 8, and as to the signing and verification of pleadings in suits by or against firms, see O. 30 R. 1 Note 13.

**3. Omission to sign pleadings—Effect.** — An irregularity in the signature or verification of a plaint is a mere defect of *procedure*<sup>1</sup> and does not affect the *jurisdiction* of the Court.<sup>2</sup> An omission or mistake in the signature is not fatal to the suit but is capable of being cured by appropriate amendments.<sup>3</sup> In fact the proper course in such cases is not to dismiss the suit or reject the plaint but to get the plaint amended.<sup>4</sup> An

('66) 6 Suth W R Misc 59 (60).

2. ('03) 25 All 431 (435).

('91) 1891 All W N 152 (152).

('03) 16 C P L R 103 (105, 106).

('15) 81 Ind Cas 859 (859) (UPBR). (In so far as this decision holds that this rule is subject to O. 3, R. 1 it cannot be accepted, as correct. O. 3 R. 1 enacts that it applies only where there is no other provision to the contrary; this rule is a provision to the contrary in so far as the authorized agent can sign only under specified circumstances.)

('14) AIR 1914 Low Bur 173 (175). (Agent can sign amended plaint.)

3. ('08) 4 Nag L R 117 (118). ("Good cause" — Significance of the words pointed out.)  
[See also ('67) 7 Suth W R 168 (169).]

4. ('25) AIR 1925 Lah 144 (144). (Plaint signed by person instructed by plaintiff to sign.)

(1900) 24 Bom 238 (239). (Pleader duly appointed by the guardian of an infant may sign and verify on behalf of his client.)

('06) 10 Cal W N 841 (844). (Plaint signed by pleader generally acting for Government is valid.)

('11) 10 Ind Cas 141 (142) (Lah). (Company in foreign territory a party—Person specially authorised can sign.)

('02) 1902 Pun Re No. 41, p. 152. (Agent specially appointed on behalf of an independent prince.)  
[See ('39) AIR 1939 Nag 242 (244) : I L R (1939) Nag 515. (A mortgage suit brought by one of the two mortgagees but duly authorised by the other is competent. Plaint in such case if presented by the pleader of the litigating mortgagee is deemed to have been properly presented.)]

5. ('12) 16 Ind Cas 255 (256) (Cal). (Mukhtear cannot sign for the party though he may present plaint or written statement into Court.)

('94) 16 All 420 (423).

('99) 1899 Pun Re No. 5, p. 23. (Principal residing within jurisdiction — Agent cannot sue unless specially authorised.)

('03) 2 Low Bur Rul 41 (42, 43).

6. ('14) AIR 1914 Low Bur 191 (192, 193).

('22) AIR 1922 Bom 113 (113) : 46 Bom 150.

7. ('03) 25 All 635 (637).

**Note 3**

1. ('27) AIR 1927 All 514 (514, 515).

('18) AIR 1918 All 275 (276) : 40 All 147. (The proper signing of the plaint is a matter of practice.)

('28) AIR 1928 Pat 51 (53, 54).

('08) 4 Low Bur Rul 284 (286, 287). (Defect in signing the plaint—Defendant may waive objection.)

('25) AIR 1925 Sind 159 (163) : 19 Sind L R 286. (Authority to sue is a matter of principle but signing plaint is a matter of practice.)

('39) AIR 1939 Nag 242 (244) : I L R (1939) Nag 515.

2. ('31) AIR 1931 All 507 (512) : 54 All 57 (S B).  
('11) 10 Ind Cas 781 (782) (Nag).

('15) AIR 1915 Cal 444 (448).

3. ('17) AIR 1917 All 90 (91) : 39 All 843.

('25) AIR 1925 Mad 660 (663, 669). (Plaint signed by agent without leave—But leave subsequently obtained cures the defect.)

('12) 17 Ind Cas 580 (581) (Mad.)

('96) 6 Mad II Jour 213 (218). (Plaint initially presented without plaintiff's signature but later on presented with signature before time fixed by Court.)

4. ('98) 20 All 442 (445).

('96) 18 All 896 (899, 400). (If the defect is discovered in appeal, the Appellate Court may send

objection to such a defect, if not taken by the defendant at the earliest possible opportunity, cannot be allowed to be raised for the first time in appeal.<sup>5</sup> Where several persons institute a suit, it is not necessary that all should sign the plaint. It is sufficient that one of them signs the plaint with the other plaintiffs' *knowledge and authority*.<sup>6</sup> In *Mohini Mohan Das v. Bungsi Buddan Saha Das*, I. L. R. 17 Calcutta 580, their Lordships of the Privy Council said: "There is no rule providing that a person named as co-plaintiff is not to be treated as plaintiff unless he signs and verifies the plaint."

Where, however, the authority and knowledge of the plaintiffs not signing the plaint are not established, the institution of the plaint will not be valid.<sup>7</sup>

**O. 6 R. 14  
Note 8**

### Local Amendment

#### CALCUTTA

*Insert the following :*

"R. 14A. — Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in Rule 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by a verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat."

**O. 6 R. 14A  
(Calcutta)**

**R. 15.** [Ss. 51, 52, 115.] (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

**O. 6 R. 15**

**Verification  
of pleadings.**

(the plaint to the lower Court for amendment.)  
(11) 11 Ind Cas 842 (843) (Lah.). (Plaintiff omitted to sign the plaint but signed the verification.)  
(15) AIR 1915 Cal 444 (448).

[See ('37) AIR 1937 Pesh 17 (18). (The defect does not justify rejection of plaint—It is enough if party who has not signed puts in an application stating that he had given authority to his co-plaintiff.)]

[But see ('94) 1804 All W N 95 (95, 96). (Decision under S. 53 of old Code — Not good law after 18 All 896.)]

5. (1900) 22 All 55 (61, 64).

(07) 11 Cal W N 871 (872). (Written statement received by the Court and objected to by the plaintiff, though not signed and verified according to law.)

(20) AIR 1920 Pat 636 (638). (Petition under O. 21 R. 26 signed by karpardaz of the decree-holder.)

(96) 1896 Pun Re No. 48, p. 133. (Objection raised at a late stage.)

(29) AIR 1929 Mad 790 (791). (High Court will not ordinarily interfere in revision.)

(11) 10 Ind Cas 731 (732, 733) : 7 Nag L R 33.

(23) AIR 1923 Rang 206 (206) : 1 Rang 42. (S. 99, C. P. C., applies to such a case.)

6. ('32) AIR 1932 Sind 9 (10) : 26 Sind L R 167.

(24) AIR 1924 Pat 104 (106) : 3 Pat 67.

(37) AIR 1937 Pesh 17 (18).

[See ('39) AIR 1939 Nag 242 (244) : I L R (1939) Nag 515. (If it is found that a mortgage suit was duly authorised by non-signing mortgagee, the question whether his signature was made by him or by somebody else on his behalf becomes immaterial—17 Cal 580, Followed.)]

7. ('14) AIR 1914 Mad 430 (431).

**O. 6 R. 15**  
**Note 1**

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

[1877, Ss. 51, 52; 1859, S. 27.]

*Synopsis*

- |                                      |                                  |
|--------------------------------------|----------------------------------|
| 1. Scope and object of the Rule.     | 5. Omission to verify.           |
| 2. Who can verify pleadings.         | 6. Objection to verification.    |
| 3. Mode of verification.             | 7. Effect of false verification. |
| 4. Effect of defective verification. |                                  |

*Other Topics (miscellaneous)*

Courts' duty to see to verification. See Note 1.  
Pleadings of *pardanishin* ladies. See Note 1.

Verification in presence of Court. See Note 2.  
Verification is no evidence. See Note 1.

**1. Scope and object of the Rule.**—The object of verifying a pleading is to fix on the party verifying, responsibility for the statements that it contains.<sup>1</sup> The Court is bound to see in every case that the pleadings are verified in the manner prescribed and that the verifications are not treated as mere formalities.<sup>2</sup> In the case of *pardanishin* ladies, their pleadings will not be accepted as satisfactory proof of the contents thereof unless it is strictly proved that the pleadings were read out and explained to them.<sup>3</sup>

The verification of a pleading is not evidence of the facts contained in the pleading, and cannot form the basis for decree in an undefended suit.<sup>4</sup>

A contentious probate proceeding should, under Section 295 of the Succession Act (XXXIX of 1925), take the form of a suit, and should be verified by the parties.<sup>5</sup> But a petition presented by the Administrator-General under the Administrator-General's Act (III of 1913) need not, under the provisions of Section 29 of that Act, be verified by the Administrator-General.<sup>6</sup>

This rule is made applicable to proceedings under the undermentioned local Acts.<sup>7</sup>

**Order 6 Rule 15 — Note 1**

1. (1900) 22 All 55 (61).
- (17) AIR 1917 Cal 269 (272, 274) : 43 Cal 1001. (It gives authenticity to the pleadings.)
- (81) AIR 1931 Mad 679 (680). (Plaintiffs are responsible for the statements contained in their plaints.)
2. ('14) AIR 1914 Low Bur 198 (199).
- (80) AIR 1930 Nag 152 (152).
- (66) 6 Suth W R 213 (215).
3. ('16) AIR 1916 P C 27 (34) : 43 Ind App 212 : 19 Oudh Cas 192 : 38 All 627 (PC).
4. ('17) AIR 1917 Cal 269 (274) : 43 Cal 1001.
5. ('24) AIR 1924 Rang 273 (274). (Case under S. 88 of the Probate and Administration Act, 1881 corresponding to S. 295 of Succession Act

of 1925.)

6. ('93) 20 Cal 879 (880). (Case under S. 12 of Act II of 1874—Signature of the Administrator-General is enough verification.)
- (99) 26 Cal 404 (406). (Do.)
7. Section 51 B, Sub-section (8), cl. (g) of Bengal Drainage Act (VI of 1880).
- Section 4, cl. (1) of the Bengal Settled Estates Act (III of 1904).
- Section 143, cl. (2) of the Bengal Tenancy Act (VIII of 1885).
- Section 70, sub-s. (2), S. 156, sub-s. (2) and S. 211, sub-s. (4) of the Orissa Tenancy Act (II of 1913).
- Section 4 of the Puri Lodging House Act (Bengal Act IV of 1871).
- Section 15 (2), Oudh Rent Act (XXII of 1888).

**2. Who can verify pleadings.** — Under Section 28 of the Code of 1859, it was necessary to show, in order to enable a third person to verify the pleading, that the party himself was by reason of absence or other good cause, unable to sign the pleading.<sup>1</sup> Under this rule a pleading can be verified —

- (1) by the party, where there is only one party,
- (2) by one of the parties where there are several parties, and
- (3) by a third person who is proved to the satisfaction of the Court to be acquainted with the facts of the case.<sup>2</sup>

It is, however, open to the opposite party to insist on the party himself verifying the pleading in important cases, *e. g.*, where there are allegations of fraud or circumstances tending to affect any possible question of limitation, if particularly within the knowledge of the party,<sup>3</sup> or where there are allegations of a scandalous nature.<sup>4</sup>

The rule does not require that the verification of a plaint by a third person should be made in the presence of the Court; but having regard to the necessity of satisfying the Court that the person, other than the plaintiff, who verifies the plaint, is acquainted with the facts of the case, it is desirable that it should be made in the presence of the Court.<sup>5</sup>

**3. Mode of verification.** — Where a plaint contains averments of fact some of which are within the knowledge of the plaintiff and others which are made upon information which he believes to be true, as where, for example, the averments in first three paragraphs are made on his own knowledge, and the averments in paragraphs 4, 5 and 6 are made upon information and not on the knowledge of the plaintiff, the verification should be, as to averments of paragraphs 1, 2 and 3, that they are true to his knowledge, and as to paragraphs 4, 5 and 6, that they are made on information which he believes to be true. A verification in the form—"the contents of the plaint are true to the best of my knowledge and belief" is not in strict compliance with the Code though it substantially complies with it.<sup>1</sup> A verification is not faulty in form merely because it does not state the *source* of the information.<sup>2</sup>

**4. Effect of defective verification.** — A defect in verification is only an irregularity in procedure and will not be a ground for rejecting the plaint.<sup>1</sup> It can be

**Note 2**

1. ('66) 6 Suth W R Misc 59 (60).
- ('67) 7 Suth W R 168 (169).
- ('66) 5 Suth W R Misc 33 (34).
- (1862) 1862 Suth W R 54 (55) (FB).
- (1862) 1 Ind Jour (NS) 226. (When third party verifies, notice should be given to the opposite party.)
- (1865) 1 Ind Jour (NS) 39. (Do.)
2. ('90) 17 Cal 580 (582) (PC). (All the co-plaintiffs need not verify.)
- ('27) AIR 1927 Cal 778 (774).
- ('04) 26 All 154 (155). (General attorney of the decree-holder.)
- (1900) 24 Bom 238 (239). (Pleader of party.)
- ('08) 8 Cal L Jour 34 (37). (By the Collector and the Government pleader.)
- ('20) AIR 1920 Pat 686 (687, 688). (By karpardaz of decree-holder—Verification of application under Order 21 Rule 66.)
- ('03) 2 Low Bur Rul 41 (41, 42).
- ('22) 69 Ind Cas 422 (423, 424) (Pesh).

3. ('87) 9 All 505 (507, 508).

('82) 8 Cal 885 (887).

('75) 24 Suth W R 215 (215, 216). (Where plaint contained allegations of fraud and in particular set out circumstances tending to affect any possible question of limitation, such circumstances being peculiarly within the knowledge of the plaintiff, the plaint ought to have been verified by the plaintiff himself, and not by a servant.)

4. ('81) 6 Cal 268 (270).

5. ('80) 4 Bom 468 (471).

**Note 3**

1. ('06) 18 All 396 (398).

('92) 15 All 59 (60). (A verification in the form—"To the limit of my knowledge the purport of this is true" is not a verification that complies with this rule.)

('96) 1896 All W N 75 (75).

2. ('94) AIR 1994 Cal 632 (632).

**Note 4**

1. ('08) 25 All 635 (637).

**O. 6 R. 15**  
**Notes 4-7**

cured by amendment at any stage of the suit.<sup>2</sup> It is not a ground of interference in appeal under the provisions of Section 99 of the Code.<sup>3</sup> In the case of an application in *forma pauperis*, however, the rule is stricter. Under the provisions of O. 33 R. 5 of the Code it is provided that, where the application is not framed and verified properly, the Court *shall* reject the application.<sup>4</sup>

See also O. 6 R. 14, Note 3.

**5. Omission to verify.** — The want of verification does not have the effect of making the plaint void. It merely amounts to an irregularity. It does not affect the merits of the case, and can be rectified by permitting the party concerned to make good the deficiency by amending the pleadings under O. 6 R. 17 of the Code.<sup>1</sup> The amendment may be made even though the period of limitation may have expired on the date of verification.<sup>2</sup>

**6. Objection to verification.** — Objection to verification should be taken at the earliest possible opportunity and if not so taken, will be deemed to have been waived.<sup>1</sup>

**7. Effect of false verification.** — Pleadings, far from being mere formalities, are required by law to be true.<sup>1</sup> Verifications being made under the sanction of a solemn declaration, a false verification will render the party verifying, liable to a prosecution for an offence under Sections 191 and 193, Indian Penal Code.<sup>2</sup> But a petition not *required by law* to be verified cannot, if verified falsely, be made the basis of a criminal prosecution.<sup>3</sup> A false verification will not, however, entail the dismissal of the suit, especially if the defendant takes no objection thereto at the proper time.<sup>4</sup>

**O. 6 R. 16**

## R. 16. [New.] The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be

### Striking out pleadings.

- (‘05) 9 Cal W N 608 (610).  
 (‘68) 1 Beng L R (A C) 100 (103, 104).  
 (‘04) 1904 Pun Re No. 57, page 168.  
 (1864) Marsh 344 : 2 Hay 325.  
 [See also (‘37) AIR 1937 Pesh 17 (18).  
 (‘75) 24 Suth W R 71 (71). (False verification—  
 Suit not to be dismissed.)]  
 2. (‘27) AIR 1927 Cal 376 (377) : 54 Cal 880.  
 (‘98) 20 All 442 (445).  
 (‘15) AIR 1915 Cal 444 (447, 448).  
 (‘96) 1896 Pun Re No. 48, page 183.  
 (‘36) AIR 1936 Bom 418 (420); ILR (1937) Bom 85.  
 [See however (‘05) 2 Cal L Jour 11 (14). (Where  
 an issue is framed and it is found that the plaint  
 is not properly framed, the plaint cannot be re-  
 turned for amendment but must be removed  
 from the file.)]  
 3. (‘96) 18 All 396 (399, 400).  
 (‘01) 5 Cal W N 91 (98).  
 4. (‘12) 16 Ind Cas 83 (83) : 6 Low Bur Rul 117.  
 [See also (‘32) AIR 1932 Lah 328 (329). (Veri-  
 fication as to points of law not needed.)]  
**Note 5**  
 1. (‘32) AIR 1932 Lah 28 (29).  
 (‘31) AIR 1931 All 607 (612) : 54 All 57 (S B).  
 (Absence of verification does not affect juris-  
 diction.)  
 (‘25) AIR 1925 All 79 (80) : 46 All 687.

- (‘07) 11 Cal W N 871 (872). (Unverified written  
 statement taken on file — Objection cannot be  
 entertained in appeal.)  
 (‘70) 18 Suth W R 342 (342). (Unverified written  
 statement taken on file — Issues must be made  
 thereon.)  
 (‘68) 10 Suth W R 145 (147).  
 (‘80) AIR 1930 Lah 735 (735). (Remanded on  
 appeal for return for amendment.)  
 (‘12) 17 Ind Cas 580 (581) (Mad).  
 (‘98) 20 All 442 (445).  
 2. (‘26) AIR 1926 Lah 82 (82).

### Note 6

1. (‘75) 24 Suth W R 71 (71).

### Note 7

1. (‘14) AIR 1914 Low Bur 272 (273) : 7 Low Bur  
 Rul 257.  
 2. (‘14) AIR 1914 Cal 192 (104) : 19 Ind Cas 598  
 (1001) : 41 Cal 118 (SB).  
 (‘84) 6 All 626 (628).  
 (1862) 1862 Suth W R 54 (55) (FB).  
 [But see (‘30) AIR 1930 Cal 689 (640). (State-  
 ments in pleadings which are not strictly true  
 cannot form the basis of criminal prosecution.)]  
 3. (‘68) 9 Suth W R Cr 58 (61).  
 (‘81) 6 Cal 440 (444).  
 4. (‘75) 24 Suth W R 71 (71).



unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

O. 6 R. 16  
Notes 1-2

[R. S. C., O. 19 R. 27; *Cf.* 1882, S. 116. See O. 6 Rr. 2 and 17.]

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Scope and object of the Rule.</li> <li>2. "Unnecessary."</li> <li>3. "Scandalous."</li> <li>4. "Or which may tend to prejudice, embarrass or delay the fair trial."</li> </ol> | <ol style="list-style-type: none"> <li>5. Matter may be struck out or amended at any stage of the proceeding.</li> <li>6. Power of the Appellate Court to expunge such matters.</li> <li>7. Appeal.</li> </ol> |
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### Other Topics (miscellaneous)

At the instance of stranger. See Note 3.  
Court's power to strike out or amend pleadings. See Notes 1, 4 and 5.  
Dismissal of a suit—Appeal. See Note 4.  
Party's right to apply for order under the Rule. See Note 1.

Power of the High Court to expunge objectionable remarks in judgment of lower Courts. See Note 6.  
Revision. See Note 5.  
Striking out whole or part of the pleadings. See Notes 1 and 4.

**1. Scope and object of the Rule.** — Every party is entitled, *ex debito justitiæ*, to have the case against him presented in an intelligible form, so that he may not be embarrassed in meeting it.<sup>1</sup> This rule has been enacted to give effect to this principle. It enables a party to apply to strike out, or compel the amendment of, the whole or any part of his *opponent's* pleadings which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action.<sup>2</sup> The Court may also *suo motu* strike out or amend such matters in such manner and on such terms as it thinks just.<sup>3</sup> The power to strike out or compel amendment under this rule is a *discretionary* one,<sup>4</sup> but should be exercised with great care and caution.<sup>5</sup> It will be exercised only when some substantial objection to the pleading complained of, or some real embarrassment is shown.<sup>6</sup> Thus, a written statement ought not to be struck out unless it is clear beyond all reasonable doubt that the allegations in it are such as cannot afford a defence to the action, and which, if not struck out, would unnecessarily delay the suit.<sup>7</sup>

Where part only of the pleading is objectionable, that part will, as a rule, be struck out if it is severable from the rest,<sup>8</sup> but if it is not so severable, the whole pleading may be struck out.<sup>9</sup> The principle underlying this rule with its limitation is given expression to in *Knowles v. Roberts*, (1888) 38 Ch. D. 263, where it is said by Bowen, L. J. :

"It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right."

**2. "Unnecessary."** — As a rule a pleading or allegation will not be struck out under this rule merely because it is unnecessary, unless it is also *scandalous* or

### Order 6 Rule 16 — Note 1

1. (1878) 7 Ch D 478 (486), *Davy v. Garret*.
2. ('25) AIR 1925 Oudh 604 (605).
3. ('18) AIR 1918 Mad 681 (686) : 40 Mad 865.
4. (1876) 1 Q B D 374 (376), *Golding v. Wharton*.
5. ('25) AIR 1925 Cal 860 (861).
6. (1913) 2 Ch 464 (467), *Thornhill v. Weeks*.

7. ('25) AIR 1925 Cal 860 (861).
8. (1862) 1862 Suth W R 41 (45) (F B). (Plaint including already decided matters—Those matters alone to be struck out.)
9. (1878) 7 Ch D 478 (488, 490), *Davy v. Garret*. (1879) 12 Ch D 787 (792), *Williamson v. L. and N. W. Ry. Co.* (1876) 3 Ch D 376 (378), *Cashin v. Cradock*.

O. 6 R. 16  
Notes 2-3

*embarrassing.*<sup>1</sup> Merely unnecessary pleading without its being scandalous, or otherwise objectionable, will only affect the cost of the pleading.<sup>2</sup> But where the pleading in addition to its being unnecessary also attributes improper motives to the defendant,<sup>3</sup> or charges the defendant with dishonest conduct,<sup>4</sup> or makes it embarrassing for the defendant,<sup>5</sup> it will be ordered to be struck out. Where, however, a plaint<sup>6</sup> or a written statement<sup>7</sup> is unnecessarily prolix and verbose, or argumentative, or is full of matter which is wholly irrelevant or non-understandable, it can be dealt with under this rule.

**3. "Scandalous."** — A Court has a general jurisdiction to prevent any of its processes being used for the purpose of disseminating scandalous and irrelevant matter.<sup>1</sup> Where such matter is introduced in the pleadings, the Court may order the same to be expunged.<sup>2</sup>

Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous.<sup>3</sup> Very often, if allegations made are *unnecessary*, they will likewise be scandalous.<sup>4</sup> Thus, where a plaintiff alleges in his plaint dishonest conduct against the defendant, but no relief is sought on that ground, the allegations will be struck out as scandalous and embarrassing.<sup>5</sup> Where, in an action by a wife against her husband for rectification of her marriage settlement, a statement was made in the plaint that the plaintiff declined to live with the defendant on account of his having committed an assault on a young girl, the allegation was held to be scandalous and was ordered to be struck out.<sup>6</sup> Allegations as to partiality against the Judge, made in a memorandum of appeal, were expunged by the High Court in the undermentioned case.<sup>7</sup>

But a pleading or allegation which is alleged to be scandalous cannot be struck out, if it is *necessary* or *relevant* to the issue or one of the issues in the action.<sup>8</sup> Indeed a matter cannot be considered as scandalous at all, if it is *material* to the issue (*i. e.*, will affect the result of the action if proved to be true), however grave the imputations may be, whether of immorality or otherwise.<sup>9</sup> The Court will not, in an application to expunge or strike out allegations alleged to be scandalous, go into the question of their truth or falsehood. The only question is: are they *relevant* to the issues in the suit? If they are, they cannot be expunged.<sup>10</sup>

**Note 2**

1. (1888) 38 Ch D 263 (270, 271), Knowles v. Roberts.
- (1887) 84 L T Jour 45, Rock v. Purshell.  
[See also ('73) 10 Bom H C R 425 (428).]
2. (1885) 1 Times Rep 609, Wegmouth v. Rich.
3. (1897) 1 Ch 35 (36, 40), Murray v. Epson Board. (Suit against member of a public institution that he used his personal influence with the institution to the detriment of the plaintiff.)
4. (1886) 55 L T 343, Brookings v. Maudslay.
5. (1878) 7 Ch D 473 (486), Davy v. Garrett.
6. ('67) 8 Suth W R 295 (297, 298).  
(29) 114 Ind Cas 906 (907) (All).
7. ('67) 7 Suth W R 212 (213).  
(74) 12 Beng L R App 19 (20). (Plea of offer "without prejudice" irrelevant.)  
(69) 3 Beng L R App 12 (12).

**Note 3**

1. (1884) 54 L J Ch 205 (206), Re Miller. (Certain parts of the bill of costs were ordered to be expunged.)
- (91) 15 Bom 468 (490, 491). (Application for bail — Defamatory allegations against the trying

Magistrate were ordered to be struck out.)

2. ('09) 4 Ind Cas 380 (381) (Cal).
- (1879) 11 Ch D 1 (13), Cracknall v. Janson. (Even when the Court's attention to the existence of the scandalous matter is drawn by a stranger to the suit.)
- Story's Equity Pleadings, 10th Edn. S. 270. (Even though the point is raised by a stranger.)
3. (1873) 8 Ch 499 (504), Christie v. Christie.  
(09) 14 Cal W N 153 (156).
4. (1886) 55 L T 343, Brookings v. Maudslay.  
(09) 14 Cal W N 153 (157).
- (1879) 40 L T 455, Coyle v. Cumming.
5. (1886) 55 L T 343, Brookings v. Maudslay.
6. (1879) 40 L T 455, Coyle v. Cumming.
7. ('99) 22 Mad 155 (160).
8. (1873) 8 Ch 499 (504), Christie v. Christie.  
(1879) 11 Ch D 1 (13), Cracknall v. Janson.
9. (1880) 6 Q B D 190 (196), Millington v. Long.  
(1878) 8 Ch D 645 (653), Fisher v. Owen. ("Nothing can be scandalous which is relevant" — Per Cotton, L. J.)
10. (1878) 8 Ch 499 (508), Christie v. Christie.  
(09) 4 Ind Cas 380 (381) (Cal).

**4. "Or which may tend to prejudice, embarrass or delay the fair trial." —**

The question whether a pleading is embarrassing is, in each case, a question for the Judge to decide in view of the facts and circumstances of the particular case.<sup>1</sup> "The rule that the Court is not to dictate to the parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to the modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law and if a party introduces a pleading which is unnecessary, and it tends to *prejudice, embarrass* and delay the trial of the action, it then becomes a pleading which is beyond his right."<sup>2</sup> A claim or defence which a party is not entitled to make use of,<sup>3</sup> or a pleading which is ambiguous or unintelligible,<sup>4</sup> or a pleading which contains unnecessary or irrelevant allegations,<sup>5</sup> is embarrassing and may be struck out. But a pleading cannot be struck out as irrelevant unless the irrelevancy is quite clear.<sup>6</sup> Nor is a pleading necessarily embarrassing merely because of the fact that it states *inconsistent* or *alternative allegations*.<sup>7</sup> Where the plaint was verbose, extremely long, involved and impossible to understand, and did not raise any fact which would show that the Judge had jurisdiction to hear the case, it was held by the High Court of Allahabad<sup>8</sup> that the proper course was to strike out the plaint under this rule or to make an order for its amendment. Similarly, where particulars are called for from a defendant under O. 6 R. 5 and he fails to comply with the order, the defence may be struck out under this rule, if without the particulars his pleading is obscure, incomplete and embarrassing.<sup>9</sup>

This rule applies to a pleading which tends to prejudice or embarrass or delay a party at the *actual trial* of the suit as well as one which tends to embarrass him at any stage of the action.<sup>10</sup>

**5. Matter may be struck out or amended at any stage of the proceeding.—**

The rule empowers the Court to strike out or compel the amendment of any pleading at any stage of the proceeding.<sup>1</sup> But the rule being discretionary, the Court may refuse to exercise its power unless the application is made at the earliest opportunity.<sup>2</sup> An objection under this rule is no ground for interference when the point is taken for the first time in appeal.<sup>3</sup>

**Note 4**

1. (1918) 2 K B 200n (206n), *Russell v. Stubbs*. (Per Lord Halsbury.)
2. (1888) 38 Ch D 263 (270, 271), *Knowles v. Roberts*. (Per Bowen, L. J.)
- (17) AIR 1917 Oudh 389 (389, 390).
- [See also (18) AIR 1918 Oudh 468 (464): 20 Oudh Cas 192. (Appeal against dismissal of suit under this rule allowed.)]
3. (1877) 25 W R (Eng) 742, *Heugh v. Chamberlain*.
- (1888) 38 Ch D 263 (269), *Knowles v. Roberts*. (Claim which a plaintiff is not entitled to raise.)
- (1876) 1 Ex D 361 (363), *Preston v. Lamont*. (Defence which a defendant is not entitled to make.)
4. (1878) 7 Ch D 473 (486), *Davy v. Garrett*.
- (10) 7 Ind Cas 166 (169) (Cal).
- (1884) 49 L T 772, *Lumb v. Beaumont*.
5. (1898) 1 Q B D 571 (575, 576), *Rassam v. Budge*.
- (73) 10 Bom H C R 425 (428).
6. (1914) 111 L T 512 (514), *London Corporation v. Hornex*. (Per Pickford, L. J. — Striking out

allegations from a defence—Irrelevancy must be apparent at the first glance.)

- (1887) 57 L T 358, *Tomkinson v. S. E. Ry. Co.*
7. (1887) 35 Ch D 492 (500), *In re Morgan; Owen v. Morgan*.
- (1878) 7 Ch D 473 (489), *Davy v. Garrett*.
- (10) 7 Ind Cas 166 (169) (Cal).
- (1877) 5 Ch D 695 (701), *Child v. Stenning*.
- (82) 8 Cal 170 (173).
8. (29) 114 Ind Cas 906 (907) (All).
9. (30) AIR 1930 Mad 473 (475, 476); 53 Mad 645. [See also (32) AIR 1932 All 467 (467). (General charge of immorality against Hindu father in an alienation suit struck off.)]
10. (1878) 3 Ex D 251 (256), *Berdan v. Greenwood*.

**Note 5**

1. (18) AIR 1918 Oudh 463 (464): 20 Oudh Cas 192.
- (17) AIR 1917 Oudh 389 (389, 390). (Revision against order to elect out of two inconsistent allegations—Allowed.)
2. (85) 9 Bom 373 (381).
3. (17) AIR 1917 Mad 954 (955). (Objection as to alternative pleas cannot be taken for the first time in appeal.)

**O. 6 R. 16**  
**Notes 6-7**

**6. Power of the Appellate Court to expunge such matters.**—The Appellate Court has power to return the memorandum of appeal where it contains allegations of partiality against the Judge whose decree is in question, and order the objectionable portion to be expunged.<sup>1</sup>

The High Court has power to expunge remarks appearing in the judgment of the lower Court, but the power will be exercised only in extraordinary cases, such as when the observations are pointedly seditious, blasphemous or irrelevantly scandalous.<sup>2</sup> Where a Subordinate Judge, while allowing amendment of a Devasthanam Scheme, remarked against a trustee that he "did not care a brass farthing for Devasthanam," it was held that it was not a fit case for the High Court to exercise the power of expunging the remarks.<sup>3</sup>

**7. Appeal.**—An order under this rule is not appealable either under Section 104 or O. 43 R. 1. Nor is the order a "judgment" within the meaning of Clause 15 of the Letters Patent so as to be appealable thereunder.<sup>1</sup>

**O. 6 R. 17**

**R. 17.** [*Cf.* S. 53.] The Court may at any stage of the proceedings<sup>13</sup> allow either party<sup>17</sup> to alter or amend<sup>2</sup> his pleadings in such manner<sup>18</sup> and on such terms as may be just,<sup>15</sup> and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy<sup>11</sup> between the parties.

[*Cf.* 1877, S. 53; 1859, S. 29; R. S. C., O. 28 R. 1. See Ss. 152, 153, O. 1 R. 10; O. 6 Rr. 2, 7, 16 and 18.]

### *Synopsis*

1. Scope of the Rule.
2. The Court may allow either party to alter or amend—Discretion of Court.
3. Amendment of plaint introducing new case.
4. Amendment introducing new case in written statement.
5. Amendment taking away right accrued to a party by lapse of time.
6. Amendment not to be allowed when it places the opposite party in a position which cannot be compensated by costs.
7. Amendment to be refused when the application is not in good faith.

8. Amendment by adding or substituting a new plea of fraud.
9. Amendment by adding new reliefs or claims.
10. Amendment by adding a new ground of relief.
11. "As may be necessary for the purpose of determining the real questions in controversy."
12. Amendment by introducing new cause of action.
13. "At any stage of the proceedings."
14. Opportunity to be given to the opposite party to amend his pleading.

('80) AIR 1980 Mad 814 (815, 816). (Plea raised in second appeal that trial is vitiated by inconsistent defences in written statement.)  
[See also (1876) 1 Q B D 374 (375, 376), *Golding v. Wharton Salt Works*. (The discretion of the trial Judge will not be ordinarily interfered with in appeal.)]

#### **Note 6**

1. ('99) 23 Mad 155 (158, 161).
2. ('17) AIR 1917 Mad 228 (224).

('83) AIR 1938 Lah 711 (712). (Remarks in judgment casting slur on Government department.)  
[See ('89) AIR 1988 Lah 678 (680). (Court giving finding on merits although holding that it has no jurisdiction to try suit—High Court cannot expunge finding but may declare it not binding on parties.)]

3. ('17) AIR 1917 Mad 228 (224).

#### **Note 7**

1. ('26) AIR 1926 Mad 64 (64).

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| 15. "On such terms as may be just."   | 18. Extent of amendment.                |
| 16. How amendments should be made.  | 19. Effect of amendment and limitation. |
| 16a. Court not having jurisdiction over suit if<br>can allow amendment of plaint. | 20. Appeal.                             |
| 17. Who can apply for amendment.  | 21. Revision.                           |

*Other Topics (miscellaneous)*

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|---|---|
| Amendment based on barred claim. See Note 5.                          | Amendment by Appellate Courts. See Note 18.                         |
| Amendment by fresh plaint. See Note 3.                                | Amendment on payment of costs. See Note 15.                         |
| Amendment by proper Court. See Note 13.                               | General principles relating to amendments. See<br>Notes 1, 2 and 3. |
| Amendment — When in the discretion of Court.<br>See Notes 1 and 2.    | Merely technical amendments. See Note 11.                           |
| Amendment wholly non-suiting plaintiff. See<br>Note 4.                | Suits for specific performance or damages. See<br>Notes 3 and 9.    |
| Amendment based on subsequent cause of action.<br>See Notes 9 and 12. | Useless and immaterial amendments. See Note 11.                     |

**1. Scope of the Rule.** — Section 53 of the old Code which dealt with amendment, return and rejection of the plaint ran as follows :

"The plaint may, at the discretion of the Court, —

- (a) at, or any time before, the settlement of issues, be rejected, if it does not disclose a cause of action ;
- (b) at, or any time before, the settlement of issues be returned for amendment within a time to be fixed by the Court, and upon terms as to the payment of costs occasioned by such amendment as the Court thinks fit, if it —
  - (i) is not signed and verified as hereinbefore required,
  - (ii) does not state correctly and without prolixity the several particulars hereinbefore required, or contains particulars other than those so required,
  - (iii) is wrongly framed by reason of non-joinder or misjoinder of parties, or joins causes of action which ought not to be joined in the same suit, or
  - (iv) is not framed in accordance with the provisions of Section 42 ;
- (c) at any time before judgment, be amended by the Court upon such terms as to the payment of costs as the Court thinks fit :

Provided that a plaint shall not be amended either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character.

When a plaint is amended under this Section, the amendment shall be attested by the signature of the Judge."

The amendment of proceedings in Courts have been dealt with under this Code in various parts thereof —

1. Section 152 deals with amendments of *judgments, decrees and orders*.
2. Section 153 confers a general power on the Court to amend any defect or error in *any proceeding in a suit*.
3. Order 1 Rule 10 provides for the amendment of a plaint by striking off or adding *parties* to a suit.
4. Order 6 Rule 16 deals with the compulsory amendment of the *opponent's* pleading.
5. The present rule deals with the amendment, with the leave of the Court, by a party of his *own* pleading.

**O. 6 R. 17**  
**Note 1**

6. Order 14 Rule 5 deals with the amendment of the issues framed in the case.

It will be seen from a comparison of Section 53 of the old Code with the present rule, that the latter is very much wider in terms than the old Section. It consists of two parts —

- (a) the Court *may*, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just ; and
- (b) all such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties *shall* be made.

In dealing with the analogous provision as to amendment of issues, namely, O. 14 R. 5, their Lordships of the Privy Council observed that the first portion of that rule left the matter of amendment of issues entirely to the discretion of the Court, while the second portion made it imperative on the Court to make all such amendments as may be necessary for the purpose of determining the real matter in controversy between the parties.<sup>1</sup> This duty has, however, been interpreted to be only a *rule of conduct*, which is subject to the inherent power of the Court to prevent injustice and abuse of process of the Court.<sup>2</sup> In a case under the corresponding English Rule (O. 28 R. 1), Lord Esher said :

"A rule has been enunciated by the Court which is rather a rule of conduct than a rule of rigid law such as can never be departed from ; because I take it that the Court might depart from it, if there were very exceptional circumstances in any particular case leading the Court to think that it would not be right to apply it. It is nevertheless, a rule of conduct which must generally be followed."<sup>3</sup>

The object of the rule is that Courts should get at and try the *merits* of the cases that come before them, and should consequently allow all amendments that may be necessary for the purpose of determining the real question in controversy between the parties, provided it can be done without causing *injustice* to the other side. In *Cropper v. Smith*,<sup>4</sup> Bowen, L. J., observed as follows :

"It is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights . . . . . I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace . . . . . It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, *if it can be done without injustice*, as anything else in the case is a matter of right."

The provisions of this rule also apply to the trial of cases before the Sikh Gurdwaras Tribunal under the Sikh Gurdwaras Act (VIII of 1925),<sup>5</sup> to cases before a Subordinate Judge deciding a dispute under the Madras District Municipal Election Rules,<sup>6</sup> and to all suits, appeals and proceedings before the Deputy Commissioner and to all appeals from decisions therein, under the Chota Nagpur Tenancy Act.<sup>7</sup>

This rule is not exhaustive of the powers of the Court as regards amendment

**Order 6 Rule 17 — Note 1**

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| 1. ('12) 16 Ind Cas 250 (252) : 85 Mad 607 : 89 Ind App 218 (P C).                                 | Sind 40.)                                    |
| 2. ('14) AIR 1914 Sind 40 (41) : 8 Sind L R 28.  | 4. ('84) 26 Ch D 700 (710; 711).             |
| 3. (1886) 16 Q B D 556 (558), <i>Steward v. North Metropolitan Tramways Co.</i> (Cited in AIR 1914 | 5. ('28) AIR 1928 Lah 825 (837) : 9 Lah 649. |
|  | 6. ('26) AIR 1926 Mad 1048 (1048).           |
|  | 7. See S. 265 (8), Bengal Act VI of 1908.    |

and hence, though the rule only refers to *pleadings* the Court has also power to allow the amendment of *applications*.<sup>9</sup>

Section 5 of the Provincial Insolvency Act renders the provisions of this rule applicable to proceedings under the Act<sup>9</sup> and a petition in insolvency can be amended under this rule.<sup>10</sup>

**2. The Court may allow either party to alter or amend — Discretion of Court.** — As has been noticed in the above Note, the amendment of pleadings is in the discretion of the Court. Under Section 53 of the old Code, the discretion was somewhat limited as to the time and the extent of the amendment allowable. But this rule confers a very wide discretion on the Courts in the matter of amendment of pleadings.<sup>1</sup> The discretion must, however, be exercised on *judicial principles* and not in an arbitrary, vague or fanciful manner,<sup>2</sup> or so as to cause *injustice* to the opposite side. The main considerations to be borne in mind in exercising the discretion are that the rules of procedure have no other aim than to facilitate the task of administering justice,<sup>3</sup> that multiplicity of suits should be avoided<sup>4</sup> and that the interests of substantial justice should be advanced.<sup>5</sup> Thus, a Court should allow the amendment of a pleading where there has been a clerical error, or a *bona fide* wrong description of property or where there has been a mistake of law or fact,<sup>6</sup> provided there is no

**O. 6 R. 17**  
**Notes 1-2**

8. ('38) AIR 1938 Pat 209 (210). (A Court has jurisdiction to allow an amendment of an application for leave to sue in *forma pauperis*, by including an item of property which was originally omitted from the application or annexure thereto.)

9. ('35) AIR 1935 Mad 202 (203). (Where the words "with intent to defeat and delay his creditors" were omitted but the act of insolvency was clearly set out, *held*, that there being a formal defect arising from the omission of certain words, the amendment to include those words should be allowed: (1897) 1 Q B D 394, *Weldon v. Neal*, Rel. on.)

10. ('38) AIR 1938 Mad 53 (55).

('35) AIR 1935 Mad 202 (203).

#### Note 2

1. ('25) AIR 1925 Oudh 692 (698).

('26) AIR 1926 All 672 (672). (Amendment before trial to cure a defect in the pleading or to bring a matter more clearly before the Court or to include some matter which the client did not inform his pleader ought to be allowed.)

('10) 5 Ind Cas 532 (535): 37 Cal 399. (*Mukhtearnama* without the name of the mukhtear in an execution application—Defect can be remedied by amendment.)

('19) AIR 1919 Lah 217 (217).

('11) 12 Ind Cas 104 (105) (Mad).

('30) AIR 1930 Nag 295 (296): 27 Nag L R 226.

('16) AIR 1916 Low Bur 71 (72): 8 Low Bur Rul 418. (O. 6 R. 17 is in more general terms than the old S. 53 of the Code of 1882.)

('38) AIR 1938 Lah 270 (272).

('35) AIR 1935 Mad 286 (287).

('37) AIR 1937 Oudh 484 (487): 13 Luck 584.

[See ('36) AIR 1936 Pat 140 (142). (Where a Court finds that the frame of a suit is defective it should give the plaintiff an opportunity of putting his pleadings in order—AIR 1930 Bom 216, *Followed*.)]

2. See Note 6 to Preamble.

('11) 11 Ind Cas 481 (491) (Cal).

('84) 7 All 79 (83) (FB).

3. ('28) AIR 1928 Oudh 305 (306).

('33) AIR 1933 Cal 271 (273, 274).

('36) AIR 1936 Pat 140 (142).

4. ('18) AIR 1918 Mad 316 (316).

('81) 5 Bom 181 (183). (Additional court-fee collected on the excess claim covered by amendment of plaint.)

('81) 5 Bom 609 (613, 614). (Party should not be put to the expense of a new suit if it can be avoided.)

('72) 9 Bom H C R 1 (6) (FB).

('98) 25 Cal 371 (390). (As far as possible all matters in dispute between the same parties should be decided in the same suit.)

('66) 11 Moo Ind App 468 (486) (PC). (Money bond executed by A—Suit against A and B for combining to get A's estate illegally transferred—Plaint was amended to recover money against A alone.)

('19) AIR 1919 Cal 904 (907): 45 Cal 305.

('37) AIR 1937 Oudh 484 (487): 13 Luck 584.

('35) AIR 1935 Mad 286 (287).

5. ('18) AIR 1911 Mad 316 (316).

('22) AIR 1922 Cal 203 (215).

(1857) 6 Moo Ind App 393 (411) (P C). (Substance and not the mere wording of the issues should be regarded.)

('30) AIR 1930 Bom 249 (250).

('37) AIR 1937 Oudh 484 (487): 13 Luck 584.

(The main consideration to be borne in mind while allowing amendment of pleadings are the advancement of the interest of substantial justice and the avoidance of the multiplicity of litigation.)

6. ('28) AIR 1928 Nag 182 (186): 19 Nag L R 36. (*Vakalatnama* not bearing pleader's name.)

('25) AIR 1925 All 538 (589). (Wrong provision of law quoted in the plaint.)



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**Notes 2-8**

injustice to the other side which cannot be compensated by the award of costs.<sup>7</sup> It has been held that the Court can only *allow* the amendment of a plaint but not amend a plaint itself or direct its amendment.<sup>8</sup> Nor can a Court compel a plaintiff to change the character of his suit.<sup>9</sup>

**3. Amendment of plaint introducing new case.** — Under Section 53 of the old Code, the rule as to amendments was more rigid and restricted than it is under the present Code. It was specifically provided by the proviso to that Section that no amendment could be allowed which converted a suit of *one character* into a *suit of another and inconsistent character*.<sup>1</sup> Thus, in the following classes of cases it was held that the amendment prayed for altered the character of the suit and was consequently disallowed —

Suit against the defendant on the basis of his being a trespasser: amendment into a suit for rent based on a subsisting tenancy.<sup>2</sup> Suit for rent on the basis of tenancy: amendment into a suit for damages for use and occupation.<sup>3</sup> Suit based on one ground of claim: amendment into a suit based on another ground of claim.<sup>4</sup> Suit

('32) AIR 1932 Bom 367 (370). (Unauthorized munim signing plaint—Plaintiff allowed to sign later.)

('31) AIR 1931 Cal 770 (771). (Sole proprietor filing suit in firm name—Objection to form of suit—Amendment to remedy the defect allowed.)

('74) 21 Suth W R 208 (209) (FB). (Omission of an alternative claim by mistake.)

('19) AIR 1919 Lah 317 (318). (Mistaken identity as to lands claimed in a pre-emption suit.)

('18) AIR 1918 Lah 6 (8). (Pleader making wrong statement as a result of mis-information.)

('14) AIR 1914 Lah 56 (59) : 25 Ind Cas 68 (71) : 1915 Pun Re No. 18. (Non-inclusion of certain property in the plaint.)

('28) AIR 1928 Nag 203 (205). (Bona fide mistake whether of law or fact — Following AIR 1924 Rang 249.)

('25) AIR 1925 Oudh 718 (719). (Omission of word due to inadvertence.)

('16) 32 Ind Cas 512 (512) (U P B R). (A clerical error as to the number of the plot in an ejectment suit.)

('11) 11 Ind Cas 827 (828) (Rang). (A clerical error in arithmetical calculation in the plaint.)

[See also ('87) AIR 1937 Pat 526 (527). (Suit instituted wrongly in name of firm by mistake — Provisions of Partnership Act should not be too rigidly enforced — Amendment of plaint should be allowed even at late stage.)

7. See Note 5 below.

('83) AIR 1933 Lah 245 (246) : 33 Pun L R 694 (695).

('37) AIR 1937 Rang 418 (416).

8. ('29) AIR 1929 Lah 820 (821).

('39) AIR 1939 Lah 172 (173).

[See ('86) AIR 1936 Pat 40 (40). (If a judgment or order is made which is not entirely in conformity with the pleadings, the party in whose favour the judgment is pronounced should be called upon to amend his pleadings.)]

9. ('80) AIR 1930 Cal 42 (46) : 57 Cal 349.

('89) AIR 1939 Lah 172 (173). (Where the plaintiff bases his claim for possession on his title and defendant alleges adverse possession, it is

not open to the Court to compel the plaintiff to amend the plaint so as to allege possession and dispossession.)

('38) AIR 1938 Mad 645 (646). (Where a plaintiff asks for a mere declaration that certain decree is not binding on him, it is not right for a Court to say that the allegations in the plaint do not show that the plaintiff was not a party to a suit in question and so he is bound to sue for cancellation of the decree.)

**Note 3**

1. ('72) 19 Suth W R 12 (14) : Ind App Sup Vol 131 (PC). (New case will not be allowed to be set up.)

('87) 9 All 188 (191). (Plaint not to be returned for amendment if amendment will convert that suit into one of different character.)

(1868) 2 Ind Jur (N S) 118.

('09) 2 Ind Cas 146 (148) : 34 Bom 244. (After arguments in appeal.)

('89) 7 Bom 155 (160, 161).

('06) 33 Cal 657 (661). (Amendment of a technical character was allowed.)

('06) 33 Cal 511 (530).

(1864) Marsh 70. (Suit on document—Document found not to be genuine—New case not to be allowed.)

('98-1900) 1898-1900 Low Bur Rul 518.

2. ('89) 13 Bom 664 (668).

3. ('99) 27 Cal 289 (242).

('95) 22 Cal 752 (756).

[But see ('09) 2 Ind Cas 920 (921) : 12 Oudh Cas 140.

('09) 3 Ind Cas 346 (349) (Cal).]

4. ('70) 2 N W P H O R 407 (408). (Claim based on gift by will; claim based on inheritance.)

('88) 5 All 456 (459).

('87) 12 Bom 431 (434).

('95) 22 Cal 562 (565). (Suit on basis of plaintiff being in permissive possession—Amendment on basis of his being full owner.)

('09) 2 Ind Cas 241 (242) : 5 Nag L R 67. (Suit on the basis that the property belonged to the plaintiffs—Change into a suit on the allegation



to establish right of ownership: amendment into claim for an easement.<sup>5</sup> Suit based on one title: amendment into claim based on another title.<sup>6</sup> Suit alleging one kind of fraud: amendment into a claim based on another kind of fraud.<sup>7</sup> Suit for rent: amendment into suit for possession<sup>8</sup> or for a declaration of title.<sup>9</sup> Suit based on letting and hiring: amendment into suit based on the relationship of principal and agent.<sup>10</sup> Suit based on the invalidity of a transaction: amendment into one based on the validity thereof.<sup>11</sup> Suit for share of property on the basis of non-division: amendment into claim for partition.<sup>12</sup> Suit for possession: amendment into claim for resumption.<sup>13</sup> Suit for ejectment on the ground of tenant holding over: amendment into claim for partition.<sup>14</sup> Suit on the basis of a contract: amendment of claim on the basis of tort.<sup>15</sup> Suit based on a plea of transfer of property: amendment into a plea of contract to transfer property.<sup>16</sup> See also the undermentioned cases.<sup>17</sup>

As has been seen in Note 2 above, the powers of amendment under the present Code are much wider than they were under the old Code. The proviso in the old Section that no amendment could be allowed which changed the character of the suit has been omitted<sup>18</sup> and a new provision has been introduced by O. 6 R. 17 which implies that even an amendment introducing a new ground of claim or an allegation of fact inconsistent with the original pleading may be allowed in proper cases.

#### Illustrations

1. *A* sues *B* for the recovery of the sum of money due on settlement of accounts of a dissolved partnership. He subsequently applies to amend his plaint by substituting a claim *for accounts*, of a dissolved partnership. Here the amendment clearly effects a change in the character of the suit, but the Court is not powerless, as it was under the old Code, to allow the amendment.<sup>19</sup>

that the property was found to be public property.)

5. See the following cases:

(1864) 2 Bom H C R A C 176 (178). (Claim to establish right of ownership overland—Claim to easement over same not to be decreed unless claimed alternatively.)

(‘07) 84 Cal 51 (58) (F.B.). (Do. — There is no harm in claiming the relief in the alternative.)

(‘78) 2 All 669 (670, 671).

6. (‘72) 18 Suth W R 274 (274). (Claim as owner of whole property by purchase from *A*; claim as heir or as joint purchaser with him.)

(‘72) 19 Suth W R 12 (14): Ind App Sup Vol 181 (PC).

(‘70) 12 Suth W R 487 (488). (Claim as heir of *N*; claim as heir of *J*.)

7. (‘87) 11 Bom 620 (638): 14 Ind App 111 (PC). [See (‘16) AIR 1916 Cal 120 (123). (Two distinct theories of fraud set up in the plaint and at trial.)]

8. (‘95) 19 Bom 303 (307).

9. (‘95) 19 Bom 303 (307).

10. (‘80) 5 Cal 602 (605).

11. (‘07) 84 Cal 372 (379). (Suit for setting aside mortgage deed into one for redemption.)

(‘83) 7 Bom 155 (161). (Original claim based on invalidity of a will—Claim by amendment based on validity not allowed.)

[See (‘10) 8 Ind Cas 98 (101) (Bom).]

12. (‘94) 18 Bom 611 (618).

13. (‘66) 6 Suth W R 211 (213).

14. (‘86) 10 Bom 451 (452).

15. (‘98) 20 Cal 805 (808). (Alteration in the

relief does not alter the character of a suit.)

(‘68) 9 Suth W R 206 (209).

16. (‘01) 24 Mad 377 (385): 28 Ind App 46 (PC).

17. (‘78) 1 All 591 (592). (Suit for pre-emption—Plaintiff not alleging in plaint he was ready and willing to pay the price found to be true by the Court—On date of final disposal seeking to so amend his plaint—Court not bound to allow the amendment.)

(‘09) 4 Ind Cas 837 (839): 94 Bom 515. (Suit for dissolution of partnership—Suit for specific item.)

(‘01) 25 Bom 337 (349, 350): 27 Ind App 216 (PC).

(Suit for redemption cannot be amended into a suit for setting aside sale in execution.)

(‘07) 6 Cal L Jour 580 (591). (Suit on the ground that no accounts were rendered, into one to reopen settled accounts for errors.)

(‘02) 6 Cal W N 326 (328, 329). (Suit for share of rent—Amendment into suit for full rent.)

(‘72) 19 Suth W R 82 (83). (Claim to set aside *zarpeshgi*; claim for declaratory decree.)

(‘88) 11 Mad 106 (114, 115).

(1900-02) 1 Low Bur Rul 193 (195). (Application for letters of administration cannot be converted into one under the Guardians and Wards Act.)

[See (‘10) 8 Ind Cas 558 (563) (Lah). (Suit by reversioners for possession on the allegation that the alleged widow was not the widow of the proprietor—Amendment into a suit for declaration that the alienation by the alleged widow was without necessity.)]

18. (‘23) AIR 1923 Nag 241 (249).

(‘10) 6 Ind Cas 1015 (1016): 13 Oudh Cas 152.

19. (‘23) AIR 1923 Nag 241 (249).

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Note 3

2. *A* sues *B* for the specific performance of a contract alleged to have been entered into by *B* with *A*. Subsequently he applies for the amendment of the plaint so as to convert it into a suit for damages for breach of the said contract. The Court has power to allow the amendment if it does not cause injustice to the other side.<sup>20</sup>

3. *A* files a suit against *B* for possession of lands on the basis of a compromise entered into by the parties and filed by them in a previous suit. The compromise was neither registered nor embodied in the decree. *A* subsequently applies for amendment of the plaint by converting it into a suit for the specific performance of the contract embodied in the compromise. The amendment could be allowed.<sup>21</sup>

4. *A* and *B* entered into an agreement for sale of goods by *A* to *B*, the goods to be taken delivery of by *B* on a certain date. *B* failed to take such delivery and *A* re-sold the goods more than two months after the date of the breach of the contract by *B* and then filed a suit for damages against *B* on the basis of such re-sale. Finding that, owing to the delay in making the re-sale, he may not get damages on the basis of re-sale, he applied for an amendment of the plaint by claiming damages on the basis of breach of contract itself. It was held that such amendment should be allowed.<sup>22</sup>

But though under the present Code there is no such rigid rule, as was enacted in the old Code, against the allowing of the amendment converting a suit of one character into a suit of another and inconsistent character,<sup>23</sup> and the whole matter is entirely in the discretion of the Court, still as a general rule the Court will not, in the exercise of such discretion, allow an amendment converting a suit of one character into a suit of another character.<sup>24</sup>

There is one limitation, however, on the wide powers of amendment that can be exercised by the Court under this Code and that is, that the Court cannot, by way of amendment, substitute one distinct cause of action for another, or change the subject-matter of the suit.<sup>25</sup> In *Ma Shwe Mya v. Maung Po Hnaung*,<sup>26</sup> their Lordships of the Privy Council observed as follows :

"All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that

20. ('28) AIR 1928 P C 208 (218, 219) : 52 Bom 597 : 55 Ind App 360 (PC). (See the precaution the Privy Council desires to be taken before allowing amendment.)

21. ('17) AIR 1917 Mad 624 (625).

22. ('25) AIR 1925 Sind 222 (228).

('24) AIR 1924 Bom 390 (391).

('17) 11 Ind Cas 827 (828) (Rang). (A converse case.)

23. See the illustrations given above.

('27) AIR 1927 Lah 103 (104) : 8 Lah 257. (Suit for recovery of purchase money on the basis of vendor's lien — Amendment into a suit for damages for breach of contract allowable.)

('26) AIR 1926 Mad 909 (910). (Suit based on exclusive ownership—Plaint allowed to be amended into one for partition by co-sharers.)

('23) AIR 1923 Nag 151 (152) : 19 Nag L R 69. (Claim for a share was allowed to be changed into claim for maintenance.)

[See also ('23) AIR 1923 Nag 241 (242). (No express restriction on the discretion of the Court provided it is judicially exercised.)]

24. ('37) AIR 1927 P C 18 (20) : 54 Ind App 55 : 6 Pat 323 (PC).

('38) AIR 1938 Pat 443 (444). (Amendment could not be allowed being made at a late stage and as it substantially changed the character of the suit.)

('34) AIR 1934 Oudh 118 (118).

('37) AIR 1937 Rang 413 (416).

[See ('38) AIR 1938 Lah 713 (714). (What

amounts to alteration of nature of suit discussed — Nature of suit is not altered by mere change in wording of plaint or introduction of fresh details.)]

See also the following cases :

('13) 18 Ind Cas 807 (809) (Lah). (Suit in individual capacity—Change into suit on behalf of wakf disallowed on the ground of inconsistency in claims.)

('14) AIR 1914 Mad 460 (461) : 15 Ind Cas 299 (301) : 37 Mad 529. (Suit in ejectment cannot be converted into one for partition.)

25. ('22) AIR 1922 P C 249 (250, 251) : 48 Ind App 214 : 4 Upp Bur Rul 30 : 48 Cal 832 (PC).

('19) AIR 1919 Cal 904 (906, 907) : 45 Cal 805.

('11) 9 Ind Cas 774 (775) (Low Bur). (Radical amendments not to be made in second appeal.)

('37) AIR 1937 Oudh 438 (442) : 18 Luck 219. (Suit for partition—On Court holding that there was partnership between plaintiff and defendants, plaintiff praying that the suit be treated as one for dissolution of partnership—Plaintiff's prayer held should not be allowed.)

('35) AIR 1935 Rang 496 (497). (Where a Burmese husband claims a declaration based on the assertion that the land was kanwin property but fails, he will not be allowed to substitute his previous claim by a claim based on his interest in that property as bought by his wife during marriage; for the two claims are entirely different—AIR 1922 P C 249, Applied.)

26. ('22) AIR 1922 P C 249 (250, 251) : 48 Ind App 214 : 4 Upp Bur Rul 30 : 48 Cal 832 (PC).

purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised; but nonetheless, no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

The reason of the above rule is that the substitution of a totally new case in place of the original one cannot be said in any sense to be an *amendment* of the *original claim*. Nor can it be said that a totally new case is "necessary for the purpose of determining the real questions in controversy between the parties," that is, the controversy disclosed in the suit as originally framed.

It follows from the principles set forth above that under the present Code :

(1) An amendment will generally be allowed where the nature of the suit is not altered, provided it does not cause prejudice or surprise to the opposite party.<sup>27</sup> Such amendments were allowed under the old Code also.<sup>28</sup>

(2) An amendment may be allowed even if it introduces a new ground of claim or an allegation of fact inconsistent with the original pleading, where the Court thinks it just and necessary.<sup>29</sup>

27. ('12) 16 Ind Cas 785 (786) (Cal). (Only test under the new Code is whether the amendment can be allowed without injustice.)
- ('33) AIR 1933 All 374 (375) : 55 All 256.
- ('33) AIR 1933 Nag 82 (83) : 29 Nag L R 115.
- ('30) AIR 1930 Lah 221 (222). (Suit by a partner for a specific sum as if balance had been struck—Amendment stating that balance had been struck does not alter nature of suit.)
- ('26) AIR 1926 Lah 472 (473). (Plaint slightly defective—Amendment should be allowed.)
- ('33) AIR 1933 Lah 245 (245).
- ('20) AIR 1920 Lah 263 (264).
- ('33) AIR 1933 Rang 247 (249).
- ('25) AIR 1925 Mad 794 (794).
- ('31) AIR 1931 Nag 20 (22) : 26 Nag L R 359.
- ('25) AIR 1925 Nag 62 (63).
- ('27) AIR 1927 Oudh 505 (505).
- ('37) AIR 1937 P C 42 (45, 46) : 16 Pat 149 (PC).
- ('37) AIR 1937 Cal 485 (487).
- ('35) AIR 1935 Lah 91 (91). (Appellate Court can allow amendment converting declaratory suit into one for possession; it is only a question of form.)
- ('35) AIR 1935 Mad 202 (203). (Amendment for remedying formal defect arising from omission of certain words *held* should be allowed.)
- ('36) AIR 1936 Mad 151 (152). (Plaint reading certain document in particular way—Amendment by reading the document in another way must be allowed as it is not introducing new and inconsistent claim.)
- ('38) AIR 1938 Mad 988 (989). (In the matter of rectifying defects in pleadings which do not affect any substantial rights, it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay. Any carelessness or delay can always be punished, so to speak, by imposing terms.)
- ('39) AIR 1939 Mad 34 (35).
- ('37) AIR 1937 Nag 173 (174) : I L R (1937) Nag 514. (Where the plaintiff was wrongly described as 'mandir' (temple) in the plaint and the case was thrown out on the ground that the plaintiff was not a juristic person, the plaint could be amended by striking out the word 'mandir' and substituting the word 'deity' for it.)
- ('35) AIR 1935 Oudh 501 (503). (Amendment adding new ground of exemption from limitation can be allowed.)
28. ('09) 3 Ind Cas 159 (160) : 34 Bom 250. (Amendment by referring to a document not included in the list of documents annexed.)
- ('07) 1907 All W N 203 (203). (Claim to a share as heir of A—Claim to whole as his own.)
- ('02) 24 All 456 (457). (Suit on mortgage—Conversion into a suit for a simple money decree.)
- ('87) 1887 All W N 28 (28, 29). (Claim for pre-emption on ground of custom—Amendment into claim on ground of Mahomedan law.)
- ('09) 3 Ind Cas 765 (766) : 33 Bom 483. (One construction of a will may be abandoned and another substituted for it.)
- ('03) 5 Bom L R 329 (330). (Suit for bare declaration into one for possession.)
- ('95) 1895 Bom P J 551 (551). (Suit by the purchaser of a hundi alleging it to be negotiable was allowed to be amended into one on a non-negotiable instrument.)
- ('79) 4 Bom 222 (226). (Suit to establish plaintiff's exclusive right to the partnership property—Amendment into one for dissolution of partnership and account.)
- ('07) 6 Cal L Jour 612 (618, 619).
- ('83) 9 Cal 695 (698).
- ('05) 28 Mad 500 (502, 503).
- ('82) 5 Bom 496 (499). (Suit for possession—Share of joint property—Amendment into claim for partition.)
- ('93) 1893 Pun Re No. 106, p. 423.
- ('84) 8 Bom 168 (173). (Suit for ejectment—Conversion into suit for redemption.)
- ('83) 7 Bom 146 (149). (Do.)
- [See ('07) 5 Cal L Jour 527 (537). (Suit for ejectment and mesne profits—Amendment into a suit for redemption was not allowed in this case.)]
- [See also ('82) 6 Bom 495 (497). (Suit for possession by mortgagee—Amendment into suit for foreclosure.)]
29. ('11) 11 Ind Cas 827 (828) (Low Bur). (English Courts do not refuse an amendment simply because it introduces a new case.)

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**Note 8**

(3) An amendment which changes the character of the suit will not, as a general rule, be allowed by the Court in the exercise of its discretion.<sup>30</sup>

(4) The Court has no power to allow an amendment which substitutes one *distinct* cause of action for another, or which changes the *subject-matter* of the suit.<sup>31</sup>

In the following cases the amendments applied for were not allowed on the ground that their introduction would totally change the character of the suit —

(1) Suit for possession ; amendment into a suit for redemption<sup>32</sup> or into a suit to enforce a mortgage.<sup>33</sup>

(2) Suit for rent ; amendment into one for damages for use and occupation.<sup>34</sup>

('35) AIR 1935 Mad 137 (138, 139). (Suit on the basis that plaintiff was heir to her husband—Defendant pleading that the property was never a family property—Amendment that plaintiff based her title on adverse possession — *Held* amendment should be allowed.)

('35) AIR 1935 Mad 158 (159, 160). (Amendment adding a new ground of exemption from limitation may be allowed.)

('26) AIR 1926 Lah 460 (460).

('31) AIR 1931 Mad 369 (370). (It is not an inflexible rule to disallow an amendment which modifies to some extent the original cause of action.)

('26) AIR 1926 Nag 265 (265, 266). (New plea of fact, inconsistent with facts already pleaded, might be raised.)

('24) AIR 1924 Pat 280 (281, 282).

('38) AIR 1938 Lah 244 (245). (Suit on contract of sale of land—Contract found to be void owing to invalid sanction — Purchaser though not claiming alternative relief for refund of purchase money *held* should be allowed to amend his plaint to recover purchase money: A I R 1937 Lah 146, *Reversed*.)

[*See* ('35) AIR 1935 Mad 286 (286). (In 1931 plaintiff prayed for declaring that he was entitled to office of temple according to turns from 1st July 1931 to 30th June 1932—Suit not coming up for hearing till March 1933 for no fault of plaintiff—Defendant urged that plaintiff must be non-suited—Plaintiff applied for amendment of plaint so as to get possession during alternate years—Amendment *held* should be allowed.)]

[*See also* ('23) AIR 1923 All 560 (562). (Decree on subsequent events even without amendment.)]

30. ('31) AIR 1931 Bom 590 (592). (New case requiring further evidence not to be allowed by way of amendment.)

('25) AIR 1925 Bom 248 (251). (By amendment one plaint cannot be substituted for another.)

('19) AIR 1919 Cal 534 (536); 46 Cal 168. (New case in appeal requiring further evidence.)

('28) AIR 1928 Lah 933 (934).

('26) AIR 1926 Lah 453 (453, 454).

('18) 20 Ind Cas 501 (502) (Lah).

('30) AIR 1930 Mad 322 (325). (Suit for redemption by purchaser—Defendant setting up title under another sale—Plaintiff cannot be allowed to show that his vendor has no title and that he got title from others.)

('36) AIR 1936 Bom 412 (418). (Suit under S. 92.)

('35) AIR 1935 Pat 86 (88).

('38) AIR 1938 Pat 127 (129). (Where the notice under S. 80, C. P. Code was not given, permission to amend the pleadings by discharging the Secretary of State from the record and allow the suit to proceed against the others could not be given in a case where it would not be possible to proceed without a material change in the nature of suit, the cause of action and the relief sought.)

[*See also* ('27) 99 Ind Cas 979 (980) (Lah).]

31. *See also* foot-notes (26) and (27).

('27) AIR 1927 Lah 771 (771, 772).

('27) AIR 1927 All 451 (453); 49 All 599. (Suit premature—Amendment of plaint after accrual of cause of action cannot be allowed.)

('38) AIR 1938 Mad 669 (671). (Suit for recovery of price of articles based on relationship of vendor and vendee—Amendment into one based on relationship of principal and agent not allowed as amendment cannot be permitted when a party wishes to change the specific legal relation which he had alleged in his plaint, and that too at a late stage.)

('36) AIR 1936 Nag 295 (296). (Where to permit amendment would be to allow the plaintiffs, who brought their claim on the allegation of a specific legal relation between the defendant and themselves, to alter it and base it on a different one amendment will not be allowed.)

('38) AIR 1938 Oudh 16 (16); 18 Luck 669. (Suit for redemption—On failure to establish the mortgage set up by him plaintiff praying for amendment into suit for redemption of an earlier mortgage—*Held* it cannot be allowed.)

('36) AIR 1936 Pat 491 (493). (An amendment which has the result of starting a new action should not be allowed.)

32. ('20) AIR 1920 Bom 64 (66); 44 Bom 515.

('11) 12 Ind Cas 576 (576) (Lah). (Obiter.)

[*See also* ('31) AIR 1931 Oudh 878 (879); 7 Luck 94.

33. ('20) AIR 1920 Cal 678 (674).

34. ('12) 17 Ind Cas 646 (647) (Cal).

('27) AIR 1927 Mad 182 (183).

('11) 11 Ind Cas 868 (864) (Low Bur). (Obiter.)

('11) 11 Ind Cas 849 (850) (Low Bur). (Suit for rent — Damages for breach of agreement to take on lease.)

('36) AIR 1936 Lah 26 (26). (When no alternative claim was made in the beginning.)

[*See also* ('16) AIR 1916 Pat 50 (51); 2 Pat LJ Jour 69. (Which was a converse case.)]

(3) Suit for declaration that a partnership was dissolved and for accounts; amendment so as to convert it into one for remuneration for services.<sup>35</sup>

(4) Claim laid on the footing that defendant was carrier; amendment into one based on his liability as bailee.<sup>36</sup>

(5) Suit based on the defendant being a tenant; conversion into a claim to eject the defendant as a trespasser.<sup>37</sup>

(6) Suit for redemption; amendment so as to make it a suit for avoidance of a sale on payment of a portion of consideration money.<sup>38</sup>

(7) Suit to set aside a decree on the ground of fraud; amendment into one for rectification on the ground of mistake.<sup>39</sup>

(8) Suit for declaration of right to easement; amendment into one for declaration of title to the property in respect of which the easement was claimed.<sup>40</sup>

(9) Suit framed against manager of an idol; amendment so as to implead idol as a party.<sup>41</sup>

See also the cases noted below.<sup>42</sup>

**4. Amendment introducing new case in written statement.**—The principles applicable to the amendments of plaints will equally be applicable to amendments of written statements. Thus, an amendment of a written statement setting up a case which is totally inconsistent with the original case set up will not be allowed if it is unjust to the opposite side to allow it.<sup>1</sup> Similarly, where the proposed amendment of the written statement will have the effect of displacing plaintiff's suit, a Court will

[See however ('18) 20 Ind Cas 570 (571) : 7 Sind LR 23. (Suit for rent and ejectment based also on title—Title in issue—Decree passed for damages for use and occupation.)

('28) AIR 1928 Nag 27 (29) : 23 Nag L R 152. (Permission to amend should be granted if the omission of the alternative plea was by inadvertence or mistake.)

('15) AIR 1915 Low Bur 47 (49) : 8 Low Bur Rul 270.

('38) AIR 1933 Pat 485 (487).]

35. ('18) AIR 1918 Cal 294 (297, 299).

('34) AIR 1934 Lah 38 (39). (Suit for dissolution of partnership and accounts into one for remuneration as an agent or servant.)

36. ('18) AIR 1918 Sind 58 (60) : 11 Sind L R 108. (It is doubtful whether such an amendment can be allowed.)

37. ('25) AIR 1925 All 705 (706, 707).

38. ('12) 14 Ind Cas 748 (744) (All).

39. ('16) AIR 1916 Cal 100 (101).

40. ('17) AIR 1917 Mad 806 (806).

41. ('30) AIR 1930 Oudh 43 (45).

42. ('90) AIR 1930 Cal 721 (721). (Suit for accounts against a receiver into another for damages for conversion.)

('13) 19 Ind Cas 661 (662) (All). (Suit for sale on a mortgage converted into a suit for money.)

('19) AIR 1919 Cal 828 (828). (From Small Cause to a regular suit.)

('11) 10 Ind Cas 250 (252, 253) (Lah). (Suit for recovery of a debt—Amendment into a suit for partnership accounts not to be allowed.)

('22) AIR 1922 Mad 49 (50). (Suit for redemption of mortgage — Legal representative seeking to amend plaint for declaring mortgage not binding.)

('13) 18 Ind Cas 212 (213) (Mad). (Suit by a plaintiff alleging himself to be the next reversioner to

avoid an adoption was not allowed to be amended at a late stage of the case into a suit by a remote reversioner.)

('10) 7 Ind Cas 801 (801) (Mad). (Suit for exclusive possession by a trustee — Amendment into one for joint possession where plaintiff and defendant are in possession of other trust properties which are not the subject of suit.)

('10) 6 Ind Cas 288 (288) (Mad). (Suit on oral agreement cannot be converted so as to bring it on a contract written.)

('30) AIR 1930 Nag 295 (296) : 27 Nag L R 226. (Plaintiff claiming under the obligee of a promissory note and subsequently on finding that such a claim was not tenable seeking amendment by which he claimed that the obligee advanced the money for his benefit—Amendment not allowed.)

('23) AIR 1923 Pat 590 (592) : 2 Pat 925. (Amendment involving a claim for additional relief, addition of parties and change in the whole aspect of the case is not to be allowed.)

('21) AIR 1921 Pat 336 (336). (Suit on a hand note passed by guardian cannot be allowed to be changed into one under S. 68, Contract Act.)

('36) AIR 1936 Mad 991 (992). (Suit by unregistered firm—Subsequent registration — Application to amend plaint and to treat suit as instituted on date of application—Original plaint held not a plaint at all—Order for amendment could not be granted.)

('37) AIR 1937 Rang 525 (526). (Suit for administration of an estate is a different kind of suit from a suit for partition of a piece of land. Different considerations arise in the two cases. It is not possible that a suit for partition should be tried as a suit for administration by amending the plaint.)

#### Note 4

1. ('09) 4 Ind Cas 652 (658, 659) (Bom).

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refuse the application to amend.<sup>2</sup> *A* sued *B*, a Tramway Company for damages caused by their negligence in keeping their tramway in bad repair. *B* simply denied negligence and did not plead that the liability to keep the tramway in repair did not belong to them but to the local authority. At a subsequent stage of the case *B* applied for amendment of the written statement to raise the said plea. At the time of the application, *A*'s remedy against the local authority was time-barred. It was held that the proposed amendment displaced the plaintiff's suit and should not be allowed.<sup>3</sup>

Where, in a suit for libel, the defendant applied at the time of trial to amend the written statement so as to include a plea of privilege, the application was disallowed on the ground that it would be unfair at that stage to allow the amendment.<sup>4</sup> An amendment of the written statement should, as a general rule, be refused when the plaintiff has called all his evidence on the issues of fact raised by the written statement and has closed his case,<sup>5</sup> unless the plaintiff is given an opportunity to call further evidence to rebut the new case set up.<sup>6</sup> A defendant, who has deliberately and under no mistake or misapprehension admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact.<sup>7</sup> But where in an ejectment suit the defendant pleaded exclusive possession and denied the plaintiff's title as landlord, and also set up a claim to be in possession under a *mourasi* lease granted by the plaintiff's predecessor-in-title, it was held that the effect of the alternative plea was merely to put the plaintiff to the proof of a title which would justify his prayer for ejectment and could, therefore, be allowed to be raised.<sup>8</sup> Again, where on the facts appearing in the plaintiff's evidence a new defence of *law* arises, there is no reason why it should not be taken by way of amendment, even after the plaintiff has closed his case on the facts. Thus, a plea that the suit is barred by virtue of Section 23 of the Contract Act was allowed to be raised in so far as it arose out of the plaintiff's evidence.<sup>9</sup>

The improbability or the unconvincing nature of the new defence sought to be raised is not in itself a ground for refusing to allow an amendment of a written statement by the inclusion of such defence.<sup>10</sup>

See also the undermentioned decision.<sup>11</sup>

### **5. Amendment taking away right accrued to a party by lapse of time. —**

The object of the rule being to get at and try the merits of the case and to do substantial justice between the parties, no amendment will be allowed which will work *injustice* to one of the parties. The rule of conduct of the Court is, that "however negligent or careless the first omission may have been, and however late the proposed amendment, the amendment should be allowed if *it can be made without injustice to the other side*."<sup>1</sup> One of the classes of cases in which an amendment will work injustice

(85) AIR 1935 Pat 463 (465). (The Court will not allow an amendment that would involve a complete change of front in the defence.)

(39) AIR 1939 Oudh 245 (246) : 188 Ind Cas 436 (437, 438). (Amendment of written statement after period fixed by Sec. 9 of United Provinces Encumbered Estates Act—Additional claims cannot be allowed.)

2. ('80) AIR 1930 Lah 278 (279).

(84) AIR 1934 All 11 (12). (New plea of limitation against a just suit not allowed.)

3. (1896) 16 Q B D 556 (558, 559), *Steward v. North Metropolitan Tramways Co.*

4. ('09) 3 Ind Cas 224 (229) : 36 Cal 883.

5. ('80) AIR 1930 Rang 140 (142) : 7 Rang 800.

6. ('14) AIR 1914 Mad 59 (61).

7. ('25) AIR 1925 Mad 950 (960).

8. ('09) 3 Ind Cas 93 (95) (Cal).

9. ('30) AIR 1930 Rang 140 (142) : 7 Rang 800.

10. ('35) AIR 1935 Pat 463 (465).

11. ('39) AIR 1939 Sind 137 (142) : I L R (1939) Kar 330. (New defence which cuts at the root of proceedings not to be allowed without amendment of pleading.)

### **Note 5**

1. (1888) 32 W R (Eng) 262 (263), *Clarapade v. Commercial Union Association*. (Per Brist, M. R.) ('10) 3 Ind Cas 798 (790) (Cal). (Putting in a document of acknowledgment to save limitation when there is a well founded claim.)



to the opposite party is where it takes away from a party a right accrued to him by lapse of time.<sup>3</sup> As a rule, therefore, a plaintiff will not be allowed to amend his plaint by introducing a new cause of action, which, since the date of the plaint, has become barred by the statute of limitation.<sup>3</sup> In other words, no amendment should be allowed as will take away a valid defence under the law of limitation.<sup>4</sup> Thus, where a plaintiff, though entitled to various alternative reliefs sued only for one of the reliefs within the period of limitation, it was held that he should not be allowed to amend the plaint in such a way as to enforce his other reliefs which had become time-barred at the date of the amendment.<sup>5</sup>

- (14) AIR 1914 Mad 322 (323).  
 (27) AIR 1927 Nag 310 (311) : 23 Nag L R 81.  
 (26) AIR 1926 Oudh 508 (509).  
 (25) AIR 1925 Sind 241 (241) : 19 Sind L R 12. (Amendment of plaint should be allowed so as to include a new plea, where even had the plea been raised earlier, defendant could not have disproved it.)  
 (37) AIR 1937 Cal 485 (487).  
 [See also (95) 22 Cal 692 (712, 713).]  
 2. ('35) AIR 1935 Mad 202 (203).  
 (38) AIR 1938 Mad 669 (672).  
 (35) AIR 1935 Pat 86 (88). (Such a case might arise when a person who was a necessary party to a suit was not impleaded and a step is taken to implead him after the suit is barred against him.)  
 3. ('14) AIR 1914 All 302 (303).  
 (09) 4 Ind Cas 652 (659) (Bom).  
 (1887) 19 Q B D 394 (395, 396), *Weldon v. Neal*.  
 (26) AIR 1926 Cal 189 (189).  
 (18) AIR 1918 Cal 294 (297, 299).  
 (31) AIR 1931 Mad 542 (547). (Amendment which involves the trial of a suit which is on the face of it barred, cannot be allowed.)  
 (31) AIR 1931 Mad 1 (2). (Suit for possession as reversioner to last male owner—Amendment that properties were stridhanam of the wife of the last male owner and that plaintiff was heir.)  
 (28) AIR 1928 Mad 828 (829).  
 (25) AIR 1925 Mad 917 (918). (Application to bring new plaintiff on record on date when suit would be barred.)  
 (16) AIR 1916 Mad 698 (698).  
 (93) 16 Mad 319 (320). (Addition of new parties at a time when the suit against them would be barred not to be allowed.)  
 (25) AIR 1925 Nag 127 (128). (Admission showing that suit was barred—Amendment with a view to get out of the bar of limitation—Amendment not to be allowed.)  
 (25) AIR 1925 Rang 49 (54) : 2 Rang 414.  
 (20) AIR 1920 Low Bur 92 (98).  
 (14) AIR 1914 Sind 70 (72, 73) : 8 Sind L R 69. (Fraud cannot be added to extend the period of limitation.)  
 (38) AIR 1938 Nag 388 (389) : I L R (1939) Nag 194.  
 4. ('26) AIR 1926 Mad 827 (828). (Original claim was for recovery of money on a loan dated 28th January 1916—Amendment into a claim as on 28th November 1916 not allowed.)  
 (33) AIR 1933 Bom 450 (451) : 58 Bom 200.  
 (38) AIR 1938 Lah 774 (774) : 14 Lah 807.  
 (32) AIR 1932 Rang 26 (26) : 10 Rang 74.  
 (31) AIR 1931 All 160 (162).  
 (31) AIR 1931 Bom 590 (591). (Suit against joint family—Claim in the alternative against defendants as partners.)  
 (27) AIR 1927 Cal 733 (736). (Whether the plaint of two persons can be amended on the application of one of them is a matter of doubt.)  
 (22) AIR 1922 Cal 255 (257). (Suit for declaration of title—Amendment for recovery of possession not allowed.)  
 (17) AIR 1917 Cal 841 (841) : 43 Cal 95.  
 (16) AIR 1916 Cal 276 (277).  
 (09) 2 Ind Cas 492 (493) (Cal).  
 (27) AIR 1927 Mad 650 (652).  
 (27) AIR 1927 Mad 182 (183).  
 (23) 71 Ind Cas 270 (272) (Mad). (Per Odgers, J.)  
 (18) AIR 1918 Mad 449 (449, 450).  
 (17) AIR 1917 Mad 37 (38).  
 (95) 18 Mad 33 (38). (Suit by an undivided member cannot be amended by bringing in other members of joint family.)  
 (21) AIR 1921 Pat 485 (486).  
 (31) AIR 1931 Nag 74 (79, 80) : 27 Nag L R 291.  
 (30) AIR 1930 Nag 295 (296) : 27 Nag L R 226.  
 (05) 1 Nag L R 117 (120, 121).  
 (25) AIR 1925 Rang 264 (265).  
 (14) AIR 1914 Low Bur 225 (225, 226).  
 (18) 21 Ind Cas 306 (307, 308) : (1918) 1 Upp Bur Rul 175.  
 (10) 8 Ind Cas 600 (601) (Low Bur).  
 (18) AIR 1918 Sind 6 (8) : 13 Sind L R 1.  
 (37) AIR 1937 Mad 122 (123).  
 (35) AIR 1935 Mad 158 (159). (Amendment introducing new ground of exemption from limitation may be allowed.)  
 (38) AIR 1938 Pat 44 (47) : 17 Pat 168. (Mortgage suit—Amendment of plaint asking for personal decree—Amendment asked for after limitation not to be allowed.)  
 (38) AIR 1938 Pat 205 (207) : 17 Pat 268.  
 (37) AIR 1937 Rang 413 (416).  
 (35) AIR 1935 Sind 26 (26).  
 [See (34) AIR 1934 Mad 220 (221). (Amendment once made—Amendment again so as to convert suit as originally filed—This does not deprive defendant of any plea of limitation.)  
 (35) AIR 1935 Oudh 501 (503). (An amendment allowed by the Court in order to let the plaintiffs plead exemption from the ordinary rule of limitation cannot be said to have the effect of defeating defendants' plea on the law of limitation.)  
 (39) AIR 1939 Mad 34 (35, 36). (Defendant not prevented from pleading limitation—Amendment allowed.)]  
 5. ('14) AIR 1914 All 80 (88) : 86 All 370.

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The rule, however, is not a universal one, and, under peculiar or special circumstances, an amendment may be allowed even where it has the effect of depriving the defendant of his right to plead limitation.<sup>6</sup> See also Note 19 *infra*. In *Charan Das v. Amir Khan*,<sup>7</sup> Lord Buckmaster in delivering the judgment of the Privy Council observed as follows :

"That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case."

*Illustrations*

1. X sold several parcels of land to several persons, who did not however get possession. The title to the property was in some confusion and the plaintiff who was entitled to a right of pre-emption in respect of that sale, sued the vendees for a declaration of his right of pre-emption without asking for the consequential relief of pre-emption and possession as he was bound to do under Section 42 of the Specific Relief Act, 1877. It was held by their Lordships of the Privy Council, that the plaintiff was attempting to assert rights which he undoubtedly possessed, but through some clumsy blundering, in a form which the statute did not permit, and that the plaint should, under the peculiar circumstances of the case, be allowed to be amended by adding the relief of pre-emption, even though, at the time of the amendment, a fresh suit for pre-emption would be barred by limitation.<sup>8</sup>

2. S purchased certain property from P, the latter, however, remaining in possession and wrongfully receiving rents and mesne profits. S then sold the property to Y who sued P for possession and mesne profits adding S as a *pro forma* plaintiff. In the plaint no relief was claimed in favour of S, the prayer being that a decree should be passed in favour of Y alone. An amendment of plaint for relief in favour of S for profits up to the date of the sale in favour of Y was applied for, after the claim had been time-barred. The High Court of Bombay held that there was no ground for suspecting that the plaintiffs had not acted in good faith and that under the peculiar circumstances of the case, the amendment should be allowed.<sup>9</sup>

Where the plaintiff had used due diligence and care in framing his plaint but had made a mistake as to the appropriate remedy he would be entitled to under the law, and the mistake was due to a conflict of judicial opinion on the point or to a subsequent change in the law, it was held in the undermentioned cases<sup>10</sup> that the

6. (1887) 19 Q B D 394 (395), *Weldon v. Neal*.

('35) AIR 1935 Mad 158 (159). (Only amendments which take away existing rights should be refused but not one which deprives bare right to plead limitation.)

('21) AIR 1921 P C 50 (51, 52) : 48 Cal 110 : 47 Ind App 255 (PC).

('29) 116 Ind Cas 871 (874) (All).

('24) AIR 1924 Cal 517 (520) : 50 Cal 878.

('27) AIR 1927 Lah 819 (821) : 9 Lah 217.

('26) AIR 1926 Mad 396 (397).

('25) AIR 1925 Sind 173 (175). (AIR 1921 PC 50, Followed.)

('25) AIR 1925 Cal 67 (74). (It was held in this case that there were no special circumstances.)

('32) AIR 1932 Bom 117 (121). (Do.)

('11) 9 Ind Cas 760 (760) (Mad). (Do.)

('11) 36 Mad 378 (380).

('11) 33 All 616 (618, 619).

('09) 33 Bom 644 (651, 652, 656).

('84) AIR 1934 Sind 83 (83, 84).

('09) 4 Ind Cas 726 (727, 728) : 33 Bom 644.

('36) AIR 1936 Mad 785 (787) (FB). (Original debt payable by instalments—Debt subsequently comprised in promissory note payable on demand—Suit on promissory note—Suit time barred—Held, plaint can be amended so as to base claim on basis of original debt.)

('36) AIR 1936 Mad 632 (633). (Claim in suit

barred on date of application to amend—Court has power to make amendments under special circumstances.)

('38) AIR 1938 Mad 265 (267). (Suit against two defendants alleging them to be partners in business—Amendment of plaint on basis that defendant 1 is carrying on business as guardian of defendant 2—Amendment can be allowed if it is in accordance with facts set out in plaint.)

('35) AIR 1935 Cal 102 (105).

('35) 39 Cal WN 1235 (1241). (Suit on promissory note insufficiently stamped—Proof aliunde—Voucher executed contemporaneously—Amendment to introduce claim on—Court can allow though barred by limitation, especially when the defendant is not in any way prejudiced, when his defence is a total denial of the transaction.)

[See ('34) AIR 1934 Cal 554 (555, 556) : 61 Cal 433.]

7. ('21) AIR 1921 P C 50 (51, 52) : 48 Cal 110 : 47 Ind App 255 (PC).

8. ('21) AIR 1921 P C 50 (51, 52) : 48 Cal 110 : 47 Ind App 255 (PC).

9. ('29) AIR 1929 Bom 51 (53, 54, 55).

[See also ('11) 10 Ind Cas 737 (738) : 7 Nag L R 43. (Amendment not to be refused merely because a new defendant has to be added against whom claim will be barred.)]

10. ('11) 10 Ind Cas 213 (220) (Mad).



circumstances justified the allowing of an amendment, even where a fresh suit would have been barred on the date of the amendment. It has been held that the rule prohibiting an amendment which takes away an existing right from the defendant refers to a legal right which has accrued to the defendant and not a bare right to plead limitation. Hence, it has been held that where there is no attempt by the proposed amendment to introduce a new cause of action or to claim a new relief, the rule does not apply.<sup>11</sup>

**6. Amendment not to be allowed when it places the opposite party in a position which cannot be compensated by costs.** — As has been seen already, the main principle guiding the discretion of the Court in granting or refusing amendment is that no amendment should be allowed if it causes injustice to the other side.<sup>1</sup> It is also a cardinal rule that "there is no injustice if the other side can be compensated with costs."<sup>2</sup> Two criteria must be kept in mind: does the amendment put the other party to a disadvantage or cause injury? And if so, can the disadvantage or injury be compensated by costs?<sup>3</sup> If it can be, then the amendment may be allowed.<sup>4</sup> If it cannot, the amendment should be refused.<sup>5</sup> Thus, for example, where the only inconvenience caused by the proposed amendment is to prolong the proceedings or to necessitate fresh evidence, the award of costs will be a sufficient compensation for the inconvenience caused.<sup>6</sup> A sued B for injunction restraining him from executing his mortgage decree against certain properties on the ground, that the mortgage decree was obtained by fraud; subsequently he applied to amend the plaint by adding a new ground of claim, namely, that in any view his title was preferential to that of the defendant even apart from fraud. It was held that the amendment could be allowed on payment of costs.<sup>7</sup>

Where the effect of an amendment would be to enable the plaintiff to escape the consequences of an adverse decision after it was given against him, it ought not to

(15) AIR 1915 Mad 1065 (1065, 1066). (Erroneous view of law, suit framed on—Subsequent alteration of law.)

(94) 17 Mad 67 (68, 69). (Complicated proceedings—Plaintiff committing error in framing execution petition—Error not unnatural—Amendment allowed.)

[See also (12) 13 Ind Cas 268 (268) : 36 Mad 378.]

11. (35) AIR 1935 Mad 158 (159).

(35) AIR 1935 Mad 202 (203). (Amendment of application for insolvency—Formal defect owing to omission of certain words can be amended though at the time of amendment more than three months have elapsed from the alleged acts of insolvency.)

(39) AIR 1939 Nag 23 (25). (Where an amended plaint, which is filed at a time when the suit is barred by limitation, does no more than furnish particulars and introduces no new cause of action, no question of limitation arises.)

(94) AIR 1984 Lah 412 (412).

[See also (87) AIR 1987 Lah 895 (896).]

#### Notes 6

1. (20) AIR 1920 Cal 991 (998).

(10) 6 Ind Cas 288 (288) : 83 Mad 258. (It should not be allowed if it deprives the opposite party of the defences which would be open to him if separate suits are brought.)

2. (1888) 32 W.R. (Eng) 262 (268), *Clarapade v.*

*Commercial Union Association.*

3. (27) AIR 1927 Mad 182 (183).

(12) 16 Ind Cas 785 (786) (Cal).

4. (12) 13 Ind Cas 128 (130) (Cal).

(09) 4 Ind Cas 726 (727) : 33 Bom 644.

(20) AIR 1920 Cal 805 (806). (Amendment allowing correction in boundaries of property.)

(21) AIR 1921 Lah 367 (368). (Plea of jurisdiction was allowed as it did not prejudice the opposite party.)

(19) AIR 1919 Lah 198 (199) : 1919 Pun Re No. 84.

(21) 61 Ind Cas 328 (329) (Lah).

(15) AIR 1915 Oudh 31 (55). (Technical defect—No prejudice to defendant—Defendant not entitled to any costs.)

(37) AIR 1937 Rang 413 (416).

(38) AIR 1938 Nag 388 (390) : I L R (1939) Nag 194. (In most cases up to issue stage no special burden as to costs is called for and thereafter justice is met by leave being granted conditionally on the payment of costs thrown away.)

5. (28) AIR 1928 Oudh 905 (806).

(16) AIR 1916 Bom 261 (262) : 40 Bom 158.

(28) AIR 1928 Lah 505 (505).

(39) AIR 1939 Mad 84 (85).

(39) AIR 1939 Sind 173 (176) : ILR (1939) Kar 602.

6. [See (27) AIR 1927 Mad 182 (183).]

7. (10) 8 Ind Cas 79 (81) (Cal).

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be allowed.<sup>9</sup>

### 7. Amendment to be refused when the application is not in good faith.—

It is one of the necessary conditions for the exercise of the Court's discretion in allowing an amendment, that the applicant has acted in good faith.<sup>1</sup> While, therefore, as a general rule, leave to amend ought not to be refused if the applicant has acted *bona fide*,<sup>2</sup> it will be refused where he has been acting *mala fide*.<sup>3</sup> Courts will infer want of *bona fides* from *great delay* in applying for leave to amend.<sup>4</sup> An amendment which seeks to reargue the same questions and lead further evidence, is an abuse of the process of the Court and hence should not be allowed.<sup>5</sup>

### 8. Amendment by adding or substituting a new plea of fraud. —

Where fraud of one kind has been pleaded, an amendment introducing a new and distinct kind of fraud in substitution of the fraud pleaded, will not be allowed especially after all the evidence has been given.<sup>1</sup> "It is a well known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind of fraud cannot, upon the failure of proof, be substituted for it."<sup>2</sup> The reason is that such a substitution will as a rule entirely change the character of the suit as originally laid. On the same principle where no fraud has at all been alleged in the original plaint, a new plea of fraud will not, except where strong grounds exist, be allowed to be raised by way of amendment.<sup>3</sup> In *Bently v. Black*,<sup>4</sup> Lord Esher, M. R., said :

"It has long been the universal practice, except in most exceptional circumstances, not to allow amendments for the purpose of adding a plea of fraud where fraud is not pleaded in the first instance."

Where the fraud is disclosed only in the pleading of the defendant, or on his cross-examination, such a circumstance may justify an amendment by adding a new plea of fraud.<sup>5</sup> Thus, where the plaintiff sued on a mortgage executed by the defendant, and the defendant pleaded that he was a minor on the date of the mortgage and that the mortgage was, therefore, void, the plaint was allowed to be amended by raising the plea that the defendant was guilty of fraudulent misrepresentation that he had attained majority at the time of the execution of the mortgage.<sup>6</sup> But the Court will, in every case, require to be satisfied about the truth, and substantiality, of the proposed amendment, and why the allegations were not originally made, before it grants the amendment.<sup>7</sup> Where, in a "passing off" action, the omission to refer to fraud in the

8. ('31) AIR 1931 Pat 426 (427) : 10 Pat 630.

#### Note 7

1. ('22) AIR 1922 Cal 255 (256).
- (82) AIR 1932 Lah 322 (323, 324). (Major suing as minor—Amendment should be allowed only if mistake is *bona fide*.)
- (19) AIR 1919 Cal 904 (907) : 45 Cal 305.
- (71) 16 Suth W R 123 (125). (Amendment is to be allowed only when a party has an honest case to raise.)
- (80) AIR 1930 Nag 295 (296) : 27 Nag L R 226.
2. (1878) 10 Ch D 393 (397), *Tildesley v. Harper*. (Cited in 4 Ind Cas 652.)
- (11) 11 Ind Cas 481 (491, 495) (Cal).
- (21) AIR 1921 Lah 367 (368).
- (29) AIR 1929 Rang 38 (34).
3. ('10) 8 Ind Cas 600 (601) (Low Bur).
- (80) AIR 1930 Pat 321 (321). (Suit for possession whether can be converted into one for redemption.)
- (85) AIR 1935 Mad 50 (51).

(36) AIR 1936 Mad 545 (547).

[See also ('37) AIR 1937 Pat 572 (575) : 16 Pat 527. (Plaint based on forged document—Amendment in second appeal will not be allowed.)]

4. ('24) AIR 1924 Mad 883 (885).

(18) AIR 1918 Sind 6 (8) : 13 Sind L R 1. (An application for amendment in order to get advantage over the other side in the course of arguments on a preliminary issue and by raising a plea which clearly is an after-thought.)

5. ('33) AIR 1933 Sind 279 (281, 291) : 27 Sind L R 841 (FB).

#### Note 8

1. ('87) 14 Ind App 111 (121) : 11 Bom 620 (PC).
2. ('87) 14 Ind App 111 (125) : 11 Bom 620 (PC).
3. ('28) AIR 1928 Mad 759 (760).
4. (1898) 9 T L R 580.
5. (1899) 14 P D 56 (59), *Riding v. Hawkins*.
6. ('98) 25 Cal 371 (388, 390).
7. ('24) AIR 1924 Mad 883 (885).

plaint was due to an oversight and there were circumstances to show that the plaintiff intended from the very outset to allege fraud, it was held that, in the interests of justice, the amendment should be allowed.<sup>8</sup> Where the plaintiff sued for the recovery of a certain sum of money on the basis of his title by inheritance, and the defendant pleaded a sale of such right to himself, the plaint was allowed to be amended, by raising the plea that the sale was invalid owing to the fraud of the defendant.<sup>9</sup>

See also the undermentioned decisions.<sup>10</sup>

**9. Amendment by adding new reliefs or claims.** — An alteration merely in the relief claimed in the suit does not, as a general rule, change the character of the suit, and an amendment seeking such alteration will be allowed if it does not cause injustice to the other side.<sup>1</sup> The same principle will apply to the addition of new reliefs in the plaint. Where a claim to which the plaintiff is entitled has been left out by a *bona fide* mistake, or by inadvertence, or on a misapprehension of facts, an amendment will be allowed by adding the claim so left out.<sup>2</sup> Where, however, the omission is a deliberate one, leave to amend will be refused.<sup>3</sup> Where, by virtue of circumstances arising subsequent to the institution of the suit, the plaintiff becomes entitled to a larger or other relief than the one claimed, amendment may be allowed so as to add such other relief.<sup>4</sup> All reliefs *ancillary* to the main relief asked in the plaint may be allowed to

8. ('28) AIR 1928 Mad 759 (760).

9. ('82) 6 Bom 309 (314, 315).

10. ('36) AIR 1936 Mad 868 (870). (Suit by minor after becoming major, against ex-guardian for accounts—Plaint may be amended by making it one for recovery of specific sum of money lost to the minor's estate through the fraud of the guardian.) ('35) AIR 1935 Mad 50 (51). (A suit on a promissory note cannot be converted into a suit based on fraud or deceit, especially at a late stage.)

#### NOTE 9

1. ('93) 20 Cal 805 (808).

('95) 22 Cal 692 (710).

('33) AIR 1933 Rang 247 (249).

('34) AIR 1934 Mad 267 (268). (Additional relief asked for by way of amendment, out of abundant caution due to conflict of decisions; amendment should be allowed.)

('34) AIR 1934 Rang 266 (267). (Amendment within limitation.)

('97-01) 2 Upp Bur Rul 231.

('34) AIR 1934 Mad 600 (600). (Suit by minor for injunction restraining decree-holder in previous suit to which he was party from enforcing his decree against him — Minor in prior suit represented by his father — Minor held bound to ask for declaration that decree was not binding on him — Suit should not have been dismissed and amendment ought to have been allowed.)

('05) 28 Mad 500 (501, 502). (Relief available to the parties as revealed by the evidence can be given.)

('96) 1896 Bom P J 617 (618).

('11) 10 Ind Cas 260 (261) (Mad). (Misconception of relief—Dismissal of suit improper.)

('82) 1882 Pun Re No. 186, p. 542. (Amendment affecting the form of the relief can be permitted.)

('34) AIR 1934 Rang 266 (267). (Amendment of prayer and not of cause of action — Relief one which plaintiff is entitled to claim — Defendant not deprived of any defence—Amendment should

be allowed.)

('35) AIR 1935 Mad 160 (161). (Promissory note executed by person on his own behalf and as guardian of minor—Suit on note — Prayer only against minor's assets in guardian's hands—Amendment asking relief against guardian personally allowed.)

2. ('19) AIR 1919 Cal 904 (906) : 45 Cal 305.

('12) 17 Ind Cas 646 (647) (Cal). (Deliberate omissions not to be allowed to be amended.)

('21) AIR 1921 Mad 664 (666). (Mistake discovered in course of suit on contract — In proper case, plaintiff may be allowed to amend his plaint so as to include a prayer for rectification.)

('28) AIR 1928 Mad 402 (404). (Plaintiff not aware of fact at the time of suit.)

('27) AIR 1927 Oudh 513 (514). (Suit for injunction—Subsequent prayer for possession.)

('25) AIR 1925 Oudh 555 (556). (Do.)

('28) AIR 1928 Lah 112 (112). (Do.)

('23) AIR 1923 Mad 553 (557). (Omission to add further relief of redemption—Amendment allowed in second appeal.)

[See also ('35) AIR 1935 Pat 365 (366). (Suit on mortgage by Hindu father—Amendment to include claim under another mortgage executed by father and son on the ground that mortgagor in both is joint family should be allowed.)]

3. ('14) AIR 1914 Mad 687 (689) : 19 Ind Cas 19 (22, 23) : 37 Mad 555.

('12) 17 Ind Cas 646 (647) (Cal).

('19) AIR 1919 Cal 904 (907) : 45 Cal 305.

4. ('29) AIR 1929 Cal 519 (520) : 58 Cal 622.

('25) AIR 1925 Cal 944 (944).

('07) 6 Cal L Jour 74 (80, 81).

('97) 24 Cal 260 (265).

('02) 26 Bom 186 (189).

('80) AIR 1930 Mad 47 (48). (Suit by reversioners for declaration that adoption is invalid — Death of widow pending appeal—Amendment of plaint including prayer for possession—Permissible.)

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**Note 9**

be added by way of amendment.<sup>5</sup> Thus, where a mere declaration is asked for, an amendment by adding the appropriate consequential relief may be allowed;<sup>6</sup> even in cases where the consequential relief is deliberately omitted, to avoid paying higher court-fee, the Court may allow the amendment to be made by the addition of a prayer for the consequential relief on payment of the additional court-fee.<sup>7</sup> For instances where amendments were allowed altering the reliefs claimed, see the cases cited below.<sup>8</sup>

5. (1900) 5 Cal W N 278 (279).

('03) 5 Bom L R 329 (330). (Relief of declaration claimed as ancillary to possession.)

('32) AIR 1932 Cal 87 (88). (Prayer for confirmation of possession—Amendment into one for recovery of possession.)

6. ('31) AIR 1931 Bom 218 (221).

('30) AIR 1930 Mad 405 (410).

('32) AIR 1932 Bom 175 (176).

('85) 9 Bom 855 (357). (Consequential prayer for accounts.)

('89) 13 Bom 548 (551).

('85) 14 Bom 895 (401). (Consequential prayer for injunction.)

('03) 5 Bom L R 329 (330). (Change of a suit for declaration into one for possession.)

('05) 29 Bom 19 (29). (Injunction by way of consequential relief.)

('82) 1882 All W N 129 (130). (Suit for declaration of proprietary rights—Amendment into one for possession.)

('84) 1884 All W N 26 (26). (Consequential prayer for possession.)

('86) 1886 All W N 248 (248).

('09) 1 Ind Cas 549 (552) : 36 Cal 726. (Plaintiffs dispossessed during a suit for declaration — Possession might then be asked for.)

('09) 3 Ind Cas 161 (162) (Cal). (Court should give the plaintiff permission to add by way of amendment, the necessary consequential relief.)

('06) 1906 Pun Re No. 135, p. 499.

('20) AIR 1920 Lah 202 (203). (Plaintiff losing possession during the pendency of the suit — Amendment of plaint for possession should be allowed.)

('79) 2 Mad 295 (298). (Suit for declaration — Amendment into one for possession.)

('92) 15 Mad 15 (18).

('05) 2 Nag L R 79 (79). (Plaintiff not allowed to claim a fresh relief barred by time.)

('24) AIR 1924 Pat 310 (311) : 2 Pat 919. (Consequential relief added by way of amendment even in appeal.)

('25) AIR 1925 Sind 260 (261, 262).

('85) AIR 1935 Lah 91 (91).

('87) AIR 1937 Nag 84 (84) : ILR (1937) Nag 151. (Suit for declaration of Maharki watan — Subsequent amendment for reliefs of possession and injunction is permissible.)

('37) AIR 1937 Lah 295 (297). (Amendment by adding prayer for possession in suit for declaration—Amendment was allowed.)

7. ('24) AIR 1924 Pat 310 (311) : 2 Pat 919.

[See ('27) AIR 1927 Lah 499 (500) : 8 Lah 531.

('12) 15 Ind Cas 427 (429) : 89 Cal 704.]

8. ('16) AIR 1916 All 137 (138). (Suit for sale on mortgage — Amendment into claim for money decree.)

('27) AIR 1927 Rang 154 (155) : 5 Rang 115.

('83) 1883 Pun Re No. 131.

('02) 24 All 456 (457).

('15) AIR 1915 Cal 357 (361). (Suit for partition — Amendment into one for joint possession.)

('27) AIR 1927 Lah 723 (724). (Plaint praying for exclusive possession—Amendment so as to include relief for joint possession.)

('18) AIR 1918 Mad 526 (529). (Suit for legacy— Amendment into one for administration.)

('27) AIR 1927 Lah 770 (771). (Application for probate by a person claiming to be executor— Amendment into application for letters of administration allowed.)

('13) 19 Ind Cas 928 (930) (Lah). (Suit for possession by reversioners against widow and daughters — Amendment into declaration of right to succeed allowed.)

('89) 12 Mad 481 (482, 483). (Suit for acceptance of patta in a Civil Court—Amendment so as to include a prayer for declaration of title which will give jurisdiction to the Civil Court to entertain the suit might be made.)

('03) 2 Low Bur Rul 4 (9). (In the circumstances of the case, it was held that the Court had power in its discretion to make the declaration of plaintiff's right even without an amendment of the plaint.)

('04) 2 Low Bur Rul 243 (244). (A prayer for mutation of names allowed to be substituted by one for possession.)

('81) 5 Bom 73 (77). (Amendment by striking out a prayer.)

('07) 21 Bom 827 (851, 852). (Suit for specific performance of contract—Amendment asking for refund of purchase money.)

('28) AIR 1928 P C 208 (218, 219) : 55 Mad L Jour 523 (543, 544) : 52 Bom 597 : 55 Ind App 360 (P C). (When damages can be got in a suit for specific performance discussed.)

('26) AIR 1926 Mad 155 (156). (Suit for specific performance of an agreement to sell — Amendment adding prayer for possession allowed.)

('19) AIR 1919 Mad 874 (377). (Suit for possession can be amended into a suit for specific performance by execution of a conveyance.)

('26) AIR 1926 All 506 (509) : 48 All 292. (Suit for redemption—Prayer for redeeming only one of three consolidated mortgages—Leave to include prayer for redeeming the other mortgages also, was granted in appeal.)

('11) 10 Ind Cas 218 (220) (Mad). (Conflicting decisions by High Court as to the remedies available to plaintiff—Plaint on one remedy can be amended into one on another.)

('11) 12 Ind Cas 119 (120) (Mad). (Suit for declaration of the property intended to be mortgaged—Relief for rectification of deed.)

Where, however, the proposed amendment is likely to cause injustice to the other side, it will not be allowed.<sup>9</sup> Thus, where the application for leave to amend was made at a very late stage of the proceedings and the grant of the leave would have necessitated practically a trial of the whole case over again, it was held that leave should be refused.<sup>10</sup> Where the relief claimed by way of amendment was totally different from, and inconsistent with, the relief originally claimed, it was held by the High Court of Lahore that leave to amend should be refused.<sup>11</sup> In *Ardeshir H. Mama v. Flora Sassoon*,<sup>12</sup> where a suit for specific performance, or, in the alternative, for damages, was sought to be amended so as to convert it into a suit for damages only, their Lordships of the Privy Council observed as follows :

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**Notes 9-10**

"That the Court should have the power of granting such an amendment in a proper case is salutary and indeed necessary . . . . But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effects upon the position both of the plaintiff and the defendant. . . . . Indeed, so serious, in many cases, is the exercise of this power that, to their Lordships, it would appear to be a wise precaution for a Judge, before allowing any such amendment in a contested case, to require the plaint to be actually remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else."

**10. Amendment by adding a new ground of relief.**— The same principles as are applicable to cases of amendments by adding *new reliefs*, apply to amendments by adding *new grounds of relief*. Thus, a new ground in support of the relief claimed cannot be said to alter the character of the suit and will as a general rule be allowed.<sup>1</sup>

('12) 13 Ind Cas 203 (204) (Mad).

('12) 16 Ind Cas 986 (987) (Mad). (Suit for partnership account—Addition of prayer for dissolution.)

('33) AIR 1933 Lah 245 (245). (Do.)

('13) 21 Ind Cas 778 (779) (Mad).

('15) AIR 1915 Mad 452 (453): 38 Mad 677. (Amendment to introduce an alternative prayer in an execution application.)

('15) AIR 1915 Mad 867 (868). (Suit for declaration of invalidity of mortgage by manager—Consideration valid in part—Suit can be amended into one for redemption.)

('18) AIR 1918 Mad 1142 (1145). (Plaintiff can be allowed to amend his plaint which prayed for redemption of the whole mortgage by praying for recovery in the alternative of his share and for partition and possession of such share on payment of the proportionate amount of the mortgage.)

('27) AIR 1927 Mad 212 (213).

('29) AIR 1929 Mad 273 (274). (Suit for rent and possession—Addition of prayer for declaration of title.)

('68) 10 Suth W R 362 (368). (Suit for enhancement of rent for specific share of land can be amended into one for enhancement of plaintiff's share of the rent.)

(1900) 5 Cal W N 162 (168). (Suit for administration—Prayer for administration was allowed to be amended into a prayer asking for a declaration as to invalidity of an alleged adoption.)

('88) 1888 Pun Re No. 161, p. 427.

('24) AIR 1924 Pat 280 (282). (Rescission and specific performance of contract in alternative could be claimed.)

('10) 8 Ind Cas 477 (479): 1 Upp Bur Rul 30. (Suit for divorce between Burmese spouses was

instituted without praying for partition—Amendment by adding a prayer for partition.)

('17) AIR 1917 Low Bur 72 (72).

('22) AIR 1922 Sind 46 (46). (Suit for specific performance or in the alternative for damages—Amendment by giving up claim for specific performance.)

[But see ('14) AIR 1914 Low Bur 225 (225). (Suit by vendee for possession—Vendor's father interested in the property sold—Vendee cannot pray by amendment for declaration of a charge to the extent of a mortgage binding on the father which was discharged by him.)

('17) AIR 1917 Pat 367 (368): 2 Pat L Jour 379.]

9. [See ('12) 14 Ind Cas 537 (539) (All).]

10. ('92) 15 Mad 255 (258).

('98) 21 Mad 288 (291).

11. ('29) AIR 1929 Lah 449 (450).

12. ('28) AIR 1928 P C 208 (219): 52 Bom 597: 55 Ind App 360 (P C).

#### Note 10

1. ('05) 8 Oudh Cas 266 (270). (Suit for declaration of title on ground of survivorship—Amendment by pleading that even if partition had taken place, the plaintiff had a preferential title.)

('31) AIR 1931 Bom 590 (591, 592). (Suit against certain persons as members of a joint Hindu family—Amendment by pleading in the alternative that the defendants were in any event liable as partners of a firm.)

('10) 8 Ind Cas 79 (81) (Cal). (Alternative ground in support of claim for injunction.)

('25) AIR 1925 Oudh 528 (524). (Original claim on custom—Amended claim independent of custom.)

('32) AIR 1932 Mad 608 (604).

('08) 10 Bom L R 346 (348).

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**Notes 10-11**

In the undermentioned case,<sup>3</sup> the plaintiff was allowed to amend his plaint by adding another ground even where he had adduced false evidence in support of his first ground, where the falsity of the claim did not extend to the whole of the title that was set up, but was confined to particular link in the chain. As regards the amendment of pleadings of parties who deliberately put forward false claims, see the undermentioned cases.<sup>3</sup>

**11. "As may be necessary for the purpose of determining the real questions in controversy."** — The main object of allowing amendments is *to get at the rights* of the parties,<sup>1</sup> and to avoid *multiplicity of suits*, where the dispute can be settled in the suit already instituted without unfairness or injustice to the other side.<sup>2</sup> "However the necessity to amend may have arisen, leave to amend should always be given and at any stage in the proceedings in order to allow the real question at issue between the parties to be raised on the pleadings, unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise."<sup>3</sup> Thus, where the properties in the plaint are wrongly described,<sup>4</sup> or some properties are omitted from the

2. ('38) AIR 1938 Cal 271 (274).

3. ('38) AIR 1938 Cal 271 (274).

**Note 11**

1. ('19) AIR 1919 Cal 904 (907) : 45 Cal 305.

('35) AIR 1935 Pat 463 (465).

2. ('21) AIR 1921 Nag 161 (162).

('25) AIR 1925 Nag 195 (196). (Amendments should be made to shorten litigation.)

('13) 19 Ind Cas 250 (250) (All).

('20) AIR 1920 Lah 220 (222).

('25) AIR 1925 Mad 585 (586). (Amendments which will enable the final settlement of the disputes between the parties should be allowed.)

('26) AIR 1926 Pat 427 (428) : 5 Pat 746. (Question of fact to be raised by amendment, already raised and evidence adduced—Amendment should be allowed.)

('72) 18 Suth W R 424 (432). (Action on promissory notes — Part of the consideration illegal—Amendment allowed in appeal so as to recover so much of the consideration as was not illegal.)

('28) AIR 1928 Rang 160 (161).

('35) AIR 1935 All 651 (652). (Suit objecting to constructions made by defendants on certain plot — Plaintiff not knowing in what capacity defendants made construction — Plaintiff applying for amendment of plaint on defendant's reply—*Held* it should be allowed.)

('98) AIR 1938 Mad 708 (709). (Suit by mortgagee to enforce his half share in mortgage—Sub-mortgagees made defendants but subsequently transposed as co-plaintiffs — Application by them for amendment of plaint by including other half share *held* should be allowed.)

('87) AIR 1937 Nag 84 (84) : 1 L R (1937) Nag 151. (Declaratory suit — Suit for declaration of Maharki watan — Subsequent amendment for reliefs of possession and injunction — Separate suit for possession in time if amendment would have been refused—Possession being consequential relief on title, amendment *held* not contrary to law.)

3. ('25) AIR 1925 Mad 950 (958).

('38) AIR 1938 Rang 461 (463) : 1938 Rang L R 521.

*See also the following cases :*

('14) AIR 1914 Mad 17 (17).

('32) AIR 1932 Bom 175 (176).

('70) 14 Suth W R 181 (182).

('26) AIR 1926 Nag 265 (266).

('25) AIR 1925 Oudh 555 (556).

('22) AIR 1922 Oudh 266 (267).

('25) AIR 1925 Sind 26 (28).

('28) AIR 1928 Mad 2 (5). (Mortgage suit—Amendment though necessitating decision as to ownership of property was allowed.)

('35) AIR 1935 Mad 158 (160). (Amendment adding a new ground of exemption from limitation.)

('26) AIR 1926 Mad 754 (755). (Amendment not affecting defendant's liability to pay.)

('15) AIR 1915 Mad 984 (986).

4. (26) AIR 1926 Nag 813 (814).

('35) AIR 1935 Oudh 92 (93) : 10 Luck 496.

('32) AIR 1932 Pat 855 (856) : 11 Pat 624. (Particulars of survey plots.)

('11) 10 Ind Cas 476 (477) : 33 All 616.

('95) 17 All 288 (291).

('74) 21 Suth W R 187 (187). (One of the boundaries of one of the plots claimed if omitted can be supplied by amendment.)

('70) 14 Suth W R 474 (474). (Quantity of land in defendant's possession not specified—Defect can be remedied by amendment.)

[*See* ('35) AIR 1935 Rang 522 (523). (Property incorrectly described in plaint, preliminary decree and final decree — Amendment can be allowed in final decree under inherent power.)]

[*See also* ('86) AIR 1936 P C 832 (834) : 18 Pat 1 : 68 Ind App 441 (P C). (Suit for partition of estate left by deceased — Partition of entire estate claimed and no occasion for differentiating between ancestral property and self-acquired properties of deceased — Finding that former not partible but only the latter — Plaintiff should be given an opportunity of proving what items were self-acquired properties of deceased.)]

plaint by inadvertence,<sup>5</sup> or where there is a mistake in the statement of the cause of action,<sup>6</sup> or a *bona fide* mistake in making the necessary averments in the plaint,<sup>7</sup> or in drawing up the pleadings,<sup>8</sup> or the suit is brought under a wrong Act,<sup>9</sup> an amendment will be allowed to rectify the omission or mistake. See also the cases cited below.<sup>10</sup>

But the "questions in controversy between the parties" which have to be brought out clearly and decided are, save in exceptional cases, the questions in controversy between the parties *when the parties joined issue*, that is, when the defendant puts in his written statement; they do not include new questions which the defendant neither wished nor intended then to dispute, but which, at a later stage in the proceedings, either because he has changed his mind, or because something has happened after he filed his written statement, he thinks it profitable to dispute.<sup>11</sup> An amendment which will be *useless* if made, as for instance, an amendment setting up a claim or defence which is bad in law,<sup>12</sup> or an amendment which, if allowed, *would still leave the claim or defence as amended unsupportable*,<sup>13</sup> cannot be said to be necessary for the purpose of determining the real question in controversy in the suit. Again, a merely *technical plea* cannot be said to be necessary for the purpose of determining the real questions in controversy between the parties, and therefore it was held that it should not be allowed to be set up by way of amendment.<sup>14</sup>

**12. Amendment by introducing new cause of action.** — It has been seen in Note 3 *ante* that there is a limitation on the wide powers of the Court to amend

5. ('14) AIR 1914 Lah 263 (264, 265) : 1914 Pun Re No. 62.

('34) AIR 1934 Cal 640 (642). (Omission in an application for leave to sue in *forma pauperis* due to inadvertence.)

('16) AIR 1916 Pat 347 (348) : 1 Pat L Jour 393. (Partition suit — Items omitted by inadvertence might be brought in by amendment.)

6. ('69) 11 Suth W R 223 (223).

('30) AIR 1930 All 474 (475).

7. ('10) 6 Ind Cas 876 (877) (Mad). (Defective averments should be allowed to be amended.)

('25) AIR 1925 Nag 9 (10).

('71) 7 Beng L R 333 (334).

('72) 9 Bom H C R 1 (6).

('85) AIR 1935 Pat 86 (87). (No averment in plaint that notice under S. 80 has been served, even though such notice has been served, as a fact — Amendment of plaint to include such averment must be allowed.)

[See ('35) AIR 1935 Mad 158 (159, 160). (Amendment adding a new ground of exemption from limitation.)]

8. ('21) 62 Ind Cas 652 (653) (Mad). (Clerical error made in the plaint.)

('32) AIR 1932 Lah 28 (29). (Want of verification in pleading may be amended.)

('18) 18 Ind Cas 444 (445) : 40 Cal 541. (Technical defect in the mode of relief asked.)

('10) 7 Ind Cas 251 (252) (Cal). (Plaint—Not properly framed.)

('15) AIR 1915 Lah 186 (187). (Technical mistake.)

('32) AIR 1932 Bom 867 (870). (Signing and verification by munim without valid authority—Amendment by plaintiff signing later—Allowed.)

('26) AIR 1926 Nag 885 (886). (Omission to raise

certain pleas by mistake or thinking they were unnecessary.)

('24) AIR 1924 Rang 249 (251) : 2 Rang 66. (Defects caused by bona fide mistakes can be remedied by amendments.)

('37) AIR 1937 Pat 526 (527). (Suit instituted wrongly in name of firm by mistake—Provisions of Partnership Act should not be too rigidly enforced—Amendment of plaint should be allowed even at late stage.)

[See also ('33) AIR 1933 Mad 410 (411). (Amendment of plaint for stating relief originally intended accurately and clearly can be allowed.)]

9. ('78) 19 Suth W R 61 (62).

10. ('37) AIR 1937 Nag 173 (174) : ILR (1937) Nag 514. (Plaintiff wrongly described as "mandir" in plaint—Plaint held could be amended by striking out the word "mandir" and substituting word "deity" for it.)

('37) AIR 1937 Oudh 290 (291) : 18 Luck 157. (Where a suit was brought by one of two co-mortgagors to recover his share only, but it was found that the mistake was due to wrong advice and that the amendment of plaint would not have changed the cause of action held that the plaintiff should be given permission to amend the plaint for the ends of justice.)

11. ('25) AIR 1925 Mad 950 (958).

12. ('23) AIR 1923 Mad 245 (246). (Negligence found—Amendment to give particulars of negligence not to be allowed as they are unnecessary.) (1894) 8 Ch 554 (557), Sinclair v. James.

13. (1905) 1 Ch 180 (187), Jones v. Hughes.

14. ('11) 10 Ind Cas 532 (534) (Cal).

('34) AIR 1934 All 11 (12). (Amendment to include mere technical plea of limitation — Not allowed.)



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Note 12

pleadings, namely, that the Court cannot, by way of amendment, substitute *one distinct cause of action for another*.<sup>1</sup> Where the plaintiff sued for specific performance of a contract alleged to have been entered into by the defendant with him in 1912; and on his failure to establish the alleged contract sought to amend the plaint by setting up another and independent contract of 1903, it was held by their Lordships of the Privy Council that such amendment could not be allowed. Their Lordships said :

"When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in their Lordships' opinion, be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made. It would be a regrettable thing, if when in fact the whole of a controversy between two parties was properly open, rigid rules prevent its determination, but in this case their Lordships think that the rules do have that operation and that it was not open to the Court to permit a new case to be made."<sup>2</sup>

In the following instances amendments were refused as introducing a new and distinct cause of action —

(1) Claim on the basis of *kittima* adoption : amendment into claim based on *apathitha* adoption.<sup>3</sup>

(2) Claim based on negligence : amendment into claim based on nuisance.<sup>4</sup>

(3) Suit based on fraud and instigation of false claims on the part of the defendant : amendment into claim based upon an implied contract of indemnity.<sup>5</sup>

#### Note 12

1. ('38) AIR 1938 Mad 53 (55). (An amendment which enables the creditor to allege new acts of insolvency which have become unimpeachable and have ceased to be acts of insolvency under S. 9 Provincial Insolvency Act, and which he neither relied nor intended to rely when presenting his petition in insolvency cannot be allowed.)

('36) AIR 1936 Pat 535 (536). (An amendment which involves a substantial alteration of the cause of action, namely, to change a suit for declaration into one for possession, should not be permitted, more especially when the suit is brought long after the expiry of the period of limitation.)

('38) AIR 1938 Rang 125 (126). (Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage, such person cannot be allowed to amend the pleadings by basing his suit on his title, the causes of action for the two suits being different.)

See also the following cases :

('27) AIR 1927 Mad 859 (860).

('16) AIR 1916 Mad 698 (698).

('16) AIR 1916 Mad 1212 (1213). (Plaint not to be amended so as to set up a totally different title and cause of action.)

('19) AIR 1919 Oudh 247 (248). (Starting a new trial on a cause of action, deliberately abandoned — Amendment will not be allowed in second appeal.)

('18) AIR 1918 Mad 681 (684) : 40 Mad 865 (FB).

('26) AIR 1926 Rang 49 (50) : 3 Rang 483. (Claim of one kind cannot be converted into claim of another kind.)

('20) AIR 1920 Low Bur 92 (93, 94).

('19) AIR 1919 Upp Bur 29 (29) : 3 Upp Bur Rul 171.

2 Ind Jur (NS) 118. (Plaint not to be amended to raise a wholly different question.)

('69) 1 N W P C H R 250 (251, 252).

('69) 1 N W P H C R 204 (210). (After virtually deciding the case Court should not permit the plaintiff to add a new defendant against whom he has a different cause of action.)

('78) 1878 Pun Re No. 66.

('14) AIR 1914 Cal 487 (488). (Account stated found to be forgery—Suit cannot be amended to one on account stated in the previous year.)

('94) 21 Cal 997 (1005) : 21 Ind App 163 (PC).

('91) 15 Bom 98 (98). (Leave to sue under Clause 12, Letters Patent will not be given in respect of a different cause of action after the institution of the suit.)

('82) 6 Bom 266 (276).

[But see ('14) AIR 1914 Mad 322 (323). (In exceptional cases, to avoid multiplicity of suits, such amendments can be allowed.)]

2. ('22) AIR 1922 P C 249 (251) : 48 Ind App 214 : 4 Upp Bur Rul 30 : 48 Cal 832 (PC).

[See also ('26) 96 Ind Cas 304 (305) (All). (Suit for redemption on basis of certain mortgage—Amendment into suit for redemption of different mortgage.)]

[But see ('16) AIR 1916 Mad 1072 (1078). (Suit for specific performance can be decreed on a contract different from the one set up when time is not essence of contract and there has been part performance of the contract.)]

3. ('18) AIR 1918 Low Bur 111 (112).

('20) AIR 1920 Low Bur 168 (169) : 10 Low Bur Rul 376.

[See however ('25) AIR 1925 Rang 178 (182) : 2 Rang 661, (Defence raising *kittima* adoption—*Apathitha* adoption proved—Defence can be amended even at the appellate stage.)]

4. ('12) 13 Ind Cas 370 (372) : 38 Cal 797.

5. ('18) 21 Ind Cas 935 (936) (Mad).



(4) Claim for declaration of ownership: amendment into claim for specific performance of a contract.<sup>6</sup>

(5) Claim to establish title to an *archaka* office and for mesne profits of certain lands attached to the office: amendment into an alternate claim for reasonable wages for having rendered *archaka* service in suit temple.<sup>7</sup>

(6) Suit on the basis of a contract: amendment raising plea that there was no contract at all.<sup>8</sup>

(7) Suit for redemption: amendment so as to convert it into one for enforcing a right as owner.<sup>9</sup>

(8) Plaintiff suing alleging right to sue on behalf of a certain committee: on failing to establish such right, amendment by adding as parties persons who had such right.<sup>10</sup>

Where, in answer to an application for amendment, it is alleged that such amendment would change the cause of action, the Court must look to the *substantial nature* of the claim and not to the *formal* manner in which it is inserted.<sup>11</sup> A mere change in the *date* of the cause of action,<sup>12</sup> or the correction of a clerical error,<sup>13</sup> or amendments to disclose further details of a fact which support or amplify a cause of action already sued on,<sup>14</sup> or the correction of a misdescription of property,<sup>15</sup> cannot be said to introduce such a *distinct* cause of action as will entail a rejection of the application for amendment. Thus, where the plaintiff sued to set aside a sale, on the ground that the defendants had taken advantage of his youth, he having just attained majority, and afterwards applied to amend the plaint by adding that on the date of the sale he was a minor, it was held that the amendment was merely for the purpose of amplifying and developing the original cause of action and should be allowed.<sup>16</sup> Similarly, a plaint can be amended by putting in the necessary ground of exemption from limitation for the suit, such as an acknowledgment of liability.<sup>17</sup> Where, in respect of an *original liability* to pay a certain sum of money, a document, such as a promissory note or a mortgage, is taken and the plaintiff in a suit on such document finds that the document is inadmissible in evidence owing to some technical defect, an amendment of the plaint by claiming relief as on the basis of the original liability does not, as a general rule, amount to a substitution of a distinct cause of action, and should,

6. ('81) AIR 1931 Lah 595 (597).

7. ('28) AIR 1928 Mad 828 (829).

8. ('27) AIR 1927 Mad 973 (973).

9. ('29) AIR 1929 Rang 179 (181) : 7 Rang 140.

(16) AIR 1916 Low Bur 71 (72) : 8 Low Bur Rul 418.

(21) AIR 1921 Lah 53 (55).

10. ('26) AIR 1926 Mad 577 (577).

11. ('26) AIR 1926 Sind 264 (267) : 21 Sind L R 336.

(38) AIR 1938 Pat 400 (401). (Amendment altering mere form of suit should be allowed.)

12. ('26) AIR 1926 Mad 128 (129). (Change in the date as to when cause of action arose.)

(33) AIR 1933 Sind 181 (183).

(24) AIR 1924 Oudh 385 (386). (A change in the date corresponding to the vernacular date which still remains the same.)

(74) 7 Mad H C R 364 (368).

[See however ('01) 80 Cal 699 (704).]

13. ('22) AIR 1922 All 81 (81).

(75) 7 N W P H C R 364 (366, 357). (Error in the plaint in date of cause of action — Suit should not be dismissed—Plaint should be allowed to be amended.)

14. ('25) AIR 1925 Nag 9 (11).

(81) 5 Bom 609 (613, 614).

(20) AIR 1920 Low Bur 92 (93, 94). (Amendment seeking nothing more than original claim in another form can be allowed.)

[See also ('88) 12 Bom 237 (241). (Suit for collision originally filed against the owners of a ship—Amendment by adding ship as a party defendant.)]

15. ('37) AIR 1937 Lah 895 (896). (Amendment of application for adjudication as insolvent.)

16. ('26) AIR 1926 Mad 188 (188).

17. ('09) 3 Ind Cas 159 (160) : 34 Bom 250.

(18) AIR 1918 Mad 1200 (1200).

(18) AIR 1918 Lah 220 (220) : 1918 Pun Re No. 102.

(27) AIR 1927 Mad 504 (505).

(28) AIR 1928 Sind 17 (20) : 22 Sind L R 222. (Equitable mortgage—Personal liability under—Saving of, by acknowledgment in fresh pro-note executed by mortgagor in favour of mortgagee—Amendment of plaint by addition of.)

(85) AIR 1935 Bom 218 (214). (The Court may at any stage of the proceedings of a suit allow

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therefore, be allowed.<sup>18</sup> Again, where subsequent to the institution of the suit by the plaintiff, events happen which give the plaintiff a new cause of action for the relief claimed or the right to a new or additional relief, he will, as a general rule, be allowed to amend the plaint by moulding it in an appropriate manner.<sup>19</sup> Thus, where the plaintiff sues to redeem a particular mortgage, and the defendant denies that mortgage but sets up another mortgage, the plaintiff may be allowed to amend the plaint by

a party to amend its pleadings by permitting him to substitute one ground of exemption from limitation for another.)

('35) AIR 1935 Mad 158 (159).

18. ('22) AIR 1922 Lah 394 (394). (Insufficiently stamped hundi.)

('20) AIR 1920 Mad 910 (911). (Do.)

('27) AIR 1927 Mad 378 (378). (Do.)

('24) AIR 1924 Mad 520 (521). (Do.)

('31) AIR 1931 Oudh 54 (56). (Do.)

('26) AIR 1926 Mad 1124 (1124, 1125). (Mortgage for amount due on settled accounts — Suit on mortgage—Binding character of mortgage denied —Amendment into claim on basis of running account.)

('30) AIR 1930 Mad 168 (170, 172).

('35) 39 Cal W N 1235 (1241).

('35) AIR 1935 All 353 (357); 57 All 459. (Suit on promissory note — Plaintiff finding his suit as such may fail, applying for amendment by falling back on original consideration—Amendment held should be allowed.)

('36) AIR 1936 Rang 508 (509); 14 Rang 383. (Promissory note — Suit for recovery of debt thereunder time-barred — Application to amend plaint to allow creditor to sue for original debt —Amendment should be allowed.)

('38) AIR 1938 Rang 461 (467); 1938 Rang L R 521. (Mortgage suit — Claim—based on pro-note and transfer by deposit of title deeds — Pro-note inadmissible because of some defect in it — Amendment to base claim on original transaction — Other party if not deprived of defence, amendment can be allowed.)

('38) AIR 1938 Pat 205 (207); 17 Pat 268. (Plaintiff in suit on hand note is entitled to recover his claim on the original loan when hand note is not admissible, provided plaint is amended.)

('36) AIR 1936 Mad 785 (787) (F B). (Suit on promissory note barred by limitation — Plaint amended so as to base claim on original debt.)

('35) AIR 1935 Rang 282 (284).

('36) AIR 1936 Mad 632 (633). (Amendment of plaint allowing plaintiff to base his cause of action on fresh promise to pay time-barred debt — Fresh promise being original cause of action, amendment allowed.)

('37) AIR 1937 Pat 656 (656).

*See also the following cases :*

('33) AIR 1933 Nag 57 (62); 29 Nag L R 131. (Facts for the original cause of action fully stated — Formal amendment not necessary.)

('30) AIR 1930 Bom 424 (426).

('25) AIR 1925 Rang 282 (282); 3 Rang 188 (F B).

('30) AIR 1930 Lah 559 (560).

('20) AIR 1920 Mad 836 (836). (Suit on a pro-note—Amendment into suit based on pro-note as well as original consideration—Allowed.)

('39) AIR 1939 Mad 84 (35). (Suit on promissory note — Note insufficiently stamped — Amendment of plaint by falling back on a previous promissory note allowed.)

('35) AIR 1935 Mad 888 (890). (Suit on hundi—Hundi found inadmissible in second appeal — Amendment of plaint allowed.)

*As to cases where the loan and the note are simultaneous, see the following cases :*

('32) AIR 1932 Mad 693 (694).

[See ('14) AIR 1914 Mad 657 (659); 38 Mad 660. (Suit on pro-note which is inadmissible—Payment of money at the time of execution of note does not give rise to independent obligation—Relief cannot be granted upon such obligation.)]

[See also ('30) AIR 1930 Bom 66 (68).

('33) AIR 1933 Bom 476 (477, 478); 57 Bom 802. (Suit on promissory note — Cause of action on original loan giving rise to pro-note can be set up by amendment at trial or appeal.)]

[But see ('25) AIR 1925 Mad 351 (352). (Suit on pro-note insufficiently stamped—Consideration of note being antecedent debt—Relief based on antecedent debt cannot be granted.)

('32) AIR 1932 Bom 394 (396).]

19. ('26) AIR 1926 Mad 6 (12).

('15) AIR 1915 Sind 25 (27); 9 Sind L R 61.

('25) AIR 1925 Pat 168 (173).

('31) AIR 1931 Nag 10 (12); 26 Nag L R 848.

('25) AIR 1925 Mad 1021 (1023).

('21) AIR 1921 Lah 220 (221). (Suit for injunction may be changed into one for possession.)

('12) 16 Ind Cas 734 (735) (Mad). (Suit for declaration — Securing of possession by defendant after suit—Adding of prayer for possession—Court can order amendment.)

('89) 12 Mad 136 (136).

('31) AIR 1931 Mad 505 (509).

('24) AIR 1924 Mad 809 (810).

*In the following cases relief based upon such new cause of action was granted although amendment was not asked for :*

('23) AIR 1923 All 560 (562).

('17) AIR 1917 Mad 198 (200). (Appellate Court can take cognizance of subsequent events.)

('18) AIR 1918 Oudh 105 (106). (Plea based on subsequent events can be raised.)

('19) AIR 1919 Lah 262 (263); 1919 Pun Re No. 127. (Decree can be given without amendment.)

('18) AIR 1918 Mad 143 (143). (Relief on cause of action arising subsequent to suit can be granted.)

('35) AIR 1935 Oudh 22 (23); 10 Luck 270. (But in such cases opposite party must be given an opportunity to amend his pleading.)

claiming relief on the basis of that mortgage,<sup>20</sup> except where the plaintiff is guilty of *mala fides*.<sup>21</sup> For other instances, see the undermentioned cases.<sup>22</sup> But where the cause of action is foreign to the original cause of action on which the suit was brought, the amendment cannot be allowed. Thus, where *A*, the endorsee of a promissory note, sued *B* on the note, and it was found that the note was void as infringing the Paper Currency Act, and the plaintiff thereupon obtained an *assignment of the original obligation* and applied to add this cause of action, it was held that it could not be allowed inasmuch as the cause of action based on the *assignment of the original obligation* was quite distinct from the cause of action based on the assignment of the promissory note itself.<sup>23</sup> On the question if Courts can give relief on a cause of action accruing after the institution of the suit, see Note 4 to O. 7 R. 7 *infra* and cases cited in Point 19 above.

**13. "At any stage of the proceedings."** — Under the old Code a plaint could only be returned for amendment in certain cases specified, *at or before the settlement of issues*.<sup>1</sup> The Court could also *at any time before judgment* amend the plaint.<sup>2</sup> The

[See also ('22) AIR 1922 Oudh 266 (267). (Suit for declaration of title — During pendency of suit defendant getting into possession of property — Court ordering plaintiff to amend plaint by asking further relief for possession—Plaintiff not making necessary amendment — Suit is liable to be dismissed.)

('71) 7 Bong L R App 65 (65). (Substitution of parties due to subsequent events.)]

[But see ('27) AIR 1927 Cal 56 (57). (Distinct cause of action — Not allowed.)

('10) 5 Ind Cas 699 (701) : 6 Nag L R 17.]

20. ('80) 4 Bom 584 (588). (Suit for redemption—Defendant admitting mortgage but proving that it was of another date and for a different amount — Relief granted to plaintiffs upon facts proved by defendant.)

('98) 17 Bom 365 (368). (Do.)

('08) 27 Bom 271 (276, 278). (Do.)

('10) 7 Ind Cas 115 (117) : 32 All 651. (Suit on a later mortgage — Later mortgage containing covenant not to redeem it before redeeming the earlier one—Amendment into suit on both mortgages allowed.)

('08) 5 Bom L R 643 (645). (Suit for redemption — Defendant denying suit mortgage but prior mortgage which was admitted by him was then alive — Amendment of plaint for redemption of earlier mortgage.)

('07) 30 Mad 888 (390). (Suit for redemption—Plaintiff failing to prove mortgage set up by him — Plaintiff may be allowed to redeem on basis of different mortgage under which defendant claims to hold.)

('17) AIR 1917 Mad 495 (498). (Suit for redemption — Defendant denying suit mortgage but claiming to hold under other different mortgages — Plaintiff can be allowed to amend his plaint so as to claim redemption of one of the mortgages set up by defendant.)

('29) AIR 1929 Oudh 483 (485) : 5 Luck 424. (Suit for redemption — Defendant denying suit mortgage but claiming to hold under two earlier mortgages—Amendment of plaint so as to claim redemption of earlier mortgages allowed.)

[See also ('80) AIR 1980 Sind 98 (98). (Suit for

ejectment on basis of sale—Defence that transaction was only mortgage by conditional sale—Amendment of plaint for relief on basis of defendant's plea.)]

[But see ('85) AIR 1988 Oudh 16 (16) : 13 Luck 669].

21. ('18) AIR 1918 Mad 121 (122). (Plaintiff fabricating a document.)

[See also ('37) AIR 1937 Pat 572 (575) : 16 Pat 527. (A party coming to Court with a forged document should not be allowed to amend his plaint in second appeal.)]

22. ('84) AIR 1984 Rang 234 (238). (Suit by heir of *M* as assignee of mortgage—Assignment unregistered and inadmissible—Suit amended as one by heir of *M* and making other heirs as defendants — Amendment does not substitute distinct cause of action.)

23. ('31) AIR 1931 Mad 533 (533).

#### Note 13

1. ('85) 7 All 79 (81) (FB).

('85) 7 All 860 (862).

('66) 5 Suth W R 234 (234). (Plaint cannot be amended after settlement of issues.)

('80) 2 All 671 (675). (Plaint amendment as per the order made at the first hearing — It cannot afterwards be returned for amendment.)

('68) 10 Suth W R 111 (112). (Plaint cannot be amended in Appellate Court.)

('80) 2 All 669 (671). (Appellate Court cannot remand case for amendment of plaint.)

('81) 1881 Pun Re No 126, p. 314.

[See also ('68) 8 Mad H C R 372 (373). (Suit for malicious prosecution — Omission to allege express malice—This is not a matter for amendment at the final hearing.)

('78) 10 Bom H O R 17 (18). (Not alleging any cause of action against one of the defendants.)

('85) 9 Bom 858 (361). (Plaint disclosing no cause of action.)

('92-'96) 2 Upp Bur Rul 251. (Cause of action not sufficiently disclosed in the plaint.)

(1868) 1 Mad H C R 427 (428). (Time for amendment should be specified.)]

[But see ('12) 15 Ind Cas 583 (584) (Cal).]

2. ('96) 18 All 896 (899).

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**Note 18**

present rule now makes it clear that the amendment can be made *at any stage* of the proceedings.<sup>3</sup> It may, thus, be allowed before or at, or after the trial, or before the final decree in the case,<sup>4</sup> or in appeal,<sup>5</sup> or in second appeal,<sup>6</sup> or in revision,<sup>7</sup> or even in an appeal before the Privy Council.<sup>8</sup> A Court of Appeal may also remand the case directing the lower Court to amend the plaint and proceed with the trial.<sup>9</sup> Mere delay, therefore, in applying for an amendment will not be a ground for refusing an application for leave to amend.<sup>10</sup> But where the application is made at such a late

('01) 1901 All W N 140 (140).  
(1900) 30 Cal 516 (519). (No amendment by trial Court after judgment.)

('96) 1896 Pun Re No. 48, p. 133.

('93-1900) 1893-1900 Low Bur Rul 130.

('04) 26 All 218 (220). (After framing of issues plaint could only be amended by the Court.)

(1900) 5 Cal W N 273 (279). (Amendment of plaint allowed by Appellate Court.)

('80) 4 Bom 222 (226). (Do.)

('88) 9 Cal 695 (698). (Do.)

('95) 22 Cal 692 (710). (Do.)

('09) 4 Ind Cas 1097 (1101) (Mad). (Do.)

('72) 18 Suth W R 424 (432). (Do.)

('97) 19 All 880 (831). (Do.)

('03) 25 All 46 (48). (Do.)

('97) 20 Mad 467 (469). (Do.)

('74) 25 Suth W R 425 (428, 429) : 2 Cal 1. (Do.)

[See also ('06) 1906 All W N 220 (221).]

3. ('25) AIR 1925 Nag 62 (63).

('35) AIR 1935 Cal 102 (105).

('33) AIR 1933 Nag 29 (31) : 28 Nag L R 320.

('11) 10 Ind Cas 731 (732) : 7 Nag L R 33.

('25) AIR 1925 Rang 282 (282) : 3 Rang 183.

('19) AIR 1919 Mad 1067 (1067).

('37) AIR 1937 Cal 562 (565). (The Court does not lose this power by reason of the fact that the party has been allowed a certain time for payment of the deficit court-fees.)

('34) AIR 1934 Lah 974 (975).

('34) AIR 1934 All 273 (276) : 56 All 428. (Though a belated amendment of pleadings will be allowed on condition of payment of costs by the petitioner to the opposite party and the latter is given an opportunity to adduce evidence on the new case adopted by the petitioner.)

('37) AIR 1937 Pat 526 (527). (Suit instituted in name of firm by mistake — Amendment to be allowed even at late stage.)

4. ('32) AIR 1932 Mad 275 (279).

5. See Section 107 (2).

('33) AIR 1933 Lah 395 (396).

('16) AIR 1916 Cal 283 (284) : 43 Cal 988.

('16) AIR 1916 Pat 347 (348) : 1 Pat L Jour 393.

('20) AIR 1920 Cal 770 (770).

('20) AIR 1920 Lah 263 (264).

('21) AIR 1921 Lah 157 (159) : 2 Lah 73. (Even the highest Court of Appeal can amend.)

('28) AIR 1928 Lah 115 (116) : 3 Lah 882. (Appellate Court can allow amendment of grounds of appeal.)

('19) AIR 1919 Oudh 154 (158). (Amendment of plaint may be allowed in appeal under exceptional circumstances.)

('26) AIR 1926 Oudh 98 (99) : 1 Luck 33.

('25) AIR 1925 Pat 168 (173).

('28) AIR 1928 Bom 425 (427).

('25) AIR 1925 Cal 434 (435). (When defendant is in default, even at the appellate stage the Court can treat the plaint as amended and allow such equitable relief as plaintiff is entitled to.)

('37) AIR 1937 P C 42 (46) : 16 Pat 149 (PC).

(Amendment not changing character of suit and not unfair can be made in appeal before High Court.)

('36) AIR 1936 All 289 (252) : 58 All 505. (But the opposite party should not be prejudiced or taken by surprise.)

('35) AIR 1935 Lah 91 (91). (Appellate Court can allow amendment converting declaratory suit into one for possession.)

('35) AIR 1935 Mad 888 (890).

('38) AIR 1938 Pat 400 (401).

[See also ('35) AIR 1935 Lah 378 (379).]

6. See Section 108 *ante*.

('18) AIR 1918 Mad 1142 (1145).

('26) AIR 1926 Mad 1117 (1120).

('21) AIR 1921 Lah 157 (159) : 2 Lah 73.

('32) AIR 1932 Bom 175 (176).

('10) 7 Ind Cas 797 (797) (Mad). (Appellate Court can allow the heading of an appeal to be amended.)

('36) AIR 1936 Mad 545 (547). (Necessary amendment can be permitted even in second appeal—Principles to be observed stated.)

[See ('35) AIR 1935 Pat 504 (506) : 15 Pat 46.

(Prayer for an amendment at the stage of the second appeal was not granted.)]

[See also ('28) AIR 1928 Pat 590 (592) : 2 Pat 925. (Not allowed in this case.)]

7. ('13) 20 Ind Cas 831 (832) (Lah).

8. ('25) AIR 1925 P C 169 (170) : 47 All 459 (PC).

('67) 11 Moo Ind App 468 (486) (P C).

9. ('01) 23 All 167 (178).

('81) 5 Bom 181 (183).

('82) 6 Bom 670 (672).

('82) 6 Bom 672 (673).

[See also ('14) AIR 1914 Cal 637 (638). (Remand by High Court for amendment by First Court—Amendment by lower Appellate Court is bad.)]

10. ('25) AIR 1925 Oudh 291 (292) : 27 Oudh Cas 231. (Loss to the defendant due to delay in amendment can well be compensated by an order for costs in his favour.)

('33) AIR 1933 All 874 (375, 376) : 55 All 256.

(1891) 1 Ch 384 (389), James v. Smith. (In this case however the amendment was not allowed on the ground that it would introduce laxity in the proceedings.)

('19) AIR 1919 Cal 191 (192). (Eleven and half months after institution of suit amendment of

stage that, under the circumstances, it will cause injustice or injury to the opposite party if the leave to amend is granted, the application will be refused.<sup>11</sup> Thus, the Court will as a rule be disinclined to grant leave to amend —

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**Note 13**

- (1) Where it introduces a totally new case,<sup>12</sup> or necessitates a fresh trial, or the letting in of fresh evidence.<sup>13</sup>
- (2) Where the amendment will lead to needless complications.<sup>14</sup>
- (3) Where the plaintiff is negligent or has taken his stand deliberately on a certain basis.<sup>15</sup>

plaint by withdrawing claim against properties outside jurisdiction allowed.)

('38) AIR 1938 Mad 388 (389). (In the matter of rectifying defects in pleadings which do not affect any substantial rights, it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay.)

('35) AIR 1935 Pat 463 (465). (The significance of delay lies not in the quantity of time that has elapsed but in what has transpired during that time.)

11. ('25) AIR 1925 P C 169 (170); 47 All 459 (P C).

('33) AIR 1933 Bom 101 (104, 105). (Leave asked for in second appeal refused.)

('33) AIR 1933 Pat 443 (444). (Nature of case altered by amendment.)

('21) 61 Ind Cas 328 (329) (Lah).

('12) 13 Ind Cas 128 (130) (Cal).

('86) 1886 Pun Re No. 68, p. 144.

('21) AIR 1921 Lah 156 (156).

('18) AIR 1918 Lah 186 (186).

('14) AIR 1914 All 302 (303). (Amendment to introduce a new cause of action when it was barred after the parties had agreed not to let in any evidence on the question of limitation.)

('18) AIR 1918 Nag 160 (160). (Six days before judgment plaintiff was refused leave to amend his suit for possession into one for a right of way.)

('18) AIR 1918 Pat 280 (239). (More than a year after issues when the case was ready for hearing raising a completely new point.)

('87) 11 Bom 620 (638); 14 Ind App 111 (P C). (Amendment applied for when the evidence had been taken.)

('73) 10 Bom H C R 182 (187).

('23) AIR 1923 Cal 228 (226). (Amendment defeating plea of defendant cannot be allowed.)

('28) AIR 1928 Mad 828 (829).

[See ('33) AIR 1933 Cal 668 (673); 60 Cal 801.]

12. ('27) 99 Ind Cas 979 (980) (Lah).

('34) AIR 1934 Oudh 118 (118).

('28) AIR 1928 Lah 933 (934).

('29) AIR 1929 Lah 710 (711). (After a period of two and half years.)

('21) AIR 1921 Lah 53 (55). (Plaintiff having prayed for redemption was not allowed to amend his plaint for possession of property on the footing that mortgage was unlawful when case was ready for judgment.)

('20) AIR 1920 Cal 673 (674).

('21) AIR 1921 Sind 169 (165); 16 Sind L R 207. (New plea—Amendment as to—Not to be allowed in revision.)

('18) AIR 1918 Nag 148 (149). (Suit for declara-

tion that sale is invalid—Amendment by claiming possession of property.)

('38) AIR 1938 P C 123 (129); 32 Sind L R 448; I L R (1938) Mad 646 (P C).

('38) AIR 1938 Nag 388 (390); I L R (1939) Nag 194.

13. ('92) 15 Mad 255 (257, 258).

('33) AIR 1933 Lah 676 (677); 14 Lah 640.

('21) AIR 1921 Cal 125 (126).

('15) AIR 1915 Lah 177 (177).

('28) AIR 1928 Lah 599 (600); 9 Lah 291. (When no cause of action at all was alleged and suit was dismissed, amendment not allowed to introduce the same.)

('31) AIR 1931 Lah 260 (262). (Suit to recover price of goods supplied refused to be amended into a suit to recover damages for breach of contract.)

('98) 21 Mad 288 (291). (Further evidence necessary.)

('11) 12 Ind Cas 200 (202) (Upp Bur). (Fresh issues and fresh evidence.)

('19) AIR 1919 Cal 534 (535, 536); 46 Cal 168.

('28) AIR 1928 Bom 516 (518); 52 Bom 640.

[See ('30) AIR 1930 Rang 140 (142); 7 Rang 800.]

14. ('28) AIR 1928 Lah 375 (376); 9 Lah 588. (Amendment changing plaintiff's name from temple to idol.)

('25) AIR 1925 Mad 441 (442). (To convert a suit for maintenance of certain members alone of a tavazhi into a suit on behalf of the whole tavazhi.)

15. ('27) AIR 1927 Bom 521 (525); 51 Bom 749. (Judgment obtained against the sheriff as corporation sole, in execution amendment will not be allowed for suing the former sheriff in name.)

('22) AIR 1922 All 5 (6). (Plaintiff basing his suit on a custom of pre-emption, without even mentioning any contract of pre-emption should not be allowed to amend the plaint at appellate stage.)

('33) AIR 1933 Cal 271 (274). (In this case, however, considering the facts and circumstances the amendment was allowed on the ground that it would be more in furtherance of justice to do so.)

('82) 1882 Pun Re No. 175, p. 519.

('23) AIR 1923 Lah 675 (677). (Defence on a definite plea that they were holding under a completed sale cannot be allowed in second appeal to be altered to a case of specific performance of an agreement to sell.)

('28) AIR 1928 Lah 92 (39). (Suit in ejectment cannot be amended in second appeal as on basis of permissive possession.)

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**Note 13**

(4) Where, notwithstanding objection by the opposite party, the plaintiff insists on proceeding with the suit as framed.<sup>16</sup>

(5) Where the plaintiff has had several opportunities to apply for amendment but has slept over his rights for a very long time.<sup>17</sup>

See also the undermentioned cases.<sup>18</sup>

('80) AIR 1930 Pat 321 (321). (Suit for possession against prior mortgagee misconceived—With full knowledge of suit plaintiff declined to withdraw it and file fresh suit for redemption—High Court declined to give permission to amend it.)

('16) AIR 1916 Mad 1208 (1208). (When the plaintiff failed to avail himself of the other remedies open to him.)

('28) AIR 1928 Oudh 135 (136, 137).

('36) AIR 1936 Mad 545 (547). (For allowing amendment in second appeal it should be seen whether the conduct of the party seeking the amendment has been *bona fide* and he has come to Court with clean hands and whether by the exercise of due diligence the relief for amendment could have been sought earlier.)

('37) AIR 1937 Sind 92 (93) : 31 Sind L R 406. (Application to amend description in plaint—Plaint instituted by living person in name of, and verified on behalf of, a dead person—Living person's name cannot be substituted under O. 1 R. 10 in place of dead person—Plaintiff guilty of gross neglect—He cannot be allowed to amend under O. 6 R. 17.)

16. ('91) 15 Mad 255 (257).

('26) AIR 1926 Mad 988 (989). (Suit for injunction—Plaintiffs out of possession—Objection to frame of suit by defendants—Plaint yet not sought to be amended—Failure of plaintiff in trial Court—Application for amendment filed in appeal.)

('82) 8 Cal 277 (278).

('97) 24 Cal 584 (588).

('18) AIR 1918 Cal 391 (391).

('09) 1 Ind Cas 397 (400) : 1909 Pun Re No. 10.

('18) AIR 1918 Lah 236 (238) : 1918 Pun Re No. 118.

('10) 6 Ind Cas 542 (543) (All).

('24) AIR 1924 Pat 310 (311) : 2 Pat 919. (Where the mistake is *bona fide*, amendment will be allowed.)

('06) 9 Oudh Cas 275 (280).

('28) AIR 1928 Rang 134 (135). (Declaratory suit—Consequential relief not asked though objected.)

('23) AIR 1923 Sind 17 (20). (Opportunity given for amendment—Amendment not availed of—Amendment cannot be allowed later on.)

('84) AIR 1984 Lah 235 (236, 237).

('88) AIR 1938 Mad 331 (333).

17. ('99) 26 Cal 845 (851).

('28) AIR 1928 Lah 530 (532).

('09) 2 Ind Cas 290 (292) : 36 Cal 481. (Amendment not sought to be made in the first Court was disallowed at a late stage of the suit.)

('10) 8 Ind Cas 600 (601) (Low Bur). (Amendment deliberately not made.)

('10) 6 Ind Cas 542 (543) (All). (Change of date in plaint in second appeal.)

('17) AIR 1917 Mad 37 (38). (Unreasonable delay.)

('37) AIR 1937 Mad 484 (487).

18. ('14) AIR 1914 All 484 (485). (Plaintiff in suit for ejectment asking plaint to be amended so as to change suit into one for redemption—In previous litigation plaintiff not asserting his rights under mortgage and for nearly 12 years taking no steps to assert his rights as mortgagor—Amendment *held* could not be allowed.)

('20) AIR 1920 Mad 180 (180). (Suit for enforcement of award—Plaintiff seeking amendment of plaint so as to turn suit into one for dissolution of partnership—Plaintiff's former application for such amendment rejected by lower Court—Plaintiff having plenty of opportunity to bring another suit on an account, not availing of it—Amendment *held* could not be allowed in second appeal.)

('74) 21 Suth W R 208 (209) (FB). (Where there is reason to think that omission to claim alternative relief is deliberate, amendment to include such relief will not be allowed.)

('10) 10 Ind Cas 532 (534) (Cal). (Written statement, *held*, could not be allowed to be amended at a very late stage of the suit, thus enabling defendant to raise objections in bar, not taken in original statement.)

('67) 3 Mad II C R 372 (373). (Defect on the face of the plaint which would have rendered it inadmissible is not a matter for amendment at the final hearing of the suit.)

('36) AIR 1936 Pat 185 (189). (Suit barred under S. 42, Specific Relief Act, by reason of plaintiff not asking for possession—Prayer for amendment just before delivery of judgment is too late.)

('38) AIR 1938 Pat 558 (559). (Plaintiff having elected to abandon relief as to possession seeking in second appeal to amend by adding prayer for possession.)

('34) AIR 1934 Lah 235 (237). (Suit for declaration—Consequential relief not asked for—Plaintiff cannot be allowed to remodel his plaint and thus alter the frame of his suit at stage of appeal.)

('39) AIR 1939 Sind 281 (286) : 1 L R (1939) Kar 632. (Person suing for money belonging to another on the basis of false acknowledgment in her name—No suggestion either in plaint or in deposition about her benami character but plaintiff persisting in the falsehood even in appeal—She is not entitled to a decree and cannot be allowed to amend the plaint.)

('36) AIR 1936 Sind 9 (11). (Suit for account—Amendment of plaint sought—Amendment required in many particulars—Plaintiff in no better position by amendment on point of limitation—Suit purposely brought as suit for account—Amendment is discretionary relief and amendment *held* not allowable at appellate stage.)

('86) AIR 1936 Pat 191 (193). (Amendment of plaint sought in appeal on ground of mistake in



**14. Opportunity to be given to the opposite party to amend his pleading.****O. 6 R. 17  
Notes 14-15**

— Where a pleading is allowed to be amended, an opportunity should be afforded to the opposite side to meet the new case by filing any additional statement or letting in such further evidence as may be necessary.<sup>1</sup> Where, however, a party raises a contention not covered by his pleading, the Court cannot direct the opposite party to file a statement in answer to such contention, without first directing the former to amend his pleading and deciding that the amendment is necessary.<sup>2</sup>

**15. "On such terms as may be just."** — These words give the Judge an unfettered discretion as to the terms to be imposed in granting an amendment of the pleadings.<sup>1</sup> As a general rule an amendment will only be allowed on the terms that the cost of the application for leave to amend, and of the costs occasioned by, and in consequence of, the amendment shall be paid by the party amending, in any event.<sup>2</sup>

typing — No sufficient explanation offered why mistake was not discovered earlier — Appellate Court will not exercise its discretion in allowing amendment.)

('38) AIR 1938 Pat 558 (559). (Suit under O. 21, R. 103, C. P. C., for declaration and possession — Amendment of plaint by deleting claim for possession to avoid payment of additional court-fee — Application for leave to re-amend plaint in second appeal by including claim for possession — Leave refused.)

('38) 1938 Oudh WN 1138 (1140). (Where a party has obtained an adjudication of his claim from the trial Court or has argued his case in respect of it in the Court of Appeal, he cannot thereafter be permitted to amend his plaint or memorandum of appeal by abandoning a part of his claim with a view to save himself from the payment of court-fee.)

('36) 40 Cal W N 1233 (1236). (Suit challenging patni sale brought in wrong form — Objection in written statement — Amendment of plaint should not be allowed in Appellate Court when objection is taken when limitation for bringing suit has expired.)

('38) AIR 1938 P C 128 (129) : 32 Sind L R 448 : I L R (1938) Mad 646 (P C). (*Held*, that the relief of so wide and exceptional a nature should not have been entertained by way of amendment at the end of the trial.)

('37) AIR 1937 Pat 572 (575) : 16 Pat 527. (A party will not be allowed to amend the plaint in second appeal, when he comes to the Court basing his suit on a forged document.)

('35) AIR 1935 Rang 88 (89). (Application for amendment, though possible earlier, made late — Fresh suit for amended relief maintainable — Allowing amendment in second appeal is improper.)

('35) AIR 1935 Mad 874 (875). (Where a grossly high value has been put on the subject-matter of the suit not *bona fide* and a request for amendment of valuation is made at the stage of appeal, the amendment should not be allowed.)

('35) AIR 1935 Pesh 126 (128). (A person cannot be allowed to change the whole nature of his claim at the stage of second appeal from what he had either in trial or in Appellate Court.)

**Note 14**

1. ('12) 16 Ind Cas 785 (786) (Cal). (Because the case was pending for a long time is no exception for not doing so.)

('35) AIR 1935 Oudh 22 (23) : 10 Luck 270.

('33) AIR 1933 Nag 29 (31) : 28 Nag L R 320.

('29) AIR 1929 PC 306 (308) (PC).

('16) AIR 1916 Cal 283 (284) : 43 Cal 938. (Appellate Court has powers to remand the case for trial, independently of Rules 23 and 25 of Order 41.)

('75) 23 Suth W R 172 (173).

('14) AIR 1914 Mad 59 (61).

('34) AIR 1934 Bom 407 (416).

('35) AIR 1935 Oudh 22 (23) : 10 Luck 270. (Now events arising during progress of suit giving rise to new cause of action.)

('34) AIR 1934 All 273 (276) : 56 All 428.

[See ('17) AIR 1917 Lah 301 (302) : 1917 Pun Re No. 83.]

2. ('16) AIR 1916 Mad 903 (907).

**Note 15**

1. (1892) 2 Q B 317 (318, 319), Woolley v. Broad. [See also ('34) AIR 1934 Cal 102 (103, 104).]

(Amendment of plaint before trial has begun should be allowed — Defendant can be compensated in costs — That another suit in which same relief sought is pending is no ground for rejecting amendment.)

2. (1879) 1879 W N 175, Blackmore v. Edwards. (1885) 58 L T 408, In re Trufort. (Costs of any evidence or pleading rendered nugatory by the amendment.)

('95) 22 Cal 692 (711, 713). (In appeal and in ordering a remand, a party amending has been ordered to deposit all costs upto date within a specified time.)

('30) AIR 1930 Cal 534 (536) : 57 Cal 898.

('15) AIR 1915 PC 172 (173) (PC).

('31) AIR 1931 Cal 770 (771).

('34) AIR 1934 All 273 (276) : 56 All 428. (Belated amendment can be allowed only on condition of payment of costs.)

('34) AIR 1934 All 273 (276) : 56 All 428. (A belated amendment in pleadings can be allowed only on condition of payment of costs by the petitioner to the opposite party, which is entitled to an opportunity to adduce evidence on the new case adopted for the petitioner.)

**O. 6 R. 17** The terms should be such as will prevent the opposite party from being prejudiced by the amendment.<sup>3</sup>  
**Notes 15-18**

An order directing a plaintiff to pay in cash the costs of amendment of the plaint after he has been found to be a *pauper* is not proper.<sup>4</sup> Where a party accepts under an order costs which, but for the order, would not at that time be payable, he cannot afterwards object that the order ought not to have been made.<sup>5</sup> Where an amendment of a pleading is allowed on condition of the party paying to the opposite party a certain sum as costs and such sum is paid and accepted by the opposite party, the latter cannot afterwards object to the order allowing amendment.<sup>6</sup>

**16. How amendments should be made.** — Under the old Code, the plaint could be *returned* for amendment in certain cases specified.<sup>1</sup> Under the present Code it would seem that the pleading should not be *returned* for amendment, but is to be kept on the Court's file with direction to the parties to amend, if necessary.<sup>2</sup> Where, however, the Court has no pecuniary *jurisdiction* to entertain the suit, the Court should under the provisions of O. 7 R. 10 of the Code return the plaint to the plaintiff, who may amend it by deleting certain reliefs claimed, and re-present the same to the Court.<sup>3</sup>

It is not, however, essential that the amendment should be made on the *face of the plaint* itself; it may be made even on a separate sheet of paper, though it is usually done on the plaint itself.<sup>4</sup>

**16a. Court not having jurisdiction over suit, if can allow amendment of plaint.** — A Court which has no jurisdiction to entertain a suit is not competent to allow an amendment of the plaint which, if granted, would bring the suit within its jurisdiction.<sup>1</sup> But it can return the plaint for presentation to the proper Court and the plaintiff can amend the plaint and re-present it to the same Court.<sup>2</sup>

**17. Who can apply for amendment.** — Where a suit is instituted by two plaintiffs, it is doubtful whether one of them alone can apply for amendment of the plaint.<sup>1</sup>

**18. Extent of amendment.** — A pleading can be amended only to the extent allowed by the Court. Thus, where a plaint was ordered to be amended by *addition of parties* and the plaintiff also altered the *relief claimed*, it was held that the plaint

3. (1887) 36 Ch D 770 (774), *Curtz v. Spence*.

4. ('22) AIR 1922 Bom 385 (385) : 47 Bom 104.

5. ('27) AIR 1927 Mad 1009 (1009).

('33) AIR 1933 Mad 410 (411).

('34) AIR 1934 Cal 554 (555, 556) : 61 Cal 433, (Per Lord Williams, J., Ghose, J., contra.)

6. ('34) AIR 1934 Nag 163 (163) : 30 Nag L R 347. (Unless he accepts the costs expressly reserving at that time his right to challenge that order).

('37) AIR 1937 Lah 895 (896).

('34) AIR 1934 Lah 974 (975).

[See ('36) AIR 1936 Nag 20 (21). (Amendment of application allowed subject to applicant's paying costs before particular date—Non-applicant appealing against order before such date—Appeal is valid though he accepts costs when tendered on due date.)]

**Note 16**

1. ('11) 10 Ind Cas 922 (923) (Low Bur).

('97) 1 Cal W N 574 (576). (Land as described in the plaint cannot be identified.)

[See also ('03) 27 Mad 80 (84, 85). (Suit bad for multifariousness.)]

2. ('21) AIR 1921 Sind 166 (168) : 17 Sind L R 223.

[See however ('18) 19 Ind Cas 672 (672) (Mad). (Pleading may, however, be returned to a party if he applies for it.)]

3. ('28) AIR 1928 Mad 559 (559, 560.)

4. ('93) 1893 All W N 225 (225).

**Note 16a**

1. ('35) AIR 1935 All 842 (843).

('38) AIR 1938 All 17 (18) : ILR (1938) All 40.

2. ('38) AIR 1938 All 17 (18) : ILR (1938) All 40.

**Note 17**

1. ('27) AIR 1927 Cal 733 (735).



must be taken as originally framed, even though the unauthorised amendment as to relief was not objected to either by the Court or by the other party.<sup>1</sup>

**O. 6 R. 17**  
**Notes 18-20**

A Court cannot allow an amendment which has the effect of ousting its own jurisdiction over the suit.<sup>2</sup>

**19. Effect of amendment and limitation.** — Where, in a suit against several defendants, the Court cannot take cognisance of the claim as against some of the defendants, and in consequence thereof the plaintiff amends his plaint by restricting his claim only as against the other defendants, the effect of the amendment is, as if the suit had never been commenced in respect of the former.<sup>1</sup>

Where an amendment is allowed under this rule, such amendment relates back to the date of the suit as originally filed where no party is added.<sup>2</sup> But where the plaint in a suit for possession of certain plots of land is subsequently amended by the inclusion of certain other plots, it is not a case of amendment properly so called, but a case of an addition of entirely new lands, and as regards such lands the suit will date only from the day when the claim was made in respect thereof<sup>3</sup> and not from the date when the application was granted. Similarly, the amendment of a plaint by the addition of a necessary party cannot relate back to the date of the filing of the suit.<sup>4</sup> See Note 41 to O. 1 R. 10 *ante*. See also the undermentioned decision.<sup>5</sup>

A plaint can be allowed to be amended under this rule although at the time of the amendment the suit (if instituted then) would have been barred by limitation.<sup>6</sup> See also Note 5 *supra*. It has been held by the Nagpur Judicial Commissioner's Court<sup>7</sup> that where an amendment of the plaint is made on the direction of the Court on the ground that the suit as framed was not maintainable, all orders passed by the Court against the defendants previously, (*e. g.*, order for attachment before judgment) are vacated automatically.

**20. Appeal.** — Under the old Code, orders *returning plaints* for amendment were appealable under clause 6 of Section 588.<sup>1</sup> But no appeal lay from an order

#### Note 18

1. ('10) 7 Ind Cas 505 (525) (Lah).
2. ('28) AIR 1928 Mad 400 (400).

#### Note 19

1. ('19) AIR 1919 Low Bur 42 (43) : 9 Low Bur Rul 275.
2. ('34) AIR 1934 Lah 412 (412). (Provided no fresh claim is added.)
- (32) AIR 1932 Bom 367 (368, 370).
- (33) AIR 1933 Mad 153 (156).
- (26) AIR 1926 Mad 487 (488).
- (12) 17 Ind Cas 193 (196) : 37 Bom 340. (Where amendment is merely development of plaintiff's position and no new cause of action is introduced, the suit is deemed to have been presented on the date of the original plaint.)
- (95) 19 Bom 320 (323).
- (80) 2 All 832 (834, 835).
- (14) AIR 1914 Lah 263 (265) : 1914 Pun R No. 62.
- (14) AIR 1914 Nag 77 (78) : 10 Nag L R 32.
- (37) AIR 1937 Lah 895 (896). (Application for adjudication in time — Amendment to correct misdescription of property allowed beyond time — Amendment takes effect *nunc pro tunc*.)
- (34) AIR 1934 Lah 412 (413). (Amendment not introducing fresh claim relates back to date of suit.)

(38) AIR 1938 Pat 205 (208) : 17 Pat 268.

(36) AIR 1936 Rang 508 (509) : 14 Rang 383.

3. ('18) AIR 1918 Cal 443 (444).

4. ('37) AIR 1937 Rang 124 (125).

[See also ('85) AIR 1935 Pat 86 (88).

('37) 167 Ind Cas 166 (167) (Lah). (Amendment should not be allowed in such cases.)]

5. ('36) AIR 1936 Mad 991 (992). (Where a suit is filed by an unregistered firm and on subsequent registration an application is made to amend the plaint and to treat the suit as instituted on date of application, the amendment will not be granted and as the suit as originally instituted was incompetent, any subsequent amendment cannot relate back to the date of institution.)

6. ('95) 17 All 288 (291). (Court can return plaint for amendment even after the period of limitation for the suit.)

(14) AIR 1914 Nag 77 (78) : 10 Nag L R 32. (General rule is that amendment claiming fresh relief will not be allowed after limitation period — But this rule will not apply where amendment is in interest of defendant.)

(11) 10 Ind Cas 731 (733) : 7 Nag L R 33.

7. ('34) AIR 1934 Nag 169 (170).

#### Note 20

1. ('03) 1903 Pun L R No. 78, p. 207 (208).

**O. 6 R. 17**  
**Notes 20-21**

passed by the Court itself under clause (c) of Section 53 directing an amendment.<sup>2</sup> Under the present Code, no appeal lies from an order granting or refusing an amendment under this rule.<sup>3</sup> Nor will an Appellate Court, in an appeal from the decree in the suit, interfere with the discretion of the lower Court in granting or refusing amendments.<sup>4</sup> Where the defendants do not take objection to the amendment, they will be deemed to have waived it and cannot raise it again at the stage of appeal.<sup>5</sup>

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable under the Letters Patent as a 'judgment.'<sup>6</sup> Nor is an order amending the title of a plaint by omitting the word "summary" and transferring the case to the short cause list, a "judgment" within Clause 15 of the Letters Patent.<sup>7</sup>

Where, on a plaint being amended in accordance with the order of the Court, the Court finds that the suit is beyond its pecuniary jurisdiction and returns the plaint for presentation to the proper Court, the order directing amendment can be challenged in the appeal from the order returning the plaint.<sup>8</sup>

**21. Revision.** — See Notes to Section 115, *ante*, generally. See also the undermentioned cases.<sup>1</sup>

**O. 6 R. 18**

**R. 18.** [*Cf.* S. 53.] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited then within

**Failure to amend  
after order.**

fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

[R. S. C., O. 28 R. 7; *Cf.* 1877, S. 53.]

2. ('81) 3 All 854 (855).
- ('89) 1889 All W N 88 (83).
- ('01) 1901 All W N 140 (140).
3. ('11) 11 Ind Cas 231 (232): 1911 Pun Re No. 96.  
[See *however* ('18) AIR 1918 Cal 188 (189). (In this case it is assumed that an appeal will lie from an order granting an amendment.)]
4. ('16) AIR 1916 Cal 605 (606).
- ('38) AIR 1938 Lah 867 (868).
- ('14) AIR 1914 Cal 842 (843).
- ('11) 4 Ind Cas 856 (857): 1909 Pun Re No. 101.
- ('84) AIR 1984 Lah 974 (975). (Discretion of lower Court not to be interfered with unless it was exercised arbitrarily and contrary to well established principles.)
- ('98) AIR 1988 Lah 270 (272).
- ('38) AIR 1938 Nag 388 (389): I L R (1939) Nag 194. (Interference allowed where lower Court acted on a wrong view of law.)
5. ('17) AIR 1917 Cal 614 (615).
6. ('17) AIR 1917 Mad 350 (350).
7. ('25) AIR 1925 Bom 159 (160).
8. ('36) AIR 1936 Mad 986 (987). (The fact that the plaintiff did not apply in revision from the order directing amendment did not estop or

preclude him from questioning the correctness of that order.)

**Note 21**

1. ('33) AIR 1933 Rang 49 (50): 11 Rang 36.
- ('35) AIR 1935 All 353 (356): 57 All 459. (Order refusing amendment is "case decided" within the meaning of Section 115.)
- ('35) AIR 1935 All 651 (652). (The refusal to allow an amendment of the plaint is a "case decided" within the meaning of S. 115.)
- ('36) AIR 1936 All 686 (689): I L R (1937) All 17 (F B). (No revision lies from an order refusing to allow an amendment of a pleading—Cases where the amendment comes under some other order of the Court, e. g., the addition or substitution of parties or the striking off of a pleading may amount to a case decided, but an order passed purely under O. 6 R. 17 does not.)
- ('86) AIR 1936 Pat 491 (498). (High Court treated appeal as revision and set aside order allowing amendment.)
- ('85) AIR 1935 Cal 102 (107). (Ordinarily discretion exercised by lower Court will not be reviewed unless irreparable injury and failure of justice will be caused; but no hard and fast rule can be laid down.)

**1. Failure to amend after order.** — Under Sections 53 and 54 of the Code of 1877, the Court could reject a plaint if the party failed to comply with the order for amendment.<sup>1</sup> There is no such provision under this Code and the only consequence of the failure to amend within time would be, that he cannot amend his pleading afterwards, unless the time is extended by the Court.<sup>2</sup> This rule does not prohibit a fresh suit being brought on the same cause of action when the amendment has not been made in time.<sup>3</sup> Where the order of amendment is made, not under this Order, but under some other provision of law, the provision that the amendment must be made within 14 days, where no time is fixed, does not apply.<sup>4</sup>

The Court has a discretion to extend the time even after the expiry of the period originally fixed<sup>5</sup> and no appeal will lie against an order admitting an amended plaint after the time fixed.<sup>6</sup>

**O. 6 R. 18  
Note 1**

## ORDER VII.

### PLAINT

Particulars to be  
contained in plaint.

**R. 1. [S. 50.]** The plaint shall contain the following particulars:—

**O. 7 R. 1**

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence<sup>4</sup> of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind,<sup>5</sup> a statement to that effect;
- (e) the facts constituting the cause of action<sup>6</sup> and when it arose;<sup>7</sup>
- (f) the facts showing that the Court has jurisdiction;<sup>8</sup>
- (g) the relief which the plaintiff claims;<sup>9</sup>

#### Order 6 Rule 18 — Note 1

1. ('04) 1904 Pun Re No. 57, p. 168.
2. ('21) 60 Ind Cas 376 (377) (Lah). (The plaint cannot be dismissed.)
- ('13) 19 Ind Cas 472 (473). (Punjab Chief Court.) (Do.)
- ('36) AIR 1936 Pesh 155 (157). (Failure to amend merely involves loss of right to amend and not to the determination of the suit as expressed in the original plaint.)
- [See also ('26) AIR 1926 Lah 571 (571). (Failure to amend and pay costs as ordered—No jurisdiction to dismiss suit.)
- ('11) 10 Ind Cas 508 (505) (Cal). (Failure to amend as ordered—No objection at the earliest opportunity — Objection deemed waived — Amendment application treated as part of plaint.)

('28) 111 Ind Cas 787 (789) (Lah). (Court cannot compel plaintiff to amend—If suit cannot proceed without amendment suit to be dismissed.)

('15) AIR 1915 Mad 984 (986). (Opportunity to amend must be given—Dismissal of amendment petition and suit together—Not proper.)

('25) AIR 1925 Lah 504 (505). (No refusal by plaintiff to join a person as co-plaintiff—Latter refusing to join as co-plaintiff—Suit not to be dismissed but Court must add him as defendant.)

3. ('27) AIR 1927 Lah 83 (83).
4. ('14) AIR 1914 Cal 637 (638). (High Court's direction of amendment apart from Order 6.)
5. ('92) 16 Bom 263 (266).
- [See ('01) 4 Oudh Cas 108 (115). (Case under S. 54 of the Code of 1882.)]
6. ('09) 4 Ind Cas 492 (492) (All).

**O. 7 R. 1**  
**Notes 1-2**

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim,<sup>10</sup> the amount so allowed or relinquished; and

(i) a statement of the value<sup>11</sup> of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

[1877, S. 50; 1859, S. 26. See S. 26 and O. 6 R. 2.]

*Synopsis*

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|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Plaintiff in general.</li> <li>3. Scope of the Rule.</li> <li>4. Name, description and place of residence.</li> <li>5. Party — A minor or person of unsound mind. See Order 32.</li> <li>6. Facts constituting the cause of action.</li> </ol> | <ol style="list-style-type: none"> <li>7. When cause of action arose.</li> <li>8. "Facts showing that the Court has jurisdiction."</li> <li>9. "Relief which the plaintiff claims." See O. 7 R. 7.</li> <li>10. "Where the plaintiff has allowed a set-off or relinquished a portion of his claim."</li> <li>11. Valuation of suit.</li> </ol> |
|---|--|

*Other Topics (miscellaneous)*

Contents of plaintiff. See Note 2. "The plaintiff shall contain." See Note 3.

**1. Legislative changes. —**

1. The word "shall" has been substituted for "must" in the opening sentence. See Note 3.
2. In clause (e) of this rule, the word "facts" has been substituted for the words "a plain and concise statement of the circumstances," occurring in the old Section. See Note 6.
3. Clauses (d), (f) and (i) are new.

**2. Plaintiff in general. —** As has been seen in Note 3 to Section 26 *ante*, a plaintiff has been held to mean "a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing." It corresponds to the "*statement of claim*" in England and its object is to state the grounds upon which the plaintiff seeks the assistance of the Court to grant him relief.<sup>1</sup>

Order 6 lays down generally, what pleadings (*i. e.*, plaintiff or written statement) should contain, and this Order lays down in *particular*, the requirements of a *plaint*. Every plaintiff, therefore, should comply with the rules contained in Orders 6 and 7, so far as they are applicable. Thus:

- (1) It should contain the name of the Court in which the suit is brought (O. 7 R. 1a).
- (2) It should contain the (a) name, (b) description, and (c) place of residence of—  
(i) the plaintiff (O. 7 R. 1b),  
(ii) the defendant so far as can be ascertained (O. 7 R. 1c).
- (3) Where the plaintiff or defendant is a minor or a person of unsound mind it should contain a statement to that effect (O. 7 R. 1d).

**Order 7 Rule 1 — Note 2**

1. See cases cited in Note 3 to Section 26.

- (4) Where the plaintiff sues in a *representative* capacity, it should show not only that he has an existing interest in the subject-matter, but that he has taken necessary steps to enable him to institute a suit, concerning it (O. 7 R. 4).
- (5) It should state in a *concise* form the *material facts* on which the plaintiff relies for his claim (O. 6 R. 2).
  - (i) It should set out the facts constituting the cause of action (O. 7 R. 1e). When necessary it should be divided into paragraphs numbered consecutively — all dates, numbers and sums to be expressed in figures (O. 6 R. 2).
  - (ii) The forms given in Appendix A to the Code, or similar forms, should be used as far as possible (O. 6 R. 3).
  - (iii) If the plaintiff pleads misrepresentation, fraud, breach of trust, wilful default, undue influence, etc., and in all cases where particulars may be necessary, beyond those as are exemplified in the forms aforesaid, it should contain the particulars (with dates and items if necessary) (O. 6 R. 4).
  - (iv) If a party relies on illegality or insufficiency in law of any contract, that party should plead such illegality or insufficiency in law in his pleading; it is not sufficient simply to deny the contract (O. 6 R. 8).
  - (v) Whenever the contents of a document are material, it is sufficient to state the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words are material (O. 6 R. 9).
  - (vi) Whenever it is material to allege malice, fraudulent intention, knowledge or any condition of mind of any person, it is sufficient to allege it as a fact, without setting out the circumstances from which it is inferred (O. 6 R. 10).
- (6) If the suit is for the recovery of money, it should state the *precise* amount claimed, and when the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so relinquished or so allowed should be stated (O. 7 R. 1h); but in suits for accounts or for mesne profits, it should state the *approximate* amount sued for (O. 7 R. 2).
- (7) If the subject-matter of the suit is immovable property, it should contain a description sufficient to identify it, *i. e.*, boundaries or survey numbers thereof should be specified (O. 7 R. 3).
- (8) Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded on separate and distinct grounds, he should state them as far as possible separately and distinctly (O. 7 R. 8).
- (9) It should state the interest of the defendant in the subject-matter and his liability to answer the plaintiff's demands (O. 7 R. 5).
- (10) It should state when and where the cause of action arose.
  - (i) It should state (if necessary) the facts showing that the Court has jurisdiction (O. 7 R. 1f).
  - (ii) If it is presented after the expiration of the period of limitation prescribed, it should show the grounds of exemption from the law of limitation (O. 7 R. 6).
- (11) It should contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits (O. 7 R. 1i).

**O. 7 R. 1**  
**Notes 2-4**

(12) It should state specifically the relief which the plaintiff claims, either simply or in the alternative; it is not necessary to ask for general or other relief which may always be given as the Court may think just (O. 7 R. 7).

(13) It should be verified at the foot by the party, or by one of the parties pleading, or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case (O. 6 R. 15).

A suit is instituted by the presentation of a plaint to the Court or to such officer as it may appoint in this behalf (O. 4 R. 1), but cannot be said to be *duly* instituted until it is admitted and *registered* as a suit (see Note 2 to Section 26). The Court may return a plaint for presentation to the proper Court at any stage (O. 7 R. 10), or reject it on any of the grounds mentioned in O. 7 R. 11 (see O. 7 R. 11, *infra*).

The provisions of this Order are made applicable to plaints presented under the provisions of the Bengal Tenancy Act,<sup>2</sup> the Madras Estates Land Act,<sup>3</sup> the Agra Tenancy Act,<sup>4</sup> the Oudh Rent Act,<sup>5</sup> the Orissa Tenancy Act<sup>6</sup> and the Provincial Small Cause Courts Act.<sup>7</sup>

**3. Scope of the Rule.** — The provisions of this rule are *imperative*.<sup>1</sup> The substitution of the word "shall" in the place of "must" in the opening sentence has not effected any change in the law. See also Note 2 above.

**4. Name, description and place of residence.** — The object of the Legislature is to secure correct particulars regarding the parties so far as they can be ascertained, so that there may be no uncertainty with regard to the identity of the parties. The full description of the party and the character in which he sues or is sued should be given in the plaint.<sup>1</sup> The word "description" includes the age, father's name<sup>2</sup> and other particulars that may be necessary to identify the person. Thus, the titles by which the defendant is generally known should also be given.<sup>3</sup> As to the effect of misdescription of parties, see Note 37 to Order 1 Rule 10, *supra*.

The place of residence of the plaintiff should be accurately given,<sup>4</sup> and that of the defendant should be given as accurately as can be ascertained; it is not sufficient to make vague statements as to the defendant's place of residence such as "carrying on business in Calcutta"<sup>5</sup> or formerly in Calcutta now residing in Kashmir.<sup>6</sup> If the plaintiff after enquiry is unable to ascertain these particulars fully, he should include a paragraph in the plaint to that effect.<sup>7</sup> It is not sufficient to give these particulars

2. Act VIII of 1885 (Bengal), S. 148.

3. Act I of 1908 (Madras), S. 192.

4. Act III of 1926 (U. P.), Sch. 2, List II, No. 9.

5. Act XXII of 1886 (Oudh), S. 137.

6. Act II of 1913 (Bihar and Orissa), S. 198.

7. Act IX of 1897 (India), S. 17.

**Note 3**

1. ('25) AIR 1925 Nag 183 (184).

('15) AIR 1915 Cal 681 (682) : 42 Cal 85.

('96) 18 All 403 (406). (The word "must" in the old Section held to be most imperative.)

(1900) 5 Cal W N 1xiii (1xiii).

**Note 4**

1. ('89) AIR 1989 Pat 430 (431). (Suit against idol — It does not matter whether it is said "A, shebait of idol" or "Idol through A, shebait".)

('85) AIR 1985 Rang 327 (327). (The Official Receiver should never in a plaint describe himself merely as "the Official Receiver"; he should

invariably state that he is suing as receiver of the estate of some person to be mentioned particularly by name who is insolvent.)

2. ('97) 7 Mad L Jour 81 (82). (The High Court refused to interfere with the order rejecting a plaint on failure to give the particulars.)

3. ('72) 18 Suth W R 301 (302, 303) (P O). (Reversing on appeal 3 Mad H C R 31 and overruling 12 Suth W R 450 under S. 29 of the Code of 1859, the suit was dismissed as plaintiff refused to amend plaint even after Court's direction to amend.)

(1900) 5 Cal W N 1xiii (1xiii). (Christian party — Initials before actual name not sufficient — Full name must be given.)

4. ('79) 4 Cal L Rep 366 (370). (To describe plaintiff as residing in Chitpore Road is not sufficient.)

5. ('81) AIR 1981 Cal 458 (462) : 58 Cal 418.

6. ('79) 4 Cal L Rep 366 (371).

7. (1900) 5 Cal W N 1xiii (1xiii).

in the cause title of the plaint, as the cause title is not covered by the verification of the particulars in the plaint.<sup>8</sup> In a suit by or against a corporation, the plaintiff or defendant, as the case may be, is the corporation itself and the name, description, and place of business of such corporation only need be given. It is not necessary to give the particulars of the person who purports to sign the pleading.<sup>9</sup>

It is a fundamental principle that a suit can be instituted only by the person having the cause of action or by some one on *his* behalf.<sup>10</sup>

**5. Party, a minor or person of unsound mind.** — See Order 32, *infra*.

**6. Facts constituting the cause of action.** — The words "plain and concise statement of the circumstances" occurring in the old Section have been substituted by the word "facts" in view of the specific provisions of Order 6 Rule 2.

As to what are material facts, see O. 6 R. 2, *supra*. As to the meaning of the words *cause of action*, see Note 14 to Section 20, *supra*.

Every suit presupposes the existence of a cause of action against the defendant for, if there is no cause of action at all, the plaint will have to be rejected under Rule 11, *infra*.

Where there is no such right in law as that claimed, there can be no cause of action in respect thereof, and a suit cannot be based thereon. See Note 41 to Section 9 and the undermentioned cases.<sup>1</sup>

8. ('31) AIR 1931 Cal 458 (461) : 58 Cal 418.

9. ('33) AIR 1933 Sind 102 (102) : 26 Sind L R 431.

10. ('36) AIR 1936 Pat 198 (200) : 14 Pat 639. (Estate held by Court of Wards is not legal entity—Suit by manager of Court of Wards not competent when he does not act as representing proprietor of estate.)

#### Note 6

1. ('05) 8 Oudh Cas 356 (360). (No suit for injunction against erecting a building will lie for interference with plaintiff's right to light and air unless there is a substantial interference with light and air.)

('05) 8 Oudh Cas 84 (85). (Defendant having never set up proprietary or under-proprietary title, plaintiff has no cause of action for declaratory decree in Civil Court.)

('08) 18 Mad L Jour 186 (187). (Any person other than the payee or the holder of a negotiable instrument has no right to sue.)

('98) 1898 Pun Re No. 57, p. 189. (The rule that when a nearer reversioner has colluded with the alienee the next reversioner can sue would not enable the reversioner having the remotest chance of success to sue.)

('05) 32 Cal 96 (105) : 31 Ind App 188 (P C). (In the absence of a completed contract no suit lies for breach of contract.)

('06) 33 Cal 669 (675). (No suit lies against the Crown for wrongful dismissal of its servant.)

('69) 1869 Pun Re No. 14. (Judgment of Court does not give new cause of action.)

('69) 11 Suth W R 381 (392). (Unsuccessful intervention in a suit for rent against raiyats can afford plaintiff no cause of action for a declaration of title against third parties.)

('69) 12 Suth W R 24 (25, 26). (When map was prepared in plaintiff's presence, no suit to rectify

the error subsequently lies.)

('69) 12 Suth W R 204 (205, 206). (Government cannot sue to recover land on behalf of a zamindar.)

('98) 20 All 198 (200). (Trespasser has no cause of action to sue for crops sown by him.)

('02) 24 All 288 (291). (Decree for costs assigned to A and A realising the cost — Decree reversed in appeal by judgment-debtor — Latter has no cause of action to sue for costs.)

('05) 27 All 14 (15). (Suit for cancellation of a will does not lie during the lifetime of the testator.)

('89) 1899 Pun Re No. 162, p. 568. (A suit for damages arising out of a civil action launched maliciously does not lie.)

('88) 1888 Pun Re No. 178, p. 469. (Pattidars, who are not the next reversioners have no cause of action to contest adoption by widow.)

('82) 1882 Pun Re No. 134, p. 397. (Obstruction to public road will not give cause of action unless plaintiff sustains particular damage.)

('89) 12 Mad 134 (136). (A suit for declaration that defendant is creating evidence does not lie.)

('06) 3 Cal L Jour 288 (290). (Payment by plaintiff of money on behalf of defendant against his wishes will not give plaintiff any cause of action against defendant.)

('87) 9 All 439 (440). (The vendor who has covenanted with the vendee that he has a good title cannot sue to set aside a mortgage decree which a third party has obtained on the same property.)

('87) 9 All 59 (61). (Application for—Sanction to prosecute does not give a cause of action for a suit for damages for malicious prosecution.)

('86) 8 All 1 (5). (Parties in possession cannot sue for partition unless they have a valid claim in the estate.)

**O. 7 R. 1**  
**Notes 7-8**

**7. When cause of action arose.** — It is necessary for the plaintiff to state *specifically* when the cause of action for the suit arose.<sup>1</sup> This is necessary for the purpose of enabling the Court or the defendant to ascertain from the plaint whether there is a cause of action, and whether it is not barred by the law of limitation.<sup>2</sup> But the statement need not be made in a *separate* paragraph, if it is clear from the other facts alleged in the plaint.<sup>3</sup>

A plaintiff is not, however, absolutely bound by the statement regarding the date of the accrual of the cause of action; it may be determined or inferred from the facts stated.<sup>4</sup>

**8. "Facts showing that the Court has jurisdiction."** — All the *facts* showing that the Court has jurisdiction should be set out in the plaint, and if any special jurisdiction vested in the Court by law is invoked, all the facts which call for the exercise of that jurisdiction should be set out.<sup>1</sup> When jurisdiction of a Court to try the suit is disputed, the Court must decide the same preliminary to the adjudication of the suit itself.<sup>2</sup> As to the statement of facts showing the pecuniary jurisdiction of a Court, see Note 11 below. See also Note 4 to Section 6 *ante* and the undermentioned cases.<sup>3</sup>

('77) 26 Suth W R 82 (85) : 3 Ind App 241 (PC).

(A decree-holder can only execute his decree and not file a suit on the decree against representatives of judgment-debtor.)

('82) 1882 All W N 144 (145). (A suit to recover money paid under legal compulsion to defendant by plaintiff which was not due does not lie.)

('70) 14 Suth W R 420 (421, 422). (A suit in anticipation of a threatened invasion of right will not lie.)

('71) 16 Suth W R 18 (19). (Reversioner has no cause of action, if he does not allege waste or improper alienation by widow.)

('95) AIR 1935 Pesh 132 (133). (In a suit on a promissory note payable at a specified place, the plaint ought to contain a statement that the note had been presented for payment as that forms part of the cause of action.— If there is no allegation of presentment in the plaint, the plaintiff cannot be given an opportunity of proving presentment.)

[See also ('74) 6 N W P H C R 104 (110). (Defendant could not have maintained a suit to close market on his neighbour's land.)

**Note 7**

1. ('82) AIR 1932 Cal 259 (261, 262) : 59 Cal 448. ('80) AIR 1930 Mad 742 (744).

('69) 11 Suth W R 233 (239). (Suit for possession — Date of dispossession to be accurately given.)

('01) 4 Bom L R 58 (59, 60) : 26 Bom 360 (362). (Ejectment suit — Precise nature of notice to quit and the date on which it was given should be stated.)

('98) 18 All 403 (406). (Only one mortgage alleged in suit for redemption — On failure of proof of that mortgage no other mortgage could be sought to be redeemed in that suit.)

('01) 6 Cal W N 585 (588).

('16) AIR 1916 Nag 34 (35) : 13 Nag L R 16.

('70) 13 Suth W R 248 (249). (In suits for damages for injury done the nature of the injury ought to

be stated.)

[See also ('15) AIR 1915 Cal 675 (678).]

[But see ('81) AIR 1931 Cal 458 (460) : 58 Cal 418.]

2. ('82) AIR 1932 Cal 259 (261, 262) : 59 Cal 448. (The defendant must be able to know from the plaint the day on which the cause of action arose.)

3. ('28) AIR 1928 Lah 516 (523) : 9 Lah 428. (The plaintiffs cannot be tied down to the date of the accrual of the cause of action mentioned in the plaint.)

4. ('79) 4 Cal 529 (531).

[See also ('35) AIR 1935 All 759 (760). (Mistake or inaccuracy in stating the date of the cause of action for the suit is not sufficient to justify dismissal of the suit.)]

**Note 8**

1. ('25) AIR 1925 Nag 183 (184).

('38) AIR 1938 Mad 497 (493). (The burden of proving want of jurisdiction is not on the defendant.— It is for the plaintiff to allege specifically and prove how Court has jurisdiction — A bare statement in the plaint that the cause of action arose within its jurisdiction is not enough.)

[See ('84) AIR 1984 Pat 593 (594). (Although it may be said in general that the question of jurisdiction is to be determined by the allegations in the plaint it cannot be said, after the Court on an investigation of the case comes to the conclusion that it has jurisdiction, that there was no jurisdiction in the Court merely because of the absence of an assertion in the plaint.)]

2. ('18) AIR 1918 Mad 998 (1000, 1006) : 40 Mad 1 (F B).

('32) AIR 1932 All 413 (414).

('09) 2 Ind Cas 269 (269) : 12 Oudh Cas 90.

('05) 2 Cal L Jour 431 (437).

3. ('30) AIR 1930 All 193 (198) : 52 All 501 (F B). ('84) AIR 1984 Pat 204 (207) : 18 Pat 844 (F B). (Value in plaint determines jurisdiction.)

('84) AIR 1984 Pat 184 (185, 186) : 18 Pat 839 (SB). (For the purpose of jurisdiction, the cri-



9. "Relief which the plaintiff claims." — See Order 7 Rule 7, *infra*.

O. 7 R. 1  
Notes 9-11

10. "Where the plaintiff has allowed a set-off or relinquished a portion of his claim." — The amount set off or relinquished should be specified with precision, or at least should be stated in such a manner that the amount may be inferred from the other allegations in the plaint.<sup>1</sup>

11. **Valuation of suit.** — The plaintiff should distinctly state in the plaint, the valuation of the suit for the purposes of court-fees and of jurisdiction. As the two valuations may not be the same in several cases, they have to be stated specifically.<sup>1</sup> Where the plaintiff claims reliefs arising out of the *same* cause of action, he can state the *aggregate* value of his reliefs, but if he claims reliefs in respect of two or more distinct causes of action, he should state the valuation of each cause of action separately, as the court-fee is separately payable in respect of each.<sup>2</sup> Where the plaintiff claims relief in the *alternative*, he should also state his valuations in respect of the two reliefs, and the court-fee is payable on the value of the larger relief.<sup>3</sup>

The valuation of a suit for the purposes of jurisdiction is necessary in order to ascertain whether the suit is within the *pecuniary jurisdiction* of the Court.<sup>4</sup> A plaintiff should, however, state the true value at which the subject-matter of the suit *ought* to be valued; it should not be arbitrary or fanciful.<sup>5</sup> See also Note 4 to Section 6 and Notes 7 to 10 to Section 15, *ante*.

The question of court-fees should be determined with reference to the plaint as it is and not as it ought to have been.<sup>6</sup> Whether a case falls within any particular provision of the Court-Fees Act must be determined from the *substance* and not merely from the *language* or form of the plaint.<sup>7</sup>

terion is an examination of the plaint and not an examination of the issues which have been framed after the written statement has been filed.) ('84) AIR 1934 Lah 803 (803). (Allegations in plaint and not pleas determine jurisdiction.) ('81) AIR 1931 All 664 (664). (Whether Civil Court or Revenue Court has jurisdiction depends upon the allegation in plaint.) ('82) AIR 1932 All 460 (460). (Do.) ('82) AIR 1932 All 478 (474). (Do.)

#### Note 10

1. (1900) 1900 All W N 214 (214). [See ('10) 8 Ind Cas 943 (943) (Mad). (Relinquishment of a particular sum on the basis of right to get a particular sum — If plaintiff is found entitled to get less he should not be tied down to the amount relinquished.)]

#### Note 11

1. [See ('87) AIR 1937 Bom 326 (333) : I L R (1937) Bom 402. (Suit for declaration and possession — S. 8 of Suits Valuation Act has no application to such suit—In such suit value for fiscal purposes is not same as value for jurisdiction—Value therefore for jurisdiction is real value of subject-matter in view of O. 7 R. 1.)]  
2. The Court-fees Act (VII of 1870) S. 17.  
3. ('82) 6 Bom 302 (303). ('91) 15 Bom 82 (83). ('82) AIR 1932 Mad 158 (159) : 55 Mad 336. [See also ('80) AIR 1980 Nag 55 (56).]  
4. ('18) AIR 1918 Mad 998 (1002) : 40 Mad 1.  
5. ('26) AIR 1926 Mad 591 (591).

('32) AIR 1932 All 413 (414). ('33) AIR 1933 Rang 40 (40). ('32) AIR 1932 Pat 9 (10) : 11 Pat 161. (Court can revise arbitrary valuation.) ('32) AIR 1932 Pat 319 (321). (Valuation cannot be accepted if on face of it not reasonable valuation.) ('83) AIR 1933 Sind 322 (323) : 27 Sind L R 335. (Provisions of Court-fees Act are controlled by this Rule, sub-r. 2 and the Court can, where the valuation is arbitrary compel the plaintiff to revise his valuation.) ('35) AIR 1935 Mad 874 (874). (Suit for declaration—Valuation—Relief not capable of money assessment—Market value of properties though not correct basis of valuation, plaintiff cannot value suit at his desire.)  
6. ('32) AIR 1932 All 316 (317). ('32) AIR 1932 All 560 (561). ('33) AIR 1933 All 350 (351) : 55 All 274. ('32) AIR 1932 Mad 409 (410). ('34) AIR 1934 Lah 563 (573) : 15 Lah 531 (FB). ('33) AIR 1933 Mad 430 (431). ('33) AIR 1933 Mad 431 (432). ('31) AIR 1931 All 869 (871, 872) : 53 All 552. ('35) AIR 1935 Cal 273 (274, 275). ('36) AIR 1936 Pat 171 (172) : 15 Pat 386. (Court cannot demand court-fee from a plaintiff on the ground that the question of possession will arise in the suit.) ('39) 182 Ind Cas 178 (179) (Pat).  
7. ('32) AIR 1932 Lah 132 (133) : 13 Lah 391. ('88) AIR 1938 Mad 439 (440) : 56 Mad 716. ('88) AIR 1938 Mad 480 (481).

**O. 7 R. 1**  
**Note 11**

The mere fact that a suit has been under-valued or over-valued cannot affect the decree, unless the wrong valuation has prejudicially affected the merits of the case.<sup>8</sup>

**O. 7 R. 2**

**R. 2.** [S. 50.] Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed:  
*In money suits.*

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaintiff shall state approximately the amount sued for.

[1877, S. 50; 1859, S. 26. See O. 20.]

### Local Amendments

#### LAHORE

In the second paragraph, *after* the word "defendant" *insert* "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate" and *after* the word "amount" where it last occurs *insert* "or value."

#### N.-W. F. P.

Same as that of Lahore, above.

### Synopsis

#### 1. Scope of the Rule.

#### 2. Mesne profits.

#### 3. Accounts.

#### 4. Suit for damages.

**1. Scope of the Rule.**—In a suit for the recovery of money, the plaintiff should, as a rule, state the amount claimed precisely.<sup>1</sup> But in a suit for *mesne profits* or for an amount which will be found due to the plaintiff on taking *unsettled accounts* between him and the defendant, in which the plaintiff is not, at the time of the institution of the suit, in a position to give the amount precisely, he should state it *approximately*. The amount is given tentatively, as the correct amount is ascertained only in the course of the suit (O. 20 Rr. 12, 16 and 17).

**2. Mesne profits.** — The expression "mesne profits" has been defined in Section 2 (12).

A plaintiff may claim in a suit *past mesne profits*, i. e., mesne profits accruing up to the date of institution of the suit, and *future mesne profits* from the date of institution up to the delivery of possession. The valuation in the plaint should, under this rule, be only with reference to the amount of the *past mesne profits* claimed.<sup>1</sup>

**8.** ('83) AIR 1933 All 249 (252); 55 All 315 (FB).

#### Order 7 Rule 2 — Note 1

**1.** ('70) 14 Suth W R 373 (374). (Suit for contribution—Plaint must state the exact amount due from each of the defendants—Else the plaint is to be rejected.)

#### Note 2

**1.** ('27) AIR 1927 Cal 182 (184); 53 Cal 992.

('80) AIR 1980 Mad 80 (86, 87); 53 Mad 838.  
(Plaintiff can be given future mesne profits as

well though he had asked only for past mesne profits.)

('14) AIR 1914 Cal 858 (860). (Where plaintiff is in a position to value mesne profits accrued due he must do so at least approximately.)

('37) AIR 1937 Mad 46 (48); ILR (1937) Mad 284.  
[See ('15) AIR 1915 Cal 852 (858, 854); 48 Cal 660 (655). (Plaintiff suing for mesne profits accrued due in a Munsif's Court must be deemed to have limited his claim to the maximum pecuniary jurisdiction of that Court.)]

The *future mesne profits* need not be valued, since it is impossible to give even an approximate statement of the amount.<sup>2</sup> But the valuation of the *past mesne profits* given will be the valuation of the "amount *sued for*" under this rule,<sup>3</sup> and is the valuation for the purposes of jurisdiction (see Section 6 and Section 96 Note 18, *supra*).

As to the ascertainment of mesne profits, see O. 20, R. 12 *infra*. See also Section 11 of the Court-fees Act.

**3. Accounts.** — A suit for money which will be found due on taking accounts, is instituted when the defendant is under a legal obligation to render accounts which the plaintiff is not in a position to ascertain.<sup>1</sup> In such cases this rule requires that the plaintiff should state *approximately* the amount which will be found due to him on taking unsettled accounts between him and the defendant.<sup>2</sup> The approximation required under sub-rule (2) may be a rough and ready approximation such as the plaintiff is able to give.<sup>3</sup> The valuation given by the plaintiff is purely tentative, and is the valuation for the purposes of jurisdiction (see Section 6, *supra*).

As to the ascertainment of the amount due in a suit for accounts, see O. 20, Rules 16 and 17, *infra*, and Section 11 of the Court-Fees Act.

**4. Suit for damages.** — It has been held that in a suit for damages based on fraud, the plaintiff may give an *approximate* valuation in the plaint and offer to pay additional court-fees in case a larger amount is found due *before the decree* is passed, as Section 11 of the Court-Fees Act will not apply to such a case.<sup>1</sup>

**O. 7 R. 2**  
**Notes 2-5**

## R. 3. [New.] Where the subject-matter of the suit is

**O. 7 R. 3**

Where the subject-matter of the suit is immovable property.

immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

### Local Amendment

#### CALCUTTA

*Add at the end the words "and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures."*

2. ('26) AIR 1926 Pat 218 (229): 5 Pat 961 (FB).  
(Per Jwala Prasad, J.)

('25) AIR 1925 Cal 1076 (1080, 1081): 53 Cal 14 (FB). (Mesne profits *pendente lite* are not to be considered in determining the value of the suit for purposes of jurisdiction—(Per Walsley, J.)  
(91) 15 Bom 416 (418).

(23) AIR 1923 Rang 110 (112, 113): 4 Upp Bur Rul 140.

('15) AIR 1915 Cal 852 (854): 43 Cal 650 (655).

('37) AIR 1937 Mad 46 (48): ILR(1937) Mad 284.

3. ('26) AIR 1926 Pat 218 (225, 229): 5 Pat 961 (FB). (Court has no jurisdiction to require plaintiff to pay additional court-fee on future

mesne profits as a condition precedent to the investigation of such profits.)

#### Note 3

1. ('12) 14 Ind Cas 786 (787): 8 Nag L R 36.

2. ('88) 12 Bom 675 (677).

3. ('14) 22 Ind Cas 71 (73) (Bom).

('85) 9 Bom 22 (24).

('35) AIR 1935 Lah 689 (689).

#### Note 4

1. ('07) 17 Mad L Jour 625 (626).

[See also (1900) 16 T L R 433, London and Northern Bank Ltd. v. George Newnes Ltd.

O. 7 R. 3  
Notes 1-3

## Synopsis

- |   |  |  |
|---|--|--|
| 1. "Immoveable property."                   |  | 3. Conflict between the description by boundaries and by area. |
| 2. "Description sufficient to identify it." |  |  |

1. "Immoveable property." — This rule does not apply unless immovable property is the *subject-matter* of the suit.<sup>1</sup> See also Section 16, *supra*.

2. "Description sufficient to identify it." — A plaint should contain a description of the immovable property sufficient to *identify* it,<sup>1</sup> as otherwise the decree, if passed, will be incapable of execution. (See O. 20 R. 9, *infra*.) But a suit cannot be dismissed or a plaint rejected on the ground that the description is insufficient;<sup>2</sup> the Court may call upon the plaintiff to furnish the necessary particulars<sup>3</sup> or allow the plaintiff to amend his plaint by giving such particulars.<sup>4</sup>

In the case of *chur* lands which are constantly going under water and re-forming, it is very difficult to premise with any degree of certainty, whether the claim would be for a re-formation in *situ* or for contiguous accretion, until full investigation, based upon a survey and comparison of maps, is made. Hence in such a case the plaint should not be construed too strictly.<sup>5</sup>

3. Conflict between the description by boundaries and by area. — If, in the plaint, or in any deed, there is an inconsistency between the description by the boundaries and by the area, that which is more certain and stable and least likely to have been mistaken, and which sufficiently identifies the land should prevail.<sup>1</sup> The true construction is that which will, as far as possible, bring the several factors into harmony with one another and express most nearly the intention of the parties.<sup>2</sup> But if a land is conveyed with *definite* boundaries, and the *measurements* indicate a smaller area than that covered by the boundaries, the rule of interpretation is that the area covered by the *boundaries* should prevail.<sup>3</sup>

## O. 7 R. 4

**R. 4.** [S. 50, para. 4.] Where the plaintiff sues in a representative character<sup>2</sup> the plaint shall show not only that he has an actual existing interest

When plaintiff sues as representative.

## Order 7 Rule 3 — Note 1

1. ('32) AIR 1932 Lah 328 (330). (Administration suit is not one for possession of immovable property—O. 7 R. 3 has no application.)

## Note 2

1. (1900) 5 Cal W N 121 (123).  
('72) 18 Suth W R 461 (462).  
('78) 2 Cal L Rep 134 (137). (In suit for injunction, boundaries should be correctly described.)  
('76) 2 Cal 1 (19). (Where estate bears a name, boundaries need not be given.)  
2. ('97) 1 Cal W N 574 (576).  
('97) 1 Cal W N clxxxix. (clxxxix).  
('70) 14 Suth W R 474 (474).  
('06) 3 Cal L Jour 560 (566) (PO).  
('03) 7 Cal W N 615 (616, 617).  
('20) AIR 1920 Pat 82 (83). (Plaint did not contain alterations in area sincere-survey—Though defective cannot be rejected.)  
[See ('99) 26 Cal 845. (849).]

[See also ('18) 18 In1 Cas 745 (746) (Cal). (Misdescription is not fatal.)]

[See however ('74) 22 Suth W R 426 (426).]

[But see ('05) 1 Cal L Jour 27n (28n).]

3. ('09) 2 Ind Cas 347 (348) : 5 Low Bur Rul 1.  
('15) AIR 1915 Cal 597 (598, 599).  
4. ('74) 21 Suth W R 187 (187).  
5. ('38) AIR 1938 Cal 199 (202).

## Note 3

1. ('09) 4 Ind Cas 713 (719) : 37 Cal 293. (If boundary is more definite, the boundary prevails.)  
('81) AIR 1931 Lah 849 (351). (Area specific—Area prevails.)  
[See ('97) 1 Cal W N clxxxix (clxxxix). (Measurements specific—Land sufficiently identified though boundary incorrect.)]  
2. ('09) 2 Ind Cas 123 (125) (Cal). (Though boundaries more generally govern.)  
3. ('24) AIR 1924 Mad 493 (493).

in the subject-matter, but that he has taken the steps, if any, necessary to enable him to institute a suit<sup>3</sup> concerning it.

O. 7 R. 4  
Notes 1-2

[See S. 92, O. 1 R. 8, O. 30, O. 31.]

### Synopsis

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Where the plaintiff sues in a representative character."</li> <li>3. Has taken the steps necessary to enable him to institute the suit.</li> <li>4. Probate and letters of administration.</li> <li>5. Hindus.</li> <li>6. Mahomedans.</li> <li>7. Indian Christians.</li> </ol> | <ol style="list-style-type: none"> <li>8. Europeans, Parsees, Jews and Armenians.</li> <li>9. Succession certificate.</li> <li>10. Suit for rent.</li> <li>11. Suit for debt.</li> <li>12. Suit by or against a company. See Order 29, Rules 1 and 2.</li> <li>13. Suit by or against a club. See Order 1, Rule 8 Note 4.</li> <li>14. Cause title of the suit.</li> </ol> |
|--|--|

**1. Scope of the Rule.** — This rule lays down that if the plaintiff files the suit in a *representative* capacity, the plaint should show —

- (1) that the plaintiff has an actual existing interest in the subject-matter, and
- (2) that he has taken the steps that may be necessary to enable him to file a representative suit.

Thus, in a suit under Section 92 of the Code, the plaintiff should state that he has an interest in the trust and that he has obtained the consent in writing of the Advocate-General. Similarly, in cases where the law requires probate or letters of administration to be obtained in respect of the estate of a deceased person, the plaintiff should state that the plaintiff has obtained a probate, or that he is the executor under the will, or, if the person died intestate, that he has obtained letters of administration in respect of the estate of the deceased.

The provisions of this rule should be strictly complied with.<sup>1</sup> Otherwise the plaint may have to be rejected on presentation.<sup>2</sup> If a decree is passed, it will not bind the estate or the persons represented by the plaintiff in the suit.

**2. "Where the plaintiff sues in a representative character."** — This rule deals with representative suits, *i. e.*, suits instituted by a person in his *representative*, as distinguished from his *individual*, character. The following are some instances of *representative* suits —

- (i) Suit by one or more persons on behalf of a community or persons having the same interest (O. 1 R. 8.)
- (ii) Suit by executor or administrator representing the estate of a deceased person.
- (iii) Suit under Section 92 of the Code by two or more persons having an interest in the trust.
- (iv) Suit by the manager of a joint Hindu family or by the karnavan of a Malabar *tarwad*.
- (v) Suit by a shebait on behalf of the idol.<sup>1</sup>

(<sup>31</sup>) AIR 1931 Cal 596 (598) : 58 Cal 686. (Extrinsic evidence may be let in to show real intention of the parties.)

(<sup>26</sup>) AIR 1926 Pat 257 (257, 258).

(<sup>23</sup>) 1923 Oudh 114 (116, 117) : 27 Oudh Cas 64.

#### Order 7 Rule 4 — Note 1

1. (<sup>25</sup>) AIR 1925 Nag 183 (184).

2. (<sup>14</sup>) AIR 1914 Bom 286 (287) : 38 Bom 618.

#### Note 2

1. (<sup>30</sup>) AIR 1930 Pat 97 (97). (Though ordinarily shebait represents an idol in certain

**O. 7 R. 4**  
**Notes 2-3**

(vi) Suit concerning property vested in a trustee where the contention is between beneficiaries and third persons (Order 31).

(vii) Suit on behalf of a partnership in the name of the firm (Order 30).

A plaintiff suing in a representative capacity should set it out clearly in the plaint and show that he is qualified to do so.<sup>2</sup> The plaint should show that the plaintiff has an actual *existing* interest in the subject-matter, and the representation must be based on some authority legally expressed; the plaintiff must further be *capable* in law of representing the person whom he professes to bind.<sup>3</sup> The Court has no jurisdiction to adjudicate upon a right when there has been no *proper* representation of the interests in litigation.<sup>4</sup> As to who are proper representatives in particular cases, see the cases cited below.<sup>5</sup>

### 3. Has taken the steps necessary to enable him to institute the suit. —

Under Section 212 of the Succession Act (39 of 1925) it is provided that letters of administration should be obtained to establish any right to the property of a person *dying intestate*, in cases to which that Section applies. The administrator, in such cases, derives his title solely under the grant of the letters of administration and, until such grant is made, he has no title to the estate of the deceased; he cannot, therefore, institute an action as administrator before he gets the grant.<sup>1</sup> The plaint should, therefore, state that the plaintiff has obtained the letters of administration.<sup>2</sup> But where a person dies *leaving a will*, the executor derives his title and authority from the *will* of the testator and not from any *grant of probate*; he may, therefore, institute a suit as executor before obtaining a probate, though he may not be entitled to a *decree* unless he produces a probate,<sup>3</sup> inasmuch as the production of the probate is the only way in which he is allowed by law to *prove* his title.<sup>4</sup> Similarly, it is not necessary for a person claiming on *succession* to the effects of a deceased person, to obtain a succession certificate before instituting a suit for the recovery of a debt due to the deceased, though

circumstances, other persons may be entrusted with the conduct of the suit.);

[See also ('90) AIR 1990 Pat 455 (459) : 9 Pat 885.]

2. ('83) 7 Bom 467 (470, 471). (But a suit brought in 1856 before the Civil Procedure Code is not subject to this rule.)

('25) AIR 1925 Nag 183 (184).

('35) AIR 1935 Rang 327 (327). (Official Receiver should state in plaint that he is suing as receiver of the estate of some person.)

[See also ('31) AIR 1931 Lah 559 (560). (Manager need not sue as such—It is enough if he is the manager and in fact sues on behalf of the family.)]

3. ('27) AIR 1927 All 128 (130).

4. ('18) AIR 1918 Cal 487 (488).

5. (1865) 2 Suth W R 49 (50, 51). (Hindu widow cannot represent husband when sons are alive.) ('67) 7 Suth W R 455 (455). (In this case adopted son was living).

('89) 16 Cal 40 (56): 15 Ind App 195 (P C). (After adoption of a son to her husband widow represents the adopted son during his minority.)

('81) 6 Cal 479 (481). (Hindu widow representing the estate of her deceased husband.)

('98) 17 Bom 758 (770). (To mother's stridhan daughters are legal representatives.)

(1866) 2 Mad H C R 365 (366). (Wife represent-

ing absent and divided husband.)

('80) 5 Cal 700 (705). (Representatives of a testator who has created a trust can sue for its administration though not personally interested in the trust.)

[See ('93) 20 Cal 498 (504): 20 Ind App 25 (P C). (Widow could sue as such or as representing her minor adopted son.)]

#### Note 3

1. ('16) AIR 1916 P C 202 (204): 43 I A 113 (P C).

2. ('08) 12 Cal W N 738 (739).

[See however ('14) AIR 1914 Bom 286 (287): 38 Bom 618. (Where it has been held that if the suit without being dismissed is allowed to proceed, and before decree the letters are obtained, a decree passed is not contrary to S. 190, Succession Act.)]

3. ('16) AIR 1916 P C 202 (204): 43 Ind App 113 (P C).

('11) 9 Ind Cas 122 (124): 38 Cal 327: 38 Ind App 7 (P C). (Obtaining of probate subsequent to the institution of the suit but before decree is sufficient compliance with S. 187 of Succession Act.)

('23) AIR 1923 Cal 1 (5): 50 Cal 49.

('14) AIR 1914 Mad 51 (54): 37 Mad 175.

('13) 19 Ind Cas 406 (409): 37 Bom 158.

('35) AIR 1935 Cal 158 (159, 160): 61 Cal 1061.

4. ('16) AIR 1916 P C 202 (204): 43 I A 113 (P C).

no *decree* will be passed before the production thereof.<sup>5</sup> The obtaining of a probate or of a succession certificate in such cases is not a "step necessary to enable the plaintiff to *institute* the suit"<sup>6</sup> and consequently it is not necessary to allege in the plaint that the plaintiff has obtained the probate or the certificate.

This rule, however, applies only to the *institution* of suits and does not prohibit the *continuing* of the suit already filed, by the legal representatives of a plaintiff dying during the pendency of the suit, provided the representative capacity is established before decree.<sup>7</sup>

**4. Probate and letters of administration.** — Sections 212 and 213 of the Succession Act provide that probate and letters of administration are necessary to establish any right to the property *in cases to which the Section applies*; but the Sections are expressly made inapplicable to particular cases and in those cases, a plaintiff may commence any action without a probate or letters of administration. See Notes 5 to 8 below. A probate issued from a Native Court is not sufficient for instituting a suit in British India.<sup>1</sup> Where a probate is not produced, the Court should grant time to the plaintiff to produce the probate, and not dismiss the suit.<sup>2</sup> See also Note 3 above.

**5. Hindus.** — As regards a will made by a Hindu, probate is necessary under Section 213 of the Succession Act, only if the will is of the class mentioned below —

- (1) If the will is made on or after the 1st September 1870, within the territories which, on that date, were subject to the Lieutenant-Governor of Bengal or were within the local limits of Ordinary Original Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay.
- (2) If the will is made outside those territories or limits, but relates to immovable property situate within those territories or limits.

Therefore, it is not obligatory on executors or legatees under *other wills* to take out probate or letters of administration (with copy of will annexed) to establish their rights in a Court of law.<sup>1</sup>

Where a Hindu dies *intestate*, it is *not necessary* to obtain letters of administration to the estate of the deceased (see Section 212, sub-section 2 of the Succession Act).<sup>2</sup>

5. ('82) 4 All 485 (486).

('86) 10 Bom 107 (108).

('86) 13 Cal 47 (50). (Plaintiff bound to produce succession certificate before he can obtain a decree.)

('70) 6 Mad H C R 181 (183).

('93) 16 Mad 454 (455). (Application in *forma pauperis* to recover a debt dismissed for want of production of succession certificate — *Held* the dismissal was wrong.)

('93) 6 C P L R 157 (158).

('18) AIR 1918 Pat 295 (295) : 8 Pat L Jour 160.

('24) AIR 1924 Pat 525 (526).

('91) 15 Bom 105 (106). (Even compromise decree cannot be passed without succession certificate).

*The same rule will apply to applications for execution of decrees.*

('96) 18 All 84 (85).

('92) 19 Cal 482 (485).

('93) 20 Cal 755 (757).

('96) 20 Bom 76 (77, 78). (Application for execution though made without succession certificate is still one made in accordance with law.)

('94) 16 All 26 (28).

[See ('91) 15 Bom 265 (267). (Section 4, sub-s. 1 cl. (b) of Act 1889 is not confined to execution of decrees passed subsequent to the Act.)]

6. ('93) 6 C P L R 157 (158). (Case of succession certificate.)

7. ('92) 16 Bom 519 (521).

#### Note 4

1. ('94) 17 Mad 14 (16).

2. ('88) 5 All 555 (556). (Certificate not produced in the time allowed—High Court refused to interfere with order of dismissal made by lower Court.)

#### Note 5

1. ('87) 14 Cal 87 (41). (Hindu will made before 1st September 1870—No probate necessary.)

('90) 17 Cal 272 (275). (Do.)

('98) 25 Cal 103 (108, 109). (Do.)

('82) 6 Bom 73 (75). (Will made in *mofussil*—No probate necessary.)

('96) 18 All 260 (262). (Do.)

2. See Note 3, Foot-note 5.

**O. 7 R. 4**  
**Notes 6-9**

If the suit is to recover a *debt due* to the deceased, it is necessary that a probate, or letters of administration or a succession certificate should be produced, as otherwise no decree can be passed (see Section 214 of the Succession Act).

**6. Mahomedans.** — In the case of Mahomedans, it is not necessary to obtain a probate or letters of administration.<sup>1</sup> See Sections 212 and 213 of the Succession Act. But it is, however, necessary, if the suit is for the recovery of a *debt due to the deceased*, to produce a probate or letters of administration or succession certificate (see Section 214 of the Succession Act)<sup>2</sup> as above.

**7. Indian Christians.** — "Indian Christian" has been defined to mean a native of India, who is or in good faith claims to be of unmixed Asiatic descent and who professes any form of the Christian religion.<sup>1</sup> Till the passing of the Native Christian Administration of Estates Act, 1901,<sup>2</sup> the Indian Christians were governed by the Succession Act (1865) and, therefore, if the deceased died intestate, letters of administration were necessary and in case the deceased left a will, a probate of the will was necessary to establish any right to his property.<sup>3</sup> But the Native Christian Administration of Estates Act provided that Section 190 of the Succession Act shall not apply to the property of an Indian Christian who died intestate, and though a probate was still necessary in the case of a will, no letters of administration were necessary in the case of intestacy. The law is the same since the passing of the Succession Act, 1925, wherein Section 212 provides that no letters of administration are necessary to establish any right to any part of the property of the deceased. A probate, however, is necessary in the case of a will. A succession certificate is necessary in a suit to recover a debt due to deceased as above (Section 214).

**8. Europeans, Parsees, Jews and Armenians.** — These persons are governed by the provisions of Section 212 (1) and Section 213 (1) of the Succession Act, and, therefore, it is necessary to obtain a probate or letters of administration as the case may be to establish any right in a Court of law.<sup>1</sup>

**9. Succession certificate.** — In a suit for *recovery of a debt due to a deceased person*, the person claiming on *succession* to the effects of the deceased should produce a probate, or letters of administration, or a succession certificate having the debt specified therein, as otherwise no *decree* can be passed under Section 214 of the Succession Act. But if the debt is a joint family debt and the plaintiff claims by *survivorship*, no succession certificate is necessary.<sup>1</sup> As to the other cases where

**Note 6**

1. ('10) 8 Ind Cas 655 (656, 657) : 37 Cal 839.
2. ('84) 8 Bom 241 (255).

**Note 7**

1. Section 2 (d) of the Succession Act, 1925 (XXXIX of 1925).
2. Act VII of 1901.
3. Sections 190 and 187 of the Succession Act, 1865 (X of 1865).

**Note 8**

1. ('94) 18 Bom 337 (342). (Letters of administration should be obtained in respect of the whole estate.)
- ('27) AIR 1927 Bom 474 (476, 477): 51 Bom 771. (But Section 212 is not applicable to a suit for sale

by a mortgagee against the heirs of mortgagor.)

**Note 9**

1. ('95) 17 All 578 (580).
- ('95) 19 Bom 338 (339).
- ('99) 1 Bom L R 197 (199).
- ('96) 23 Cal 912 (913). (Continuation of suit by the sons.)
- ('96) 9 C P L R 65 (68).
- ('91) 14 Mad 377 (379).
- ('94) 17 Mad 108 (117). (Succession certificate not necessary for coparcenary debt.)
- ('97) 20 Mad 232 (234).
- ('99) 22 Mad 380 (381).
- ('01) 1901 Pun Re No. 20, page 65.
- ('10) 7 Ind Cas 806 (808): 38 Cal 182. (Impartible estate—Succession certificate not necessary to recover debt due to last holder of estate.)



succession certificate is not necessary, see the undermentioned cases.<sup>2</sup> As to what is a "suit for debt" for the purposes of Section 214 of the Succession Act, see Notes 10 and 11 below.

**O. 7 R. 5**  
**Notes 9-14.**

**10. Suit for rent.** — The word "debt" in Section 214 (1) of the Succession Act does not include rent, revenue or profits in respect of land used for agricultural purposes [see Section 214 (2)] and, therefore, no succession certificate is necessary to recover rent for agricultural land.<sup>1</sup> The amount of the decree for rent deposited by defendant in Court is still rent and can be withdrawn without a succession certificate by the legal representatives of deceased decree-holder.<sup>2</sup>

**11. Suit for debt.** — Under Section 214 of the Succession Act the Court cannot pass a decree against a debtor of the deceased in favour of a person claiming on *succession* to be entitled to the effects of the deceased, except on production of a succession certificate, etc. As to what is a suit for debt, see Note 10 above and the undermentioned cases.<sup>1</sup>

**12. Suit by or against a company.** — See Order 29 Rules 1 and 2, *infra*.

**13. Suit by or against a club.** — See Order 1 Rule 8 Note 4, *supra*.

**14. Cause title of the suit.** — See Appendix A "Description of parties in particular cases." It is not, however, *necessary* under this rule that the capacity in which the plaintiff sues should be stated in the *cause title* of the plaint, although it is

[See also ('91) 1 Mad L Jour 679 (680). (Where there is nothing to show that debt belongs to joint family, succession certificate should be produced.)]

[But see ('07) 30 Mad 454 (458). (Impartible estate—Claim by survivorship—Suit to recover debt due to the last holder—Certificate is necessary.)]

2. ('92) 16 Bom 240 (241). (To file an award no succession certificate necessary.)

('96) 20 Bom 437 (438). (Curator suing under Act XIX of 1841 need not produce succession certificate.)

(1858) 1858 161 Bl & El 63, Jones v. Thomson. (Rent due after death of deceased—No succession certificate necessary.)

('97) 20 Mad 162 (166, 167): 24 Ind App 73 (PC). (Widow suing as trustee of endowment for a debt due thereto—No succession certificate necessary.)

('94) 18 Bom 394 (396). (Rent accruing after death of deceased—No certificate necessary.)

#### Note 10

1. ('99) 26 Cal 536 (538).

('07) 17 Mad L Jour 257 (257).

[See **however** ('91) 1 Mad L Jour 680 (682). (But in a suit on a bond though for rent, a succession certificate is necessary.)]

2. ('13) 18 Ind Cas 495 (495) (Cal).

#### Note 11

1. ('08) 30 All 315 (317). (Dower whether prompt or deferred is a debt.)

('91) 1891 Pun Re No. 88 page 429. (Do.)

('94) 16 Cal 143 (150). (Suit on mortgage—Not a suit for debt — No succession certificate necessary.)

('92) 19 Cal 886 (889, 840). (Do.)

('94) 16 All 259 (268). (Dissenting from 19 Cal 336—Suit for sale on mortgage — Succession

certificate necessary.)

('93) 16 Mad 64 (66). (Suit for foreclosure — No succession certificate is necessary.)

('04) 28 Bom 630 (633, 635). (Suit for sale on mortgage—No succession certificate is necessary.)

('89) 12 Mad 255 (257). (Suit on mortgage brought by the adopted son of the mortgagee—Not a suit for debt—No certificate under Act 27 of 1860 is necessary for the purpose of maintaining the suit.)

('01) 24 Mad 22 (24). (Suit on mortgage—Not a suit for debt—No succession certificate is necessary.)

('88) 15 Cal 54 (57, 58). (Purchaser of mortgaged property is not a "debtor".)

(1900) 1900 All W N 94 (95). (Suit for foreclosure.)

('06) 29 Mad 77 (79). (Suit on mortgage—But if personal remedy sought, succession certificate necessary.)

('08) 12 Cal W N 145 (150). (Do.)

('95) 18 Mad 457 (458). (Suit for damages for wrongful detention not a suit for debt.)

('01) 28 Cal 246 (249). (Right for personal decree being conditional not a debt.)

('99) 1899 All W N 217 (218). (Arrears of annuity under a will is a debt.)

('99) 22 Mad 139 (141, 144). (Suit for accounts—Not a suit for debt.)

('05) 32 Cal 418 (420, 421). (Do.)

('76) 2 Cal 45 (54). (Suit for immovable property not a suit for debt.)

('09) 3 Ind Cas 492 (493, 494): 36 Cal 492 (F B). (Debt existing in the life of a creditor but which became payable only after his death is still a debt.)

('98) 2 Cal W N 591 (593). (Debt fallen due since the death of the creditor—No succession certificate is necessary.)

**O. 7 R. 4**  
**Note 14**

a convenient place to make such a statement. It is sufficient if the capacity in which the plaintiff sues appears in the body of the plaint.<sup>1</sup> The strict rules of English pleadings are not applicable to India.<sup>2</sup>

**O. 7 R. 5**

**R. 5.** [S. 50, para. 5.] The plaint shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

**Defendant's interest and liability to be shown.**

[*Cf.* 1877, S. 50, cl. 5.]

**1. Defendant's interest and liability.**—This rule makes it necessary that the plaintiff should show the interest of the defendant in the subject-matter of the suit and his liability to meet the plaintiff's demand.<sup>1</sup> If the defendant is sued in a *representative* capacity, it is incumbent on the plaintiff to state the capacity in which the plaintiff seeks to make him liable, as otherwise any decree passed will bind no more than the defendant's individual interest.<sup>2</sup> As to the liability of the defendant in particular cases, see the cases cited below.<sup>3</sup>

**Note 14**

1. ('28) AIR 1928 Nag 319 (321).  
(16) AIR 1916 Cal 164 (166).  
(17) 1917 Cal 441 (442).  
(19) AIR 1919 Cal 245 (247) : 46 Cal 877.  
(28) AIR 1928 Mad 445 (446).
2. ('28) AIR 1928 Mad 445 (447).

**Order 7 Rule 5—Note 1**

1. ('24) AIR 1924 Nag 191 (193, 194).
2. ('92) AIR 1932 Mad 185 (186, 187).  
(89) 12 Mad 484 (487).  
(27) AIR 1927 P C 41 (41) (P C). (Suit against the daughter individually and not as representing her father's estate—Decree does not bind estate.)  
(67) 11 Moo Ind App 241 (265, 266) (P C). (Decree against the widow—Reversioners not bound.)  
(76) 1 Cal 133 (140) : 2 Ind App 275 (P C).  
[See ('35) AIR 1935 Mad 425 (426). (Suit against female owner having only limited interest—Plaintiff must give indication in plaint that it is estate or person against which he is proceeding.)]  
*In the following cases it was held that where a creditor sues the father alone for a debt contracted by the father and in execution sells the right, title and interest of the father the purchaser does not get the son's interest :*  
(78) 8 Cal 198 (204) : 4 Ind App 247 (P C).  
(82) 6 Bom 564 (566). (Suit against elder brother alone—Younger brother not affected.)  
(80) 5 Cal 144 (146, 147). (Do.)  
(82) 8 Cal 517 (527).  
[See also ('95) 22 Cal 903 (908). (Debtor dies leaving a will—Heirs on intestacy do not represent him in a suit by the creditor—The suit is bad unless the estate is represented.)  
(82) 8 Cal 898 (907).]
3. ('90) 14 Bom 597 (603, 604). (The other members of the family are bound by a decree properly passed against the manager.)

- (08) 81 Mad 161 (162, 163). (Debts contracted by manager though amounting to a breach of civil duty binds minor members of family.)  
(08) 26 Mad 214 (221, 223). (Debt incurred for family trade—Minor coparcener bound by the debt.)  
(07) 9 Bom L R 1289 (1293). (Do.)  
(98) 2 Cal W N 603 (606). (Suit against son upon mortgage executed by father—Rule of *damdapat* does not apply to son's liability for interest.)  
(02) 6 Cal W N 787 (793, 794). (Hindu sons if liable to pay interest on mortgage.)  
(97) 19 All 26 (32) (F B). (Do.)  
(04) 28 Bom 383 (389). (Son liable to pay father's debts whether father is dead or alive.)  
(04) 27 Mad 71 (75). (Son not liable to pay sums misappropriated by father where the misappropriation involves a criminal offence.)  
(08) 32 Bom 348 (351, 352). (Debts referable to father's follies or caprices—Son not liable.)  
(02) 24 All 459 (460). (Sons and grandsons liable under mortgage bond executed by father.)  
(83) 6 Mad 293 (294). (Father acknowledging to pay barred debt—Son liable to pay debt so acknowledged.)  
(99) 28 Bom 454 (457). (Surety debts of father bind the son.)  
(04) 26 All 611 (614, 616). (Do.)  
(05) 28 Mad 377 (378). (Do.)  
(88) 11 Mad 873 (874). (Do.)  
(07) 17 Mad L Jour 283 (284, 285). (Yet father cannot charge the estate as surety.)  
(04) 28 Bom 408 (411). (The surety debts of the grandfather are not binding on the grandson.)  
(85) 7 All 716 (719). (Suit against some only of the heirs of a deceased Mahomedan does not bind those heirs who were not parties to the suit.)  
(77) 2 Cal 895 (898). (Do.)  
(85) 7 All 822 (826) (F B). (Do.)  
(75) 1 All 57 (59, 60) (F B). (Do.)

If there are more defendants than one, the plaint should disclose a cause of action against each defendant and should state the interest of each defendant in the subject-matter and how each defendant is liable to meet the plaintiff's demand.<sup>4</sup>

O. 7 R. 5  
Note 1

**R. 6.** [S. 50, para. 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

O. 7 R. 6

Grounds of exemption from limitation law.

[1859, S. 26.]

### Synopsis

#### 1. Scope of the Rule. | 2. "The plaint shall show."

#### Other Topics (miscellaneous)

Exemption from limitation — Grounds of. See Note 2.

Omission to show grounds of exemption — Effect. See Note 1.

**1. Scope of the Rule.** — Where, but for some ground of exemption from the law of limitation, a suit would *prima facie* be barred by limitation, it is necessary for

('89) 12 Mad 90 (91). (Heirs not represented being minors—Suit binding since their father is a party and represents them though not formally appointed guardian.)

('69) 12 Suth W R 41 (42, 44). (Adopted son liable for adoptive mother's debt only if he succeeds to her estate.)

('81) 8 Mad 42 (46). (Liability of Hindu son limited to the extent of father's assets received.)

('84) 8 Bom 220 (222, 223). (Son liable to pay father's debts even if assets are in the hands of third parties.)

('89) 18 Bom 653 (654). (Though decree against sons might be passed their liability in execution is only to the extent of the assets inherited.)

('68) 10 Suth W R 216 (217). (Property alienated by Mahomedan heir for paying debts not liable to creditor of deceased.)

(1865) 2 Suth W R 258 (258). (Heirs of deceased liable to the extent of assets for debts due by deceased.)

(1865) 2 Suth W R 296 (297). (Heir can dispose of property for discharging the debts of the deceased.)

('69) 12 Suth W R 233 (233). (Heirs of a deceased person are responsible for the debts due by him to the extent of the assets in their possession.)

('84) 8 Bom 309 (310). (Legal representative not in possession of assets liable if he can become possessed of the assets.)

('97) 20 Mad 446 (447). (If heirs received sufficient assets from deceased, they can be made even personally liable to the extent of the assets.)

('81) 1881 Pun Re No. 11, p. 11. (Legal representatives can be sued without proof of receipt of assets from deceased.)

('79) 4 Cal 342 (345, 346). (Person in possession of estate represents estate till probate is obtained.)

('05) 28 Mad 351 (352, 353). (Creditor in possession of assets liable as executor *de son tort*.)

('85) 11 Cal 45 (51). (Decree against person in possession binds estate even if he is not the heir.)

('91) 14 Mad 454 (457). (Decree against person in possession as representing estate binds the estate.)

('79) 3 Cal L Rep 157 (158). (Suit against person in possession as representing estate of deceased binds the estate.)

('94) 21 Cal 311 (318). (Mahomedan widow in possession of assets liable as representative.)

('82) 8 Cal 370 (373, 374). (Do.)

('85) 11 Cal 421 (429). (Mahomedan heir liable in respect of proportionate share of assets received.)

('82) 4 All 861 (866). (Do.)

('95) 19 Bom 273 (275). (Do.)

('83) 9 Cal 406 (410). (Mortgagee of several properties from heir-at-law can proceed against purchaser of one of them only to the extent to which that property is liable.)

('81) 8 Cal L Rep 447 (448). (Creditor of deceased Mahomedan cannot follow assets in hands of *bona fide* purchaser from heir-at-law.)

('81) 7 Cal L Rep 460 (463). (Do.)

('79) 4 Cal 402 (408) : 5 Ind App 211 (P C). (Do.)

('08) 30 All 352 (355, 359). (Estate of husband not liable for debts voluntarily incurred by wife to pay off husband's debts during husband's lifetime.)

('95) 22 Cal 259 (262, 265, 266, 267). (Insolvent dying before filing schedule but after adjudication—Widow and not Official Assignee is the legal representative of the insolvent for purposes of a suit by a creditor.)

('82) 16 Bom 233 (237). (Residue left by widow (Bombay school) not liable for personal debts of widow.)

[See ('96) 20 Bom 338 (344, 345, 346).]

4. ('24) AIR 1924 Nag 191 (193, 194).

**O. 7 R. 6  
Notes 1-2**

the plaintiff to show in the plaint such ground of exemption.<sup>1</sup> If no such ground is shown in the plaint, it is liable to be rejected under Order 7 Rule 11 (d), *infra*. The plaintiff will not be allowed to show the ground of exemption at the trial by putting in evidence any documents, such as acknowledgments of liability.<sup>2</sup> But the Court may, save in exceptional circumstances, allow the plaint to be amended by making the necessary allegations.<sup>3</sup> See also Note 7 to O. 7 R. 11, *infra*.

2. "The plaint shall show." — It is sufficient that the ground of exemption is apparent on the face of the plaint. It is not necessary that the plaint should specifically, and in so many words, claim the ground of exemption.<sup>1</sup> Thus, where the fact of minority is apparent on the face of the record, it is not necessary that the ground of exemption under Section 8 of the Limitation Act should be specifically pleaded.<sup>2</sup> Similarly, where a plaint is presented on the re-opening date after court-holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under Section 4 of the Limitation Act was not specifically mentioned in the plaint will not entail the dismissal of the suit, inasmuch as the Court is bound to take judicial notice of the holidays.<sup>3</sup> On the same principle it has been held that where a plaint, presented to a wrong Court, is returned for presentation to the proper Court, the endorsements on the plaint will show the applicability of Section 14 of the Limitation Act, and that therefore it is not necessary to specifically allege that ground of exemption.<sup>4</sup> All that the rule requires is that the plaint should show a ground of exemption from limitation where the suit is instituted after the expiration of the period of limitation. But once that is shown, the rule does not preclude the plaintiff from relying upon a *new ground* of exemption at the trial. According to the High Court of Bombay, however, the new ground taken should be *not inconsistent* with that taken originally,<sup>5</sup> while, according to the Allahabad,<sup>6</sup> Calcutta<sup>7</sup> and Lahore<sup>8</sup> High Courts and the Judicial Commissioner's Court of Nagpur,<sup>9</sup> the new ground may *even be inconsistent* with the original one. The High Court of

**Order 7 Rule 6 — Note 1**

1. ('32) AIR 1932 All 461 (464) : 54 All 506. (Acknowledgment relied on — Plaintiff must show it was within period of limitation.)
- ('38) AIR 1933 Lah 491 (492).
- ('39) AIR 1933 Mad 675 (677).
- ('13) 18 Ind Cas 391 (392) (Cal).
- ('23) AIR 1923 Nag 30 (31).
- ('10) 7 Ind Cas 455 (457) : 34 Bom 540.
- ('86) 9 Mad 175 (182).
- ('74) 21 Suth W R 47 (48).
- ('19) AIR 1919 Mad 332 (333).
- ('24) AIR 1924 Nag 80 (80).
- ('21) AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (710). (Payment of interest as such to save the bar of limitation cannot be pleaded in second appeal.)
- ('37) 20 Nag L Jour 42 (46).
- ('35) AIR 1935 Cal 255 (256).
- ('36) AIR 1936 Mad 545 (546). (It is obligatory as a matter of pleading to show the grounds upon which exemption from limitation is claimed.)
- ('37) AIR 1937 Mad 826 (828).
- ('35) AIR 1935 Cal 255 (256).
2. ('03) 81 Cal 195 (201). (Confirming 80 Cal 699.)
- ('84) AIR 1934 Lah 753 (756).
- ('84) AIR 1934 P C 208 (210) (PC). (Plea of fraud not allowed to be raised for the first time in arguments before Privy Council.)

- ('24) AIR 1924 Lah 702 (706).
- ('22) AIR 1922 Lah 39 (40) : 3 Lah 238.
- ('14) AIR 1914 Lah 337 (338) : 1914 Pun Re No. 88.
- ('24) AIR 1924 Pat 806 (806).
3. ('18) AIR 1918 Lah 220 (220) : 1918 Pun Re No. 102.
- ('10) 7 Ind Cas 797 (797) (Mad).
- ('09) 9 Ind Cas 159 (160) : 34 Bom 250.

**Note 2**

- 1 [See ('37) AIR 1937 Mad 826 (828). (Documents relied on to save time filed in the suit and defendant in no way prejudiced — High Court refused to interfere with decree in plaintiff's favour.)]
2. ('09) 2 Ind Cas 77 (78) (Cal).
3. ('20) AIR 1920 Nag 200 (202) : 16 Nag L R 198.
- ('37) AIR 1937 Peah 41 (41).
4. ('23) AIR 1923 Lah 591 (592).
- ('11) 9 Ind Cas 157 (158) (Mad).
- ('08) 7 Cal L Jour 560 (562).
- [See however ('14) AIR 1914 Cal 858 (860).]
5. ('08) 10 Bom L R 846 (848).
6. ('85) AIR 1935 All 946 (949) : 58 All 261 (FB).
7. ('10) 8 Ind Cas 81 (86) (Cal). (Distinguishing 31 Cal 195.)
- [See also ('09) 2 Ind Cas 77 (78) (Cal).]
8. ('22) AIR 1922 Lah 280 (282) : 3 Lah 18.
9. ('21) AIR 1921 Nag 1 (1, 2) : 17 Nag L R 200.

Madras<sup>10</sup> has dissented from the view of the Calcutta and Lahore High Courts, and has held that a new ground of exemption can be urged only after amendment of the plaint so as to include the new ground. But where the plaintiff once amends his plaint by relying upon a new ground of exemption, it has been held by their Lordships of the Privy Council that he will not, thereafter, be allowed to rely upon the original allegation in the unamended plaint.<sup>11</sup>

A plaintiff will not be allowed to rely upon a ground of exemption from limitation for the first time in appeal.<sup>12</sup> The Appellate Court has the same powers of rejection of plaint as the trial Court under O. 7 R. 11 (d).<sup>13</sup> Similarly, a defendant will not be allowed to raise objections on the ground of failure to set out the grounds of exemption, for the first time in appeal or revision.<sup>14</sup>

This rule applies only to cases where the suit is barred *prima facie*;<sup>15</sup> a plaintiff, therefore, is not precluded from relying upon a ground of exemption from limitation, if, on the facts found, the plaintiff's claim appears to be barred.<sup>16</sup> The plaintiff has to show that his cause of action accrued within the period of limitation.<sup>17</sup>

**O. 7 R. 6  
Note 2**

**R. 7. [New.]** Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

**O. 7 R. 7**

Relief to be specifically stated.

[R. S. C., O. 20 R. 6.]

### Synopsis

1. Relief.

2. General or other relief.

3. Alternative relief.

3a. Suit under Section 77 of the Registration Act.

4. Events happening after suit.

**1. Relief.** — This rule and O. 2 R. 2, sub-rule 3 should be read together, and so reading them, the following general propositions may be deduced —

(1) If the plaintiff, being entitled to more than one relief in respect of the same cause of action, omits to sue for any one of such reliefs, he shall not afterwards sue for any relief so omitted.

(2) Every plaint shall state *specifically* the relief which the plaintiff claims, either simply, or in the alternative.

10. ('88) AIR 1938 Mad 395 (396).

(36) AIR 1936 Mad 545 (546).

11. ('26) AIR 1926 P C 85 (88) : 48 All 457 : 53 Ind App 187 (PC).

12. ('07) 17 Mad L Jour 281 (282).

(21) AIR 1921 Nag 94 (95) : 59 Ind Cas 709 (710).

[See also ('87) 20 Nag L Jour 42 (46). (If the plaintiff fails to make any averment of exemption from the law of limitation in the plaint, he cannot be permitted in second appeal to amend his plaint.)]

13. ('24) AIR 1924 Nag 80 (80).

(29) AIR 1923 Nag 30 (31).

14. ('17) AIR 1917 Mad 845 (845).

(09) 4 Ind Cas 923 (924) (Lah).

15. ('14) AIR 1914 Lah 408 (410) : 1914 Pun Re No. 70.

(19) AIR 1919 Lah 20 (21) : 1 Lah 89.

16. ('19) AIR 1919 All 227 (228).

(22) AIR 1922 Oudh 185 (186, 187) : 25 Oudh Cas 89.

17. ('28) AIR 1928 Lah 763 (764).

**O. 7 R. 7**  
**Note 1**

- (3) But a *general or other* relief need not, however, be specifically asked for, but may be given by the Court as if it had been asked for.

Where a question arises as to whether a plaintiff has asked for a particular relief in his plaint, the *whole* of the plaint must be considered,<sup>1</sup> and the *substance* and not merely the *form* of the plaint should be looked to.<sup>2</sup> But this liberality of construction is subject to a limitation that the facts and documents which entitle the plaintiff to the relief claimed must be *stated or referred to* in his pleading. In *Mahomed Zahoor Ali Khan v. Mt. Thakooranee Rutta Koer*,<sup>3</sup> their Lordships of the Privy Council observed as follows :

"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings."

In *Sri Mahant Govind Rao v. Sita Ram Kesho*,<sup>4</sup> their Lordships of the Privy Council observed that the general rule that a plaintiff cannot be entitled to relief upon facts and documents not stated or referred to by him in his pleadings, does not apply where the substantial matters which constitute the title of all the parties are touched in the *issues* and have been fully *put in evidence* in the case. Relief can be granted in such cases on the basis of such matters.<sup>5</sup>

It follows from what has been said above that no relief can be granted upon facts and documents not disclosed in the pleadings, nor dealt with by the issues or the evidence in the case.<sup>6</sup> Thus, where the plaintiff asks for a particular relief on a specific

**Order 7 Rule 7 — Note 1**

1. ('31) AIR 1931 Nag 198 (200): 27 Nag L R 299.
2. ('31) AIR 1931 Mad 94 (95).  
(11) 11 Ind Cas 882 (884) (Cal). (Plaint in form for confirmation of possession but in substance for recovery of possession—Latter relief can be given.)
- (26) AIR 1926 Lah 417 (418). (Plaint badly drafted and hence the relief sought not clearly brought out—If evidence is let in on right issues, appropriate reliefs can be granted.)
- (35) AIR 1935 Cal 744 (745). (Suit for declaration of existence of custom—Real relief sought being declaration of right based on custom—Relief really sought should be allowed.)  
[See also ('37) AIR 1937 Lah 1 (2). (Plaint crudely drafted—Evidence on proper issues—Proper relief should be granted.)]
3. ('68) 11 Moo Ind App 468 (474) (P C).
4. ('98) 21 All 53 (69): 25 Ind App 195 (P C).  
[See also ('87) 14 Cal 592 (597).  
(26) AIR 1926 Cal 1003 (1005).  
(01) 24 All 90 (93). (Per Chamier, J.)  
(33) AIR 1933 Pesh 37 (37).  
(24) AIR 1924 Mad 116 (117). (Title alleged to arise out of purchase—Both courts giving decree on the basis of prescription without objection by defendant—Defendant cannot raise the objection in second appeal.)  
(05) 6 Bom L R 288 (290). (Where on the pleadings, the issues and the evidence the relief sought is clear the rule that plaintiff is not entitled to relief not founded on the pleadings does not apply.)]
5. [See ('36) AIR 1936 Pat 147 (149). (If a Court sees that the plaintiff is entitled to the relief which he claims, although on other grounds than those put forward in his claim, the Court would grant that relief if the defendant is not taken by surprise.)  
(37) AIR 1937 Mad 223 (226). (Suit on promissory note—Cash consideration alleged by plaintiff—Consideration in some other form proved—No surprise to defendant—Suit may be decreed.)]
6. (1863) 1 Mad H C R 471 (477).  
(09) 2 Ind Cas 492 (493) (Cal). (Relief restricted to property in plaint.)  
(15) AIR 1915 Cal 339 (341): 43 Cal 103. (Plaintiff cannot claim relief on defendant's allegations abandoning his case.)  
(70) 2 N W P H C R 407 (408).  
(25) AIR 1925 All 59 (59). (Suit on lease—Lease not proved—Court not to give decree on plaintiff's title.)  
(10) 8 Ind Cas 962 (965) (Low Bur). (Suit on one cause of action not to be decreed on another cause of action.)  
(15) AIR 1915 Mad 74 (75).  
(10) 5 Ind Cas 764 (765, 766) (Mad).  
(36) AIR 1936 Pat 230 (231). (Suit by landlord for ejectment—Defendants recorded as *raiyats*—Plaintiff challenging entry, suing for declaration of his rights to property and for ejecting defendants—Decree by Court should be confined to relief asked for—It should not grant declaration that defendants are tenants, in respect of land in dispute.)  
(38) AIR 1938 Lah 296 (299) (SB). (Plaintiff not proving facts constituting his cause of action—

ground, he cannot be granted the same relief on a different ground which is not at all disclosed in the plaint.<sup>7</sup> A plaintiff suing for a declaration of title to a certain property under a sale deed executed in his favour cannot succeed on the ground of *adverse possession* if the facts in support of that ground are not disclosed in the plaint.<sup>8</sup> But where a ground of relief is disclosed in the plaint, the fact that the plaintiff asked for the relief on a *different* ground will not disentitle him to relief on the ground disclosed in the pleading.<sup>9</sup>

Where a plaintiff claims a larger relief than he is entitled to, the suit should not be dismissed on that ground, but the plaintiff should be given the relief he is entitled to,<sup>10</sup> unless the ground on which the lesser relief can be granted is *inconsistent* with the case of the plaintiff as set out in his pleadings or would lead to a determination of

Suit should not be decreed on proof of different facts which defendant had no opportunity to controvert.)

[See ('99) 21 All 58 (69); 25 Ind App 195 (P C). ('95) AIR 1935 Rang 34 (35). (It is wrong for a Judge to pass a decree which is entirely different from the prayer in the plaint.)

('84) AIR 1934 Rang 139 (144). (Body of plaint not mentioning the relief for mesne profits—Court-fee not paid—Mesne profits not estimated—Only mention in prayer—Mesne profits cannot be granted.)

[See also ('32) AIR 1932 All 353 (355).

('35) AIR 1935 Cal 234 (238). (Plaintiff's whole case rejected—Held that Court was not justified in granting relief on equitable grounds.)]

7. ('68) 10 Suth W R 189 (189). (Pre-emption on basis of plaintiff being a coparcener with the vendor—Decree on the ground of vicinage not to be given.)

('27) AIR 1927 Lah 36 (36). (Where plaintiff claimed easement by prescription, no relief can be given on basis of a natural right.)

('20) AIR 1920 Pat 195 (196). (Do.)

('69) 3 Beng L R App 142 (142). (Suit for pre-emption on ground of partnership—Plaintiff cannot get relief on the ground of vicinage.)

('70) 2 N W P H C R 407 (408). (Title claimed under a will—Decree not to be given as on inheritance.)

('35) AIR 1935 Pat 105 (109). (Suit for compensation against municipality on ground of unlawful removal of certain materials—Plaintiff on failure of that ground claiming compensation on ground that statute itself allowed compensation for removal of structures—Relief cannot be granted.)

8. ('08) 31 Mad 531 (531, 532).

('33) AIR 1933 Lah 25 (27); 13 Lah 677. (Adverse possession should be pleaded.)

9. ('18) AIR 1918 Cal 802 (803).

('34) AIR 1934 All 990 (993).

('74) 21 Suth W R 121 (122).

('82) 8 Cal 926 (930, 931). (Suit for rent on kabuliyaat—Suit for rent may be decreed on other evidence if kabuliyaat not proved.)

('35) AIR 1935 Pat 503 (503). (Omission to indicate in plaint basis of relief—Suit cannot fail if all facts are stated.)

[See also ('81) 6 Cal 812 (814).

('90) 14 Bom 213 (220, 221).]

10. ('18) AIR 1918 Mad 300 (307).

('06) 28 All 482 (487); 33 Ind App 81 (PC).

('80) 4 Bom 584 (588, 589).

('16) AIR 1916 Cal 547 (548). (Claim for Rs. 40—Only Rs. 30 found due—Decree should be for Rs. 30 and suit should not be dismissed.)

('67) 7 Suth W R 92 (93).

('88) 11 Mad 94 (97).

('13) 19 Ind Cas 848 (848) (Mad). (Decree for admitted amount passed though plaintiff claimed larger figure.)

('30) AIR 1930 All 225 (244); 52 All 619 (F B).

('13) 21 Ind Cas 724 (729) (Mad). (Plaintiff claiming whole of property—A share in it can be decreed.)

('17) AIR 1917 Mad 884 (884, 885). (Exaggeration of plaintiff's claim is no ground for dismissal of the suit.)

('17) AIR 1917 Nag 31 (32).

('19) AIR 1919 Lah 339 (341); 1919 Pun Ro No. 13. (Plaintiff claiming whole of property under custom—Custom not proved—Decree for half of the property under Mahomedan law awarded.)

('23) AIR 1923 Sind 5 (8); 16 Sind L R 112 (F B).

('15) AIR 1915 All 116 (117, 118). (Plaintiff sued for possession—Possession subject to conditions of service decreed.)

('31) AIR 1931 Bom 473 (476).

('86) AIR 1936 Mad 252 (255).

('36) AIR 1936 Lah 673 (675). (Both parties overstating respective claims is not sufficient to defeat plaintiff's claim.)

('38) AIR 1938 Mad 270 (271). (Property dedicated for use of whole Brahmin community—Suit by representatives of Brahmin Vadagalai Sri Vaishnavite community claiming exclusive title—Negativating of title as claimed held could not preclude Court from granting relief which they were entitled to get as members of Vadagalai community.)

('37) AIR 1937 Pesh 81 (82).

[See also ('29) AIR 1929 Lah 667 (669). (Punjab Land Alienation Act, S. 16 prohibits the permanent alienation—Application for sale—Relief by way of attachment may be granted.)

('30) AIR 1930 Mad 567 (568).]

[See however ('21) AIR 1921 Lah 336 (336, 337). (Plaintiff's case partly false—Whole suit should be dismissed.)]



# **O. 7 R. 7** **Notes 1-2**

the issues which would embarrass the defendant.<sup>11</sup> Nor is it a ground for dismissing a suit that groundless charges of fraud are made by the plaintiff in his plaint, provided he has a good cause of action.<sup>12</sup> But a Court cannot grant a *larger* relief than that claimed, even if the plaintiff is really entitled to it, unless the plaintiff gets the plaint *amended* with the leave of the Court.<sup>13</sup> A plaintiff, who has established facts which would entitle him to the particular form of relief claimed, should not be debarred from obtaining that relief merely because the allegations made by him have not been established in their *entirety*.<sup>14</sup>

Where the plaintiff has omitted to ask for the appropriate reliefs, he may apply for amendment of the plaint by inserting a prayer for the grant of such reliefs. See Order 6 Rule 17 Note 9.

A Court will not grant any relief which it cannot enforce<sup>15</sup> or which is useless and unprofitable to the parties.<sup>16</sup>

**2. General or other relief.**—A general or other relief need not be specifically asked for in the plaint, but can always be granted by the Court as if it had been asked for. Where, from mistake or inadvertence, the plaintiff omits to pray for the proper relief, or, if the relief claimed in the plaint is not wholly sufficient or appropriate, the Court has always the power to grant the proper relief according to the circumstances of the case.<sup>1</sup> Thus, a Court can always award future interest on the sum found to be

11. ('18) AIR 1918 Mad 300 (307).

12. ('17) AIR 1917 P C 116 (117) : 42 Bom 380 : 45 Ind App 61 (P C).

('11) 9 Ind Cas 429 (431) (Oudh).

[But see ('78) 2 Cal L Rep 18 (21, 22).]

13. ('66) 5 Suth W R 127 (128) (P C). (Mesne profits.)

('33) AIR 1933 Lah 193 (194).

('03) 90 Cal 516 (519).

('32) AIR 1932 Lah 251 (251). (Declaration asked as regards ancestral property — Declaration as regards self-acquisition also not to be given.)

('18) AIR 1918 Mad 998 (1002) : 40 Mad 1 (7, 8) (F B).

[But see ('82) AIR 1932 Rang 141 (142). (There is no provision in the Civil Procedure Code that a man cannot get a decree for more than the amount which he has claimed in his plaint without the plaint being amended — This was a suit under Workmen's Compensation Act (1923).]

14. ('36) AIR 1936 Pat 147 (149).

15. ('84) 10 Cal 525 (527). (Prayer for relief which Court cannot grant should be treated as a mere surplusage.)

('26) AIR 1926 Pat 305 (312) : 5 Pat 595.

16. ('25) AIR 1925 Oudh 598 (600). (Court cannot be required to do what is useless and unprofitable.)

('27) AIR 1927 Pat 286 (287). (Courts will not make infructuous declarations.)

## **Note 2**

1. ('05) 27 All 325 (331) : 32 Ind App 123 (P C).

('29) AIR 1929 All 555 (555). (Though declaratory relief was not asked for, it can be given in appropriate circumstances.)

('28) AIR 1928 All 172 (175, 176) : 50 All 559 (F B). (Court not confined to the language of the relief claimed — Wider relief if plaintiff is

entitled thereto can be given.)

('05) 27 All 97 (122) (F B). (Court not prevented from applying principles of justice, equity and good conscience by any inapt or inappropriate words in the plaint.)

('27) AIR 1927 Bom 125 (127). (Plaintiff praying for payment to himself — Under this rule payment can be decreed to plaintiff and defendant partner.)

('78) 1 Cal L Rep 144 (146). (Plaintiff doubtful as to precise form of relief he was entitled to — He may ask for such a relief as Court may think fit to give.)

('72) 17 Suth W R 432 (439). (If plaintiff should mistake the relief to which he is entitled, Court may afford him an agreeable relief.)

('22) 4 Lah L Jour 393 (396). (Court to grant the appropriate relief.)

('30) AIR 1930 Nag 92 (94) : 26 Nag L R 94. (Court can grant relief though not specifically prayed for in plaint if facts pleaded and found proved show that plaintiff is entitled to it.)

('31) AIR 1931 Oudh 375 (377). (Land for the possession of which the suit was brought was wakf property — Court has jurisdiction to pass such order as may be just and proper.)

('30) AIR 1930 Pat 71 (74).

('30) AIR 1930 Nag 273 (278) : 26 Nag L R 277. (Plaintiff failing to prove his case might obtain relief on facts pleaded by defendant and found correct.)

('28) AIR 1923 Pat 886 (390). (There was no prayer for general relief—Yet it was granted.)

('82) AIR 1932 Lah 401 (411) : 13 Lah 618 (F B). (Courts to mould the relief according to facts proved and consistent with plaintiff's pleadings.)

[See also ('81) AIR 1931 Mad 45 (46) : 54 Mad 352.

('33) AIR 1933 Pat 695 (696).]



due to the plaintiff, even though the latter has not claimed it.<sup>3</sup> The Court may in a suit for exclusive possession pass a decree for *joint* possession.<sup>3</sup> Similarly, in a suit for sale of mortgaged property the Court may pass a personal decree against the mortgagor-defendant provided the claim under the personal covenant is not barred by limitation.<sup>4</sup> Again, where the Court cannot decree partition because all the coparceners are not parties, it can grant the plaintiffs a declaration as to their title.<sup>5</sup>

But the power to grant such relief is controlled by the following considerations —

(1) The relief granted should be based on facts stated or referred to in the plaint and should not be inconsistent with the case set up by the plaintiff<sup>6</sup> or with the relief claimed by him.<sup>7</sup> Thus, the Court cannot pass a decree for possession of property in a suit for *confirmation* of possession, inasmuch as the relief of possession is not consistent with the case set up by the plaintiff or with the relief claimed by him.<sup>8</sup> Similarly, in a suit for injunction on the basis of title, the Court cannot declare that the plaintiff is entitled to a right of easement, jointly with the defendant.<sup>9</sup> For other illustrations, see the undermentioned cases.<sup>10</sup>

2. ('21) AIR 1921 Lah 125 (126) : 2 Lah 256.
3. ('26) AIR 1926 Lah 567 (568).  
( '09) 2 Ind Cas 492 (493) (Cal).  
( '09) 8 Ind Cas 54 (54) : 5 Nag L R 105.  
( '30) AIR 1930 Mad 567 (568).  
( '14) AIR 1914 Mad 128 (130) : 38 Mad 1036.  
(Suit for ejectment — Decree for joint possession passed.)
- ( '13) 21 Ind Cas 724 (729, 733) (Mad). (In suit for ejectment, a share of the property can be decreed to the plaintiff.)
4. ('25) AIR 1925 P C 280 (289) : 52 Ind App 418 : 5 Pat 135 (P C).  
( '02) 24 All 456 (457).  
( '82) 4 All 281 (283).  
( '06) 29 Mad 491 (495).  
[But see ('29) AIR 1929 Oudh 303 (304).]
5. ('81) AIR 1931 Sind 74 (75).
6. (1806) 13 Ves 114 (120), *Hiern v. Mill*.  
(Referred to in A I R 1923 Pat 386.)  
( '72) 11 Moo Ind App 468 (478, 474) (P C).  
(1878) 10 Ch D 502 (508), *Gargill v. Bower*.  
( '05) 27 All 325 (331) : 32 Ind App 123 (P C).  
(Appropriate relief was granted.)  
( '21) AIR 1921 Pat 14 (17) : 6 Pat L Jour 190.  
( '74) 22 Suth W R 248 (254).  
( '17) AIR 1917 Cal 367 (368). (Alternative prayer not included in the general relief.)  
( '04) 81 Cal 433 (440). (A prayer for general relief must be limited by the facts alleged and by the prayer for express relief.)  
( '78) 21 Suth W R 8 (10).  
( '23) AIR 1923 Pat 386 (390).  
( '33) AIR 1933 Nag 115 (116) : 29 Nag L R 100.  
(Plaintiff claiming property as owner cannot succeed as trustee.)  
( '92) 15 Mad 489 (490). (Plaintiff's title found against — Joint right of easement in favour of plaintiff and defendant not to be decreed.)  
( '14) 23 Ind Cas 332 (335) (P C). (Relief on a wholly different basis not to be given.)
- ( '70) 5 Beng L R 682 (690). (Inconsistent relief cannot be given under the general prayer.)  
( '92) 21 Cal 116 (120, 121). (Mere insertion of the general prayer clause in the plaint is not sufficient—There must be some other evidence.)  
( '67) 7 Suth W R 145 (146). (Jagirdar's right pleaded — A subordinate right of occupancy not to be granted.)  
( '16) AIR 1916 Oudh 255 (257). (Relief vague and based on allegation outside pleadings — Allegation if allowed turning character of suit—Relief should not be granted.)  
( '29) AIR 1929 Lah 126 (127). (Relief to be granted should not go beyond the scope of the suit or the facts proved.)  
( '33) AIR 1933 Lah 267 (268).  
( '36) AIR 1936 Cal 465 (468).  
( '38) AIR 1938 Mad 865 (878).
7. ('97) 7 Mad L Jour 50 (51). (Suit by usufructuary mortgagee for possession — Decree for return of mortgage money cannot be given.)  
( '33) AIR 1933 Lah 267 (268).  
( '29) AIR 1929 Oudh 303 (304).  
( '24) AIR 1924 Bom 507 (508). (Application for inventory of the property of the deceased for the appointment of a curator and "other reliefs" — "Other reliefs" could only be read in connection with the main reliefs prayed.)
8. ('21) 68 Ind Cas 2 (3) (Pat).
9. ('92) 15 Mad 489 (490).
10. ('24) AIR 1924 Lah 713 (716) : 5 Lah 509.  
(Suit for specific performance — Damages also awarded under general relief.)  
( '04) 28 Bom 153 (161, 162, 163). (Suit for sale—Redemption in favour of prior mortgagee passed.)  
( '11) 14 Ind Cas 845 (848) (Cal). (Do.)  
( '10) 8 Ind Cas 64 (64) (Mad). (Suit for cancellation of sale deed — Decree for unpaid purchase money passed.)  
( '17) AIR 1917 Low Bur 8 (4). (Suit for share of inheritance treated as administration suit.)  
( '74) 18 Beng L R 243 (252) (F B). (Suit for rent on kabulyat—Rent at previous rate decreed as kabulyat was not proved.)

**O. 7 R. 7**  
**Note 2**

(2) The relief granted should be based on the same cause of action as the relief claimed in the suit.<sup>11</sup>

(3) The relief granted to the plaintiff should not be of an entirely *different description* from the relief claimed in the plaint. The plaintiff "cannot desert the specific relief prayed; and under the general prayer ask specific relief of another *description*, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief."<sup>12</sup> Thus, an injunction will not ordinarily be granted under the power to grant general relief.<sup>13</sup> "It must be expressly prayed, because the defendant might by his answer make a different case under the general prayer from what he would, if an injunction were specifically prayed."<sup>14</sup> The *test*, therefore, in such cases is to see whether the defendant will not be taken by surprise or be embarrassed by such relief being granted.<sup>15</sup> There can be no surprise if the relief granted is *consistent* with that claimed and with the case raised in the pleadings<sup>16</sup> or if the parties knew the case which had to be tried.<sup>17</sup> Thus, a declaratory decree may be passed in a suit for possession of property,<sup>18</sup> or a decree for joint possession can be passed in a suit for partition by metes and bounds, where the property happens to be impartible,<sup>19</sup> provided there is no surprise under the circumstances of the case to the defendants. Similarly, *damages* may be awarded in addition to a decree for specific performance,<sup>20</sup> or an *account* directed to be taken in a suit *for money*.<sup>21</sup> But the Court cannot pass a decree for a general taking of accounts of a partnership in a suit to recover plaintiff's share alone in one item of the partnership assets,<sup>22</sup> nor can it, in a personal

11. ('09) 3 Ind Cas 408 (414, 415) (Cal). (Relief conformable to the case made in the plaint can be given.)

('05) 27 All 174 (176).

('12) 13 Ind Cas 650 (651) (Lah). (When a plaintiff sues to redeem a certain mortgage that particular mortgage is his cause of action — To shift the attack to later mortgage is to change the suit into one based on different cause of action.)

('17) AIR 1917 Cal 367 (368). (General prayer does not cover a relief based on different cause of action.)

('38) AIR 1938 Lah 71 (71) : I L R (1938) Lah 511. (Suit for compensation on express agreement — No relief under S. 70, Contract Act, asked — Court cannot decree suit on principles of Section 70.)

12. (1806) 13 Ves 114, *Hiern v. Mill*. (Referred to in A I R 1923 Pat 886 — Per Lord Erskine, L. C.)

(1887) 2 Moo Ind App 353 (389, 390) (P C). (Relief of a different description can be given if such a relief can be sustained by the allegations in the plaint.)

('16) AIR 1916 Cal 829 (833, 837) : 43 Cal 743 (FB).

('24) AIR 1924 Lah 324 (325).

('37) AIR 1937 Oudh 484 (487) : 13 Luck 584. (Plaintiff claiming decree for money found due from defendants on taking accounts — Decree declaring plaintiff's right to a share of the money with the defendants cannot be passed — Further decree cannot be passed against defendants against whom the plaintiff did not originally claim any relief.)

13. 7 Hare 89 (98, 99, 100), *Castelli v. Cooke*.

('81) 6 Cal 485 (489, 490).

[See also ('29) AIR 1929 All 430 (431, 432). (Injunction is only an alternative within the discretion of the Court and is not an independent form of relief.)]

14. *Story's Equity Pleadings* S. 41, p. 37. (Cited in 19 Bom 323.)

15. ('16) AIR 1916 Cal 829 (837, 838) : 43 Cal 743 (FB).

('08) 3 Ind Cas 408 (414, 415) (Cal).

('28) AIR 1928 Bom 484 (486) : 52 Bom 875.

('26) AIR 1926 Lah 417 (418). (Case should not be allowed to be defeated owing to technicality.)

('19) AIR 1919 Sind 98 (99) : 13 Sind L R 150. (Prayer for demarcation and possession includes ejectment — Ejectment can be granted though relief not specifically asked for.)

('23) AIR 1923 Pat 386 (390).

('36) AIR 1936 Cal 465 (468).

16. ('16) AIR 1916 Cal 829 (837, 838) : 43 Cal 743 (FB).

('36) AIR 1936 Cal 465 (468).

17. ('26) AIR 1926 Lah 417 (418).

18. ('23) AIR 1923 Lah 422 (423).

('24) AIR 1924 Lah 324 (325).

('29) AIR 1929 All 555 (555). (Suit for possession — Declaration that transfer by widow to defendant was void beyond widow's lifetime granted under general prayer.)

('16) AIR 1916 Pat 94 (95). (Suit for possession — Declaratory decree that plaintiff is entitled to possession after expiry of term passed.)

19. ('21) AIR 1921 All 106 (107) : 43 All 818.

20. ('24) AIR 1924 Lah 713 (716) : 5 Lah 509.

21. ('19) AIR 1919 Cal 296 (305).

22. ('19) AIR 1919 Mad 146 (148).

claim, pass a decree for sale of property in default of the payment of the sum decreed.<sup>23</sup> Where a reversioner sues a Hindu widow for an *injunction* restraining her from committing waste and in such a suit prays for the *appointment of a receiver*, he is not entitled to a *declaration* of his reversionary right if he fails to establish his right to the reliefs claimed.<sup>24</sup> It has been held by the Bombay High Court that in a suit for dissolution of marriage or in the alternative for a declaration that the marriage is a nullity, it is not open to the Court to pass a decree for judicial separation, such relief not being 'general or other relief' within the meaning of this rule.<sup>25</sup>

A Court cannot, under the power to grant further relief, pass a decree in favour of a *pro forma* plaintiff if it is found that the real plaintiff is not entitled to the relief claimed.<sup>26</sup>

An equitable relief under this rule may be granted even by the Appellate Court,<sup>27</sup> though it will be slow to interfere with the discretion exercised by the trial Court in granting appropriate relief under this rule.<sup>28</sup>

**3. Alternative relief.** — "A person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them."<sup>1</sup> Thus, a plaintiff may claim specific performance of a contract, or, in the alternative, cancellation of the contract and damages.<sup>2</sup> Where *A* and *B* are tenants of the same landlord, in a suit for *khas* possession by *A* against *B* and the landlord, refund of *salami* or rent paid to the landlord can be granted if the right to *khas* possession is found against.<sup>3</sup> Similarly, a plaintiff may in a suit on a negotiable instrument claim in the alternative a decree on the original consideration.<sup>4</sup> So also, in a suit based on tenancy, the plaintiff can claim damages for use and occupation in the alternative.<sup>5</sup> Again, a pre-emptor may allege that the vendor has no title to part of the property and may alternatively offer to pre-empt the whole, if the Court finds that the vendor had title to sell the whole.<sup>6</sup> An injunction, it has been held, is an alternative relief within the discretion of the Court and not an independent relief under Section 35 (a) of the Easements Act.<sup>7</sup> But in all such cases plaintiff has to *set out the facts* relied on by him in his alternative claim distinctly and separately.<sup>8</sup> He cannot be allowed to pick out such of the allegations as will support any alternative case put forward by him.<sup>9</sup> If the facts are not stated in the plaint, the plaintiff cannot claim

23. ('25) AIR 1925 Oudh 550 (552).

24. ('16) AIR 1916 P C 117 (119) : 39 Mad 634 : 43 Ind App 207 (100).

25. ('98) AIR 1938 Bom 65 (67).

26. ('08) 31 Cal 433 (440).

27. ('25) AIR 1925 Cal 434 (435).

28. ('26) AIR 1926 Lah 417 (418).

('67) 7 Suth W R 180 (181).

#### Note 3

1. (1887) 35 Ch D 492 (499), *Owen v. Morgan*. (Per Lindley, L. J.)

('72) 9 Bom H C R 1 (6). (Plaintiff may from the beginning put forward an alternative case.)

[See (1878) 7 Ch D 473 (489), *Davy v. Garret*.]  
2. ('24) AIR 1924 Bom 119 (127) : 48 Bom 259. (Section 37 of the Specific Relief Act.)

3. ('25) AIR 1925 Cal 193 (194). (Suit for *khas* possession — Alternative claim for refund of *salami*.)

4. ('18) AIR 1918 P C 146 (146) : 46 Cal 668 : 46 Ind App 88 (P C).

('24) AIR 1924 Mad 520 (521). (Claim for money

due based on the original dealings may be combined with a claim for the same money as due under a *pro-note*.)

('12) 14 Ind Cas 399 (401) : 8 Nag L R 7.

('24) AIR 1924 Lah 144 (145) : 4 Lah 198.

('30) AIR 1930 Bom 66 (68). (As to when a decree on the original consideration cannot be passed, see the observations made in this case.)

[See however ('33) AIR 1933 All 109 (109).

(Where the loan is not independent of the promissory note no decree can be given even on the receipt given for money paid.)]

5. ('11) 11 Ind Cas 863 (864) (Low Bur).

('32) AIR 1932 Cal 41 (43).

('24) AIR 1924 Oudh 97 (98).

('26) AIR 1926 Mad 1071 (1072).

[See also ('33) AIR 1933 Lah 15 (17) : 13 Lah 561. (Suit on contract—Compensation can be granted.)]

6. ('29) AIR 1929 All 898 (899).

7. ('29) AIR 1929 All 430 (431, 432).

8. ('20) AIR 1920 Cal 93 (95).

9. ('10) 6 Ind Cas 472 (472) : 37 Cal 856.

**O. 7 R. 7**  
**Notes 3-4**

the alternative relief without amending the plaint.<sup>10</sup> In a suit by a son to set aside a transfer by his mother, the plaintiff specifically alleged that his mother was of unsound mind, and stated further that she was under the control of the donee. The Privy Council was inclined to the view that the claim based on undue influence cannot be entertained as it was not specifically pleaded.<sup>11</sup> So also in a suit on a hundi, the Privy Council declined to pass a decree on the original consideration as such an alternative relief had not been prayed for.<sup>12</sup>

But where in a suit all the facts giving rise to the alternative claim are *fully stated in the plaint*, the fact that the plaintiff has not *formally* asked for the relief on the alternative claim is no bar to the granting of the relief on that basis.<sup>13</sup>

The plaintiff might rely upon different allegations in the alternative claim even though they may be inconsistent with each other. See Order 6 Rule 2 Note 5.

A prayer for *alternative* relief cannot be converted into one for *additional* relief.<sup>14</sup> A plaintiff praying for a relief and also for a lesser relief in the alternative, cannot be deemed to have waived his right to the relief originally claimed.<sup>15</sup> Where the plaintiff asks for one of two alternative reliefs and is granted one, he cannot, in appeal, contend that he should be given the other relief.<sup>16</sup>

**3a. Suit under Section 77 of the Registration Act.** — In a suit under Section 77 of the Registration Act, 1908, no other claim, such as a claim for possession and mesne profits, can be coupled with the prayer to enforce registration of the document. The reason is that the purpose of such a suit is strictly limited; a special period of limitation is prescribed for it and the court-fee leviable is separately provided for. The allowing of another claim to be included in such a suit will completely alter its scope and character.<sup>1</sup>

**4. Events happening after suit.** — The ordinary rule is that the rights of parties must be determined as at the date of the action, and not on the basis of rights which accrued to them after the institution of the suit.<sup>1</sup> Thus, where the plaintiff has no cause of action at all to institute the suit, he will not ordinarily be allowed to take

10. [See ('28) AIR 1928 Sind 103 (104): 23 S in L R 370. (Plaintiff cannot change his case in the second appeal especially when he has made no application to amend his plaint.)]

11. ('06) 33 Cal 773 (782, 783): 33 Ind App 86 (PC). [See ('33) AIR 1933 Lah 1045 (1046). (Alternative prayer put forth after several years in appeal on facts contradictory to allegation in plaint should not be allowed.)]

12. ('18) AIR 1918 P C 146 (146): 46 Cal 663: 46 Ind App 33 (P C.)

13. ('32) AIR 1932 Nag 23 (26, 27): 27 Nag L R 327.

(81) AIR 1931 Rang 139 (143): 9 Rang 56. (Suit on pro-note insufficiently stamped—Plaintiff is yet entitled to decree on original consideration if plaint discloses such cause of action.)

(82) 4 All 281 (283).

(12) 15 Ind Cas 268 (269, 270) (Cal).

(26) AIR 1926 Cal 831 (834): 53 Cal 418. (Mortgage deed invalid because of subsequent alteration—Mortgagee can recover upon the original consideration.)

(83) 4 All 245 (247, 248).

14. ('24) AIR 1924 All 271 (272).

15. ('14) AIR 1914 Lah 204 (206): 1915 Pun Re No 4.

16. ('24) AIR 1924 Cal 445 (446).

**Note 3a**

1. ('24) AIR 1924 Cal 600 (610).

(99) 9 Mad L Jour 107 (108). (Plaintiff claimed a declaration of the validity of his adoption in a suit under S. 77, Registration Act—Claim was not allowed.)

(33) AIR 1933 Cal 196 (197). (Suit for registration of a usufructuary mortgage bond—Certain other alternative reliefs were also prayed for.)

**Note 4**

1. ('08) 7 Cal L Jour 262 (264). (Suit for recovery of possession—Plaintiff can succeed only on title as it stood on the date of the institution of the suit.)

(30) AIR 1930 Nag 173 (176, 177): 26 Nag L R 208. (Suit for possession on redemption—Plaintiff becoming entitled to possession only during suit—Not taken into account.)

(24) AIR 1924 Pat 438 (438): 3 Pat 224. (Suit on basis of relinquishment by A—Relinquishment made only during suit.)

(71) 15 Suth W R 106 (106).

advantage of a cause of action arising subsequent to the suit and claim relief on that basis.<sup>3</sup> Nor, where a plaintiff has a cause of action on the date of the suit, will relief be ordinarily refused to him on that basis by reason of subsequent events.<sup>3</sup>

But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, the Courts may depart from the general rule and mould the relief on the basis of the altered circumstances.<sup>4</sup> Thus, where

('28) AIR 1928 Mad 245 (246). (Suit decreed for instalments fallen due—No decree could be given for instalments fallen due during suit.)

('08) 81 Mad 408 (404). (Landlord not doing anything before his suit for possession that he intended to avail himself of the forfeiture—Suit not maintainable.)

('89) 11 All 438 (443, 444). (Suit for possession by redemption of mortgage—Plaintiff must show title subsisting on the date of his suit.)

('37) AIR 1937 Mad 200 (207).

('38) AIR 1938 Mad 293 (295).

('35) AIR 1935 Oudh 22 (28): 10 Luck 270. (If the plaintiff seeks to introduce a new case, he can do so only by an amendment of the plaint in which case the defendant must be given an opportunity of raising an appropriate defence.)

('36) AIR 1936 Oudh 280 (289): 12 Luck 185.

2. ('93) 21 Mad 288 (290). (Suit by landlord to eject trespassers pending lease—Subsequent expiry of lease—Plaintiff cannot get relief on that basis.)

('93) 15 All 399 (403). (Death of person subsequent to suit giving title to plaintiff.)

('10) 8 Ind Cas 576 (577) (Lah). (Suit by mortgagee for possession before expiry of period fixed for payment—Subsequent expiry of period will not entitle plaintiff to decree.)

('26) AIR 1926 Mad 594 (597). (Suit for redemption premature—Period expired during pendency of litigation—Suit dismissed.)

('36) AIR 1936 Mad 504 (506).

[See also ('36) AIR 1936 Oudh 250 (253): 12 Luck 101. (The title of plaintiff pre-emptor must be subsisting not only at the date of sale deed but also at the date of the institution of the pre-emption suit. His acquiring title during pendency of the pre-emption suit is immaterial—AIR 1930 Oudh 274 and AIR 1931 Oudh 281, Relied on.)]

[But see ('25) AIR 1925 Mad 63 (64). (No right of suit on date of institution—Right got later by inheritance—Right can be recognized.)

('26) AIR 1926 Lah 145 (146). (Suit premature at date of institution of suit—Cause of action maturing afterwards—Suit not to be dismissed.)]

3. ('31) AIR 1931 Mad 505 (509).

('33) AIR 1933 Nag 224 (226).

('22) AIR 1922 All 526 (526).

('37) 21 Bom 701 (708).

('08) 8 Cal L Jour 116 (119).

('89) 12 Mad 196 (187, 188). (Suit for mere declaration—Further relief becoming available during suit—Declaration cannot be refused.)

('24) AIR 1924 Mad 809 (310).

('15) AIR 1915 Cal 103 (104, 105).

('28) AIR 1928 Oudh 242 (245).

[But see ('33) AIR 1933 Lah 481 (483): 14 Lah 421. (The law of pre-emption is highly technical and the plaintiff must have a subsisting right at the date of the trial Court's decree.)]

4. ('07) 6 Cal L Jour 74 (78).

('28) AIR 1928 Pat 396 (397, 398). (Suit by landlord against trespasser while lease was running, for declaration and formal possession through tenant—Lease expiring—Decree for possession can be given.)

('28) AIR 1928 Bom 427 (430): 52 Bom 883. (In awarding damages change of circumstances may be taken into consideration.)

('99) 1 Bom I. R. 218 (219). (P sued as heir of X—Held, not heir in presence of M—M having died pending suit, decree can be given on basis of M's death.)

('17) AIR 1917 Cal 716 (719): 44 Cal 47.

('29) AIR 1929 All 841 (343, 344). (Suit is to be tried as on the date of cause of action—Subsequent events can be considered only in exceptional cases such as where the original relief has become inappropriate.)

('27) AIR 1927 Nag 230 (232): 23 Nag L R 57.

('27) AIR 1927 Pat 422 (425).

('24) AIR 1924 Nag 344 (345).

('31) AIR 1931 Cal 776 (778). (Obiter.)

('17) AIR 1917 Cal 822 (822). (Suit for khas possession against lessee on the ground of relinquishment—Relinquishment not proved but *pendente lite* lease expired—Decree for khas possession can be given.)

('33) AIR 1933 Cal 534 (535): 60 Cal 685.

('29) 1929 Mad W N 165 (165).

('24) AIR 1924 Nag 204 (207). (Relief refused on basis of subsequent events.)

('30) AIR 1930 Mad 248 (249).

('25) AIR 1925 Nag 104 (106, 108).

('25) AIR 1925 Mad 63 (64). (Formal amendment may sometimes be dispensed with.)

('18) AIR 1918 Mad 143 (143). (Cause of action arising subsequent to the filing of suit.)

('95) 22 Cal 589 (596).

('29) AIR 1929 Bom 337 (338).

('18) AIR 1918 Mad 272 (274). (Cause of action arising subsequent to the suit may be included by amendment.)

('25) AIR 1925 Nag 251 (257).

('80) AIR 1930 All 856 (857). (After preliminary decree on a mortgage the mortgagors were by Government Notification declared to be agriculturists whose property was not liable for sale—

**O. 7 R. 7**  
**Note 4**

pending a suit for a declaration of title the defendant takes possession of the property in dispute, the plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit.<sup>5</sup> Similarly, if, pending a suit for partition by *A* against his brothers *B* and *C*, *B* dies, *A* can amend his plaint and claim a half share instead of one-third.<sup>6</sup> Again, where in a suit for money the real cause of action arose only after the institution of the suit, it was held in the cases noted below<sup>7</sup> that the Court should not reject the plaint and drive the plaintiff to file a fresh suit but should pass a decree on the basis of such subsequent cause of action. It is not only in the power but sometimes the *duty* of the Court to take notice of subsequent events where, if it is not so done, the Court might decide matters no longer in controversy or deliver judgment which could not be carried into effect or grant a relief which is inappropriate and ineffectual.<sup>8</sup>

But the discretionary power to depart from the general rule and to take notice of subsequent events will not be exercised where it would have the effect of taking away the jurisdiction of the Court, or there is great delay in making the application, or if a fresh enquiry into other facts becomes necessary.<sup>9</sup> It will not also be exercised where the subsequent cause of action is alleged to arise by virtue of something done *in the suit itself*.<sup>10</sup> Thus, in a suit for possession against a tenant on the ground of forfeiture by denial of title, the plaintiff on failing to prove such denial before suit

It was held that the final decree could not direct the sale of their property.)

('19) AIR 1919 Lah 262 (269): 1919 Pnn Re No. 127. (Minor Mahomedan girl sued before puberty to exercise her option of puberty—Puberty attained during the pendency of the suit—Option can be exercised.)

('37) AIR 1937 Oudh 87 (97): 12 Luck 495. (Suit on contract—Contract found void—Court can grant relief under S. 65 of the Contract Act.)

('36) AIR 1936 Oudh 280 (289): 12 Luck 185. (Do.)

('35) AIR 1935 Oudh 22 (29): 10 Luck 270.

('38) AIR 1938 Mad 298 (295). (Where the continued existence of a certain right is an essential requisite for according the relief asked for and such right has been lost before the relief can be granted, the Court cannot but take notice of the altered circumstances and decline to give the relief to which a party would be entitled before the change of circumstances.)

('37) AIR 1937 Mad 200 (207, 208). (Compromise of suit brought to knowledge of Court—Court is bound to raise and try issue regarding it.)

[See also ('93) AIR 1933 All 217 (218). (Agra Pre-emption Act as amended in 1929, S. 19—The date of the decree is the crucial date and any rule or change in law that came into existence before that date would govern the suit.)

('81) 6 Bom 139 (142, 143). (Auction-purchaser's suit for redemption of a mortgage—Sale certificate not obtained on date of suit—Production at trial—Decree for redemption proper.)

('37) 41 Cal W N 534 (536). (Suit by firm—Firm registered after institution of suit—Plea in bar of suit not taken in written statement—Suit should be treated as instituted on the day when the firm is registered.)

5. ('12) 16 Ind Cas 734 (735) (Mad).

('30) AIR 1930 Mad 405 (410).

('22) AIR 1922 Oudh 266 (267, 268).

6. ('93) 16 Mad 350 (353).

('15) AIR 1915 Sind 25 (27): 8 Sind L R 61. (Claim as heirs of *A*—During the pendency of the suit a defendant, daughter of *A*, died—Claim as heirs of *A*'s daughter could be allowed by way of amendment.)

('26) AIR 1926 Mad 6 (12). (Suit by one co-widow against another co-widow and her alienee for possession after partition of her one-half share—Defendant co-widow died pending appeal—Plaintiff can pray for possession of whole estate.)

('21) AIR 1921 Bom 455 (456): 45 Bom 983. (Alienee from a minor coparcener sued for partition—Pending suit minor attained majority and executed a new conveyance—Plaintiff entitled to succeed.)

7. ('18) AIR 1918 Mad 143 (143).

('23) AIR 1923 Lah 590 (591).

('26) AIR 1926 Mad 377 (377, 378).

[See also ('29) AIR 1929 Lah 409 (415).]

8. 159 U S 651, *Mills v. Green*. (Referred to in AIR 1925 Nag 104.)

('33) AIR 1933 Cal 584 (585): 60 Cal 685.

('25) AIR 1925 Nag 104 (107).

(1900) 41 C C A 585, *Ransom v. City of Pierre*. (Referred to in 6 Cal L Jour 74.)

('30) AIR 1930 Bom 254 (260): 54 Bom 125.

9. ('26) AIR 1926 Mad 6 (12).

10. ('91) 15 Bom 407 (412, 414).

('18) AIR 1918 Oudh 118 (119). (Plea in written statement cannot furnish cause of action to plaintiff.)

('22) AIR 1922 Lah 437 (439). (Do.)

('02) 29 Cal 203 (206). (Tenancy terminated during suit—Notice to quit alleged in plaint not proved—Suit itself cannot be a notice.)

('29) AIR 1929 Cal 830 (830, 831). (No cause of action could be founded on any allegation made in the pleadings.)

cannot take advantage of a denial in the written statement of the defendant.<sup>11</sup> The Court will not also exercise such discretionary power if the subsequent cause of action is entirely different and distinct from the cause of action as originally alleged.<sup>12</sup>

A decree which is good and valid at the date it was passed cannot by reason of a subsequent event become bad.<sup>13</sup>

But where subsequent to the date of judgment of the first Court events happen which entitle the plaintiff to a change in the relief, can the Appellate Court take notice of such events and mould the relief accordingly? In *Mt. Anand Moyee Chowdhoorayan v. Sheeb Chunder Roy*,<sup>14</sup> their Lordships of the Privy Council observed as follows :

"The first and most important question is, whether the decision of the Principal Suther Ameen was, *when pronounced*, a correct decision of the issues *then pending* before him between the then parties to the suit. No subsequent event, or devolution of interest, can affect this question ; because to give effect to these, should justice require it, would be the office not of an appeal but of some supplemental proceeding."

It was, however, held in the undermentioned cases<sup>15</sup> that there were exceptions to that general rule and that in such exceptional cases the Appellate Court may take notice of events happening after the date of the judgment of the first Court. The introduction of the new rule, O. 41 R. 33, on the lines of the English Rules of the Supreme Court, enabling the Appellate Court, not only to pass any order which ought to have been passed or made, but to pass such *further or other decree or order* as the case may require, makes it now perfectly clear that on appeal "such a judgment may be given as ought to be given if the case came at that time before the Court of first instance."<sup>16</sup>

**O. 7 R. 7  
Note 4**

**R. 8. [New.]** Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

**O. 7 R. 8**

[R. S. C., O. 20 R. 7. See O. 1 Rr. 1 to 7 and O. 2 Rr. 1 to 6.]

(03) 31 Cal 433 (440).

11. ('19) AIR 1919 P C 1 (4): 42 Mad 589: 46 Ind App 109 (P C).

(92) 15 Mad 123 (124).

(09) 2 Ind Cas 656 (657, 658): 36 Cal 927.

(05) 2 Cal L Jour 389 (395, 396).

(01) 28 Cal 223 (227).

(01) 28 Cal 185 (188).

(31) 134 Ind Cas 1038 (1039) (Lah).

(86) 13 Cal 96 (98, 99).

(96) 20 Bom 759 (764).

[See also ('35) AIR 1935 Cal 255 (256). (Recital of payment in written statement cannot be relied on as saving limitation for suit under S. 20 of the Limitation Act.)]

[But see ('84) 8 Bom 228 (230). (Setting up a right to hold at a customary rent in answer to a claim for increased rent is a repudiation of the landlord's title, which dispenses him from giving notice to quit.)]

12. ('27) AIR 1927 Cal 56 (57).

(17) AIR 1917 Mad 198 (200).

13. ('93) AIR 1083 Cal 321 (322).

14. (1863) 9 Moo Ind App 287 (299, 300) (P C).

[See also ('34) AIR 1934 Pat 21 (23).]

15. ('07) 6 Cal L Jour 92 (93).

(07) 6 Cal L Jour 102 (104).

(07) 6 Cal L Jour 662 (666).

(81) 6 Bom 113 (115).

(01) 25 Bom 606 (613, 614).

16. ('10) 8 Ind Cas 736 (737, 738): 36 Mad 439 (F B). (Change of law subsequent to original Court's decree.)

(28) AIR 1928 Cal 436 (437).

(1882) 9 Q B D 672 (676, 678), *Quilter v. Mapleson*. (Referred to in AIR 1914 Mad 564.)

(24) AIR 1924 Nag 204 (207).

(25) AIR 1925 All 361 (361): 47 All 324.

(30) AIR 1930 Bom 554 (557): 54 Bom 902. (Even in second appeal, the Court should take into consideration the events that have happened since filing of first appeal and grant relief accordingly.)

(09) 1 Ind Cas 670 (675) (Cal).

(18) AIR 1918 Mad 1299 (1301): 40 Mad 818. (Change of law subsequent to original Court's decree.)

(17) AIR 1917 Mad 198 (200).



**O. 7 R. 8  
Note 1**

**1. Relief founded on separate grounds.** — The object of this rule is to prevent the trial being embarrassed by the want of clearness in the allegations in the plaint. Plaintiff may, as has been seen in Rule 2 *ante*, in a proper case, rely upon one set of material facts for his relief and also on another and even inconsistent set of material facts for relief in the alternative; but where such alternative cases are alleged, the facts belonging to them respectively should not be mixed up but should be stated separately so as to show on what facts each alternative relief is claimed.<sup>1</sup>

See Order 6 Rule 2 Note 5, and Order 7 Rule 7 Note 3.

**O. 7 R. 9**

**R. 9. [S. 58.]** (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many

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plaint.**

copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of

**Concise statements.**

the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

[1877, S. 58. See O. 7 Rr. 4 and 5.]

**Local Amendments****ALLAHABAD**

(a) *For the semicolon after "it" in clause (1), substitute a full stop and delete the rest of this clause as well as clauses (2) and (3); and*

(b) *Re-number clause (4) as clause (2), deleting the words "or statements" therein.*

[See ('29) AIR 1923 Lah 24 (25).]

[But see ('29) AIR 1929 All 699 (701). (Subsequent events being brought to the knowledge of the Appellate Court, it was held that the attention of the lower Court should be drawn to them.)]

**Order 7 Rule 8 — Note 1**

1. (1878) 7 Ch D 473 (489), *Davy v. Garrett*.  
[Per Thesiger, L. J.]

('20) AIR 1920 Cal 98 (95).

(1887) 35 Ch D 492 (499), *Re Morgan*.

[See also ('29) AIR 1929 Nag 347 (347).]



**CALCUTTA**

*Cancel* clause (1) and *substitute* therefor the following:

"(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1A) The plaintiff shall present with his plaint:

- (i) as many copies on plain paper of the plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

- (ii) draft forms of summons and fees for the service thereof."

**MADRAS**

*After* the word "and" occurring in clause (1) *delete* the comma and the five words following, *viz.* "if the plaint is admitted" and *insert* the expression "along with the plaint" *after* the words "shall present."

**NAGPUR**

*Substitute* the following for Rule 9:

"9. (1) The plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it.

(2) The chief ministerial officer of the Court shall sign such list and the copies of the plaint presented under Rule 1 of Order 4, if, on examination, he finds them to be correct."

**PODH**

In sub-rule (1) *for* the words "and, if the plaint is admitted, shall present," *substitute* the words "and shall, at the same time, present." Also *delete* the words "unless the Court . . . . present such statements", as well as sub-rules (2) and (3), and *re-number* sub-rule (4) as sub-rule (2) *deleting* the words "or statements."

**RANGOON**

In sub-rule (1), *add* the words "on the day on which the plaint is admitted" *after* the word "present."

**SINDH**

*Substitute* the following for sub-rule (1).

"9. (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and shall present along with the plaint as many copies of it on plain paper as there are defendants; on application made the Court may by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, presented along with the plaint."

**1. Procedure on admitting plaint.** — This rule relates to the procedure adopted when a plaint is admitted. It provides for presentation into Court of concise statements instead of copies of plaints for service on the defendants in the cases mentioned in the rule. These statements should contain the nature of the claim made or of the relief claimed, and the capacity in which the party sues or is sued (sub-rule 2). As to the representative capacity of plaintiff, see O. 7 R. 4, and as to the representative capacity of defendants, see O. 7 R. 5.

O. 7 R. 10

**R. 10.** [S. 57.] (1) The plaint shall at any stage of the suit<sup>2</sup> be returned to be presented to the Court in which the suit should have been instituted.<sup>7</sup>

Return of plaint.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint.

[1877, S. 57; 1859, S. 30.]

a. This rule has been applied to suits for the recovery of rent under the Chota Nagpur Tenancy Act, 1908 (Ben. VI of 1908), S. 265.

### Synopsis

- |   |   |
|---|---|
| 1. Scope of the Rule.   | 7. Court in which the suit should have been instituted. |
| 2. "At any stage of the suit."                                      | 8. Court-fee.   |
| 3. Return of plaint by Appellate Court.                             | 9. Limitation.  |
| 4. Return of plaint by Small Cause Court.                           | 10. Chartered High Courts.                              |
| 5. Return of plaint by Civil Court to Revenue Court and vice versa. | 11. Appeal.   |
| 6. Return of applications.  | 12. Revision.   |

### Other Topics (miscellaneous)

In what cases plaint may be returned. Rule mandatory. See Note 2.  
See Note 1. Want of jurisdiction. See Note 1.

**1. Scope of the Rule.** — It is enacted in Section 15 *ante*, that every suit shall be instituted in the Court of the *lowest grade competent* to try it. Where a suit is instituted in a wrong Court, *i. e.*, in a Court which is either not *competent* to try it, or which though competent, is not the Court of the *lowest grade* competent to try it, the plaint should be *returned*, under the provisions of this rule, to be presented to the proper Court. The reason is this: where the Court has no jurisdiction over the suit, a judgment given by it will be a determination *coram non iudice* and it would be a futile proceeding for the judge to go on with an investigation which would have no jural effect.<sup>1</sup> Where the Court has jurisdiction, but is not the Court of the *lowest grade* competent to try it, it would, if such suits are entertained and tried, be overcrowding Courts of higher grade with suits, which it is the object of the Legislature to prevent.<sup>2</sup>

Where, however, in such a case the evidence has been gone into and concluded and the objection is raised at the time of arguments, the Court should, instead of returning the plaint, proceed to decide the same.<sup>3</sup>

Where the Court comes to the conclusion that the suit should have been instituted in another Court, the only thing that it can do is to *return* the plaint for presentation to that Court and not to *dismiss* the suit.<sup>4</sup> But it has been held that a

### Order 7 Rule 10 — Note 1

1. ('84) 8 Bom 313 (317) (FB). (Even after a trial is concluded the Court can return a plaint for presentation to the proper Court.)
2. See Section 15 Note 1.
3. ('84) AIR 1984 Cal 524 (525).
4. ('22) AIR 1922 All 424 (424) : 44 All 686.
- ('31) AIR 1931 All 88 (88, 84).
- ('29) AIR 1929 All 669 (670) : 51 All 926.
- ('81) AIR 1981 All 664 (665).
- ('06) 8 All L Jour 511 (518).

- ('66) 1 Agra 280 (280).
- ('25) AIR 1925 All 142 (144).
- ('39) AIR 1939 Nag 82 (84) : 29 Nag L R 115.
- ('05) 7 Bom L R 993 (994).
- ('99) 28 Bom 756 (759).
- ('99) 28 Bom 679 (681).
- ('84) 9 Bom 266 (268).
- ('68) 5 Bom II C R 212 (213).
- ('32) AIR 1932 All 418 (414).
- ('82) 11 Cal L Rep 800 (802).
- ('68) 10 Suth W R 335 (335).
- ('66) 5 Suth W R Act X 87 (87).

British Indian Court has no jurisdiction to return a plaint for presentation to a Court *outside British India*.<sup>5</sup>

**O. 7 R. 10**  
**Note 1**

The provisions of this rule are wide enough to cover all cases where the Court is unable to entertain the suit for want of jurisdiction whatever may be the nature of the objection to its jurisdiction.<sup>6</sup> The shape in which the suit is *originally instituted* is the test of jurisdiction. Therefore, where it is found *in the course of the hearing*, as the result of admissions made by the parties or of the evidence led by them, that the relief which the plaintiff was really entitled to was not cognizable by that Court, the rule does not apply.<sup>7</sup>

#### Illustrations

1. *M* filed a plaint in a Sub-Court praying for a declaration that a certain tax was illegal and also for damages for illegal entry into his house. The Judge amended the plaint by striking out the reliefs other than that for damages and then, holding that the claim for damages would lie only in the Small Cause Court, returned the plaint for presentation to that Court. It was held that the order was not justified : *Motabhai Motilal v. The Surat City Municipality*, I. L. R. 20 Bombay 675.

2. *S* sued *R*, his co-owner, in the Sub-Court claiming Rs. 1,152-13-0 as his share of profits for certain years. The suit was dismissed and *S* appealed in respect of Rs. 450 only. The Appellate Court remanded the case for re-trial in respect of that claim. The Subordinate Judge who had pecuniary jurisdiction over Rs. 1,000 returned the plaint for presentation to the Munsif's Court. It was held that this rule applied only where the suit as *originally framed* was wrongly instituted and did not apply to any part of a dismissed claim abandoned in appeal and that, hence, the order returning the plaint was not justified : *Nur Khan v. Shaik Rahim*, AIR 1920 Nagpur 47 : 54 Ind Cas 655.

(1864) 1864 Suth W R 65 (65).

('75) 23 Suth W R 263 (263).

('69) 11 Suth W R 177 (180). (If Court has no jurisdiction plaint is to be rejected — Decision under S. 31 of Act 8 of 1859.)

('81) 7 Cal 157 (163).

('30) AIR 1930 Lah 195 (196, 197). (Should not send it to District Judge for transfer under S. 24.)

('26) AIR 1926 Mad 140 (141).

('18) AIR 1918 Mad 590 (591).

('10) 6 Ind Cas 702 (702) (Mad).

('84) 7 Mad 171 (174).

('85) 8 Mad 62 (63).

('86) 9 Mad 208 (213). (Where the amount of the subject-matter of the suit can become increased in value and if such increased value exceeds the pecuniary jurisdiction of Court, it should not proceed further with the suit but should give back the plaint to be filed in proper Court.)

('27) AIR 1927 Pat 254 (255) : 6 Pat 358.

('25) AIR 1925 Oudh 735 (736). (Should not decide the suit on the merits.)

(1892-96) 1892-96 Upp Bur Rul 338.

('09) 4 Ind Cas 814 (815) (Upp Bur). (Transfer by High Court to another Court beyond its jurisdiction not proper — The plaint must be returned for presentation to the proper Court.)

[See also ('26) AIR 1926 Pat 28 (29). (Where transfer of some of the defendants as plaintiffs raises the value of the suit after transfer the plaint should be returned for presentation to proper Court.)

('35) AIR 1935 All 157 (160). (It is not necessary that defendant should state that relief has been overvalued to oust jurisdiction of one Court.)

('32) AIR 1932 Sind 9 (11, 12) : 26 Sind L R 167. (Where a Court can reasonably assume jurisdiction it should not return the plaint merely on the ground that some other Court has undoubted

jurisdiction.)

('33) AIR 1933 Lah 851 (851). (Case of an insolvency petition.)

('35) 153 Ind Cas 53 (54) (Lah). (Value of suit exceeding jurisdiction—Order directing presentation to proper Court is proper.)

[See however ('16) AIR 1916 Oudh 229 (230) : 18 Oudh Cas 364. (But if the valuation of the suit is not fraudulent and is admitted by defendant, plaint should not be returned although it is found that the market value exceeds pecuniary jurisdiction.)]

[But see 2 Hay 386.]

5. ('11) 9 Ind Cas 824 (824) (All).

6. ('30) AIR 1930 Lah 394 (395).

('38) AIR 1938 Sind 124 (125) : I L R (1939) Kar 50. (O. 7 R. 10 is not restricted only to those cases in which the Court for want of territorial jurisdiction returns the plaint—A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision and not under S. 151.)

7. ('96) 20 Bom 675 (676, 677).

('33) AIR 1933 Sind 296 (298).

('32) AIR 1932 Sind 67 (68, 69).

('30) AIR 1930 Sind 252 (253) : 25 Sind L R 63.

('22) AIR 1922 Bom 152 (154) : 46 Bom 229.

('28) AIR 1928 Lah 484 (486).

('24) AIR 1924 Pat 267 (268) : 2 Pat 746. (Suit to eject trespassers—Defendants found to be not trespassers but non-occupancy ryots—Suit must be dismissed — Plaint cannot be returned for presentation to proper Court.)

('20) AIR 1920 Nag 47 (49).

('13) 20 Ind Cas 278 (279) : 7 Low Bur Rul 20.

('86) 8 All 111 (113). (Suit for Rs. 49—Plaintiff's right involved the investigation of title to property whose value exceeded the pecuniary jurisdiction of the Court—Court had jurisdiction.)

O. 7 R. 10  
Note 1

It has been held that this rule is sufficiently wide to cover a case in which by operation of legislation the situation arises even after a suit has been instituted, that it should have been instituted in another Court.<sup>8</sup>

A Court has no jurisdiction to act under this rule after it has passed a decree in the suit.<sup>9</sup> Nor can it do so unless it comes to a definite *finding* that the suit should have been instituted in another Court.<sup>10</sup> Thus, a Court has no power to return the plaint for presentation to the proper Court merely on the ground that it would be more advantageous to the defendant to have the suit tried in that Court.<sup>11</sup>

Where a Court returns a plaint for presentation to the proper Court on the ground that it was beyond its jurisdiction, the plaintiff is entitled to relinquish a portion of the claim, so as to bring the suit within the pecuniary jurisdiction of the former Court and to re-present the plaint in the same Court.<sup>12</sup>

Suppose now that two reliefs are claimed in a plaint, one of which the Court is not competent to grant. Can the Court return the plaint as regards the relief which it is not competent to grant? There is a conflict of opinion on this point. According to one view, it is competent for the Court to return the plaint in respect of the cause of action which is not within its jurisdiction, and proceed with the suit in respect of the cause of action within its jurisdiction on a certified copy of the plaint.<sup>13</sup> A contrary view has been taken in the undermentioned cases,<sup>14</sup> which hold that the Court should retain the plaint, striking out therefrom such portions as are not within its jurisdiction and in respect of which the plaintiff could file another suit.

It is open to a Court to ignore a relief as being based on no cause of action and then to return the plaint under this rule, if it finds that the rest of the claim is within the jurisdiction of an inferior Court.<sup>15</sup> The Court can also return a plaint when it finds that the plaint has been overvalued.<sup>16</sup>

(29) AIR 1929 All 907 (907).

(29) AIR 1929 Lah 107 (109, 110). (Suit for accounts within the jurisdiction of the Court — On taking of accounts, the amount exceeded Court's jurisdiction—Yet preliminary decree not void.)

(17) AIR 1917 Pat 334 (334) : 2 Pat L Jour 394. (On the question of jurisdiction it is the allegation in the plaint that counts.)

(37) AIR 1937 Oudh 183 (184) : 13 Luck 18. (Suit as framed cognizable by Court — Jurisdiction found to be barred on findings arrived at by Court—Dismissal of suit is proper.)

(38) AIR 1938 All 39 (41). (Allegations as to jurisdiction found after trial to be incorrect — Plaint should not be returned for proper presentation but suit should be dismissed.)

[See (26) AIR 1926 Mad 339 (340).]

[See also (39) AIR 1939 All 444 (445).]

8. (38) AIR 1938 Oudh 224 (225) : 14 Luck 218.

9. (30) AIR 1930 Cal 147 (147).

(29) AIR 1929 Lah 107 (110).

(84) 8 Bom 380 (389, 390).

(71) 6 Beng L R App 141 (141). (Party bringing suit in a Court which on his own showing has no jurisdiction—He cannot ask plaint to be returned for presentation to proper Court.)

(72) 1872 Pun Re No. 89, p. 85.

(37) AIR 1937 Cal 430 (432). (Preliminary decree in suit for accounts by Court having jurisdiction — Plaint cannot at later stage be returned to

another Court.)

10. (29) AIR 1929 Lah 248 (249).

(26) AIR 1926 All 58 (59, 60) : 48 All 168.

[See (35) AIR 1935 Rang 310 (314). (If a Court has jurisdiction, it is impossible for it to act under O. 7 R. 10, for the Court itself, if it has jurisdiction, is the Court in which the suit should be instituted.)]

11. (27) AIR 1927 Cal 87 (88).

(05) 32 Cal 146 (151).

12. (31) AIR 1931 Mad 8 (9).

(09) 9 Ind Cas 725 (725) : 33 Mad 262.

(26) AIR 1926 Mad 133 (134).

(39) AIR 1939 Mad 397 (398).

13. (27) AIR 1927 Pat 254 (255) : 6 Pat 358.

(21) AIR 1921 All 198 (193).

14. (26) AIR 1926 Bom 283 (283, 284).

(17) AIR 1917 Oudh 49 (50).

(12) 16 Ind Cas 752 (752) (Lah). (Relief beyond the jurisdiction of the Court should be treated as surplusage.)

15. (20) AIR 1920 Oudh 21 (23).

16. (85) 8 Mad 384 (387).

(38) AIR 1938 Nag 149 (150) : I L R (1939) Nag 300. (In case of overvaluation patent on face of the plaint it is the duty of Court to return the plaint under this rule.)

(35) AIR 1935 All 157 (160). (Court finding in course of preliminary inquiry that value of relief has been overvalued—Court's duty is to return plaint for presentation in proper Court—It is

A Court which has once returned the plaint for presentation to another Court has no jurisdiction to re-entertain it, although the latter Court has returned it for presentation to the former Court, unless the order of the former Court is set aside by a superior Court.<sup>17</sup>

**O. 7 R. 10**  
**Notes 1-2**

Where a Munsif's Court returns a plaint for presentation to the proper Court, and in appeal against that order the District Court holds that the Munsif's Court has jurisdiction to entertain the plaint, the Munsif's Court is bound by such order.<sup>18</sup> But where a Munsif returns a plaint for presentation to the Revenue Court and the Revenue Court returns it as being not cognizable by it, and the District Judge *in an appeal from the order of the Revenue Court* holds that it is a suit cognizable by the Civil Court, the Munsif is not bound by the order of the District Judge. He may make such order on the plaint as he thinks proper, when it is re-presented to him.<sup>19</sup>

Where a plaint is returned under this rule the *vakalatnama* should also be returned as it enures for the suit in the Court in which it is subsequently presented.<sup>20</sup> The plaint that should be returned under this rule is the plaint which is the basis of the suit at the time when its return is ordered and so, where at such time an application for amendment of the plaint is pending, the plaint that should be returned under this rule is the original plaint and not the proposed amended plaint.<sup>21</sup>

This rule is made applicable to proceedings under the Chota Nagpur Tenancy Act.<sup>22</sup>

**2. At any stage of the suit.**— The direction in this rule is imperative<sup>1</sup> and as soon as the Court arrives at a conclusion at any stage of the suit that it should have been instituted in some other Court, the plaint should at once be returned.<sup>2</sup> The words "at any stage of the suit" have been newly added and give effect to the Full Bench decision in I. L. R. 8 Bombay 313.

A Court which has no jurisdiction over a suit cannot pass any judicial order in such a suit except the orders which the statute empowers it to pass<sup>3</sup> and all the

not necessary that defendant should state that relief has been overvalued to oust jurisdiction of one Court.)

17. ('22) AIR 1922 Pat 368 (369).

18. ('15) AIR 1915 Mad 613 (613, 614).

19. ('26) AIR 1926 Mad 365 (365).

20. ('23) AIR 1923 Nag 182 (187); 19 Nag L R 36.

21. ('35) AIR 1935 Rang 310 (314).

22. Bengal Act VI of 1908, S. 265 (3) (M).

#### NOTE 2

1. ('19) AIR 1919 Mad 1071 (1075): 41 Mad 701.

('27) AIR 1927 Bom 257 (258): 51 Bom 236.

('82) 8 Cal 884 (886).

('20) AIR 1920 Mad 688 (689). (The direction in O. 7 R. 10 is mandatory.)

('87) 10 Mad 211 (212).

('30) AIR 1930 Lah 195 (196).

('35) AIR 1935 All 157 (160).

2. ('84) 8 Bom 318 (318) (FB). (Overruling 7 Bom 487.)

('82) 8 Cal 884 (886). (After hearing evidence.)

('19) AIR 1919 Mad 1071 (1075): 41 Mad 701.

(Court has no power to allow withdrawal under O. 23 R. 1.)

('79) 2 All 357 (358).

('70) 13 Suth W R 358 (359). (Even in appeal to the High Court plaint may be returned.)

('69) 11 Suth W R 177 (178). (Return may be made at any time before judgment.)

('19) AIR 1919 Lah 26 (27): 1 Lah 203.

('07) 1907 Pun W R No. 16. (Returned after trial of an issue.)

('10) 10 Ind Cas 980 (980): 4 Sind L R 264. (Returned at a late stage.)

('69) 1809 Pun Re No. 88. (Plaint registered does not become unreturnable.)

('88) AIR 1988 All 76 (78). (Order returning plaint at stage of preliminary arguments when the suit had not proceeded very far is proper.)

[See however ('88) 11 Mad 482 (483, 484, 485). (However an Appellate Court is not bound to return the plaint under all circumstances.)]

[But see ('67) 8 Suth W R 46 (48). (Suit found to be undervalued at the time of hearing must be dismissed.)]

3. ('19) AIR 1919 Mad 1071 (1075): 41 Mad 701.

('28) AIR 1928 Mad 384 (384, 385). (Plaint cannot be amended so as to give jurisdiction.)

**O. 7 R. 10**  
**Notes 2-4**

proceedings in the suit before such return are of no effect.<sup>4</sup> Thus, where a Court finds that a suit is undervalued and on re-valuation the suit is found to be beyond the pecuniary jurisdiction of that Court, the proper procedure to be followed by the Court is to return the plaint for presentation to the proper Court and not to call upon the plaintiff to pay the proper court-fee according to the correct valuation and to reject the plaint under O. 7 R. 11 on non-payment of the additional court-fee.<sup>5</sup>

**3. Return of plaint by Appellate Court.** — Section 107 provides that an "Appellate Court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein." Therefore, when an Appellate Court decides that the *suit* should have been instituted in another Court, it has power to direct the plaint to be returned for presentation to the proper Court.<sup>1</sup> As has been seen in Note 22 to Section 107 *ante*, the Appellate Court can also return the *memorandum of appeal* presented to it for presentation to the proper Court.<sup>2</sup> Where the Appellate Court so returns a memorandum of appeal on a plea raised by the respondent, and the appeal is presented to the proper Court, the respondent will be estopped thereafter from contending that the former Court should not have returned the memorandum of appeal at all.<sup>3</sup>

**4. Return of plaint by Small Cause Court.** — This rule is applicable to Provincial Small Cause Courts as well, and therefore, when such a Court finds that a suit is not cognizable by it, it should not go into the merits of the case, but should return the plaint under this rule.<sup>1</sup>

[See also ('86) 12 Cal 271 (272). (Defendant entitled to costs in the wrong Court.)

('84) 8 Bom 813 (817) (F B) (Do).]

4. ('21) AIR 1921 Mad 696 (698). (Per Sadasiva Aiyar, J.)

('33) 1933 Mad W N 197 (199). (Leave to sue as pauper granted by Munsif—Plaint subsequently returned for presentation to Sub-Court — Proceedings before Munsif are not valid.)

('31) AIR 1931 Mad 575 (576, 577) : 54 Mad 561. (Evidence taken by Court without jurisdiction cannot be used under S. 33 of the Evidence Act.)

('12) 15 Ind Cas 773 (774) : 1912 Pun Re No. 96. (Evidence taken by first Court cannot be used in proper Court.)

('39) AIR 1939 Mad 724 (728).

('35) 153 Ind Cas 53 (53) (Lah). (Proceedings before a Court having no pecuniary jurisdiction are *coram non judice*.)

5. ('30) AIR 1930 Mad 699 (699).

('33) AIR 1933 Nag 312 (313) : 29 Nag L R 367.

('31) AIR 1931 Mad 69 (70). (Court to return the plaint on finding it has no jurisdiction—It cannot refuse to return the plaint till the proper court-fee is paid.)

('31) AIR 1931 Mad 67 (69).

('27) AIR 1927 Bom 257 (258) : 51 Bom 236. (Deficient court-fee can be paid in the Court having jurisdiction.)

[But see ('24) AIR 1924 Mad 646 (647). (Dis-sented in cases cited above.)]

**Note 3**

1. ('08) 25 All 174 (176) (F B).

('34) AIR 1934 Lah 233 (233). (In such a case

order of Appellate Court remanding suit is a mere surplusage.)

('99) 26 Cal 275 (278).

('23) AIR 1923 All 137 (139) : 45 All 193.

('85) 9 Bom 259 (265). (High Court directed return of the plaint.)

('85) 9 Bom 266 (268). (High Court in second appeal directed return of the plaint.)

('76) 1 Bom 538 (543).

('80) 4 Bom 642*n*.

('08) 7 Cal L Jour 152 (164).

('81) 7 Cal 157 (163).

('70) 13 Suth W R 358 (359). (Whether Court of first appeal or second appeal, it should return.)

('88) 11 Mad 197 (198, 199).

('87) 10 Mad 211 (212).

('78) 1878 Pun Re No. 55, p. 203. (Should return notwithstanding a trial on the merits in the Court of first instance.)

('84) 1884 Pun Re No. 90. (Returned in revision.)

('76) 1876 Pun Re No. 73, p. 262. (Chief Court on a reference directed the lower Court to return the plaint.)

[See also ('30) AIR 1930 All 869 (878). (Suit over-valued — Appellate Court should return plaint for presentation to proper Court only if it is satisfied that overvaluation has prejudicially affected disposal of suit on merits.)]

[But see ('30) AIR 1930 Lah 182 (184).]

2. ('38) AIR 1938 All 108 (109).

3. ('30) AIR 1930 All 15 (16).

**Note 4**

1. ('18) AIR 1918 Cal 869 (870).

('26) AIR 1926 Mad 679 (680).

**5. Return of plaint by Civil Court to Revenue Court and vice versa.** — When a Civil Court finds that a suit is triable only by a Revenue Court, and not by itself, it should return the plaint to be presented to that Court.<sup>1</sup> The Revenue Court has a similar power.<sup>2</sup>

Section 99 of the Punjab Tenancy Act provides that where a Revenue Court or a Civil Court returns a plaint to be presented to the other Court and the latter Court is of opinion that the suit should have been instituted in the former Court, it should not again return the plaint, but refer the matter to the Chief Court.<sup>3</sup>

**6. Return of applications.** — This rule applies only to *plaints* and not to applications.<sup>1</sup> Thus, a Court cannot under this rule return an *application* for leave to sue *in forma pauperis*.<sup>2</sup> Nor can it return an application for the ascertainment of mesne profits on the ground that the amount exceeds the Court's pecuniary jurisdiction.<sup>3</sup>

**7. Court in which the suit should have been instituted.** — Where a suit is wrongly instituted in a case in which only an application should have been made to the executing Court, the plaint can be returned for presentation as an application to the executing Court.<sup>1</sup>

Where a plaint, returned under this rule, is presented to the proper Court without any undue delay, but in the interval immovable property which is the subject-matter of the suit is alienated, is the alienation affected by the doctrine of *lis pendens*, enacted in Section 52 of the Transfer of Property Act? The High Court of Rangoon has held that the words "at any stage of the *suit*" show that it cannot be said that there was *no suit pending* before the presentation to the proper Court, and that therefore the doctrine of *lis pendens* will apply.<sup>2</sup>

**8. Court-fee.** — Where a plaint is returned for presentation to the proper Court, it does not lose its force by reason of the fact that the court-fee stamp affixed thereto was cancelled by the Court in which the suit was instituted. The Court of re-presentation is bound to give credit for the court-fee already paid.<sup>1</sup> But if in the interval between the date of the original presentation and the presentation in the proper Court the fee payable on the plaint is increased by the Legislature, the amount of court-fee payable is governed by the law in force on the date of the proper presentation.<sup>2</sup>

('13) 19 Ind Cas 427 (427) (All). (S. 23 of the Provincial Small Cause Courts Act does not debar a return under this rule.)

('84) 1884 Pun Re No. 90, page 262.

('25) AIR 1925 Oudh 735 (736).

('29) AIR 1929 All 816 (816).

#### Note 5

1. ('93) 15 All 387 (390).

('20) AIR 1920 Mad 688 (689).

('87) 10 Mad 211 (212).

('25) AIR 1925 Oudh 499 (499). (Appeal filed in Civil Court, triable by Revenue Court — Memorandum of appeal should be returned for presentation to Revenue Court.)

2. ('22) AIR 1922 All 424 (424) : 44 All 686.

('34) AIR 1934 Pat 284 (286).

3. ('04) 1904 Pun Re No. 63 page 182.

('12) 18 Ind Cas 447 (447) (Lah).

#### Note 6

1. ('84) AIR 1984 Sind 95 (95, 96). (Application to stay suit.)

('33) 143 Ind Cas 535 (535) (F B) (Hyderabad Court). (Application to file an award is not a plaint—Rule does not apply.)

('35) AIR 1935 Mad 1043 (1043). (Order returning petition to sue *in forma pauperis* is not appealable as it is not passed under this rule.)

2. ('19) AIR 1919 All 213 (214).

3. ('17) AIR 1917 Pat 334 (334) : 2 Pat L Jour 394.

#### Note 7

1. ('20) AIR 1920 Oudh 21 (23).

2. ('27) AIR 1927 Rang 145 (146, 147) : 5 Rang 101.

#### Note 8

1. ('11) 10 Ind Cas 201 (204, 205, 207) : 35 Mad 567 (F B).

('27) AIR 1927 Bom 257 (257) : 51 Bom 236.

('84) 8 Bom 318 (317) (F B). (Overruling 7 Bom 487.)

('70) 18 Suth W R 358 (358).

('84) 1884 Pun Re No. 91, page 268.

2. ('26) AIR 1926 Cal 355 (356). (The court-fee payable is that payable under the new Act, after



**O. 7 R. 10**  
**Note 9**

**9. Limitation.** — Where a suit has been instituted in a Court having no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suit are identical.<sup>1</sup> Therefore, for purposes of limitation, the date of the institution of the suit is the date on which the plaint is presented to the Court in which it ought to have been instituted.<sup>2</sup> If at the time of the presentation of the plaint in the proper Court the law of limitation has been altered, it is the law as so altered that will apply to the case.<sup>3</sup>

But the plaintiff can in such cases avail himself of the provisions of Section 14 of the Limitation Act, and claim the exclusion of the time during which the prior proceeding was prosecuted, provided that such proceeding was prosecuted in *good faith*.<sup>4</sup> A filed a suit in Court X on 23rd October 1924, and the same was returned for presentation to the proper Court on 16th March 1925. On 11th March 1925, however, A had filed an appeal against the order returning the plaint, but pending the appeal he re-presented the suit to the proper Court on 28th April 1925. The latter Court dismissed the suit under O. 9 R. 2 of the Code on 13th August 1925. The appeal was dismissed on 29th July 1926. On the same day, A presented a fresh plaint on the same cause of action to the proper Court and claimed the exclusion of the period from 16th March 1925 to 29th July 1926. It was held that when he re-presented the plaint on 28th April 1925, A must be deemed to have accepted the order of return as correct, that the prosecution of the appeal against the order of return could not thereafter be said to have been in good faith and that therefore the period from 28th April 1925 to 29th July 1926 could not be excluded in computing the period of limitation for the suit.<sup>5</sup>

The period that can be deducted under Section 14 of the Limitation Act is only the period from the date of the *filing of the plaint* to the date on which it was *finally returned* by the Court for re-presentation.<sup>6</sup> No period *preceding* the original presentation of the plaint can be deducted under that Section.<sup>7</sup> But, if, after deducting

crediting the plaintiff with the court-fee originally paid.)

of original presentation is the date of institution.]]

**Note 9**

1. ('29) AIR 1929 P C 103 (107) : 56 Ind App 128 : 56 Cal 1048 (P C).

('28) AIR 1928 Bom 421 (422) : 52 Bom 548.

('39) AIR 1939 Mad 724 (728).

[See however ('29) AIR 1929 Lah 409 (416). (Suit in District Court — Transfer to Subordinate Court—Subordinate Court returning plaint as the suit was beyond its jurisdiction—Presentation again to District Court—Suit is a continuation of the original one.)]

[But see ('15) AIR 1915 All 344 (344).]

2. ('14) AIR 1914 Cal 858 (860).

('30) AIR 1930 Lah 394 (395).

('28) AIR 1928 Lah 484 (486).

('13) 36 Mad 482 (483).

('21) AIR 1921 Mad 654 (655) : 44 Mad 817.

('39) AIR 1939 Mad 724 (728).

[See also ('13) 20 Ind Cas 767 (767) (Mad). (Plaint presented to a Court not having jurisdiction—Re-presentation of the plaint when the Court was invested with jurisdiction — Suit to be considered to be instituted on the latter date.)]

[But see ('71) 16 Suth W R 47 (48). (The date

3. ('29) AIR 1929 Lah 877 (878).

4. ('28) AIR 1928 Bom 421 (422) : 52 Bom 548.

('38) AIR 1938 Cal 914 (918) : 60 Cal 1122.

('32) AIR 1932 All 877 (878).

('12) 18 Ind Cas 377 (381) (Cal).

('32) AIR 1932 Cal 504 (506). (Time spent *bona fide* in determining valuation of suit can be deducted under Section 14.)

('22) AIR 1922 Pat 368 (369).

('31) AIR 1931 Mad 632 (634). (Plaint first returned for amendment — After amendment it was returned for re-presentation to the proper Court — For limitation the period taken in making the amendment was also excluded in favour of the plaintiff — High Court refused to interfere — *Obiter*.)

5. ('29) AIR 1929 Nag 219 (221) : 25 Nag L R 99.

6. ('26) AIR 1926 Mad 178 (179). (Order of return confirmed on appeal — Date of appellate order is not the test — It is the actual date of return endorsed under sub-rule 2.)

('37) AIR 1937 Lah 464 (465).

[But see ('98) 3 Mad L Jour 190 (191). (Dis-sented from in AIR 1926 Mad 178.)]

7. See *Illustration 3 and the following cases* :

('23) AIR 1923 Mad 114 (119).



the period allowed under that Section the limitation expires on a day on which the Court is closed, the plaint can be presented on the re-opening day.<sup>8</sup>

**O. 7 R. 10**  
**Notes 9-10**

### Illustrations

1. A presented a plaint in Court X and the same was ordered to be returned on the 25th March for presentation to the proper Court but the Office returned it only on the 10th of April. It was held that A was entitled to count in his favour the days up to the 10th of April when the plaint was *finally returned*.<sup>9</sup>

2. The last day of limitation for a suit expired on 5-9-1927 on which date the Court was closed for the vacation and the plaintiff presented the plaint in Court X on 7-10-1927 which was the re-opening day. It was returned for presentation to the proper Court on 8-10-1927. It was held that the period between 5-9-1927 and 7-10-1927 could not be excluded under Section 14 of the Limitation Act.<sup>10</sup>

3. A presented a plaint in a wrong Court and the same was finally returned on 20-3-1924 for presentation to the proper Court. The next 3 days were holidays for the Court in which the plaint was to be presented and the plaintiff re-presented the same on 24-3-1924. It was held that the re-presentation was proper.<sup>11</sup>

It has been held by the Madras High Court that where a plaint is returned under this rule as being beyond the pecuniary jurisdiction of the Court and the plaintiff, after amending the plaint so as to bring the claim within the jurisdiction of the Court, re-presents the plaint in the same Court, the plaint can be treated as a continuation of the former suit without any necessity of falling back on the provisions of Section 14 of the Limitation Act.<sup>12</sup>

A plaint cannot be returned under this rule merely because the plaintiff has not mentioned in it the list of documents on which he relies. Hence, if a plaint is returned for this defect, and is then re-presented, the date of the institution of the suit for purposes of limitation is the date of the original presentation of the plaint.<sup>13</sup>

There is a difference of opinion on the question whether the Court returning a plaint under this rule can allow the plaintiff a period within which he might re-present it in the proper Court. In an earlier case of the Calcutta High Court<sup>14</sup> it was held that the Court had a discretion to grant a reasonable time within which the plaintiff might present the plaint to the proper Court. But the same High Court has, in a later decision,<sup>15</sup> held that the order granting time is a nullity and will not save the suit from the bar of limitation. This view has also been followed by the Patna High Court.<sup>16</sup> In the undermentioned case<sup>17</sup> where the Court had granted such time, the High Court of Lahore did not say that the order was wrong, but decided the case on other grounds.

**10. Chartered High Courts.**—Order 49 Rule 3, sub-rule 1 provides that this rule is not applicable to Chartered High Courts. As to the practice of the High Court of Bombay on its original side, see the undermentioned cases.<sup>1</sup> The High Court can, however, under its inherent powers direct, in a suit which it has dismissed for want of jurisdiction, that the plaint should be returned to the plaintiff so that he may file it in the proper Court, and thus avoid the payment of court-fee twice over.<sup>2</sup>

[But see ('21) AIR 1921 Bom 379 (380): 45 Bom 443.]

8. See *Illustration 3*.

9. ('33) AIR 1933 Lah 611 (611).

10. ('29) AIR 1929 Lah 425 (426): 11 Lah 12.

[See also ('37) 1937 Lah 464 (465).]

11. ('29) AIR 1929 Cal 315 (317, 318).

12. ('39) AIR 1939 Mad 397 (399).

13. ('80) AIR 1930 Lah 480 (480).

14. ('10) 6 Ind Cas 637 (637) (Cal).

15. ('17) AIR 1917 Cal 794 (795).

16. ('37) AIR 1937 Pat 495 (496).

17. ('29) AIR 1929 Lah 425 (426): 11 Lah 12.

### Note 10

1. ('84) 8 Bom 313 (317) (F B). (Practice is to return plaint even in the course of the trial.)

('84) 8 Bom 380 (387). (The practice of the original side is to retain the plaint unless it has been returned on presentation.)

2. ('34) AIR 1934 Rang 342 (343).

**O. 7 R. 10**  
**Note 11**

**11. Appeal.** — An order under this rule, returning a plaint to be presented to the proper Court, is appealable under O. 43 R. 1 (a), whether the order is made by the Court of the first instance<sup>1</sup> or by the Court of first appeal in the exercise of its powers under Section 107 *ante*.<sup>2</sup> But where such an order is reversed or confirmed in appeal, a *second appeal* is barred by the provisions of Section 104 sub-section (2).<sup>3</sup> The appellate order reversing that of the Court of first instance cannot also be construed as an order of remand under O. 41 R. 23 so as to be appealable under O. 43 R. 1 (u) inasmuch as the order is not one passed on appeal from a decree.<sup>4</sup> But the aggrieved party can, under Section 105, dispute the correctness of the order in an appeal from the decree if he is otherwise entitled to do so.<sup>5</sup>

Where a Small Cause Court returns a plaint under Section 23 of the Provincial Small Cause Courts Act to be presented to an ordinary Civil Court in order to decide a question of title to immovable property, the Civil Court has no jurisdiction to return again the plaint under this rule, as the reference to the Civil Court by the Small Cause Court was under a special provision of law empowering the Small Cause Court to make such reference.<sup>6</sup> Section 192 of the Madras Estates Land Act excludes the operation of Order 43 to proceedings under that Act and consequently where, in an appeal to the District Court from a decree in a suit under that Act, the District Court, holding that the Revenue Court had no jurisdiction, directed the plaint to be presented to the proper Court, it was held that no appeal lay against the order of the District Court to the High Court.<sup>7</sup>

It has been held by the High Courts of Madras and Lahore and the Judicial Commissioner's Court of Nagpur that a plaintiff whose plaint is returned for presentation to the proper Court and who accordingly presents the plaint to the proper Court does not forfeit his right of appeal against the order of return simply on the ground that he chose to file his plaint in the latter Court.<sup>8</sup> But the High Court of Calcutta and the

**Note 11**

1. ('79) 2 All 357 (358).  
(82) 4 All 478 (480).  
(67) 2 Agra 214 (215).  
(25) AIR 1925 Bom 431 (431).  
(12) 16 Ind Cas 575 (575) (Cal).  
(19) AIR 1919 Mad 93 (98) : 42 Mad 690.  
(98) AIR 1938 Sind 124 (126) : I L R (1939) Kar 50.  
[See also ('25) 26 Pun L R 342 (343). (If no appeal is filed, the correctness of the order cannot be challenged in Court in which it is re-filed nor in appeal therefrom.)]
2. ('03) 25 All 174 (176) (F B). (Appeal lies to the High Court under S. 106, C. P. C. — Overruling 3 All 456.)  
(19) AIR 1919 All 82 (83) : 42 All 74.  
(14) AIR 1914 All 128 (128) : 36 All 58.  
(19) AIR 1919 All 23 (23) : 42 All (222). (Order of Court to which suit is transferred.)  
(99) 26 Cal 275 (278, 279). (Appeal lies to the High Court under S. 106, C. P. C.)  
(82) 8 Cal 126 (130).  
(98) 21 Mad 234 (235, 236). (Where the appeal was filed as a second appeal, it was allowed to be amended into an appeal from an order.)  
(25) AIR 1925 Oudh 70 (71).  
(99) 1899 Pun Re No. 59, p. 265. (Dissenting from 1898 Pun Re No. 15.)  
[But see ('98) 1898 Pun Re No. 15, p. 31. (Section

588 (b) corresponding to O. 43 R. 1 (a) applies only to order of Court of first instance.)]

3. ('11) 9 Ind Cas 666 (667) : 33 All 479.  
(30) 125 Ind Cas 581 (581) (All).  
(81) 3 All 855 (856).  
(25) AIR 1925 Bom 431 (431).  
(18) 18 Ind Cas 529 (530) : 1912 Pun Re No. 119.  
(09) 4 Ind Cas 977 (977) (Lah). (But the appeal can be treated as an application for revision.)  
(20) 2 Lah L Jour 587 (589, 590).  
(18) AIR 1918 All 415 (415).  
(31) AIR 1931 Lah 294 (295) : 12 Lah 646.  
(26) AIR 1926 Lah 141 (141).  
(38) AIR 1938 Oudh 224 (224) : 14 Luck 218.  
(35) AIR 1935 Mad 574 (575).  
[But see ('78) 1 All 620 (622). (Decision under the Code of 1877, holding the order of the first Court to be a decree—It is no longer law under this Code.)]
4. ('35) AIR 1935 Mad 574 (575).
5. ('26) AIR 1926 Mad 900 (901, 902).
6. ('13) 18 Ind Cas 325 (325) (Cal).  
(26) AIR 1926 Cal 88 (84). (If the Civil Court returns plaint it is not under O. 7 R. 10.)
7. ('18) AIR 1918 Mad 191 (198) : 41 Mad 554.
8. ('19) AIR 1919 Mad 1062 (1068) : 41 Mad 721.  
(30) AIR 1930 Nag 207 (208) : 26 Nag L R 300.  
(39) AIR 1939 Lah 18 (19).

Judicial Commissioner's Court of Oudh have taken a contrary view.<sup>9</sup> The High Court of Calcutta has, however, in a later case held that the plaintiff will not forfeit his right of appeal if he specifically *reserves* his right to do so.<sup>10</sup> In the undermentioned case<sup>11</sup> a plaint was returned for presentation to the proper Court. In the latter Court the plaint was rejected for non-payment of deficit court-fees. Thereafter an appeal was filed against the order returning the plaint. In appeal, the case was remanded for trial to the first Court in ignorance of the rejection of the plaint by the other Court. It was held that there was no plaint to try and the remand was ineffectual.

An Appellate Court which reverses an order returning a plaint under this rule has no jurisdiction to *remand* the case to the lower Court for fresh disposal; the proper procedure is to annul the order of the trial Court and direct it to dispose of the suit according to law.<sup>12</sup>

Where a memorandum of appeal is returned for presentation to the proper Court, is the order of return appealable? The High Courts of Calcutta, Allahabad and Lahore<sup>13</sup> have held that the word "plaint" in this rule does not include a memorandum of appeal and that, therefore, no appeal lies from such an order. The High Court of Madras and the Chief Court of Lower Burma have, on the other hand, held that an appeal does lie in such cases.<sup>14</sup>

It has been held that where a plaintiff does not appeal against an order returning the plaint under this rule and submits to the decision of the Court on the point of jurisdiction, the question cannot be re-agitated in a subsequent suit between the same parties.<sup>15</sup>

**12. Revision.** — Where a Munsif's Court returned the plaint for presentation to the Small Cause Court and the latter Court returned the plaint for presentation to the Munsif's Court and the Munsif's Court refused to go back on its original order and receive the plaint, the High Court in revision against the second order of the Munsif directed the Small Cause Court to try the case.<sup>1</sup> As to whether an order of the *Appellate Court* confirming or reversing an order of the Court of first instance returning a plaint under this rule is revisable, see Note 15 to Section 115 and the undermentioned cases.<sup>2</sup>

**O. 7 R. 10**  
**Notes 11-12**

[See also ('25) AIR 1925 Bom 418 (418). (Plaintiff changed his mind after re-presentation and appealed. After losing the appeal he can again present the plaint in the proper Court.)]

9. ('07) 5 Cal L Jour 580 (582).

('08) 11 Oudh Cas 98 (100).

10. ('19) AIR 1919 Cal 447 (448).

11. ('29) AIR 1929 Bom 202 (204).

12. ('25) AIR 1925 Oudh 393 (394) : 29 Oudh Cas 21.

('09) 4 Ind Cas 780 (781); 12 Oudh Cas 388. (The Appellate Court cannot itself proceed to hear the merits.)

[See also ('16) AIR 1916 Mad 1154 (1154, 1155).]

[But see ('82) 1882 All W N 45 (45). (Appellate Court must decide the case on the merits.)]

13. ('03) 81 Cal 844 (847).

('29) 117 Ind Cas 849 (851) (Cal).

('18) AIR 1918 All 96 (96) : 40 All 659.

('28) AIR 1928 Lah 635 (635). (Seems to have been assumed that no appeal lay.)

14. ('91) 14 Mad 462 (464).

(1900) 1 Low Bur Rul 82 (38).

15. ('36) AIR 1936 Oudh 222 (223).

#### Note 12

1. ('22) AIR 1922 Pat 368 (369).

2. ('18) AIR 1918 Mad 191 (193) : 41 Mad 554.

('19) AIR 1919 Mad 93 (93) : 42 Mad 699.

('13) 18 Ind Cas 529 (530); 1913 Pun Re No. 119.

('23) AIR 1923 Oudh 98 (99).

('36) AIR 1936 Pesh 78 (79). (A plaint was returned for presentation to proper Court. Appeal against this order was dismissed by District Judge — *Held*, a revision to the High Court was not competent.)

[See also ('17) AIR 1917 Oudh 49 (50).]

## O. 7 R. 11

## Rejection of plaintiff.

**R. 11.** [Ss. 53 & 54.] The plaintiff shall be rejected in the following cases:—

(a) where it does not disclose a cause of action<sup>3</sup>:

(b) where the relief claimed is undervalued,<sup>4</sup> and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so:

(c) where the relief claimed is properly valued, but the plaintiff is written upon paper insufficiently stamped,<sup>5</sup> and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so:

(d) where the suit appears from the statement in the plaintiff to be barred by any law.<sup>7</sup>

[1877, Ss. 53, 54; 1859, Ss. 29, 31, 32.]

## Local Amendment

## CALCUTTA

Add the following as clause (e):

"(e) Where any of the provisions of Rule 9 (1A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so."

*Synopsis*

1. Legislative changes.
2. Scope of the Rule.
3. "Where it does not disclose a cause of action."
4. "Where the relief claimed is undervalued."
5. Where the plaintiff is insufficiently stamped.
6. Memorandum of appeal insufficiently stamped.

7. Where the suit appears to be barred by any law — Clause (d).
8. Rejection of plaintiff on other grounds.
9. Rejection of plaintiff in part.
10. At what stage plaintiff can be rejected.
11. Appeal.
12. Revision.
13. Review.

*Other Topics (miscellaneous)*

Applicability of this rule to Chartered High Courts. See Note 2.  
Court's duty to examine plaintiff. See Note 3.

Extension of time. See Note 5.  
Rule, how far mandatory. See Notes 5 and 10.  
Within a time to be fixed by the Court. See Note 5.

**1. Legislative changes. —**

1. Clause (a) corresponds to clause (a) of Section 53 of the old Code which provided that "the plaintiff may, at the discretion of the Court, at, or any time before the settlement of issues be rejected. . . . ." See Note 10 and the undermentioned cases decided under the old Code.<sup>1</sup>

2. The words "positive rule of" before "law" in clause (d) have been omitted.

3. Clause (d) of Section 54 of the old Code has been omitted, as this Code does not anywhere provide for return of pleadings for amendment.

**Order 7 Rule 11 — Note 1**

1. ('81) 7 Cal 848 (845). (*Held* too late to reject a plaintiff in appeal for want of cause of action, as the proceedings in the lower Court showed that plaintiff was entitled to relief.)

('05) 2 Cal L Jour 534 (537). (Do).

[*But see* ('99) 21 All 341 (345) (FB). (The plaintiff disclosed no cause of action against the defendant named therein — The High Court entertained the plea and dismissed the suit.)]

**2. Scope of the Rule.** — This rule enacts that the plaint shall be rejected in the four classes of cases mentioned in clauses (a) to (d). But the instances given cannot be regarded as exhaustive of *all* the cases in which a Court can reject a plaint, or as limiting the inherent powers of the Court in respect thereof.<sup>1</sup> Thus, a Court has jurisdiction, in a proper case, to reject the plaint filed by the next friend of a minor on the ground that it is not in the *interests of the minor* that the suit should be proceeded with.<sup>2</sup> So also where it is alleged that a suit was instituted without the signature and authority of the plaintiff, the Court will frame a preliminary issue on the point and reject the plaint if it finds the issue against the plaintiff.<sup>3</sup> An Appellate Court has the same powers of rejecting a plaint as the Court of first instance.<sup>4</sup>

In disposing of a suit under this rule, the Court ought not to dismiss the suit, but should *reject* the plaint.<sup>5</sup> The effect of rejection as distinguished from a dismissal is that, in the former case, the plaintiff would not under Rule 13 *infra*, be precluded from filing a fresh plaint in respect of the same cause of action, if he so desires.

A plaintiff is not entitled to have the dismissal of a suit for default set aside under O. 9 R. 9 on the ground that the plaint should have been rejected.<sup>6</sup>

This rule does not apply to Chartered High Courts in the exercise of their ordinary, or extraordinary original civil jurisdiction (see O. 49 R. 3 *infra*). The High Court of Allahabad has in the undermentioned case<sup>7</sup> held that this rule is inapplicable to their *appellate* jurisdiction also notwithstanding the provisions of Section 107 of the Code.

**3. "Where it does not disclose a cause of action."** — When a plaint is filed, it is the duty of the Court to see that the plaint contains the necessary allegations which must be proved before a decree could be given, and, if there are not the necessary allegations, to reject the plaint.<sup>1</sup> To enable a Court to reject a plaint on this ground, it

#### Note 2

1. ('24) AIR 1924 Oudh 413 (414). (See also cases cited in S. 2 (2), N. 13, Foot-note 3.)
2. ('15) AIR 1915 Mad 483 (484). (Order 32 is not exhaustive and does not deal with the case of a suit filed contrary to the interests of a minor.)
3. ('10) 7 Ind Cas 600 (600) (Sind).
4. ('85) 1885 All W N 294 (294). ('24) AIR 1924 Nag 80 (80).
5. ('88) 15 Cal 533 (537, 539); 15 Ind App 119 (PC). ('22) AIR 1922 Cal 506 (508); 49 Cal 880. (Where plaint is written on insufficiently stamped paper, Court is bound to give time to make up the deficiency at any stage of the proceeding.) ('09) 12 Suth W R 313 (314). (Plaint disclosing no cause of action.) ('09) 11 Suth W R 223 (223). (Mis-statement of cause of action may be allowed to be amended.) ('08) 8 Mad L Jour 187 (189). (Court-fee not paid on the alternative prayer — Dismissal is not proper.) [See ('88) AIR 1988 All 497 (500). (The rejection of the plaint under O. 7 R. 11 is a matter prior to the issue of notice to a defendant and after the issue of notice to the defendant the correct word to use is dismissal of the suit and not rejection of the plaint.)]
- [See however ('20) AIR 1920 Pat 656 (659, 660); 4 Pat L Jour 708. (This rule does not

apply where Appellate Court acts under S. 12 of the Court-fees Act — S. 10 of the Court-fees Act will apply.)]

6. ('24) AIR 1924 Pat 271 (272) : 2 Pat 784.
7. ('90) 12 All 129 (152) (FB). (In this case clauses (a) and (b) of S. 54 of the Code of 1877 only were considered.)

#### Note 3

1. ('28) AIR 1928 Cal 425 (425) : 55 Cal 590. (Case against numerous defendants—Court must examine the plaint before issuing the summonses to see if the plaint reveals a cause of action — If no cause of action is revealed plaint must either be rejected or returned for amendment.) ('23) AIR 1923 Lah 290 (291). (Plaint disclosing no cause of action — Suit dies and no question of jurisdiction arises.) ('17) AIR 1917 Low Bur 28 (29, 30) : 9 Low Bur 37. (Before admitting a plaint for mere declaration as to property Court must see that allegations as to plaintiff being in possession of the property are made.) ('92-96) 2 Upp Bur 244. ('72-92) 1872-92 Low Bur 365. (Court shall consider the plaint before action is taken upon it.) ('78) 10 Bom H CR 17 (18). (The Lower Court had decided the case in favour of the mamlatdar.) ('80) 3 All 766 (768). (Should be rejected and not returned.) ('39) AIR 1939 Lah 158 (160).

**O. 7 R. 11**  
**Notes 3-4**

should look at the *plaint* and at nothing else.<sup>2</sup> In asking the Court to decide an issue like this (which is essentially a *demurrer*), the defendants must be taken to admit *for the sake of argument* that the allegations of the plaintiff in his *plaint* are true *modo et forma*—in manner and form.<sup>3</sup> In doing so they must be taken to reserve their right to show that those allegations are wholly or partially false in the further stages of the action, should the preliminary point be overruled. The power to reject a *plaint* under this clause must be exercised only if the Court comes to the conclusion that even if all the allegations are proved, the plaintiff would not be entitled to any relief whatever.<sup>4</sup>

As to cases where a cause of action accrues after the presentation of the *plaint*, see Order 7 Rule 7.

The expression "cause of action" as used in this rule does not mean a claim which is still enforceable under the law of limitation. Where, therefore, a suit is barred by time it cannot be said that the *plaint* does not disclose a cause of action, and that it falls to be dealt with under clause (a). The Court may, however, proceed under clause (d).<sup>5</sup>

**4. "Where the relief claimed is undervalued."**—If the Court comes to the conclusion that the plaintiff's valuation of a suit is fictitious, it can require him to make a correct valuation and can reject the *plaint* on his failure to do so;<sup>1</sup> and this rule applies even to cases in which under the Court-fees Act it is provided that the amount of court-fee is to be determined according to the amount at which the relief sought is valued in the *plaint* (see Court-fees Act, Section 7, sub-s. 4).<sup>2</sup> But the Court cannot *itself* fix a valuation in place of the plaintiff's valuation.<sup>3</sup> If the correct valuation would make the Court incompetent to try the suit, then the matter falls under Rule 10 *ante*, and not under clause (b) of this rule (see O. 7 R. 10, Note 2).

In order to determine whether a suit is properly valued or not, the Court must confine its attention to the *plaint* and should not look to other circumstances which

2. ('17) AIR 1917 All 355 (356): 39 All 516. (Per Walsh, J.)

('78) 10 Bom H C R 182 (185). (Should not refer to documents and facts not stated in or annexed to the *plaint* or ascertained by interrogation of the plaintiff by the Court.)

('33) AIR 1933 Sind 1 (2). (Court should not refer to written statement.)

('37) 169 Ind Cas 788 (791) (Cal).

[See ('85) AIR 1935 Rang 497 (498). (Court is at liberty to go beyond allegations pleaded as cause of action, in determining whether there is cause of action for suit—It is not precluded from considering other allegations in the *plaint*.)

('35) AIR 1935 Pat 449 (450). (For the purpose of deciding whether the *plaint* discloses any cause of action, evidence of defendant is not necessary—Such question should be decided on the allegation of fact in the *plaint* and if necessary after examining the plaintiff.)

('36) AIR 1936 Lah 85 (86). (Pre-emption suit—Plaintiff merely alleging in *plaint* that he has right of pre-emption without specifying grounds of his claim—Grounds specified in replication—Pleadings taken as whole disclose cause of action with sufficient clearness.)

[But see ('71) 16 Suth W R 218 (219). (On finding that *plaint* discloses no cause of action, Court can examine pleaders on both sides and

fix the real issues in the case.)]

3. ('13) 40 Cal 598 (609): 40 Ind App 56 (PC).

4. ('21) AIR 1921 Sind 106 (108): 17 Sind L R 9. (1862) 1 Mad H O R 240 (243, 244). (Mere unlikelihood of plaintiff's success will not justify rejection.)

('73) 10 Bom H C R 17 (18).

('70) 7 Bom H C R 99 (101).

[See also ('31) AIR 1931 Cal 659 (661): 58 Cal 539.]

5. ('32) AIR 1932 All 543 (545): 54 All 525.

**Note 4**

1. ('34) AIR 1934 Cal 448 (449): 61 Cal 796 (FB). (Rule controls Court-fees Act, S. 7, sub-s. 4.)

('35) AIR 1935 Lah 75 (76). (Question of court-fee should be decided at earliest opportunity—Court recording finding on all issues and while dismissing suit on merits requiring plaintiffs to make good deficiency in court-fees—Procedure is not proper.)

2. ('37) AIR 1937 Sind 241 (241, 242): 81 Sind L R 442 (FB). (The provisions of Court-fees Act S. 7, sub-s. 4 must be read with O. 7 R. 11.)

('37) 81 Sind L R 37 (43). (Do.)

('36) AIR 1936 Sind 25 (25). (Do.)

('39) AIR 1939 Nag 50 (56): I L R (1938) Nag 553 (FB). (Do—A I R 1937 Nag 14: 165 I O 106, Overruled.)

3. ('17) AIR 1917 All 78 (79): 39 All 723.

may subsequently influence the judgment of the Court as to the true value of the relief sought.<sup>4</sup>

See also Note 5 below and Section 6 Note 4.

As to Court's powers of rejection for undervaluation in cases where the plaintiff is entitled to put his own valuation, see the undermentioned cases.<sup>5</sup>

**5. Where the plaint is insufficiently stamped.**—Where the plaint is *properly valued* either at the time of the presentation itself or at a time subsequent thereto, in pursuance of an order of the Court under clause (b), but is *insufficiently stamped*, the Court can act under this rule.<sup>1</sup> But the Court cannot exercise the powers conferred under this clause after the suit has been *decided finally* so far as that Court is concerned.<sup>2</sup> Where, however, the order for making good the deficiency in court-fee is made before the final decision in the suit, the fee can be realised in execution even after the final decision.<sup>3</sup>

Under the old Code there was a conflict of opinion as to whether a suit would become barred by limitation where the deficiency in court-fee is supplied *after* the period of limitation for the suit but *within the time fixed* by the Court. The conflict has now been set at rest by the enactment of Section 149. For a full discussion of the subject, see Note 7 to Section 149 and the undermentioned cases.<sup>4</sup>

A plaint cannot be rejected under this rule for undervaluation or for insufficiency of stamp unless the plaintiff is *given an opportunity* to correct the valuation or to supply the deficient stamp, as the case may be, within a time to be fixed by the Court, and he fails to do so.<sup>5</sup> Nor does the use of the words "shall be rejected" prevent

('89) 13 Bom 517 (519).

('30) AIR 1930 Cal 686 (688) : 58 Cal 281. (This rule is not meant to enlarge any taxing Section.) [But see ('07) 11 Cal W N 705 (711, 712).]

4. ('24) AIR 1924 Cal 969 (969).

('35) AIR 1935 Cal 273 (274, 275).

[See ('35) AIR 1935 Cal 338 (340). (Mere form and language is not final test—Real substance must be looked into.)]

[See also ('35) AIR 1935 Pat 160 (162) : 14 Pat 414. (Value of suit is value on date of institution—Future mesne profits or future damages cannot be taken into account for purpose of court-fees.)]

5. ('30) AIR 1930 Cal 473 (474) : 56 Cal 275.

('29) AIR 1929 Mad 896 (898).

('31) AIR 1931 Pat 78 (79) : 10 Pat 432.

#### Note 5

1. ('32) AIR 1932 Cal 685 (686).

('31) AIR 1931 Lah 622 (623).

('34) AIR 1934 All 989 (990).

2. ('85) 7 All 528 (532).

('35) AIR 1935 Lah 75 (76). (Decree itself directing levy of additional court-fee is bad and cannot stand.)

('25) AIR 1925 Lah 326 (327). (Suit dismissed on merits—Order for additional court-fee is incompetent.)

3. ('34) AIR 1934 Oudh 396 (398).

4. *Cases under the old Code in addition to those given in Note 7 to S. 149 :*

('09) 2 Ind Cas 1 (8) (Cal). (Court can enlarge the time for the payment of deficit court-fees on a plaint.)

('05) 1905 Pun Re No. 104, p. 319 (FH).

('01) 4 Oudh Cas 108 (114). (The Court has a discretion to extend time.)

('09) 9 Ind Cas 557 (558) (All). (Deficiency made up within time allowed—Suit not barred.)

('04) 27 All 197 (199, 200). (Deficiency in court-fee paid after limitation owing to Court proceedings—Suit not barred.)

('02) 24 All 218 (220). (Dissented from in 27 All 197—Court cannot extend ordinarily prescribed period for limitation.)

*Cases under the new Code in addition to those given in Note 7 to S. 149 :*

('28) AIR 1928 All 538 (538) : 45 All 518. (Ruling in 15 All 65 held to be superseded by this rule.)

('22) AIR 1922 Pat 56 (56).

('22) AIR 1922 Cal 234 (234).

('37) AIR 1937 Pat 550 (553) : 16 Pat 600 (S B). (Suit filed in time—Deficiency made up within time allowed by Court after limitation—Plaint is within time.)

('38) AIR 1938 Mad 560 (562). (Plaint insufficiently stamped filed on last day of period of limitation—Court allowing certain time for payment of deficient court-fee—Proper court-fee paid within time allowed but beyond period of limitation for suit—Suit is not time barred.)

5. ('22) AIR 1922 Cal 506 (508) : 49 Cal 880.

('27) AIR 1927 Mad 1002 (1008).

('69) 1 N W F H C R 16 (17).

('85) 9 Bom 355 (357).

('88) 1888 Bom P J 58.

('88) 1888 Bom P J 120.

('17) AIR 1917 Lah 377 (378) : 1917 Pun Re No. 27.

('14) 25 Ind Cas 24 (25) (Lah).



**O. 7 R. 11**  
**Note 8**

the Court from exercising its powers under Section 148 of the Code and enlarge the time fixed by it, from time to time.<sup>6</sup> But the plaintiff cannot, as of right, claim extension of the time fixed by the Court. The question depends on the discretion of the Court.<sup>7</sup> No *express* order is necessary for such extension of time. An extension may be *inferred* from the fact that the Court has actually allowed a thing to be done beyond the prescribed time.<sup>8</sup>

The rule does not apply to applications for leave to sue in *forma pauperis*. Hence, a Court is not bound, on its dismissing an application for leave to sue in *forma pauperis*, to grant a time within which a properly stamped plaintiff could be filed.<sup>9</sup>

Where a plaint is written upon insufficiently stamped paper and the plaintiff does not supply the requisite stamp within the time fixed by the Court, can he be allowed to reduce his claim so as to bring it within certain court-fees? There is a conflict of opinion on this point. The High Courts of Allahabad and Madras have held that it is open to the plaintiff to relinquish a portion of the claim in order to bring it

(88) 1888 Pun Re No. 156, p. 417.

(26) AIR 1926 Mad 676 (677). (Under S. 149 Court can accept deficient court-fees after the time fixed but it cannot refuse to fix time under O. 7 R. 11.)

(98) 8 Mad L Jour 187 (189).

(90) AIR 1930 Oudh 104 (105) : 5 Luck 474. (Reasonable time should be allowed to make up deficiency.)

(22) AIR 1922 Pat 56 (56).

(14) AIR 1914 Lah 268 (269) : 1914 Pun Re No. 35. (Deficiency not supplied within time fixed — Plaintiff must be rejected.)

(1900) 27 Cal 376 (378). (If within that time period of limitation expires, the suit is barred by time if the deficiency is made up after the time fixed.)

(30) AIR 1930 Lah 101 (101).

(26) AIR 1926 Cal 504 (505).

(37) AIR 1937 Pat 550 (553) : 16 Pat 600 (S B).

(38) AIR 1938 Mad 542 (543). (That the plaint is presented on the last day of limitation makes no difference at all—Whether the payment of insufficient court-fee has been by design or due to inadvertence the Court is bound by the mandatory terms of O. 7 R. 11 to give effect to the provision of law.)

(37) AIR 1937 Mad 266 (267). (Court has no jurisdiction to return plaint presented with insufficient stamp — It must fix time for making up deficiency and can reject plaint if deficiency is not made up within the time fixed—Order declining to receive plaint with stamps of smaller denomination is unjust.)

(38) AIR 1938 Mad 645 (645, 646). (Order returning plaint for necessary amendments is not fair — Proper order is to require deficiency to be made up within particular date and to reject it if order is not complied with.)

(37) AIR 1937 Lah 992 (893). (It is immaterial that the action of the plaintiff in instituting a plaint on a deficient court-fee is not bona fide, and the worst that the Court can do is to ask the plaintiff to make up the court-fee on the very day on which the plaint is presented.)

[See also (24) AIR 1924 Pat 271 (272) : 2 Pat

784. (Dismissal for default cannot be set aside on ground that plaint ought to have been rejected under this rule.)]

[But see (38) AIR 1938 Lah 361 (364) (F B). (Per Din Mohammad and Coldstream, JJ. in Order of Reference—It is not incumbent upon a Court of Justice to allow the plaintiff an opportunity to make good the deficiency under O. 7 Rule 11.)]

6. ('07) 19 All 240 (243, 244).

(92) 16 Bom 263 (266).

(04) 31 Cal 75 (78).

(19) AIR 1919 Cal 261 (261).

(09) 2 Ind Cas 1 (2) (Cal).

(10) 6 Ind Cas 424 (425) (Cal).

(05) 2 Cal L Jour 70 (72, 73). (Deficit court-fee paid one day after time fixed—If on that date suit is not barred, it can go on.)

(28) AIR 1928 Lah 274 (275).

(94) 1894 Pun Re No. 113, p. 435.

(26) AIR 1926 Mad 676 (677).

(99) 9 Mad L Jour 348 (348).

(27) AIR 1927 Oudh 507 (507). (Refusal to take the deficit court-fee for delay by one day is an abuse of the powers of a Court.)

(26) AIR 1926 Nag 312 (312).

(01) 4 Oudh Cas 108 (114).

(25) AIR 1925 Pat 435 (437) : 4 Pat 180. (Deficit court-fee paid by the plaintiff—Plaintiff's clerk misappropriated the amount and repeatedly applied for time—Plaint was finally rejected—On coming to know of this plaintiff applied for revocation of the order of dismissal.)

(36) AIR 1936 Cal 221 (223).

[See also (38) AIR 1938 All 481 (485) : I L R (1938) All 470. (Payment of deficiency—Question involved being complex requiring decision of High Court—Party should be given further opportunity to pay deficiency after decision of High Court.)]

7. ('36) AIR 1936 Pat 810 (811).

(38) AIR 1938 Mad 542 (543, 544).

8. See Note 8 to Section 148 *ante*.

(07) 84 Cal 20 (24, 29) (F B).

[See also (26) AIR 1926 Mad 676 (677).]

9. ('35) AIR 1935 Mad 878 (879).



within a certain court-fees.<sup>10</sup> The High Courts of Calcutta and Bombay held in earlier decisions that under such circumstances the Court had no jurisdiction to allow the plaintiff to reduce his claim and was bound to reject the plaint, on the ground that this rule is mandatory.<sup>11</sup> A contrary view has, however, been taken in the undermentioned decisions of the same High Courts.<sup>12</sup>

Where a plaintiff is given time to pay additional court-fees under this rule and he does not appear on the date fixed in consequence of which the Court dismisses the suit, the order though one of dismissal must be deemed to be an order under this rule, and not under O. 9 R. 8, so that a fresh suit on the same cause of action will not be barred under O. 9 R. 9.<sup>13</sup> Clause (c) of this rule does not apply to the case of failure of a plaintiff to pay stamp duty on a partition decree.<sup>14</sup>

Where plaintiff is given time to make up the deficiency in court-fees, and within the time so allowed the plaintiff applies for permission to continue the suit as a pauper, the application should be considered on its merits and the plaint should not be considered as rejected for failure to pay the deficiency in court-fees.<sup>15</sup>

It has been held that when a plaint was re-presented in a proper Court after being returned by the wrong Court where it was originally filed, the proper Court is not debarred from requiring the proper stamp to be affixed though no objection was taken in the wrong Court.<sup>16</sup>

**6. Memorandum of appeal insufficiently stamped.** — This rule applies in terms to *plaints* insufficiently stamped. Where a *memorandum of appeal* is found to be presented with an insufficient court-fee, the Court *can* allow time for paying the deficit court-fee.<sup>1</sup> But, is the Court *bound* to grant time to the appellant to make up the deficiency? There is a conflict of opinion on this point. According to the High Courts of Bombay,<sup>2</sup> Calcutta<sup>3</sup> and Patna<sup>4</sup> and the Chief Court of

10. ('05) 27 All 151 (152).

(29) AIR 1929 All 808 (309).

(31) AIR 1931 Mad 716 (716).

11. ('17) AIR 1917 Cal 77 (78): 44 Cal 352. (Court has no power to allow amendment by omitting prayer in respect of which extra court-fee was ordered.)

(14) AIR 1914 Bom 117 (118).

12. ('39) AIR 1939 Bom 354 (357). (*Prima facie*, O. 7 R. 11 is mandatory only *rebus sic stantibus*, that is to say, when the Court has to deal simply with the position referred to in the rule, and would not preclude an amendment of the plaint which under O. 6 R. 17 may be made at any stage of the proceedings. O. 7 R. 11 and O. 6 R. 17 must be read together.)

(37) AIR 1937 Cal 562 (564). (Court has power to allow abandonment of claim before rejecting plaint or to allow application therefor as amendment of pleadings under O. 6 R. 17.)

13. ('29) AIR 1929 Mad 344 (345).

(32) AIR 1932 Pat 11 (12).

[See ('35) AIR 1935 Cal 764 (765). (Amendment of plaint allowed—Plaintiff directed to give value of property and put in deficit court-fee—Non-compliance with order—Suit dismissed for default on rejecting permission to withdraw under O. 28 R. 1—Proper order is rejection of plaint—Fresh suit is not barred by O. 28 R. 1, O. 9 R. 9 or O. 2 R. 2.)]

[See also ('28) AIR 1928 Lah 221 (228). (Condi-

tional decree that it was to be of no effect unless deficit court-fee is paid—Such order is to be deemed an order of rejection.)]

14. ('19) AIR 1919 All 269 (270).

15. ('33) AIR 1933 Cal 238 (239).

(39) AIR 1939 Mad 498 (499).

(29) AIR 1929 Mad 828 (829): 53 Mad 43.

(36) AIR 1936 Cal 221 (222). (Mandatory provision contained in Rule 11 is intended for cases where no other complications intervene and Court has sufficient inherent power to depart from normal procedure to suit exigencies of the situation.)

16. ('31) AIR 1931 Pat 39 (40).

#### Note 6

1. ('88) AIR 1938 Nag 322 (323).

(35) AIR 1935 Lah 448 (450): 17 Lah 122.

2. ('14) AIR 1914 Bom 249 (250): 21 Ind Cas 337 (337, 338): 38 Bom 41.

3. [See ('32) AIR 1932 Cal 482 (484, 485): 59 Cal 888. (Rejection of memorandum of appeal for deficiency in stamp—Properly stamped memorandum can be filed.)]

4. ('39) AIR 1939 Pat 432 (432): 180 Ind Cas 791 (791).

(39) AIR 1939 Pat 137 (137).

[See also ('39) AIR 1939 Pat 83 (85): 17 Pat 687. (If an insufficiently stamped memoran-

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**Notes 6-7**

Oudh,<sup>5</sup> this rule applies to memorandum of appeals also by virtue of Section 107. A contrary view has been taken by the High Courts of Allahabad,<sup>6</sup> Lahore<sup>7</sup> and Madras<sup>8</sup> and the Judicial Commissioner's Court of Nagpur.<sup>9</sup> This view proceeds on the ground that the insertion of Section 582 in the old Code corresponding to Section 149 providing for memorandum of appeals, shows that the rule does not apply to memorandum of appeals.

Where an appeal is filed in time and the deficient court-fee is paid within the time fixed by the Court, though on that date the appeal would have been barred by limitation, the appeal must be deemed to have been filed on the date when it was presented.<sup>10</sup>

**7. Where the suit appears to be barred by any law — Clause (d). —** This clause authorises the rejection of a plaint where the suit appears, from the statement in the plaint, to be barred by any law.<sup>1</sup> Where a plaint appears to be barred by limitation and no ground of exemption from limitation is mentioned therein, the Court

dum of appeal has, in fact, been accepted by the Court by inadvertence or when the amount of the court-fee payable is open to doubt, or the amount of the fee cannot be ascertained by the Court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, the Court may properly receive the appeal and allow time for the deficiency, if any, to be made good—AIR 1917 Pat 26, Relied on.]

[But see ('17) AIR 1917 Pat 26 (27).

('35) AIR 1935 Pat 201 (201). (When deficiently stamped memo of appeal is filed, Court can reject it at once or allow deficit to be made good.)]

5. ('80) AIR 1980 Oudh 104 (105) : 5 Luck 474. ('35) AIR 1935 Oudh 119 (120) : 10 Luck 476.

[See also ('37) AIR 1937 Oudh 414 (416) : 13 Luck 397. (Appeal on insufficiently stamped paper filed within limitation—Prayer along with appeal to grant time to make good deficiency—Appellate Court can grant time under S. 149 and O. 7 R. 11 (c)—Order dismissing appeal as time-barred, ignoring prayer is bad.)]

6. ('29) AIR 1929 All 75 (76) : 50 All 980. (Appellate Court may refuse to accept an insufficiently stamped memorandum of appeal.)

[But see ('23) AIR 1923 All 349 (349). (Appellate Court has no right to reject a memorandum of appeal on the ground that it is insufficiently stamped.)

('80) 2 All 875 (876). (Should fix time under S. 54 (b) of 1882 Code.)]

7. ('20) AIR 1920 Lah 92 (93) : 1 Lah 234. (Decided on the assumption that S. 149 applied and not this rule—Time for payment was refused as not being a *bona fide* case of mistake.)

[But see ('88) 1888 Pun Re No. 156, p. 417. (This would appear not to be good law in view of A I R 1920 Lah 92.)]

8. ('15) 1915 Mad 426 (427).

('86) AIR 1988 Mad 316 (316).

[But see ('82) 1982 Mad W N 104 (104).

9. ('30) AIR 1930 Nag 224 (225) : 26 Nag L R 183.

10. ('92) 15 Mad 78 (79).

('18) AIR 1918 Mad 1039 (1040) : 40 Mad 687.

('75) 24 Suth W R 258 (258). (Appeal petition though deficient in stamp was presented in time —If though beyond time, appellant is prepared to make good the deficiency and the Deputy Registrar is bound to receive the memorandum.)

('35) AIR 1935 Pat 201 (201).

[See ('92) 15 Mad 29(84). (Memorandum of appeal insufficiently stamped—Court is competent to levy the deficient stamp duty.)

('38) AIR 1938 Mad 316 (317). (Court refusing to allow time for payment of deficient court-fee —Memorandum of appeal cannot be held to be presented in time.)]

[But see ('90) 12 All 129 (142) (FB). (Deficit court-fee if supplied after limitation, appeal is barred—This decision is superseded by the enactment of S. 582 (A) of the old Code corresponding to the present S. 149.)

('92) 19 Cal 747 (749).]

**Note 7**

1. ('08) 25 All 187 (193). (Suit against Secretary of State without notice under S. 80.)

('93) 15 All 887 (890) (FB).

('19) AIR 1919 Cal 755 (756). (Per Chatterjee, J.)

('27) AIR 1927 Lah 88 (89). (Suit bad for multifariousness falls under this clause.)

('24) AIR 1924 Nag 80 (80). (In this case Kotval, A. J. C. has held that the plaint should have been rejected under this rule, as the suit was barred by limitation — It is submitted that in such a case, the suit ought to be dismissed under S. 9 of the Limitation Act, and not to be rejected under this rule.)

(1900-07) 1 Low Bur Rul 16 (17). (Plaint not showing that Court has jurisdiction might be returned for amendment.)

('15) AIR 1915 Cal 62 (68). (Rule does not apply unless the suit appears to be barred on the face of it.)

('28) AIR 1928 Oudh 495 (496). (Suit not barred by any law on the face of the plaint—But if the bar is found during arguments, suit is to be dismissed and not rejected under this rule.)

('03) 6 Cal W N 411 (418). (Executive orders not "positive rule of law.")

may in proper cases allow an amendment of the plaint under O. 6 R. 17 so as to make a plea of exemption, if any.<sup>2</sup>

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Notes 7-10

**8. Rejection of plaint on other grounds.**—As has been seen in Note 2 *ante*, the instances given in this rule are not exhaustive of the cases in which a Court may reject a plaint. But a Court has no power to reject a plaint merely because it is defective in that it does not comply with some provisions of law.<sup>1</sup> The proper procedure in such a case is to call on the plaintiff to cure the defect and on his failure to do so, to proceed to decide the suit forthwith and to dismiss it under O. 17 R. 3 or to reject the plaint under the Court's inherent powers.<sup>2</sup> Section 203, sub-section 4 of the Madras Estates Land Act (I of 1908) provides that the following clause shall be deemed to be added to this rule as clause (e), *viz.*—

“(e) In any suit to which Section 203 of the Madras Estates Land Act, 1908, applies if the certified copy therein mentioned is not annexed to the plaint and the plaintiff on being required by the Court to produce it fails to do so within the time allowed by the Court.”

**9. Rejection of plaint in part.**—A plaint cannot, under this rule, be rejected *in part* and retained in part. It should be rejected as a *whole*.<sup>1</sup> Thus, where in a suit by two plaintiffs against the Secretary of State for India, one of them has failed to give notice as required by Section 80 of the Code, the plaint should be rejected as a whole and not merely as regards the plaintiff who had failed to give notice.<sup>2</sup>

**10. At what stage plaint can be rejected.**—The provisions of this rule are imperative and can be brought into operation at *any stage* of the suit. Therefore, the registration of a plaint does not prevent its rejection under this rule.<sup>1</sup> Where, however,

(‘38) AIR 1938 Pat 127 (128). (Secretary of State impleaded in suit along with other defendants—No statement in plaint about issue of notice under Section 80.)

2. (‘09) 3 Ind Cas 159 (160) : 34 Bom 250.  
[See also (‘32) AIR 1932 Cal 146 (146) : 59 Cal 150.]

#### Note 8

1. (‘20) AIR 1920 Pat 82 (83).
- (‘24) AIR 1924 Lah 608 (608). (Non-production of a document under O. 7 R. 18.)
- (1864) 2 Bom H O R 369 (369). (Do.)
- (‘12) 17 Ind Cas 580 (581) (Mad). (Want of signature and verification.)
- (‘11) 10 Ind Cas 731 (732) : 7 Nag L R 33. (Want of proper signature.)
- (‘04) 1904 Pun Re No. 57, p. 168. (Insufficient or improper verification.)
- (‘11) 10 Ind Cas 212 (219) (Lah). (Misjoinder of parties and causes of action or nonjoinder of parties.)
- (‘03) 7 Cal W N 615 (616, 617). (Insufficient identification of property.)
- [See (‘97) 1 Cal W N 574 (576).]
- But see the following cases under the old Code:
- (‘87) 14 Cal 485 (439).
- (‘01) 1901 Pun Re No. 56, p. 178. (Nonjoinder of a necessary party as plaintiff.)
- (‘07) 8 Suth W R 15 (16) (FB). (Misjoinder of defendants and causes of action.)
2. (‘20) AIR 1920 Pat 82 (88).

#### Note 9

1. (‘07) 29 All 825 (826).
- (‘31) AIR 1931 Mad 175 (176) : 54 Mad 416.

(‘21) AIR 1921 Sind 106 (108) : 17 Sind L R 9.

(‘35) AIR 1935 Mad 389 (390).

(‘36) AIR 1936 Lah 1021 (1022). (Note appended to an issue to the effect that the plaint was rejected to the extent of the claim for interest—Note does not amount to rejection of plaint as contemplated by Code.)

[See however (‘37) AIR 1937 Lah 800 (801). (Suit on pro-note executed by A, B, C and D—Court ordering that suit could not proceed against A on ground that pro-note was signed by him at place beyond that Court's jurisdiction—Order held to be tantamount to rejection of plaint as regards A and appeal was therefore competent.)]

2. (‘31) AIR 1931 Mad 175 (176) : 54 Mad 416.

(‘35) AIR 1935 Mad 389 (390).

#### Note 10

1. (1900) 27 Cal 376 (378).
- (‘22) AIR 1922 Cal 506 (508) : 49 Cal 880.
- (‘97) 1 Cal W N 670 (671).
- (‘90) 12 All 553 (555).
- (‘95) 18 Mad 338 (341).
- (‘88) 1888 Pun Re No. 126, page 339.
- (‘05) 1 Nag L R 103 (105).
- (‘92-96) 1892-96 Upp Bur Rul 253.
- (‘85) 7 All 79 (83, 84) (F B). (Under S. 53 of the old Code corresponding to clause (a) it was held that a plaint could be rejected for want of cause of action only at or before the first hearing—This has now been omitted.)
- (‘35) AIR 1935 Mad 569 (571) : 58 Mad 1051.
- (‘85) AIR 1935 Cal 764 (765). (The fact that the suit is registered, heard by the trial Court, and

**O. 7 R. 11**  
**Notes 10-11**

a plaintiff is rejected in the early stages of the suit, there is no justification for allowing excessive costs to the defendant.<sup>2</sup>

**11. Appeal.** — An order rejecting a plaintiff, whether under this rule or not, is a decree as defined in Section 2, sub-section 2 *ante* and hence is appealable as such.<sup>1</sup> But in cases coming under clause (b) of this rule, if the order is based merely upon a valuation of the subject-matter of the suit and the only question involved is as to the amount upon which the court-fee has to be paid, the decision of the first Court is final under Section 12 of the Court-fees Act. Where, however, the question is, what provision of the Court-fees Act applies to the relief sought for in the plaintiff or under what category the suit falls, the decision is not final under that Section and an appeal is not barred.<sup>2</sup>

by the Appellate Court and remanded is of no moment.)

[*See also* ('99) 8 Cal W N 220 (221). (It is competent for the defendant to obtain at the earliest stage the decision of the Court, whether the plaintiff discloses a cause of action.)]

[*But see* ('82) 8 Cal 192 (195). (Dissented from in 27 Cal 376 — Plaintiff can be rejected only before it is registered.)

('80) 2 Mad 308 (309). (Dissented from in 18 Mad 388.)]

2. ('14) AIR 1914 Lah 268 (269) : 1914 Pun Re No. 35.

**Note 11**

1. ('29) AIR 1929 Cal 226 (227).

('21) AIR 1921 Lah 43 (43). (Memorandum of appeal must bear an *ad valorem* court-fee.)

('29) AIR 1929 Lah 83 (84). (It is not essential that a decree should be drawn up.)

('86) 13 Cal 189 (191). (Plaintiffs proved on evidence to be minors—Suit rejected—Appeal lies.)

('37) AIR 1937 Lah 800 (801). (Suit on pro-note executed by A, B, C and D—Court ordering that suit could not proceed against A on ground that pro-note was signed by him at place beyond that Court's jurisdiction—Order held was tantamount to rejection of plaintiff as regards A, and appeal therefore was competent — Even if no appeal lay, revision was competent as there was case decided.)

('35) AIR 1935 Cal 336 (337) : 62 Cal 61.

('35) AIR 1935 Cal 157 (157). (Suit dismissed for proper court-fee not being paid within time — Appeal and second appeal are competent.)

[*See* ('37) AIR 1937 All 280 (281) : I L R (1937) All 484. (Rejection of plaintiff does not amount to decree when such rejection is not authorized by some provision of the Code.)]

[*See also* ('23) AIR 1923 Pat 354 (355) : 2 Pat 504. (Suit dismissed under O. 7 R. 11 (c)—Court can review the order.)

('26) AIR 1926 Cal 427 (427). (Rejection for insufficiency of court-fee — Value for appeal is the same as in plaintiff—Additional court-fee for appeal and plaintiff if any can be ordered only after enquiry.)

('86) AIR 1936 Pesh 155 (156). (Order rejecting plaintiff is itself equivalent to decree and hence eliminates the necessity for preparing separate

decree sheet.)]

[*But see* ('10) 5 Ind Cas 371 (372) (All). (Order of rejection by a Court acting under the Agra Tenancy Act is not a decree under S. 177 of that Act.)]

2. ('77) 1 All 360 (362).

('86) 10 Bom 610 (616) (F B). (The decisions in 2 Bom 145, 2 Bom 219 and 9 Bom 355 referred to—On a question if a plaintiff admits of valuation by a Judge, appeal lies.)

('99) 23 Bom 486 (488, 489).

('93) 17 Bom 56 (59).

('90) 15 Bom 82 (83). (Valuation settled by the Judge was not one within his proper function—Appeal lies.)

('01) 28 Cal 334 (338).

('81) 6 Cal 249 (250). (Section 588 (Act X of 1877) removed the finality declared by S. 12 of Court-fees Act.)

('10) 5 Ind Cas 18 (19) (Cal).

('82) 12 Cal L Rep 148 (151).

('73) 19 Suth W R 214 (214).

('71) 16 Suth W R 10 (12) (F B). (Overruling 18 Suth W R 415 and 6 Beng L R 12 — Sch. B, Art. (b), Stamp Act, 1867, cannot by implication take away the right of appeal given by S. 36 of the Civil Procedure Code of 1859.)

('94) 4 Mad L Jour 183 (188) (F B).

('91) 14 Mad 169 (170). (Where it is not a mere question of amount of arithmetical calculation, S. 12 does not apply.)

('82) 4 Mad 204 (208).

('24) AIR 1924 Pat 673 (675) : 3 Pat 930. (Held that decision as to category of suit is liable to be revised.)

('19) AIR 1919 Pat 270 (275) : 4 Pat L Jour 57.

('19) AIR 1919 Oudh 98 (101) : 22 Oudh Cas 289.

('12) 16 Ind Cas 773 (774) (Sind).

('90) 12 All 129 (158) (F B).

('36) AIR 1936 Bom 166 (166).

[*See also* ('14) AIR 1914 Lah 153 (153, 154) : 1914 Pun Re No. 80. (Rejection of plaintiff—Appeal lies as rejection is not under S. 12, Court-fees Act.)

('94) 1894 Bom P J 425. (Decision final under S. 12, Court-fees Act.)]

[*But see* ('89) 11 All 91 (93) (F B). (Held to be erroneous in 12 All 129 so far as it decided that even a decision on a question under S. 12, Court-fees Act, was appealable.)]

An Appellate Court can reject a memorandum of appeal under this rule read with Section 107.<sup>3</sup> But a memorandum of appeal cannot be rejected on the ground that the court-fee on the *plaint* in the trial Court has not been paid by the plaintiff-appellant.<sup>4</sup>

As to whether the rejection of a memorandum of appeal is a "decree," see Note 13 to Section 2 sub-section 2, *ante*.

Where a plaint returned under R. 10 *ante* for presentation to the proper Court is rejected by the latter Court for not making up the deficiency in court-fee and the order of return is reversed on appeal, the plaintiff having suppressed the fact of rejection, the appellate order is void and the only remedy of the plaintiff is to appeal against the order of rejection.<sup>5</sup>

See also the undermentioned cases.<sup>6</sup>

**12. Revision.** — An order rejecting a plaint being a decree and appealable as such, a revision against such an order is incompetent.<sup>1</sup> But where appeal is barred under Section 12 of the Court-fees Act,<sup>2</sup> or where an appeal against an order under this rule is rejected as incompetent<sup>3</sup> or where the plaint is rejected by a Provincial Small Cause Court,<sup>4</sup> the order is revisable if the conditions of Section 115 are satisfied. There is a conflict of opinion on the question whether an order demanding *additional court-fee* is open to revision, so long as the order has not resulted in the rejection of the plaint for non-compliance with the order. It has been held in the undermentioned cases<sup>5</sup> that no revision lies, since the plaintiff has another remedy open to him by way of appeal on the rejection of the plaint. The contrary opinion has been maintained in the undermentioned cases<sup>6</sup> on the ground that the question is really one of jurisdiction as the plaint has to be rejected if the stamp duty has not been paid. According to the High Court of Calcutta,<sup>7</sup> where the plaintiff's valuation is accepted by the Court as correct on an examination of the facts alleged, the order is not open to revision inasmuch as such an order does not fall within Section 115 and as the decision could be challenged in an appeal from the decree in the suit.

3. ('37) AIR 1937 All 280 (281) : I L R (1937) All 484.

4. ('37) AIR 1937 All 280 (281) : I L R (1937) All 484.

5. ('29) AIR 1929 Bom 202 (204, 205).

6. ('37) AIR 1937 Lah 380 (381). (An appeal does not lie against the order of Appellate Court setting aside an order of Court of first instance rejecting a plaint under O. 7 R. 11, C. P. C., and directing the trial Court to proceed with the trial of the suit. Such order is not an order under O. 41 R. 23 and is not appealable under O. 43 R. 1 (u).)

('35) AIR 1935 Nag 83 (86) (F B). (Order rejecting plaint for failure to pay additional court-fee is a complete and final determination of rights of parties — Appeal from such order — Subject-matter in appeal is same as that in suit and same court-fee is payable on appeal as on plaint.)

#### Note 12

1. ('29) AIR 1929 Cal 226 (227).

('82) 12 Cal L Rep 148 (151).

('25) AIR 1925 Lah 191 (192).

('39) AIR 1939 Nag 107 (108); 29 Nag L R 125 (F B).

('14) AIR 1914 Lah 158 (159) : 1914 Pun Re No. 80.

('85) AIR 1985 Cal 157 (157). (Suit dismissed for proper court-fee not being paid within time —

Appeal and second appeal are competent—Revision from Appellate Court's order is not competent.)

[See also ('19) AIR 1919 Lah 11 (11, 12) : 1919 Pun Re No. 120. (Where under Court-fees Act the order is final neither appeal nor revision lies.)

('36) AIR 1936 Lah 1021 (1022). (Note appended to an issue, in effect rejecting the plaint to the extent of interest as not showing cause of action—Note does not amount to rejection of plaint — Order therefore not being appealable, revision is only remedy.)]

2. ('19) AIR 1919 Pat 270 (275) : 4 Pat J. Jour 57. ('86) 10 Bom 610 (616) (F B).

3. ('29) AIR 1929 Lah 125 (125).

4. ('28) AIR 1928 Lah 274 (275).

5. ('12) 16 Ind Cas 475 (476) : 1912 Pun Re No. 60.

('30) AIR 1930 Pat 277 (278).

('20) AIR 1920 Pat 789 (789).

('38) AIR 1938 Lah 80 (81) : I L R (1938) Lah 377.

6. ('25) AIR 1925 Mad 722 (723).

('24) AIR 1924 Pat 673 (676) : 3 Pat 930. (Where the question is what provision of Court-Fees Act is applicable revision lies.)

('18) AIR 1918 Pat 181 (181) : 4 Pat L Jour 191.

7. ('25) AIR 1925 Cal 814 (815, 816).

**O. 7 R. 11**  
**Notes 12-13**

See also the undermentioned case.<sup>8</sup>

**13. Review.** — An order rejecting a plaint can be reviewed if the conditions of O. 47 R. 1 are satisfied.<sup>1</sup> It has been held by the Allahabad High Court that the Court has power to restore the suit to the file after it has rejected a plaint under this rule.<sup>2</sup> It has also been held that the Court can treat an application for restoration as a fresh plaint under O. 7 R. 13 *infra*.<sup>3</sup>

**O. 7 R. 12**

**R. 12.** [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Procedure on rejecting plaint.

[1877, S. 55.]

**1. Rejection of memorandum of appeal.** — It has been held by the High Court of Allahabad that where a memorandum of second appeal is rejected by virtue of this rule read with Section 107, the procedure prescribed by this rule should be followed.<sup>1</sup>

**O. 7 R. 13**

**R. 13.** [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where rejection of plaint does not preclude presentation of fresh plaint.

[1877, S. 56; 1859, S. 36.]

**1. Rejection of plaint does not preclude fresh plaint.** — Where a plaint is rejected under Rule 11 *ante*, the plaintiff is not thereby precluded from presenting a fresh plaint in respect of the same cause of action, provided his right of action is not barred by the law of limitation.<sup>1</sup> But where the order is in substance one of *dismissal* though in form one of rejection, as where the Court purports to reject the plaint after a full trial on the merits and after recording a finding adverse to the

8. ('85) AIR 1935 Cal 336 (337) : 62 Cal 61. (Suit filed when claim is about to be barred—Rejection of plaint — No appeal filed from order — Court cannot use inherent power to set aside order—If it uses it, High Court can interfere in revision.)

**Note 13**

1. ('23) AIR 1923 Pat 354 (355) : 2 Pat 504.
- ('25) AIR 1925 Pat 435 (437) : 4 Pat 180.
- ('36) AIR 1936 Pat 310 (311). (Order rejecting plaint for non-compliance with order for payment of court-fee—Review is permissible.)
- [See ('35) AIR 1935 Cal 336 (337) : 62 Cal 61. (It is doubtful whether an order rejecting a plaint can be reviewed under O. 47 R. 1, C.P.C.)]
2. ('39) AIR 1939 All 452 (453).
3. ('35) AIR 1935 All 985 (986). (It can allow the old court-fee paid on the rejected plaint to be computed towards court-fee on the fresh plaint, under Sec. 149 and under its inherent powers

derived under S. 151, C. P. C.)

**Order 7 Rule 12 — Note 1**

1. ('98) 15 All 367 (370). (Per Aikman, J.)
- [See also ('39) AIR 1939 Sind 221 (221) : I L R (1939) Kar 527. (Provisions of O. 7 by reason of S. 141 of the Code, apply *mutatis mutandis* to memoranda of appeals as well as to plaints.)]

**Order 7 Rule 13 — Note 1**

1. ('88) 15 Cal 533 (538, 539) : 15 Ind App 119 (PC).
- ('90) 12 All 553 (556).
- ('27) AIR 1927 Lah 83 (83).
- ('25) AIR 1925 Mad 1045 (1046).
- ('66) 4 Bom H C R A C 110 (112).
- ('70) 14 Sindh W R 289 (290).
- ('35) AIR 1935 Cal 764 (765). (Order of dismissal of suit for default in paying deficit court-fee and in not giving correct valuation of property — Order is one of rejection and fresh suit is not barred.)

plaintiff, a subsequent suit in respect of the same subject-matter based upon the same cause of action will be barred as *res judicata*.<sup>2</sup>

See also Note 13 to Order 7 Rule 11, *ante*.

**O. 7 R. 13**  
**Note 1**

## DOCUMENTS RELIED ON IN PLAINT

**R. 14.** [S. 59.] (1) Where a plaintiff sues upon a document

**O. 7 R. 14**

**Production of document on which plaintiff sues.**

in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

[1877, Ss. 58, 59, 62, 63; 1859, S. 39.]

### Local Amendments

#### ODDH

*Substitute the following for sub-rule (2) :*

(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented, such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible, state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose.

*Explanation.* — A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be "in the power" of the plaintiff.

**N.-W. F. P.**

*Add to sub-rule (2) "and shall also produce such documents as are in his possession or power."*

### Synopsis

- |   |  |
|---|--|
| <p>1. <b>Scope and object of the Rule.</b></p> <p>2. <b>Right of the defendant to inspect the documents relied on by the plaintiff.</b> See O. 11 R. 15 Note 3.</p> | <p>3. <b>Failure to comply with this Rule.</b> See Note 1 and Rule 18.</p> <p>4. <b>Loss of document after production.</b> See Note 1.</p> |
|---|--|

### Other Topics (miscellaneous)

Defendant entitled to copy of such document before filing written statement. See Note 3.

"He shall enter such document in a list." See Note 1.

Production of document on which plaintiff sues. See Note 1.

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[See also ('90) 12 All 129 (148) (F.B). (Similarly in the case of dismissal of a suit under S. 10, Court-fees Act.) ('86) 8 All 282 (287). (Do.)]

2. ('20) AIR 1920 Mad 449 (451).



**O. 7 R. 14**  
**Note 1**

**1. Scope and object of the Rule.** — This rule makes a distinction between a document *sued on* and a document *relied on* by the plaintiff as evidence in support of his claim.<sup>1</sup> Where a plaintiff *sues* upon a document he should *produce* the document into Court when the plaint is presented<sup>2</sup> except where such document is an entry in a shop-book or account, in which case he should produce a *true copy* of the entry to be filed with the plaint and the procedure laid down in Rule 17, *infra*, should be followed. Where the plaintiff *relies* on any document as *evidence* in support of his claim, he should enter such document in a list to be annexed to the plaint, whether the document is in his power or not.<sup>3</sup> But even such documents should, if they are in his possession or power, be *produced* into Court at or before the first hearing of the suit.<sup>4</sup> (See O. 13 R. 1, *infra*.) A document on which the plaintiff has not in terms sued, and which is not produced into Court when the plaint is presented, can only be treated, if subsequently produced, as a piece of *evidence* and not as *creating any rights* in favour of the plaintiff.<sup>5</sup>

The object of this rule is to exclude documents as to the existence of which, at the date of the suit, there may be reasonable doubt and as to the genuineness of which suspicions might arise when subsequently tendered.<sup>6</sup> The provisions of this rule therefore are imperative<sup>7</sup> and compel the plaintiff to produce or disclose all documents on which he relies in support of his claim.<sup>8</sup> But the plaintiff's failure to produce or disclose the documents as provided by this rule does not entail the return<sup>9</sup> or rejection of the plaint or the dismissal of the suit.<sup>10</sup> The only penalty for such default is that he cannot produce the documents in evidence at the hearing without the leave of the Court (see Rule 18, *infra*).

This rule, however, does not apply if the plaintiff himself is not *aware* of the existence of any documents which he subsequently discovers as supporting his claim.<sup>11</sup>

It has been held by the Privy Council that if the plaintiff produces the document sued on, as required by this rule, and the document is lost subsequently from the custody of the Court, the plaintiff should be allowed to adduce secondary evidence of the document under Section 65 of the Evidence Act, 1872, without showing how the original document was lost.<sup>12</sup>

**Order 7 Rule 14 — Note 1**

1. ('20) AIR 1920 Cal 416 (416).
2. ('20) AIR 1920 Bom 94 (95) : 44 Bom 625.
3. ('18) AIR 1918 Cal 329 (330). (Having regard to the particular circumstances of this case it was later on received as evidence in the case.)  
[See ('37) AIR 1937 Lah 464 (465). (When the document on which the plaintiff sues is not in his possession, he can state this fact in the list of documents to be attached to the plaint.)]
3. ('07) 32 Bom 152 (153).
3. ('85) 8 Mad 373 (374). (If the trial Court receives the documents later on of which a list was not given in the plaint, Appellate Court must consider them.)
3. ('08) 12 Cal W N 312 (315). (When a list of documents has been attached to the plaint he need not produce them all at the first hearing.)
3. ('18) AIR 1918 P C 118 (119) : 45 Ind App 284 : 41 All 63 (P C). (A horseshoe intended to refresh memory of the maker thereof need not be entered in the list of documents.)
3. ('27) AIR 1927 Oudh 612 (612).
3. ('28) AIR 1928 Pat 555 (557) : 7 Pat 589. (Trial Court has discretion to receive documentary

evidence at a late stage.)

[See also ('81) AIR 1931 Cal 458 (461) : 58 Cal 418. (The documents themselves need not be annexed to the plaint.)]

4. ('22) AIR 1922 Pat 569 (571).
5. ('16) AIR 1916 P C 217 (219) (P C).
5. ('37) AIR 1937 Mad 122 (123).
6. ('09) 2 Ind Cas 946 (948) (Cal).
6. ('20) AIR 1920 Pat 811 (812). (If the documents are shown to be not fabricated they may be received in evidence later on.)
7. ('09) 2 Ind Cas 946 (948) (Cal).
8. ('17) AIR 1917 P C 6 (8) : 40 Mad 402 : 44 Ind App 98 (P C). (Practice of withholding documentary evidence by parties trusting upon abstract doctrine of onus of proof deprecated by Privy Council.)
9. ('30) AIR 1930 Lah 480 (480).
10. ('98) 22 Bom 971 (972).
10. ('66) 2 Bom H C R 369 (369, 370).
10. ('21) AIR 1921 All 218 (218).
10. ('24) AIR 1924 Lah 608 (608).
11. ('21) AIR 1921 Nag 49 (49, 50).
12. ('25) AIR 1925 P C 80 (82) (P C).



**2. Right of the defendant to inspect the documents relied on by the plaintiff.** — See Order 11 Rule 15, Note 3.

**O. 7 R. 14  
Notes 2-4**

**3. Failure to comply with this Rule.** — See Note 1 and Rule 18.

**4. Loss of document after production.** — See Note 1.

**R. 15.** [S. 60.] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

**O. 7 R. 15**

Statement in case of documents not in plaintiff's possession or power.

[1877, S. 60.]

**Local Amendment**

**POUDH**

*Delete the rule.*

**R. 16.** [S. 61.] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

**O. 7 R. 16**

Suits on lost negotiable instruments.

[1877, S. 61.]

**1. Suit on a lost negotiable instrument.** — In a suit based on a lost negotiable instrument, the plaintiff should give sufficient indemnity against possible claims of persons in respect of that instrument.<sup>1</sup>

**R. 17.** [S. 62.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

**O. 7 R. 17**

Production of shop-book.

**Order 7 Rule 16 — Note 1**

1. ('12) 16 Ind Cas 769 (771) (Lah).  
(20) AIR 1920 Mad 886 (886).

**O. 7 R. 17**  
**Note 1**

Original entry to be  
marked and returned.

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

[1877, Ss. 58, 62, 63; 1859, S. 39.]

**Local Amendments****ALLAHABAD**

Add the following proviso to sub-rule (2):

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in Order 13 Rule 12 as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original.

**LAHORE**

After sub-rule (2) add the following Explanation:

*Explanation.*—When a shop-book or other account written in a language other than English or the language of the Court is produced with a translation or transliteration of the relevant entry, the party producing it shall not be required to present a separate affidavit as to the correctness of the translation or transliteration, but shall add a certificate on the document itself, that it is a full and true translation or transliteration of the original entry, and no examination or comparison by the ministerial officer shall be required except by a special order of the Court.

**ODDH**

Add the following proviso:

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in Order 13 Rule 12, as to verification shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original.

**1. Shop-book or account.** — Section 4 of the Bankers' Books Evidence Act<sup>1</sup> provides that a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as the original entry is now by law admissible, but not further or otherwise. The term "Bankers' Books" includes ledgers, daybooks, cash books, account books and all other books used in the ordinary course of business of a bank.<sup>2</sup> Therefore, if the document sued on is a banker's book it is not necessary to produce the original book itself along with the plaint: it is enough if a certified copy of the entry or entries is produced. But it should be shown that the bank is one to whose books the provisions of the Bankers' Books Evidence Act have been extended.<sup>3</sup>

If the document sued on is not a banker's book but is an entry in a shop-book or account, the plaintiff should produce the book or account at the time of filing the

**Order 7 Rule 17 — Note 1**

S. 2 (8).

1. Act XVIII of 1891.

3. (1900) 4 Cal W N 488 (484) (F B).

2. The Bankers' Books Evidence Act 1891, Act VIII of 1891, S. 2 (2) and S. 8.

plaint together with a true copy of the entry sued on.<sup>4</sup> Thereupon the Court or its officers should mark the document for identification<sup>5</sup> and should, if the copy is found to be correct, file the copy along with the plaint.

But the fact that the original document is *not* presented along with the plaint, as provided by this rule and the plaint is registered, is not a ground for rejecting the plaint: but the plaintiff cannot afterwards produce the document in evidence except with the leave of the Court as provided by Rule 18 *infra*.<sup>6</sup>

**O. 7 R. 17**  
**Note 1**

**R. 18.** [S. 63.] (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

**O. 7 R. 18**

**Inadmissibility of document not produced when plaint filed.**

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

[1877, Ss. 58, 62, 63; 1859, S. 39.]

### *Synopsis*

1. Scope and object of the Rule.
2. Cases where leave is not necessary.
3. Revision.

### *Other Topics (miscellaneous)*

Appellate Court's power to consider documents rejected or admitted by trial Court. See Note 1.  
"To refresh his (witness's) memory." See Note 2.

**1. Scope and object of the Rule.** — The policy underlying this rule is to exclude evidence, the existence of which at the date of the suit is doubtful, and as to the genuineness of which suspicion may arise because it was produced at a late stage of the suit.<sup>1</sup> The Court has, however, a wide discretion with regard to the reception of documents which were not produced with the plaint or entered in the list of documents<sup>2</sup> and where there can be no doubt about the genuineness of the documents produced, such as certified copies of public documents or records of judicial proceedings, Courts will not as a rule shut them out.<sup>3</sup> But even in such cases leave may be refused

### **Order 7 Rule 18 — Note 1**

4. ('20) AIR 1920 Lah 186 (140) : 1 Lah 6.  
[See however ('28) AIR 1928 Pat 555 (557) : 7 Pat 589. (In this case it was held that the accounts were not sued on but were only relied on.)]  
5. (1865) 3 Bom H C R A C 92 (98).  
(91) 15 Bom 687 (689, 690, 691).  
6. ('97) 22 Bom 971 (972).  
(66) 2 Bom H C R 869 (869, 870).

1. ('09) 2 Ind Cas 946 (948) (Cal).  
2. ('27) AIR 1927 Cal 168 (169, 179).  
3. ('08) 12 Cal W N 812 (815).  
(82) 4 Mad 417 (418). (Improper rejection — Urged as a ground in appeal.)  
(84) 8 Bom 877 (879).

**O. 7 R. 18**  
**Notes 1-3**

where there has been unreasonable delay in the production of documents, unless satisfactory reasons are assigned for the delay.<sup>4</sup> An Appellate Court will not ordinarily interfere with the discretion exercised by the lower Court under this rule.<sup>5</sup>

The leave granted by the Court need not be *express*, but may be gathered from the records and the circumstances of the case.<sup>6</sup>

**2. Cases where leave is not necessary.** — Sub-rule 2 of this rule enacts that the rule as to the inadmissibility of documents not produced with, or referred to in the plaint, does not apply to the following cases —

- (1) Where the document is to be handed over to the witness for the purpose of refreshing his memory and not to be relied upon as a probative document in itself in support of the plaintiff's case.<sup>1</sup>
- (2) Where the documents are produced in answer to any case set up by the defendant.<sup>2</sup>
- (3) Where they are produced for the cross-examination of the defendant's witnesses.<sup>3</sup> The words "defendant's witnesses" include also plaintiff's witnesses who have turned hostile to the plaintiff and whom the plaintiff is permitted to cross-examine.<sup>4</sup>

**3. Revision.** — The question of admission of evidence is not ordinarily a question of jurisdiction but is merely one of law and no revision will lie in such cases.<sup>1</sup>

**Local Amendments****ALLAHABAD**

Add the following Rules 19 to 25 :

**O. 7 R. 19**  
**(Allahabad)**

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

**O. 7 R. 20**  
**(Allahabad)**

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the

('18) AIR 1918 Cal 329 (330).

(1864) 1864 Suth W R Act X 67 (68).

('21) 60 Ind Cas 372 (374) (Pat). (If document is proved to be not fabricated it can be received even at a late stage.)

4. ('20) AIR 1920 Bom 94 (95) : 44 Bom 625.

('67) 1867 Pun Re No. 98.

('72) 18 Suth W R 515 (516). (Khusrah papers filed at a very late stage.)

('35) AIR 1935 Lah 648 (649) : 17 Lah 218. (Documents produced after close of argument cannot be received in evidence.)

5. ('85) 8 Mad 373 (374, 375). (Documents not filed along with the plaint received by the trial Court — Appellate Court is bound to consider them.)

('21) AIR 1921 Nag 49 (50). (Objection as to admissibility of documents cannot be taken for the first time in appeal.)

(1864) 1 Suth W R 12 (12). (Documents received by the lower Court not to be rejected on the sole ground that they were not filed with the plaint.)

(1865) 2 Suth W R 237 (238). (Time for filing certain documents extended by trial Court—Appellate Court not to interfere with the order.)

6. ('13) 20 Ind Cas 331 (332) (All).

('69) 12 Suth W R 32 (32) : 13 Moo Ind App 77 (PC). (Where trial Court admitted documents at a late stage.)

**Note 2**

1. ('18) AIR 1918 P C 118 (119) : 41 All 63 : 45 Ind App 284 (P C).

(1862) 1 Mad H C R 168 (170).

2. ('16) AIR 1916 Lah 262 (264).

('34) AIR 1934 Lah 126 (127).

('22) AIR 1922 Pat 569 (571).

[See also ('36) AIR 1936 Lah 1016 (1017). (Suit on promissory note for cash consideration — Defendant denying receipt of consideration — Plaintiff, in answer producing documents not included in list of documents filed with plaint — Adverse inference could not be drawn against plaintiff.)]

3. ('37) AIR 1937 All 55 (56). (Plaintiff is entitled to tender in evidence previous statement in writing by defendant for purpose of contradicting him under S. 145, Evidence Act.)

4. ('20) AIR 1920 Nag 43 (43, 44).

[See also ('38) AIR 1938 Cal 65 (66) : 60 Cal 1841.]

**Note 3**

1. ('14) AIR 1914 Cal 826 (827).

District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

**O. 7 R. 20**  
(Allahabad)

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

**O. 7 R. 21**  
(Allahabad)

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

**O. 7 R. 22**  
(Allahabad)

NOTES—Where service has been effected by affixture of the notice on the outer door of the house, but the party is not present on the date fixed for his appearance, the Court ought under this rule to order notice by *registered post*. Otherwise the service cannot be considered to be sufficient.<sup>1</sup>

This rule applies also to appellate proceedings by virtue of O. 41 R. 38 (3) (added by Allahabad High Court.)<sup>2</sup>

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order 3 Rule 5, unless the Court directs service at the address for service given by the party.

**O. 7 R. 23**  
(Allahabad)

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

**O. 7 R. 24**  
(Allahabad)

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so."

**O. 7 R. 25**  
(Allahabad)

#### **BOMBAY**

The following shall be *added* as Rules 19 to 26 :

"19. Every plaint or original petition shall be accompanied by a memorandum Address to be filed with in writing giving an address at which service of notice, or plaint or original petition. summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

**O. 7 R. 19**  
(Bombay)

20. An address for service filed under the preceding rule shall be within the Nature of address to be local limits of the District Court within which the suit or filed. petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

**O. 7 R. 20**  
(Bombay)

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

**O. 7 R. 21**  
(Bombay)

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the

**O. 7 R. 22**  
(Bombay)

#### **Order 7 Rule 22 (Allahabad)**

**O. 7 R. 22 (Bombay)** notice, summons or other process shall be sent to the registered address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

**O. 7 R. 23 (Bombay)** 23. Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by Order 3 Rule 5, unless the Court directs service at the address for service given by the party.

**O. 7 R. 24 (Bombay)** 24. A party who desires to change the address for service given by him as Change of address. aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

**O. 7 R. 25 (Bombay)** 25. Nothing in these rules shall prevent the Court from directing the service Rules not binding on of a notice or process in any other manner, if, for any reasons, Court. it thinks fit to do so.

**O. 7 R. 26 (Bombay)** Applicability to notice under Order 21 Rule 22. 26. Nothing in these rules shall apply to the notice prescribed by Order 21 Rule 22."

#### LAHORE

Add the following as Rules 19 to 25 :

**O. 7 R. 19 (Lahore)** "19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

**O. 7 R. 20 (Lahore)** 20. An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or of the district Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

**O. 7 R. 21 (Lahore)** 21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

**O. 7 R. 22 (Lahore)** 22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be fixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served.

**O. 7 R. 23 (Lahore)** 23. Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by Order 3 Rule 5, unless the Court directs service at the address for service given by the party.

**O. 7 R. 24 (Lahore)** 24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit."

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so."

**O. 7 R. 26**  
(Lahore)

# **NAGPUR**

*Add the following as Rules 19 to 23 :*

"19. Every plaint or original petition shall be accompanied by an address at which service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the civil district in which the suit or petition is filed, or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

**O. 7 R. 19**  
(Nagpur)

Registered address by a party subsequently added as plaintiff or petitioner. 20. Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

**O. 7 R. 20**  
(Nagpur)

21. (1) If the plaintiff or the petitioner fails to file a registered address as required by Rule 19 or Rule 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

**O. 7 R. 21**  
(Nagpur)

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub-rule (1), the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

22. Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

**O. 7 R. 22**  
(Nagpur)

23. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform."

**O. 7 R. 23**  
(Nagpur)

# **N.-W. F. P.**

*Add the following as Rules 19 to 22 :*

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons, or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately, on being so added, file a proceeding of this nature.

**O. 7 R. 19**  
(N.-W.F.P.)

20. An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed or, of the district Court within which the party ordinarily resides, if within the limits of the North-West Frontier Province.

**O. 7 R. 20**  
(N.-W.F.P.)

**O. 7 R. 21.  
(N.-W. F. P.)**

21. Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

**O. 7 R. 22  
(N.-W. F. P.)**

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties, or be sent to them by registered post, as the Court thinks fit."

**ODDH**

Add the following as Rules 19 to 27 :

**O. 7 R. 19  
(Oudh)**

"19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the "registered address," and service thereat shall be deemed to be sufficient service.

**O. 7 R. 20  
(Oudh)**

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

**O. 7 R. 21  
(Oudh)**

21. A registered address shall be within the local limits of the District Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within those limits.

**O. 7 R. 22  
(Oudh)**

22. If a plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

**O. 7 R. 23  
(Oudh)**

23. Where the registered address of the plaintiff or petitioner is within the limits of a head-quarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

**O. 7 R. 24  
(Oudh)**

24. In all cases to which Rule 23 does not apply, where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If, on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

**O. 7 R. 25  
(Oudh)**

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him a notice or process for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at his registered address :

Provided that, where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

*Explanation.* — Where ten days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such ten days by the pleader concerned for further time.



26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

**O. 7 R. 26**  
(Oudh)

27. Nothing in Rules 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if for any reason it thinks fit."

**O. 7 R. 27**  
(Oudh)

#### PATNA

Add the following as Rules 19 to 22:

"19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement.

**O. 7 R. 19**  
(Patna)

20. An address for service filed under the preceding rule shall state the following particulars:—

**O. 7 R. 20**  
(Patna)

- (1) the name of the street and number of the house (if in a town);
- (2) the name of the town or village;
- (3) the Post Office;
- (4) the district; and
- (5) the munsif (if in Bihar and Orissa) or the District Court (if outside Bihar and Orissa).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

**O. 7 R. 21**  
(Patna)

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit."

**O. 7 R. 22**  
(Patna)

#### SIND

Add the following as Rules 19 to 25:

"19. *Address to be filed with plaint.* — Every plaint shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff. Plaintiffs subsequently added, shall immediately on being so added, file a memorandum in writing of this nature.

**O. 7 R. 19**  
(Sind)

20. *Nature of address to be filed.* — An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

**O. 7 R. 20**  
(Sind)

21. *Consequences of failing to file address.* — Where a plaintiff fails to file an address for service, he shall be liable to have his suit dismissed by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

**O. 7 R. 21**  
(Sind)

22. *Procedure when party not found at the place of address.* — Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of

**O. 7 R. 22**  
(Sind)

**O. 7 R. 22**  
(Sind)

the notice or process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the notice or process had been personally served.

**O. 7 R. 23**  
(Sind)

23. *Service of notice on pleaders.* — Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by O. 3 R. 5, unless the Court directs service at the address for service given by the party.

**O. 7 R. 24**  
(Sind)

24. *Change of address.* — A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to all the other parties to the suit and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

**O. 7 R. 25**  
(Sind)

25. *Rules not binding on Court.* — Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so."

## ORDER VIII.

### WRITTEN STATEMENT AND SET-OFF

**O. 8 R. 1**

**R. 1.** [S. 110.] The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

Written Statement.

[1877, S. 110; 1859, S. 120.]

### Local Amendments

#### LAHORE

After the word "defence" place a semicolon and *add* the following :

"and with such written statement, or if there is no written statement, at the first hearing, shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set-off.

(2) Where he relies on any other documents as evidence in support of his defence or claim for set-off, he shall enter such documents in a list to be added or annexed to the written statement, or where there is no written statement, to be presented at the first hearing. If no such list is so annexed or presented, the defendant shall be allowed a further period of ten days to file this list of documents.

(3) A document which ought to be entered in the list referred to in sub-clause (2) but which has not been so entered, shall not, without the leave of the Court, be received in evidence on the defendant's behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents produced for cross-examination of plaintiff's witnesses or handed to a witness merely to refresh his memory."

**N.-W.F.P.**

*Add* the following as sub-clause (2) :

"The defendant at the time of presenting a written statement shall, where he relies on any documents (whether in his possession or power or not), enter such documents in a list and produce those documents which are in his possession or power."

OU DH

O. 8 R. 1  
Notes 1-3

Add the following as Rule 1 (2), and read the existing Rule 1 as Rule 1 (1) :

1 (2). The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose.

*Explanation.* — A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be "in the power" of the defendant.

*Synopsis*

1. Written statement.

2. Supplemental written statement. See  
O. 6 R. 7 and O. 8 R. 9.

3. First hearing, meaning of.

4. Court-fee not leviable on written statement.

1. **Written statement.** — A written statement is the pleading of the defendant, and must be filed by him *personally*, or on his behalf by a *duly constituted agent*. The filing of a written statement by a *third* person on behalf of the defendant is not sanctioned by the Code.<sup>1</sup>

Where, after the service of summons the defendant has not had sufficient time to enable him to file a written statement<sup>2</sup> or where the Court requires him to file a written statement,<sup>3</sup> it should grant an adjournment for that purpose. An Appellate Court cannot call for a written statement from any of the parties.<sup>4</sup> As to what a written statement should or should not contain, see O. 6 Rr. 2 and 7.

The omission to file a written statement does not amount to an admission of the facts stated in the plaint.<sup>5</sup>

2. **Supplemental written statement.** — See O. 6 R. 7 and O. 8 R. 9.

3. **First hearing, meaning of.** — The "first hearing" of a suit does not mean the day on which the *witnesses are examined* or the trial taken up. It means the day on which the Court goes into the pleadings in order to understand the contentions of the parties.<sup>1</sup> In suits in which issues have to be framed, the day on which such issues are framed is the first hearing of the suit<sup>2</sup> inasmuch as on that day the Court looks into the pleadings with a view to understand the contentions of the parties. This is

**Order 8 Rule 1 — Note 1**

1. ('31) AIR 1931 All 939 (335) : 53 All 466.
- ('76) 25 Suth W R 17 (18). (No one should be allowed to file a written statement unless he has been formally placed on the record as a defendant.)
- (1865) Bourke Oudh Cas 153. (Third party will not be allowed to file a written statement for a plaintiff who has neglected to file one himself.)
2. ('66) 5 Suth W R (Act X) 89 (39).
3. (1862) 2 Hyde 89 (89).
- ('80) AIR 1930 Oudh 171 (172) : 4 Luck 529. (Small cause suit—Statement not necessary in the absence of specific notice in the summons—If the Court wants a written statement it should grant time.)
4. ('66) 5 Suth W R 50 (51). (Issuing the writ-

ten statement as an evidence cannot be allowed in the Appellate Court.)

5. ('35) AIR 1935 Pat 306 (331) : 14 Pat 70.

**Note 3**

1. ('39) AIR 1939 Nag 110 (112) : I L R (1939) Nag 452.
2. ('26) AIR 1926 Mad 347 (348, 349). ("First hearing" in O. 13 R. 1 means the day on which issues are framed.)
- ('22) AIR 1922 Pat 252 (254) : 6 Pat L Jour 650. "Hearing" is used in different rules with a view to state the different purposes for which a date for hearing of the suit is fixed.)
- ('74) 21 Suth W R 42 (48). ("First hearing" was defined in S. 139 of the Code of 1859 and did not mean the first hearing on the issue.)

**O. 8 R. 1  
Notes 3-4**

made clear by the provisions of O. 10 R. 1 under which "the Court shall, at the *first hearing* of the suit, ascertain from each party or his pleader whether he admits or denies such allegations or facts as are made in the plaint or written statement, if any, of the opposite party."

In cases in which no issues need be framed, such as small cause suits, the first hearing will, it is conceived, be the day on which the Court goes into the case of the parties for the purpose of trial.

**4. Court-fee not leviable on written statement.** — Written statements called for by the Court after the first hearing are specially exempted from a fee by Section 19, clause 3 of the Court-fees Act, 1870. But it cannot be inferred therefrom that written statements filed at or before the first hearing are chargeable with a fee, since the Legislature has expressly repealed the provision in the Code of 1859 requiring court-fee on all written statements.<sup>1</sup> See also the undermentioned case.<sup>2</sup>

**O. 8 R. 2****R. 2. [New.]** The defendant must raise by his pleading

New facts must be specially pleaded.

all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

[R. S. C., O. 19 R. 15. See O. 6 Rr. 4 and 8.]

*Synopsis*

1. Scope of the Rule.
2. Special defences.
3. Alternative defences. See O. 6 R. 2.
4. Fraud. See Order 6 Rule 4.

5. Limitation.
6. "Facts showing illegality."
7. Joint contractors — Separate defences.

*Other Topics (miscellaneous)*

Payment. See Note 2.  
Performance. See Note 2.  
Special pleas — Instances. See Note 2.

**1. Scope of the Rule.** — It is the duty of a defendant to *particularise* in his defence all points, either of fact or of law, which he desires to take.<sup>1</sup> If he does not do so, he will not be allowed to raise a new plea depending upon evidence for its

('19) AIR 1919 Cal 70 (71). (First hearing of suit means the day when the case is actually gone into.)

[See also ('68) 10 Suth W R 179 (181).]

(Exemption in S. 19 (3) of Court-fees Act is not limited to written statement in a suit but extends also to a written statement in a miscellaneous case.)

**Order 8 Rule 2 — Note 1**

- Note 4**
1. ('81) 5 Bom 400 (402, 408).
  - ('82) 12 Cal L Rep 367 (370).
  2. ('84) AIR 1984 All 382 (388) : 56 All 747.

1. ('28) AIR 1923 Cal 578 (578).
- ('15) AIR 1915 Cal 478 (481) : 42 Cal 625. (Plea of purchaser for value without notice.)
- ('08) 5 Bom L R 991 (995). (Do.)

determination, for the first time in appeal.<sup>2</sup> The rule requires that the defendant must raise by his pleading all matters which show that the suit is not maintainable. Hence, the defendant will not be entitled, as of right, to rely on any ground of defence which he has not taken in his written statement.<sup>3</sup> It has been held by the High Court of Calcutta that a plea of *estoppel* is not one 'which shows the suit to be not maintainable' and that therefore such plea can be allowed to be raised for the first time in appeal under O. 41 R. 2, though not raised in the written statement.<sup>4</sup> Whether a matter has been pleaded sufficiently to give the Court the right to form a judgment depends upon the allegations and form of the pleadings; the Courts must not look to the mere wordings of the plaint, but to the issues settled and the manner of the treatment in the lower Court.<sup>5</sup> "The effect of the rule is, for reasons of practice and justice and convenience, to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that, the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it and protect the other party, if necessary, by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just."<sup>6</sup> Thus, a plea though not taken in the statement can be raised provided it is taken before the trial has commenced and no prejudice is caused to the plaintiff.<sup>7</sup>

Where service of notice on defendant by the plaintiff is the foundation of defendant's liability, and where no allegation of service of such notice is made in the plaint, the plaintiff is not relieved from proving service of such notice merely because the defendant has not raised the plea in his written statement but raises it at the time

[See also ('32) AIR 1932 Cal 146 (147) : 59 Cal 150. (The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement.)]

2. ('26) 95 Ind Cas 573 (574) : 28 Bom L R 513 (515). (Plea of want of notice to quit.)

('22) AIR 1922 Pat 356 (358) : 1 Pat 612. (Want of legal necessity.)

('28) AIR 1928 All 596 (606) : 51 All 136 (FB). (Abandoning the plea of legal necessity in the lower Court—It cannot be raised in appeal.)

3. ('36) AIR 1936 Bom 10 (11) : 60 Bom 34. (Defendant not objecting to suit in lower Court on ground that suit was not in representative capacity under S. 53, T. P. Act—Defendant deemed to have waived objection and cannot raise such objection in appeal.)

('37) AIR 1937 Mad 571 (574) : I L R (1937) Mad 990. (Defendant not pleading S. 6, Married Women's Property Act, as bar to maintainability of suit — Defendant cannot have benefit of defence which he did not plead.)

('37) AIR 1937 Bom 476 (477). (Plea that suit not maintainable as not having been brought as a representative suit.)

('35) 18 Nag L Jour 97 (99). (Where a defendant deliberately abstains from setting out in his pleading a fact of which he is then aware, he cannot be allowed to bring it in at a late stage in the evidence, and after the plaintiff has closed his case.)

('98) AIR 1938 Lah 96 (96). (Suit by firm—Defendant not denying registration of firm—Suit cannot be dismissed on ground that such registration was not proved.)

[See also ('37) 41 Cal W N 534 (536). (Where a firm is registered after the institution of the suit by it, and the plea in bar of suit is not taken in the pleadings but is taken at the time of the arguments, the suit should not be thrown out but should be treated as properly instituted on the day when the firm is registered.)]

4. ('15) AIR 1915 Cal 373 (374). (One of the mortgagor's plea of *res judicata* can be raised by leave of Court in second appeal.)

5. ('15) AIR 1915 Mad 770 (772).

('19) 18 Ind Cas 568 (570) : 1 Upp Bur Rul 141. (It will cause great hardship to non-suit because of a careless written statement.)

6. (1912) 1 Ch 717 (728), *In re Robinson's settlement*, *Gant v. Hobbs*. (Per Buckley, L. J.)

7. ('25) AIR 1925 All 241 (242, 243) : 47 All 291 (Plea that notice was not given under S. 80, C. P. C.)

('36) AIR 1936 Lah 141 (141). (Witnesses summoned but not examined—Defendant taking up new plea of defence going to root of case — Plea allowed.)

[See also ('67) 7 Suth W R 120 (121). (Defendant may avail himself of any equity arising on the facts proved at trial though it is not raised in the written statement.)]

**O. 8 R. 2**  
**Notes 1-7**

of the argument.<sup>8</sup>

**2. Special defences.** — In answer to the claim of a plaintiff (for instance, on the basis of a contract), the defendant may admit that he made the contract, but may avoid the effect of that admission by pleading performance, fraud, release, limitation, etc.<sup>1</sup> Such a plea is called a plea in *confession and avoidance*. For instances of the nature of the pleas that may be set up in *defence*, see the undermentioned cases.<sup>2</sup>

**3. Alternative defences.** — See Order 6 Rule 2.

**4. Fraud.** — See Order 6 Rule 4.

**5. Limitation.** — A party should not be allowed to raise a plea of limitation for the first time in appeal where such plea involves a decision upon questions of fact.<sup>1</sup> Where the written statement asserts that the suit is barred by limitation, it is not necessary that the plea ought to be stated more explicitly, as by reference to the *particular article* of the Limitation Act.<sup>2</sup> But where the plaint itself shows that the suit is filed after the period prescribed, the Court is not precluded from going into the question of limitation even though it is not raised in the statement.<sup>3</sup> As a matter of fact, under Section 3 of the Limitation Act the Court must dismiss the suit if on the facts stated in the plaint, the claim is barred.

**6. "Facts showing illegality."** — A plea of illegality of the consideration for a bond which is the subject of suit must be definitely pleaded in the written statement, for it is a case in which particulars may be necessary. The plea cannot be raised for the first time in the arguments.<sup>1</sup> See also Notes to O. 6 R. 8.

**7. Joint contractors—Separate defences.** — In a suit against joint contractors, a successful defence pleaded by one only enures for the benefit of the others as well.<sup>1</sup>

**8.** ('33) AIR 1933 Cal 632 (634) : 60 Cal 733. (Notice under S. 54 Bengal Cess Act (9 of 1880).)

**Note 2**

1. ('20) AIR 1920 Nag 9 (10, 11).
2. ('06) 30 Mad 169 (175, 178). (Defendant may set up invalidity of a transaction though he has not avoided it by a suit within limitation.)
- ('07) 30 Mad 444 (445). (A defendant whose right to set aside a sale is barred by limitation can set up its invalidity in defence if he is in possession of the property.)
- ('06) 30 Mad 248 (250). (Do.)
- ('94) 17 Mad 255 (256). (Section 28, Limitation Act, has no application to persons who have been in possession and who have had no occasion to sue for recovery of possession.)
- ('05) 2 Cal L Jour 599 (601). (Auction-purchase declared subject to mortgage—Purchaser not estopped from contesting the validity of the mortgage.)
- ('04) 28 Bom 639 (642). (Though defendant had not sued to set aside a mortgage on the ground of fraud, he can set up the fraud in defence.)
- ('90) 14 Bom 222 (226). (Fraudulent sale—Vendor can plead fraud though he did not sue to set aside sale.)
- ('16) AIR 1916 Cal 63 (64) : 43 Cal 554. (Lessee can plead eviction by title paramount to his lessor in suit for rent.)
- ('09) 1 Ind Cas 525 (527) (Cal). (Defendant can plead *jus tertii* provided he states definitely the

name of the person in whom any such right resides.)

('07) 29 All 339 (346) : 34 Ind App 102 (PC.) (*Lis pendens* is a good defence.)

(1857) 1 De. G. & Jo. 566 (578), *Bellamy v. Sabine*. (Do.)

('94) 18 Bom 372 (374). (Defendant can plead that transaction was a sham one to defraud creditors.)

('08) 8 Cal W N 620 (621). (Plea of benami.)

('08) 12 Cal W N 409 (412). (Do.)

('04) 28 Bom 326 (329). (But defendant cannot set up as a defence an agreement the object of which is to stifle a prosecution.)

('28) AIR 1928 Mad 840 (845). (Suit for ejectment — Defendant having no title can still put the plaintiff to proof of his title.)

**Note 5**

1. ('21) AIR 1921 Cal 661 (671). (Especially where bar is under special law.)

('24) AIR 1924 Cal 463 (463). (Do.)

('20) AIR 1920 Cal 846 (848). (The defendant must raise the question of limitation in his pleadings.)

('24) AIR 1924 Pat 664 (664) : 3 Pat 546.

2. ('22) AIR 1922 Cal 544 (545).

3. ('21) AIR 1921 Bom 381 (383, 384) : 45 Bom 920.

**Note 6**

1. ('25) AIR 1925 Lah 845 (846) : 6 Lah 442.

**Note 7**

1. (1927) 1 K B 448 (453, 454), *Pirie v. Richardson*.

**R. 3.** [New.] It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

**O. 8 R 3**

**Denial to be specific.**

[R. S. C., O. 19 R. 17.]

### Synopsis

1. Scope of the Rule. | 2. "Except damages."

**1. Scope of the Rule.** — A defendant can either admit or deny the several allegations made in the plaint. If he decides to deny any such allegation he must do so *clearly and explicitly*.<sup>1</sup> Thus, in *Grocott v. Lovatt*<sup>2</sup> the plaintiff alleged in para. 3 of his statement of claim that the defendant, on or about a certain date, falsely and maliciously wrote, printed and published a certain handbill. The reply of the defendant to this was: "the defendant denies the facts alleged in para. 3 of the statement of claim." The Court of Appeal held that the denial was sufficient. But a statement that the defendant "puts the plaintiff to proof of the several allegations in the plaint" or that he "does not admit the correctness of the statements contained in the plaint" is not a sufficient denial within the meaning of this rule (see Rule 5 below). The rule is not limited to denial alone; it includes non-admission as well, so that where a defendant pleads that he does not admit a particular allegation in the plaint, it would be a sufficient traverse.<sup>3</sup> As to the effect of failure to deny specifically, see O. 8 R. 5.

No party should traverse matter not alleged; he should be content to answer the case that is actually laid against him and should not plead that which he thinks his opponent meant or ought to have raised.<sup>4</sup>

**2. "Except damages."** — The exception in this rule makes it unnecessary for the defendant to deny the claim to or amount of damages.<sup>1</sup> It is probably intended that damages shall be deemed to be put in issue in all cases, unless expressly admitted.

**R. 4.** [New.] Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient

**O. 8 R. 4**

**Evasive denial.**

#### Order 8 Rule 3 — Note 1

1. (1876) 3 Ch D 637 (640), *Thorp v. Holdsworth*. ('25) AIR 1925 Mad 950 (957). (Defendant should specifically deny publication in a libel suit.)
- (16) AIR 1916 Pat 411 (416). (In a suit for money "accounts incorrect" is not a specific denial.)
- (38) 1938 Oudh W N 1080 (1084). (Plaint allegations as to the terms of lease deed—Defendant replying that terms will appear from agreement—No specific denial.)
2. (1916) 61 S J 28.  
[See also (1894) 68 L J Q B 361 (863), *Adkins v. North Metropolitan Tramways Co.*]
3. (1876) 3 Ch D 637 (640), *Thorp v. Holdsworth*. (Per Jessel, M. R.)

(27) AIR 1927 All 225 (226).

(20) AIR 1920 Oudh 68 (69). (By putting plaintiff to proof of his mortgage deed the defendant must be taken to be putting the plaintiff to proof of its execution.)

(09) 4 Ind Cas 318 (318) (PC).

4. (1893) 1 Q B 571 (575), *Rassam v. Budge*. (In an action for slander defence justifying words other than those complained of, will be struck out.)

#### Note 2

1. (1888) 21 Q B D 501 (506, 508), *Wood v. Earl of Durham*. (Matters in mitigation of damages need not be specifically pleaded.)
- (17) AIR 1917 Cal 269 (272); 43 Cal 1001. (It is sufficient if the defendant pleads generally to the damages.)

**O. 8 R. 4**  
**Note 1**

to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

[R. S. C., O. 19 R. 19.]

**1. Plaintiff allegations not to be denied evasively.** — *A* sues *B* for dissolution of partnership alleging that he agreed to enter into partnership with him to carry on certain business. *B* in his written statement admits that he agreed to enter into partnership as alleged but adds that "the terms of the arrangement between himself and the plaintiff were not definitely agreed upon as alleged." This is an *evasive* denial of the fact of partnership and is not permissible.<sup>1</sup> Similarly, where several circumstances are set out in the plaint as constituting the details of certain transactions, and the defendant, instead of denying the several circumstances specifically, denies them as a whole using almost the precise language of the allegations denied, the denial will, as a rule, be considered *evasive*.<sup>2</sup> Thus, if the plaintiff in an action for wages alleges that he has served the defendant as a hired servant from the 25th March 1908 to 24th June 1909, at Epson, in the County of Surrey, it would be a bad traverse for the defendant to plead "the plaintiff did not serve the defendant as a hired servant from the 25th March 1908 to 24th June 1909, at Epson, in the County of Surrey." He must deny that the plaintiff ever served him at all, or else state how long he admits the plaintiff did serve him. He must not traverse the place which is immaterial, or, if he does, he must add the words 'or at any other place' after the words 'the plaintiff did not serve him at Epson.'<sup>3</sup> But where the plaintiff, claiming title under one *S* alleged that she died on the 28th of September 1906, and the defendant pleaded that he did not admit that *S* died on the 28th of September 1906, and that the suit was barred by limitation, the denial is not *evasive*, inasmuch as there is only one fact and that has been stated to be not admitted.<sup>4</sup> Where a denial is evasive, leave to amend may be given under O. 6 R. 17, except where the defendant is found to have acted *mala fide*.<sup>5</sup>

**O. 8 R. 5**

**R. 5.** [New.] Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

**Order 8 Rule 4 — Note 1**

1. (1876) 3 Ch D 637 (640, 641): 45 L J Ch 406, *Thorp v. Holdsworth*.

(1929) AIR 1929 Sind 7 (8). (Plaint alleging certain shares as between partners—Defendant's pleading that he does not admit the allegation as to shares and not specifying the shares is evasive denial.)

2. (1924) AIR 1924 Mad 888 (889). (See the observations based on English cases cited in this de-

cision.)

(1929) AIR 1929 All 721 (728). (Pleading should be specific.)

(1928) AIR 1928 Cal 578 (578).

3. See Odger's Principles of Pleadings and Practice, 10th Edn. page 166.

4. (1924) AIR 1924 Mad 888 (889).

5. (1878) 10 Ch D 398 (396, 397), *Tlidesby v. Harper*. (On appeal from (1878) 7 Ch D 406.)



Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

**O. 8 R. 5**  
**Note 1**

[R. S. C., O. 19 R. 13.]

### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. Facts not denied specifically will be taken as admitted.</li> <li>3. "Except as against a person under disability."</li> </ol> | <ol style="list-style-type: none"> <li>4. Admission, if binds co-defendants.</li> <li>5. Court may require the facts so admitted to be proved.</li> <li>6. Rule does not apply where no written statement is filed.</li> </ol> |
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### Other Topics (miscellaneous)

Admissions in pleadings—Effect. See Note 2.  
Not admitted. See Note 1.

Onus of proof—Where plaint allegations not denied. See Note 2.

**1. Scope of the Rule.** — "The whole object of pleadings is to bring the parties to an issue, and the object of this Order is to prevent the issue being enlarged, which would prevent either party from knowing, when the cause came on for trial, what the real point to be decided was."<sup>1</sup> This rule states the effect of the failure to conform to Rule 3 *ante*, and must not be read in a sense inconsistent with Rule 3; therefore, a *general* denial cannot mean a denial by *implication*.<sup>2</sup> The rule permits the traversal of a statement in the plaint by saying that it is not admitted.<sup>3</sup> The word "specifically" qualifies also the words "or stated to be not admitted" and therefore, a refusal to admit must also be stated specifically.<sup>4</sup> The words "if not denied specifically . . . or stated to be not admitted" must be read to mean "if not denied specifically . . . or if *not* stated to be not admitted." In other words, every allegation of fact in the plaint will be deemed to be admitted, if in the written statement it is neither specifically denied nor specifically stated to be not admitted.<sup>5</sup>

The principle of the rule does not apply to allegations in the *written statement* and hence, it cannot be said that where there is no specific denial by the plaintiff of such allegations, he admits them.<sup>6</sup>

This rule does not apply where the allegation in the plaint as to the fact which is said to be admitted by the want of a specific denial under this rule is vague and inconclusive.<sup>7</sup>

In the undermentioned case,<sup>8</sup> it was held by Niamatullah, J., of the Allahabad High Court that the principle of this rule may be applied to a judgment-debtor on whom a notice of application for execution of a decree containing an allegation of fact is served.

#### Order 8 Rule 5 — Note 1

1. (1876) 8 Ch D 637 (639), *Thorp v. Holdsworth*. (Per Jessel, M. R.)
2. ('25) AIR 1925 Mad 950 (957, 958).
3. ('84) AIR 1984 Mad 579 (579). (AIR 1924 Mad 888, Followed.)
4. ('25) AIR 1925 Mad 950 (957).
5. ('27) AIR 1927 All 225 (226, 227).
- (1877) 85 L T 848 (849), *Hall v. L & N W Ry. Co.* (Per Grove, J.)
- (1879) 12 Ch D 758 (759), *Rutter v. Tregent*.
- ('88) AIR 1988 All 521 (522): 55 All 700. (Allegation stated to be not admitted amounts to denial.)

('88) AIR 1988 Mad 225 (226).

6. ('37) AIR 1937 Pat 428 (429).

[See however ('88) AIR 1988 Nag 163 (164) : ILR (1988) Nag 469. (Where an assertion is made in the written statement by a party to the effect that the parties are members of a family of Maharashtra Brahmins, and the opposite party does not traverse or challenge that assertion in his reply, it must be taken that the assertion is admitted as correct. It is too late to challenge that assertion at the stage of argument in second appeal.)]

7. ('37) AIR 1937 Sind 11 (12): 30 Sind L R 345.

8. ('86) AIR 1986 All 21 (32, 33): 58 All 813 (FB).

**O. 8 R. 5**  
**Note 2**

**2. Facts not denied specifically will be taken as admitted.** — The effect of this rule is to relieve the plaintiff from the obligation of *proving* such allegations in his plaint as are neither specifically denied nor stated to be not admitted in the written statement.<sup>1</sup> Thus, where in a suit for ejection the land from which it is sought to eject a tenant is alleged to be 'old waste' under the Madras Estates Land Act, 1908, and this is not traversed in the written statement, the defendant cannot afterwards plead that the land is not 'old waste.'<sup>2</sup> A plea that the defendant *does not admit any of the allegations* in the plaint except such as have been expressly admitted and that he puts the plaintiff to the proof of all allegations not so admitted is not a sufficient denial within the meaning of this rule; every allegation so denied will be deemed to have been admitted.<sup>3</sup> But a plea in a written statement that a particular allegation in the plaint is not admitted is a sufficient denial within the meaning of this rule so as to put the plaintiff to the proof thereof.<sup>4</sup> A denial of knowledge of a particular fact is not a denial of the fact and has not the effect of putting the fact in issue. It merely means that the defendant denies that he has any knowledge of the fact and a man can admit a fact of which he has no personal knowledge.<sup>5</sup> Thus, where a plaintiff suing as a curator of the estate of a deceased person stated in the plaint that he was authorised by the Court to sue, and the defendant stated in reply that those allegations were not known to him, it was held that it was not open to him to raise again the question of the plaintiff's authority to sue.<sup>6</sup> But where a landlord sues a tenant for recovery of possession on the ground that the defendant had forfeited his lease by denial of his title and this plea is not traversed by the defendant, such non-denial, though amounting to an admission of the denial of title, will not by itself work a forfeiture of which the plaintiff can take advantage in that suit, inasmuch as the forfeiture must have accrued *before* the suit was instituted.<sup>7</sup>

As to the effect of admissions made in the written statement, see the under-mentioned cases<sup>8</sup> and also Evidence Act, Sections 17 to 31 and Section 58.

**Note 2**

1. ('19) AIR 1919 Pat 162 (162).
- ('16) AIR 1916 Bom 108 (108, 104) : 41 Bom 89.
- ('11) 9 Ind Cas 470 (472) (Low Bur). (No reference to notice in the written statement — *Held*, defendant must be deemed to have admitted notice.)
- ('02) 26 Bom 785 (787, 788).
- ('20) AIR 1920 Lah 66 (66).
- ('23) AIR 1923 Nag 7 (7).
- ('72) 18 Suth W R 287 (287). (Averments upon which no issue is framed must be taken to be admitted.)
- ('38) 1938 Oudh W N 1080 (1084). (Suit for damages for breach of lease—Lease not registered — Defendant not specifically denying terms of lease alleged in plaint — *Held* suit could be decreed on such admission in written statement though lease was inadmissible in evidence.)
- ('38) AIR 1938 Bom 108 (108) : 1 L R (1938) Bom 102.
- [See also ('81) AIR 1981 Lah 208 (204). (Statements on certain point by plaintiff—Defendant agreeing—That much part of plaintiff's claim should be deemed to be admitted, no further proof being necessary.)
- (1863) 1 Bom H C R 85 (86).
- ('81) AIR 1981 Lah 478 (475) : 12 Lah 628. (Allegations not denied will be presumed to be correct.)]

2. ('19) AIR 1919 Mad 927 (927) : 42 Mad 315.
3. ('25) AIR 1925 Mad 950 (957). (1878) 7 Ch D 877 (877), Harris v. Gamble.
4. ('38) AIR 1938 All 521 (522) : 55 All 700.
- ('24) AIR 1924 Mad 888 (889).
- ('34) AIR 1934 Mad 579 (579).
5. ('34) AIR 1934 Rang 278 (280). (Defendant in a mortgage suit merely denied knowledge of the mortgage—It is not a specific denial of the mortgage and mortgage *held* to be admitted.)
6. ('31) AIR 1981 All 423 (424). ("Not known" does not mean "not admitted.")
7. ('23) AIR 1923 Lah 409 (410).
8. ('68) 9 Suth W R 290 (291). (Defendant's admission should be taken as a whole.)
- ('68) 9 Suth W R 180 (180). (A written statement is not a plea by way of avoidance and confession and the whole statement must be taken together.)
- ('68) 9 Suth W R 190 (191, 192) (F B). (Do).
- ('67) 7 Suth W R 29 (30). (Whole admission should be put in.)
- (1864) 1864 Suth W R (Gap) 805 (806). (Admission when relied upon as against the opponent must be taken as a whole — This rule does not apply to pleadings.)
- ('74) 22 Suth W R 220 (221). (Admission in a written statement—Whole of the written statement must be put in.)

**3. "Except as against a person under disability."** — The rule of admission by non-denial does not apply where the defendant is a person under disability such as a minor.<sup>1</sup> But this exception has nothing to do with *the conduct of the suit*. Thus, if at the time of the framing of issues or at the trial, the person representing a minor defendant admits certain allegations of fact, it cannot be said that this rule in any way affects such admissions.<sup>2</sup>

**4. Admission, if binds co-defendants.** — As to whether and when an admission made by a defendant in his written statement will bind co-defendants, see Sections 17 to 23 of the Evidence Act and the undermentioned cases.<sup>1</sup>

**5. Court may require the facts so admitted to be proved.** — In England the rule as to admission by non-denial is very stringent and a defendant, who omits to traverse in his defence any allegation of fact in the statement of claim, is not allowed to traverse that fact at the trial. In India, the general practice is not to construe the pleadings very strictly and on this principle, the defendant who had omitted to traverse in his written statement allegations made in the plaint, was allowed, in cases arising under the old Code, to traverse them at the hearing under special circumstances.<sup>1</sup> The proviso to this rule now makes it clear that the failure of the defendant to deny the allegations in the plaint does not necessarily amount to proof and that the Court can, in its discretion, require proof of such allegations.<sup>2</sup> The discretion should be

('24) AIR 1924 Nag 103 (103) : 20 Nag L R 7. (Admission should be taken as a whole — Principle— Qualified statement cannot be used apart from that qualification.)

('19) 18 Ind Cas 878 (880) (All). (Admissions in the written statement cannot be taken out of their context to be used against the defendant.)

('68) 10 Suth W R 132 (133). (Admission may shift burden of proof.)

('86) 9 Mad 307 (318) : 13 Ind App 32 (P C). (Admission made in a case is not binding on a person who is not party to that suit.)

('68) 1 Beng L R A O 183 (186). (A qualified statement cannot be used apart from the qualification against the person making it — But where a series of unqualified statements are made any one of them can be used.)

('81) 5 Bom 143 (152). (Suit for specific performance of an agreement—Defendant in his written statement admitting the terms of agreement and its execution—*Held*, plaintiff need not prove the execution of the agreement or put it in evidence.)

('90) 14 Bom 516 (519). (Admission of execution of deed by a defendant does not dispense with necessity of proving its validity by plaintiff.)

#### Note 3

1. ('28) AIR 1928 Mad 114 (115).

2. ('19) AIR 1919 Mad 698 (698).

('36) AIR 1936 Pat 428 (429). (Admission by father — Minor represented by pleader not denying it— Minor is bound by admission.)

#### Note 4

1. ('75) 23 Suth W R 214 (219) : 2 Ind App 113 (P C). (Will not bind co-defendants.)

('28) A I R 1928 Lah 769 (770, 771). (Admission by one defendant is no evidence against the co-defendants.)

('85) 7 All 353 (359). (Defendant by his admission cannot bind the shares of the co-defendants.)

('89) 16 Cal 627 (635) : 16 Ind App 96 (P C). (Do.)

('84) 6 All 395 (397). (Do.)

('81) 9 Cal L Rep 359 (360). (Do.)

('97) 2 Cal W N 166 (167, 168) (Do). (Admission by one co-tenant as to who is the landlord is not binding on the others.)

('85) 11 Cal 588 (590, 591). (But co-contractors are bound if admission is made with reference to the transaction in issue.)

#### Note 5

1. ('85) 11 Cal 111 (117, 118) : 11 Ind App 186 (P C). (Case under S. 8 of Regulation 17 of 1806.)

(1862) 9 Moo Ind App 287 (301) (P C). (The strict rule of pleading that allegations not traversed must be taken to be admitted cannot be applied in India.)

('07) 34 Cal 57 (64). (Do.)

('84) 6 All 406 (413, 414).

('70) 7 Bom H C R A C 136 (137). (Mere fact that an allegation in the plaint is not traversed by the defendant does not relieve the plaintiff of the onus of proving his case.)

('79) 21 Suth W R 59 (60). (Pleadings in Indian Courts should not be construed with the same strictness as they are done in English Courts.)

('72) 17 Suth W R 171 (172). (Mere fact of non-traverse of the plaintiff's allegation of heirship was *held* not to amount to an admission of title.)

('70) 14 Suth W R 55 (57). (The procedure in this country is not such that if a defendant fails to dispute or contest a point he thereby admits it.)

2. ('14) AIR 1914 Cal 842 (842, 843). (Appellate Court can decide point in issue in spite of failure of denial of the specific point.)

**O. 8 R. 5**  
**Notes 5-6**

exercised where the Court suspects that the admission is made collusively, or to avoid a rule of public policy,<sup>3</sup> or where the defendant's failure to deny the allegation is due to ambiguous and unsatisfactory assertions in the plaint,<sup>4</sup> or where the defendant is taken by surprise or misunderstands the plaint.<sup>5</sup> The discretion should usually be exercised by the Court of first instance.<sup>6</sup>

**6. Rule does not apply where no written statement is filed.** — It is clear from the wording of this rule that it is not intended to apply to a case where the defendant *has not put in a written statement*. A Court is, therefore, not justified in passing a decree on no evidence where the defendant does not file a written statement.<sup>1</sup>

**O. 8 R. 6**

**R. 6.** [S. 111.] (1) Where in a suit for the recovery of money<sup>3</sup> the defendant claims to set-off against the plaintiff's demand any ascertained sum of money<sup>4</sup> legally recoverable<sup>6</sup> by him from the plaintiff, not

Particulars of set-off to be given in written statement.

exceeding the pecuniary limits of the jurisdiction of the Court,<sup>8</sup> and both parties fill the same character<sup>9</sup> as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader<sup>16</sup> in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

(24) AIR 1924 All 180 (182): 46 All 55. (Words "not admitted" at least amount to a denial by implication.)

(24) AIR 1924 Lah 744 (744). (Fact admitted by defendants' mukhtear may be required to be proved.)

(19) AIR 1919 Mad 469 (470). (Admission of execution of document will not cure the defect from want of proper attestation.)

(18) AIR 1918 Cal 402 (402, 403). (Pleadings in mofussil are not to be strictly construed.)

(28) AIR 1928 Nag 83 (84). (Ex parte case—Court requiring proof under this rule must state points to be proved in the form of issues.)

(28) AIR 1928 Nag 165 (166). (Ex parte case—Points to be proved must be stated in form of issues.)

(15) AIR 1915 Mad 770 (772, 773).

(18) AIR 1918 Cal 178 (179). (As the standard of pleadings in this country is not very high they

ought not to be strictly construed.)

3. ('20) AIR 1920 Mad 588 (589).

4. ('24) AIR 1924 All 150 (152): 45 All 571.

5. ('23) AIR 1923 Mad 114 (115).

6. ('20) AIR 1920 Mad 588 (589).

**Note 6**

1. ('17) AIR 1917 Cal 269 (272, 274): 43 Cal 1001.

(28) AIR 1928 Lah 769 (771).

(80) AIR 1930 Pat 293 (296). (In such a case defendant is not debarred from giving evidence traversing allegation made in plaint.)

(25) AIR 1925 Nag 380 (381). (Does not apply to oral pleading.)

(85) AIR 1935 Pat 306 (331): 14 Pat 70. (Omission to file written statement does not amount to admission of facts stated in plaint.)

[But see ('86) AIR 1936 Bom 285 (285, 286): 60 Bom 788. (Rule applies even to cases where no written statement is filed.)]

*Illustrations*

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

[1877, S. 111; 1859, S. 121; R. S. C., O. 19 R. 3., See O. 20 Rule 19.]

**Local Amendment****PATNA**

Add the following words :

"and the provisions of Order 7, Rules 14 to 18 shall, *mutatis mutandis*, apply to a defendant claiming set-off as if he were a plaintiff."

*Synopsis*

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and applicability of the Rule.</li> <li>3. Suit must be one for the recovery of money.</li> <li>4. "Any ascertained sum of money."</li> <li>5. Equitable set-off in cases of unascertained sums of money.</li> <li>6. "Legally recoverable from plaintiff."</li> <li>7. Separate debt not to be set-off against joint debt.</li> <li>8. "Not exceeding the limits of the pecuniary jurisdiction of the Court."</li> </ol> | <ol style="list-style-type: none"> <li>9. Both parties must fill the same character.</li> <li>10. Winding-up proceedings.</li> <li>11. Insolvency proceedings.</li> <li>12. Proceedings under the Agra Tenancy Act and other special Acts.</li> <li>13. Effect of not claiming set-off.</li> <li>14. Court-fee.</li> <li>15. Counter-claim.</li> <li>16. Solicitor's lien for costs.</li> <li>17. Appeal.</li> <li>18. Limitation.</li> </ol> |
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*Other Topics (miscellaneous)*

Claims between principal and agent. See Note 2.  
 Defendant entitled to a decree on set-off admitted in plaint. See Note 2.  
 Omission to claim set-off, whether *res judicata*. See Note 13.

Rent—Could it be set off. See Note 12.  
 Set-off against an assignee. See Note 6.  
 Shall have the same effect as a plaint. See Note 2.  
 Unliquidated damages — Whether can be set off. See Notes 4 and 5.

**1. Legislative changes.** — Sub-clause (3) of this rule is new.

**2. Scope and applicability of the Rule.** — The doctrine of set-off may be defined as "the extinction of debts of which two persons are reciprocally debtors to one another, by the credits of which they are reciprocally creditors to one another."<sup>1</sup>

**Order 8 Rule 6 — Note 2**

1. ('84) 6 All 351 (355). (Reciprocal acquittal of

debts between two persons.)

('18) AIR 1918 Mad 995 (997) : 40 Mad 1004.

**O. 8 R. 6**  
**Note 2**

A plea of *set-off* must be distinguished from a plea of *payment*. A payment refers to a satisfaction or extinguishment of a debt effected *prior to the raising of the defence* of payment, while a plea of set-off *prays for a satisfaction or extinguishment thereof commencing in the future after the date of the plea.*<sup>2</sup> In order to enable a defendant to claim a set-off, the following conditions must exist<sup>3</sup> —

- (1) The suit must be for *recovery of money*.
- (2) The defendant's claim must be for an *ascertained* sum of money.
- (3) It must be *legally recoverable*.
- (4) Both the parties must fill the *same character* as they fill in the plaintiff's suit.
- (5) The sum claimed by way of set-off *should not exceed the pecuniary limits* of the jurisdiction of the Court.

As Illustration (d) to the rule shows, a defendant can claim as set-off under this rule a sum for which he has already obtained a decree against the plaintiff.<sup>4</sup>

Order 20 Rule 19, clause (1) shows that a decree can be passed in favour of a defendant pleading a set-off; therefore, the defendant is in the position of a plaintiff as regards a set-off pleaded by him in respect of the balance claimed by him.<sup>5</sup> No Court can entertain a plea of set-off if it has no jurisdiction to take cognizance of a suit, if one is brought for the recovery of the money sought to be set-off.<sup>6</sup> But it is not necessary that the Court should have territorial jurisdiction over the subject-matter of the claim of set-off, if a separate suit is brought in respect of it.<sup>7</sup>

Where the defendant does not specifically plead a set-off in his written statement, the Court may decline to allow the same to be set up subsequently.<sup>8</sup> Similarly, where no issues are framed on the plea and no application is made by the

2. ('25) AIR 1925 Rang 22 (25) : 2 Rang 349.

('10) 5 Ind Cas 67 (68) (Cal). (The suit was for rent due for 1311, 1312 & 1313. The defendant pleaded that the rent due from the plaintiffs to them for 1309 & 1310 should be set off — *Held* that the matter was not of 'set-off' in the technical sense but of account and set-off in the general sense.)

('79) 4 Cal L Rep 296 (297). (Suit for arrears of rent — That Collector who was in charge of the land on behalf of the defendant had paid the rent is a plea of payment, not of set-off.)

[See also ('27) AIR 1927 Nag 120 (120). (Plea of satisfaction.)]

('89) 16 Cal 711 (714). (Right of set-off to be allowed even in cases of cross demands arising out of the same transaction.)]

3. ('31) AIR 1931 Nag 12 (13). (Suit on negotiable instrument — Set-off can be claimed.)

('20) AIR 1920 Mad 819 (820, 821): 42 Mad 873. (Suit on contract — Equitable set-off barred at the date of the suit cannot be claimed.)

('92) 15 Mad 29 (33).

('32) AIR 1932 Bom 617 (618). (Difference between set-off and counter-claim pointed out.)

('86) 1886 All W N 172 (172).

('36) AIR 1936 Pesh 57 (60, 61). (Essentials of set-off indicated.)

[See also ('39) AIR 1939 Pat 142 (144). (The claim must be ascertained and legally recoverable.)]

4. ('39) AIR 1939 Bom 386 (388).

5. ('20) AIR 1920 Mad 819 (820): 42 Mad 873.

('34) AIR 1934 All 543 (545): 56 All 912. (Decree may be granted to defendant though plaintiff's suit is dismissed.)

('92) 15 Mad 29 (34).

('70) 5 Beng L R 639 (642).

('69) 6 Bom H O R A C J 151 (152). (Defendant denying plaintiff's claim can plead set-off.)

('09) 9 Cal W N 748 (749). (Set-off admitted in plaint — Defendant entitled to decree though plaintiff's suit fails.)

6. ('93) 15 All 404 (405). (The Court of Revenue cannot entertain a set-off in a case in which the help of the Civil Court is required.)

('32) AIR 1932 Bom 617 (618). (Suit on subject-matter of set-off not entertainable by Court trying suit on grounds of jurisdiction — Set-off can be entertained.)

('99) 1899 All W N 143 (145, 147).

('12) 15 Ind Cas 526 (528) (Oudh).

7. ('82) AIR 1932 Bom 617 (618).

8. ('27) AIR 1927 Lah 431 (432).

('15) AIR 1915 Mad 242 (243). (No plea of set-off can be raised without filing a written statement.)

('70) 14 Suth W R 478 (478). (Defendant seeking to claim set-off is bound to tender a written statement.)

[See also ('97-'01) 1897-01 Upp Bur Rul 244.]

[See however ('10) 6 Ind Cas 162 (162, 163): 32 All 525. (But in a suit by a principal against an agent for accounts, it is unnecessary for the defendant to plead a set-off.)]

defendant therefor, it is not open to him to raise it in appeal.<sup>9</sup> Nor can a defendant who has failed to claim a set-off before decree in a suit, claim it in execution proceedings.<sup>10</sup> Where, however, he states in the written statement that he will file a separate suit in respect of his claim, he is not precluded from proving a set-off afterwards on getting the written statement amended.<sup>11</sup>

Where the defendant sets up a plea of set-off falling under this rule, the Court has no option to refuse to adjudicate on it.<sup>12</sup> But a plaintiff cannot compel a defendant to plead a set-off. Thus, where a plaintiff in a suit deducted a sum of money due from him to the defendant with a view to bring the suit within the jurisdiction of the Small Cause Court, it was held that the procedure was illegal and that the plaintiff could not enforce a set-off on the defendant.<sup>13</sup>

**3. Suit must be one for the recovery of money.** — Under the Code of 1859, it was necessary that the suit should have been for a *debt*. A set-off could not, therefore be pleaded in a suit for *mesne profits*, such suit not being for the recovery of a debt.<sup>1</sup> Under the present rule it is sufficient that the suit is one for the *recovery of money*. The Illustrations to this rule show that no matter what the title may be, no matter whether such title arises *ex delicto* or *ex contractu*, so long as the *relief sought is to recover money*, it is a suit for money, and a set-off can be pleaded therein under this rule.<sup>2</sup> A suit on a negotiable instrument is a suit for money.<sup>3</sup> But a suit merely for dissolution of a partnership or for an account is not a suit for money,<sup>4</sup> though, if there is also a prayer for the payment of such balance as might be found due to the plaintiff, the suit would be one for the payment of money.<sup>5</sup> The High Court of Rangoon has held that a suit on a mortgage for payment of money and in default thereof for the sale of the mortgaged property is a suit for the recovery of money within the meaning of this rule.<sup>6</sup> The High Court of Calcutta has, however, held that a suit to enforce a mortgage under which the right to a personal decree is barred is not a suit for money and no set-off can be pleaded therein under this rule.<sup>7</sup>

**4. "Any ascertained sum of money."** — See Illustrations (c), (d) and (e) above. An "ascertained sum of money" means a sum of money of which the amount is fixed and known; it does not necessarily mean a sum *admitted* by the other side or *decreed* by Court; the words are used in contradistinction to unliquidated damages.<sup>1</sup> The mere fact that an arithmetical calculation is necessary to arrive at the total sum

9. ('86) 18 Cal 124 (185) : 19 Ind App 48 (PC).

10. ('24) AIR 1924 Oudh 434 (435) : 27 Oudh Cas 248.

11. ('25) AIR 1925 Mad 228 (229).

12. ('20) AIR 1920 Mad 142 (143).

13. ('94) 21 Cal 419 (426, 427).

('25) AIR 1925 Sind 819 (820).

#### Note 3

1. ('66) 5 Suth W R 160 (160).

2. ('88) 10 All 587 (598, 599). (Suit for dissolution of partnership with a prayer for such sum as may be found due on a taking of accounts.)

3. ('81) AIR 1981 Nag 12 (13).

See also illustration (d) to the Rule.

4. ('86) 18 Cal 124 (185) : 19 Ind App 48 (P C). (Suit for account only is not one for money.)

('88) 10 All 587 (598).

5. ('88) 10 All 587 (598).

6. ('88) AIR 1988 Rang 13 (14). (8 Cal W N 174 distinguished as a case where there was no personal remedy.)

7. ('04) 8 Cal W N 174 (177). (Claim also cannot be regarded as one for equitable set-off as it does not arise out of the same transaction.)

#### Note 4

1. ('10) 5 Ind Cas 67 (68) (Cal).

('39) AIR 1939 Rang 13 (14). (Plea of set-off in respect of a sum not admitted by plaintiff is yet a claim for an ascertained sum of money.)

('24) AIR 1924 All 872 (873) : 46 All 922.

('81) AIR 1981 Nag 12 (13). ("Ascertained sum" excludes such items as unliquidated damages and mesne profits.)

('16) AIR 1916 Pat 167 (169). ("Ascertained sum" means amount which is beyond challenge and beyond dispute, concluded and conclusive.)

('10) 5 Ind Cas 211 (212) (All). (A plea of set-off can succeed even where no money is found due to plaintiff.)

(1880) 5 Q B D (N. S.) 569 (575), *Stooke v. Taylor*. (For difference between set-off and counter-claim, see the observations of Cockburn, C. J.)



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**Notes 4-5**

cannot render such total an unascertained sum of money.<sup>3</sup> Thus, where in a suit by a landlord against his tenant for rent, the tenant pleaded that he was entitled to set off a commission of three per cent. on the amount of the collection made by him on behalf of the landlord, it was held that the set-off was for an ascertained sum of money.<sup>3</sup> But where the set-off is in respect of a claim for damages which are not ascertained,<sup>4</sup> or where the amount can be ascertained only on taking accounts<sup>5</sup> or by determining the *quantum* of the share due to the defendant,<sup>6</sup> or where the claim is for interest on a sum due to the defendant fixed by him at an arbitrary rate,<sup>7</sup> this rule will not apply. Unascertained sums may, however, be set off by the *consent of parties* when they compromise the suit.<sup>8</sup>

**5. Equitable set-off in cases of unascertained sums of money.** — The right to set-off dealt with by this rule is called a *legal* set-off. But the rule does not take away from the parties any right to set-off which they would have had *independently* of the Code.<sup>1</sup> Thus, in cases of mutual debits and credits, and in cases where cross demands arise out of the same transaction, or, are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant driven to a cross-suit, Courts of Equity in England have allowed a plea of set-off even though the amount may be *unascertained*. This set-off is known as an *equitable* set-off and such a right is recognised in this country also apart from the provisions of this rule.<sup>2</sup> The provisions of O. 20 R. 19, sub-rule (3) also show that this

*See also the following cases for examples:*  
(‘17) AIR 1917 Lah 261 (264); 1917 Pun Re No. 62. (Damages assessed by arbitrators.)  
(‘88) 1888 All W N 5(5). (Suit for salary—Set-off of a definite amount received on behalf of defendant.)  
(‘17) AIR 1917 Pat 259 (260). (Several orders awarding costs made in the same proceeding.)  
(‘03) 80 Cal 1066 (1069). (Costs awarded by Court in a previous suit between the same parties.)  
(‘07) 29 All 649 (650, 651). (Pleader’s fees allowed to be set off.)  
(‘08) 25 All 266 (270). (Hindu widow in possession of her husband’s estate is entitled to set off her maintenance and the funeral expenses of her late husband against the mesne profits decreed in favour of the adopted son.)  
(‘71) 16 Suth W R 224 (225). (Liquidated sum due on the bond can be set off against sum due for rent.)  
(‘69) 2 Beng L R A C 84 (85). (Case of assignee.)  
[See also (‘38) AIR 1938 Pat 484 (485). (A claim by the mortgagor, in the mortgagee’s suit on the mortgage, to have some sort of abatement of the consideration of the mortgage, the mortgagee not seeking to set aside the contract of mortgage, is in the nature of an unliquidated claim.)  
2. (‘04) 2 Low Bur Rul 186 (187, 189) (FB). (“Ascertained” means ascertained at the time of pleading and not subsequently.)  
3. (‘16) AIR 1916 Pat 84 (84).  
4. (‘17) AIR 1917 All 176 (176) : 39 All 392.  
(‘29) AIR 1929 All 52 (52).  
(‘97) 21 Bom 126 (185).  
(‘74) 22 Suth W R 1 (2).  
(‘04) 2 Low Bur Rul 186 (190, 191) (FB).  
(‘80) 2 All 252 (253). (Mortgagor cannot set off the compensation due to him for the waste com-

mitted by the mortgagee against latter’s claim for mortgage money.)  
(‘68) 3 Agra H C R 48 (44). (Unascertained damages for breach of contract.)  
(‘36) AIR 1936 All 522 (528).  
5. (‘31) AIR 1931 Cal 23 (24) : 57 Cal 855.  
(‘19) AIR 1919 Sind 88 (89) : 12 Sind L R 70. See Illus. (d) to the rule.  
6. (‘17) AIR 1917 Pat 583 (585) : 2 Pat L Jour 451. (Defendant pleader claiming to set-off a sum of his fees to which he was entitled along with other pleaders—Claim not allowed.)  
7. (‘12) 14 Ind Cas 463 (463) (Lah).  
8. (‘71) 17 Suth W R 113 (115). (*Obiter*.)

**Note 5**

1. (‘07) 34 Cal 97 (99). (*Obiter*.)  
(‘83) 9 Cal 914 (918).  
(‘10) 7 Ind Cas 1006 (1006) : 1910 Pun Re No. 77. *See also cases in foot-note (2) below.*  
2. (1864) 2 Mad H C R 296 (308).  
(‘25) AIR 1925 Mad 890 (891). (Equitable set-off recognised in Indian Courts.)  
(‘34) AIR 1934 All 115 (117). (Timbers supplied by tenant — Agreement to deduct costs for rent brings the matter within same transaction in suit for arrears of rent.)  
(‘30) AIR 1930 All 875 (876). (Equitable set-off—No court-fee necessary.)  
(‘88) AIR 1938 Sind 247 (249). (In a suit for accounts defendant is entitled to say that on taking accounts he would be entitled to something and Court can pass a decree in his favour.)  
(‘05) 27 All 145 (148).  
(‘93) 15 All 9 (10).  
(‘97) 21 Bom 126 (185, 186). (Question whether equitable set-off should be granted depends upon the facts of each case.)



rule is not exhaustive. The distinction, however, between a legal set-off and an equitable set off is, that while in the former case the Court is *bound* to entertain and adjudicate upon the plea when raised,<sup>3</sup> the defence of equitable set-off cannot be claimed as a *matter of right*,<sup>4</sup> but the Court has a discretion to adjudicate upon it in the same suit or to order it to be dealt with in a separate suit.<sup>5</sup> Thus, where a Court thinks that the investigation into the claim of equitable set-off will cause great delay, it may refuse to allow it<sup>6</sup> or may order the enquiry to proceed on such terms as it thinks fit.<sup>7</sup>

It is not the law that a claim to set off a definite sum of money can only be put forward under O. 8 R. 6. Nor is it the case that an equitable set-off can be claimed only where the claim is to an *unascertained* amount. An equitable set-off can be claimed also where the claim of the defendant is to an *ascertained* sum.<sup>8</sup>

It is essential for a valid claim to an equitable set-off that the cross demands should have arisen out of the *same transaction*. A plea of equitable set-off will not be available where it relates to a different transaction.<sup>9</sup> Thus, where a plaintiff who promised to supply seven hundred tons of coal, supplied only 469 tons and sued the defendant for the price thereof, the latter can claim set-off in respect of damages for the

('80) 4 Bom 407 (413). (Demands connected with same transaction — Amount payable by plaintiff was capable of being determined immediately—Set-off allowed.)

('85) 7 All 284 (286, 287).

('75) 7 N W P H C R 157 (163, 164). (On facts set-off was not allowed.)

('23) AIR 1928 Bom 118 (118).

('18) 21 Ind Cas 716 (718) (Cal). (A time-barred debt can be claimed by way of equitable set-off.)

('89) 16 Cal 711 (714).

('85) 11 Cal 557 (560, 561).

('31) AIR 1931 Cal 358 (359).

('18) 19 Ind Cas 901 (908) (Cal). (Principal and agent.)

('05) 32 Cal 576 (580). (Law of equitable set-off applies where the cross-claims, though not arising out of the same transaction, are closely connected together.)

('05) 9 Cal W N 178 (189, 190).

('98) 20 Cal 527 (531).

('69) 4 Mad H O R 120 (126, 127) (See as to when set-off can be claimed.)

('85) 1885 Pun Re No. 47, p. 89.

('18) 19 Ind Cas 390 (390) : 6 Sind L R 138.

('14) AIR 1914 P O 153 (154, 155) : 17 Oudh Cas 38 (P C).

('14) AIR 1914 Lah 363 (365) : 1914 Pun Re No. 82. (1863) 1 Mad H C R 396 (397). (High Court would deal with questions of set-off on the principles of English Courts of equity or of the Roman Law and would give no weight to objections based on the language of the statutes of set-off.)

('94) 18 Bom 717 (720).

('76) 1876 Pun Re No. 25, p. 40.

('36) AIR 1936 All 522 (523). (Suit for arrears of rent on basis of lease — Unascertained claim for expenses incurred under the lease though inadmissible under O. 8 R. 6 can be claimed by way of set-off.)

('36) AIR 1936 Cal 277 (278).

('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.

[See ('38) AIR 1938 All 522 (523). (In this case,

A sued B for the price of a building constructed by him for the latter.—The latter pleaded that as the plaintiff had stored the materials on his land and had dug out earth from his land, he was entitled to a certain sum by way of set-off.—It was held that this was not a claim for an equitable set-off.—It is doubtful if the view is correct inasmuch as although the sum claimed by way of set-off is specified, it is more in the nature of an estimated amount.)]

[See also ('14) AIR 1914 Sind 137 (138) : 8 Sind L R 123. (Suit for accounts and to recover money due on a dissolved partnership—Defendant's claim for decree on account is not a counter-claim.)]

[But see ('68) 10 Suth W R 295 (295).]

3. ('20) AIR 1920 Mad 142 (143).

4. ('97) 21 Bom 126 (135).

5. See cases in foot-notes (6) and (7).

6. ('97) 21 Bom 126 (136).

7. ('18) 21 Ind Cas 716 (718, 719) (Cal).

8. ('36) 40 Cal W N 751 (752). (AIR 1915 Cal 649, Foll.)

[But see ('36) AIR 1936 Nag 290 (290) : I L R (1937) Nag 481.]

9. ('04) 8 Cal W N 174 (177).

('30) AIR 1930 Lah 808 (809).

('16) AIR 1916 Pat 167 (169).

('17) AIR 1917 Pat 533 (535) : 2 Pat L Jour 451.

('26) AIR 1926 Oudh 301 (302, 303).

('26) AIR 1926 Nag 155 (156). (Suit for contribution of rent—Co-sharer defendant cannot claim by way of set-off an amount as share of profits realized by plaintiff.)

('28) AIR 1928 Bom 24 (25) : 47 Bom 182.

('74) 22 Suth W R 15 (16, 17). (Circumstances under which equitable set-off will be allowed considered.)

('38) AIR 1938 Pat 484 (485). (A purchasing property from B and again mortgaging it to him—In suit by third party, it was established that B had only eight annas interest in property sold to A—Suit by B against A on his mortgage—A claiming reduction of his liability on ground that he had purchased only half of the property

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**Notes 5-6**

breach of contract caused by the failure to supply the full stock promised.<sup>10</sup> Similarly, in a suit for the recovery of the principal and interest due on a mortgage bond, the defendant can plead an equitable set-off in respect of the loss occasioned by the plaintiff's failure to make repairs while in possession of the mortgaged properties.<sup>11</sup>

Similarly, where a washerman who lost some of the articles given to him for washing, sued his employer for wages, it was held that the latter could equitably set off the price of the articles so lost.<sup>12</sup> In all the above cases it will be seen that the cross demand of the defendant arose out of the same transaction as that on which the plaintiff's claim was based. But where the plaintiff sues a limited company for recovery of dividend payable to him as a shareholder, the company is not entitled to set off damages for breach of a contract by him to deliver cotton.<sup>13</sup> The reason is that the latter claim arises out of a *different transaction* altogether from that on which the plaintiff's claim is based.

**6. "Legally recoverable from plaintiff."** — Where a *legal set-off* is claimed, it is necessary that the amount set off must be 'legally recoverable' from the plaintiff. The words 'legally recoverable' have no reference to the ability of the debtor to pay the demand in full; a sum is legally recoverable, though, in the result, the creditor must be satisfied with a dividend.<sup>1</sup> A sum cannot be said to be 'legally recoverable' where the plaintiff is not bound by law to pay it,<sup>2</sup> or where he is not liable to the defendant in respect of that debt,<sup>3</sup> or where the claim is barred by *res judicata*,<sup>4</sup> or is based upon a decree incapable of execution<sup>5</sup> or upon a document not receivable in evidence.<sup>6</sup> A *barred debt* is not legally recoverable and, therefore, in order to enable a defendant to claim a set-off under this rule the sum due to him must not have been barred by the law of limitation *on the date of the suit*.<sup>7</sup> The right to plead this defence arises when the action is brought, so that it does not become barred subsequently by

—Sale and mortgage being separate transactions *B's* claim *held* could not be reduced, and being unliquidated, *held* was not allowable under O. 8 R. 6, C. P. C.)

('86) 40 Cal W N 751 (752). (A claim for equitable set-off will not arise simply because there are cross-demands; there must be some connexion between them which will make it inequitable to drive the defendant to a separate suit. The two claims must arise out of the same transaction, and there must be knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it.)

[See also ('94) 21 Cal 419 (423).]

10. ('10) 6 Ind Cas 924 (925) : 87 Cal 334.

('98) 15 All 9 (11).

11. ('92) 15 Mad 290 (291).

12. ('10) 7 Ind Cas 1006 (1006) : 1910 Pun Ro No. 77.

13. ('28) AIR 1928 Bom 24 (25, 26) : 47 Bom 182.

**Note 6**

1. ('06) 80 Bom 178 (193, 194).

2. ('92) 15 Mad 29 (84).

('79) 4 Cal 576 (581).

('82) 11 Cal L Rep 140 (142).

('66) 6 Suth W R (Civ Ref) 26 (27). (Case of rent — Suit for house rent — Tenant repairing the house without permission from the lessor cannot set off the expenses of repair.)

('74) 22 Suth W R 1 (2). (Suit for rent—Tenant cannot set-off money in deposit with plaintiff unless at the time of suit the deposit had become payable.)

3. ('26) AIR 1926 Oudh 301 (302, 303). (Suit by vendee for return of purchase money on the ground of dispossession by vendor's relatives — Set-off of mesne profits cannot be allowed.)

('26) AIR 1926 Sind 225 (228) : 21 Sind L R 385.

('06) 11 Cal W N 215 (216). (Suit by benamidar against A—Costs awarded to A—Subsequent suit by real owner against A—Latter cannot set off costs.)

4. ('71) 15 Suth W R 252 (252).

[See also ('86) 8 All 396 (401). (Claim for set-off was not barred by *res judicata*—Claim was allowed.)]

5. ('71) 16 Suth W R 308 (309, 310).

6. ('70) 13 Suth W R 307 (309).

7. ('21) AIR 1921 Cal 67 (68) : 48 Cal 817.

('21) AIR 1921 Mad 688 (688). (Time-barred debt cannot be claimed by way of set-off.)

('19) AIR 1919 Cal 916 (917). (Debt barred at the time of filing the written statement cannot be set off.)

('18) AIR 1918 Mad 258 (262).

('85) 8 Mad 381 (388). (Only so much of the claim as is not barred will be allowed to be set off.)

('80) 122 Ind Cas 490 (490) (Lah.).

('98) 1898 Pun Ro No. 53, page 178.

the statute of limitations.<sup>8</sup> A claim which is barred by limitation according to the law of the place where the suit is instituted, but is subsisting according to the *lex loci contractus* is a legally recoverable claim.<sup>9</sup>

Where *A* transfers to *C* a debt due to him by *B*, *C* takes it subject to the liabilities and equities to which *A* is subject as against *B*, under the provisions of Section 132 of the Transfer of Property Act, 1882. If *B* therefore has a legally recoverable claim against *A* in respect of another debt, he can enforce the same as against *C* also, by way of set-off.<sup>10</sup>

In cases of *equitable set-off*, can a barred debt be pleaded by way of set-off? It has been held that where there is a fiduciary relationship, as of trustee and *cestui que trust* or where there is accountability as between plaintiff and defendant, even barred debts can be set off.<sup>11</sup> But in the undermentioned case<sup>12</sup> the High Court of Madras refused to extend this principle to a case of lessor and lessee and to allow an equitable set-off in answer to a suit *for rent*, on the ground that equity cannot act contrary to the statute of limitations or evade its operation. See also the undermentioned cases.<sup>13</sup>

Where on a plea of set-off it is found that money is due to the defendant in excess of that due to the plaintiff, and the defendant's claim is barred on the date of the written statement but not on the date of the plaint, the question arises whether the Court can pass a decree for the balance in favour of the defendant. The High Courts of Madras,<sup>14</sup> Bombay,<sup>15</sup> Allahabad,<sup>16</sup> and Calcutta<sup>17</sup> and the Judicial Commissioner's

(‘36) AIR 1936 Pesh 57 (61). (Set-off based on time-barred promissory note.)

(‘39) AIR 1939 Pat 142 (143).

(‘39) AIR 1939 Pat 567 (567) : 181 Ind Cas 1006 (1006). (The fact that the transactions which were the subject-matter of the claim and of the set-off were with regard to the same estate is immaterial.)

8. (1850) 15 Q B 1046, Walker v. Clements.

(‘21) AIR 1921 Cal 67 (68) : 48 Cal 817.

9. (‘18) 85 All 288 (289, 240).

10. (‘12) 16 Ind Cas 686 (687) (Mad). (Assignee by operation of law.)

(‘07) 30 Mad 295 (298).

(‘07) 17 Mad L Jour 481 (482). (Suit by receiver of estate of *A* against *B*—*B* having claim against *A* may set off against receiver also.)

(‘69) 2 Beng L R 84 (85).

(‘03) 16 C P L R 118 (120, 121). (Rental claim—Tenants allowed to set off amounts under decrees obtained against assignee of landlord.)

(‘82) 5 Mad 108 (112). (The endorsee of an overdue note is not liable to a set-off due by the payee to the maker.)

[See (‘36) AIR 1936 Nag 217 (218). (Right to recover arrears of profits assigned in conveyance of village share is immovable property and not actionable claim—Claim of set-off under S. 132, T. P. Act cannot be allowed.)]

[See however (‘17) AIR 1917 Mad 928 (930) : 40 Mad 688. (Suit by assignee of mortgage—Debt due against assignor under a judgment of later date not allowed to be set off.)]

11. (‘16) AIR 1916 Mad 720 (725, 726) : 39 Mad 365. (Trustee and *cestui que trust*.)

(‘05) 32 Cal 576 (580). (Between mortgagor and mortgagee.)

(‘13) 21 Ind Cas 701 (701, 702) (Mad). (Do.)

(‘80) 5 Cal 338 (335). (Do.)

(‘93) 6 C P L R 22 (23). (Do.)

(‘26) AIR 1926 Lah 633 (634). (Do.)

(‘26) AIR 1926 Pat 77 (79). (Do.)

(‘13) 21 Ind Cas 716 (718) (Cal).

(‘07) 12 Cal W N 60 (62).

(‘10) 5 Ind Cas 67 (68) (Cal).

[See (‘17) AIR 1917 Mad 258 (259) : 39 Mad 939.]

[See also (‘36) 164 Ind Cas 590 (592). (Suit for partition of joint family property among Hindus governed by Dayabhaga law—Right of defendant to debts due out of estate—Equitable set-off can be allowed even in case of a time-barred debt.)]

12. (‘17) AIR 1917 Mad 258 (259) : 39 Mad 939.

13. (‘20) AIR 1920 Mad 819 (821, 822) : 42 Mad 873. (Where defendant could sue independently if the claim were within time—Such claim if barred by limitation cannot be pleaded as set-off.)

(‘23) AIR 1923 Bom 113 (118). (Equitable set-off not allowed if claim barred on the date of suit.)

(‘36) AIR 1936 Nag 290 (290) : ILR (1937) Nag 481. (Ascertained sum barred by limitation—No equitable set-off can be claimed.)

14. (‘20) AIR 1920 Mad 819 (820, 821, 822) : 42 Mad 873.

15. (‘23) AIR 1923 Bom 113 (118). (In the case of a counter-claim it is enough if it is proved to have been barred when it was pleaded.)

16. (‘34) AIR 1934 All 427 (428, 430) : 56 All 821. [But see (‘85) 7 All 284 (287, 288).]

17. (‘36) AIR 1936 Cal 277 (278, 279). (In a case of defensive set-off, the set-off claimed must be recoverable at the date of the plaintiff's suit, while in the case of a counter-claim under which the defendant claims a decree for the surplus

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Court of Nagpur<sup>18</sup> have held that the plea is a weapon of defence, up to the amount of the plaintiff's claim but that it is one of attack so far as the amount is in *excess* of the claim and that, therefore, limitation in regard to its recovery must be determined with reference to the date of the *written statement*.

**7. Separate debt not to be set-off against joint debt.** — Illustrations (f) and (g) to this rule adopt the general principle of law that a joint debt and a separate debt cannot be set off against each other.<sup>1</sup> Where the debt sought to be set off is due jointly to the defendant and another who is not a party to the suit, it cannot be pleaded by way of set-off; for, the defendant could not have sued the plaintiff without making the other person a party to the suit.<sup>2</sup>

See also the undermentioned cases.<sup>3</sup>

**8. "Not exceeding the limits of the pecuniary jurisdiction of the Court."** — It has been seen in Note 2, *ante*, that a Court cannot entertain a plea of set-off if it has no jurisdiction to take cognizance thereof. It follows that the value of the claim of set-off must be within the *pecuniary jurisdiction* of the Court.<sup>1</sup> Where both the amount of claim and the value of the set-off are each within the jurisdiction of the Court, it is immaterial that the *combined amount* of the two claims is beyond its jurisdiction.<sup>2</sup> The words 'not exceeding the pecuniary limits of the jurisdiction of the Court' must be construed as applying to the whole of the ascertained sum; therefore, the valuation of the set-off for purposes of jurisdiction is the *entire* sum pleaded and not the difference between the plaintiff's claim and the defendant's claim.<sup>3</sup> But where the plaintiff *admits* in the plaint any portion of the defendant's claim, that portion must be deducted in determining the jurisdiction of the Court to try the set-off.<sup>4</sup> In a small cause suit a set-off beyond the pecuniary limits of the Small Cause Court's jurisdiction cannot be entertained, even though it may be within the pecuniary limits of that Court sitting on the original side.<sup>5</sup>

**9. Both parties must fill the same character.** — In order to entitle a defendant to plead a set-off it is necessary that the parties should fill the *same character* as they fill in the plaintiff's suit.<sup>1</sup> See also Illustrations (a) and (b) to this

amount due to him, the claim must be legally recoverable at the date of the written statement in which he makes the claim.)

18. ('25) AIR 1925 Nag 445 (447).

[See also ('37) AIR 1937 Nag 210 (210, 211). (Suit for money due in partnership business—Defendant pleading discharge and payment of loan to plaintiff and claiming same—Claim is counter-claim and if barred on the date of written statement cannot be allowed.)]

**Note 7**

1. ('85) 9 Bom 373 (404).

('78) 2 Cal L Rep 414 (418). (Case of rent — For set-off, the debts should be mutual, due from and to the same parties and in the same right.)

1 Ind Jour (NS) 354.

('75) 23 Suth W R 134 (134, 135). (Rights not mutual to the opposing parties cannot be set off.)

2. ('10) 5 Ind Cas 570 (571) (Cal).

3. ('84) AIR 1934 All 543 (545, 546); 56 All 912. (To a suit for joint debt defendant, if he denies former debt, may plead set-off due to him alone — Illus. (g) to O. 8 R. 6, does not apply.)

('86) AIR 1936 Pesh 57 (61). (Suit by depositor against Bank to recover deposit—Bank claiming

set-off in respect of debt on promissory note executed by depositor and others—Set-off cannot be allowed.)

**Note 8**

1. ('71) 8 N W P H C R 114 (116).

('32) AIR 1932 Bom 617 (617).

('88) 1888 All W N 5 (5); 5 All 286. (Provided the set-off is within the limits it is immaterial if it exceeds the claim of the plaintiff.)

2. ('89) 1889 Pun Re No. 69, page 220.

3. ('25) AIR 1925 Rang 65 (66, 67); 2 Rang 462. (Same rule applies to equitable set-off.)

('25) AIR 1925 Rang 22 (25); 2 Rang 349.

('93) 20 Cal 527 (532).

('90) 1890 Pun Re No. 17, page 46.

4. ('25) AIR 1925 Rang 65 (66); 2 Rang 462.

5. ('90) 14 Bom 371 (372). (See S. 88 Act IX of 1887.)

[But see ('88) 12 Bom 31 (33). (Submitted not correct.)]

**Note 9**

1. ('27) AIR 1927 Lah 228 (229); 8 Lah 105. (Dealings "not mutual" cannot be set off one against the other.)

rule. Thus, an amount due to the defendant in the capacity of a *manager* cannot be set off against a *personal* claim against him.<sup>2</sup>

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Notes 9-12

**10. Winding-up proceedings.**—A debtor to a company, who is not a member thereof, is entitled in an action by the liquidators to recover the amount due from him, to plead by way of set-off an ascertained sum of money due to him from the company, provided it had become payable before the date of suit.<sup>1</sup> But a debt due by the company to a firm of which the defendant is a partner cannot be set off, since the defendant does not fill the *same character* as in the plaintiff's suit.<sup>2</sup> A member of a company with limited liability, which is under liquidation, is not entitled to set off paid-up calls or calls to be paid up against a debt due by him to the company and thus give himself a preference over the other creditors of the company.<sup>3</sup> But, in a suit by the liquidator of a company for recovery of money due to the company from a director, the director can plead a set-off in respect of sums due to him from the company.<sup>4</sup>

**11. Insolvency proceedings.**—Section 47 of the Presidency Towns Insolvency Act (III of 1909) and Section 46 of the Provincial Insolvency Act (V of 1920) provide for set-off in case of *mutual dealings* between an insolvent and his creditors. There can be no set-off unless there are mutual dealings.<sup>1</sup> Mutual credits which may be set off include credits which have a natural tendency to terminate in debts, and not merely credits which must *necessarily* terminate in debts.<sup>2</sup> This principle of set-off in insolvency is a doctrine of equity and its object is not merely to avoid cross actions, but to do substantial justice. Therefore, it cannot be extended to a case where at the time of insolvency the debtor of the insolvent, with full knowledge that the latter has become hopelessly involved, buys a third person's claim against the insolvent in order to relieve himself of the liability of having to pay his just debts.<sup>3</sup>

**12. Proceedings under the Agra Tenancy Act and other special Acts.**—Section 193 (g) of the Agra Tenancy Act (II of 1901) provides that no set-off shall be allowed in any suit under that Act except a sum due to the defendant on an *unsatisfied decree under that Act* or any other enactment repealed thereby.<sup>1</sup> No set-off can be allowed, under Section 140 of the Oudh Rent Act (XXII of 1886), in a suit for

(192) 15 Mad 29 (33). (Debt due to defendant by deceased can be set off in a suit by the legal representative of the deceased.)

(1864) 1 Suth W R Miso 28 (23). (Do.)

(1916) AIR 1916 Bom 139 (140) : 41 Bom 163. (Plaintiff's claim for goods supplied—Set-off for wages can be allowed.)

(1926) AIR 1926 Nag 33 (34). (Suit by ex minor for unpaid purchase money—Debt due by his guardian cannot be set off.)

(1914) AIR 1914 Bom 238 (238, 239) : 39 Bom 131. (Plaintiff's claim as inamdar — Defendant's as pujari—No set-off.)

(1911) 15 Bom 186 (189). (Different character.)

(1925) AIR 1925 Sind 142 (143, 144). (Do.)

(1936) AIR 1936 Pesh 57 (61). (Suit by depositor against Bank to recover deposit—Bank claiming set-off in respect of debt on promissory note executed by depositor and others — Parties do not fill same character.)

2. (1938) 5 All 299 (301).

#### Note 10

1. (1905) 28 Mad 240 (243).

(1915) AIR 1915 Lah 204 (205, 207) : 1915 Pun Re No. 68.

2. (1927) AIR 1927 Lah 228 (229) : 8 Lah 105.

3. (1918) AIR 1918 Mad 995 (996, 997) : 40 Mad 1004.

4. (1906) 30 Bom 173 (194).

#### Note 11

1. (1836) 1 Moo Ind App 87 (147, 148, 149) (P C). (1900) 6 Cal L Rep 294 (295). (Set-off allowed as a case of mutual credits.)

2. (1910) 5 Ind Cas 845 (846) : 33 Mad 53 (54). [But see (192) 19 Cal 146 (158). (Reciprocal demands must terminate in a debt.)]

3. (1914) AIR 1914 Lah 317 (318) : 1914 Pun Re No. 53.

#### Note 12

1. (1924) AIR 1924 All 341 (344, 349) : 46 All 398 (F B). (Decree for rent against assignors of plaintiff not allowed to be set off.)

(1907) 1907 All W N 269 (270). (Payment as lambardar of Government Revenue cannot be set off.) (1934) AIR 1934 All 684 (684). (Suit by co-sharer to recover revenue paid by him on behalf of other co-sharers—Co-sharers cannot claim to set off the amount of profits recovered by plaintiff.)

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**Notes 12-14**

arrears of rent.<sup>2</sup> A Revenue Court acting under Section 24 of the Bengal Tenancy Act (X of 1859) has jurisdiction to allow the claim of set-off.<sup>3</sup> No set-off, whether legal or equitable, shall be pleaded by way of defence to any suit under the Madras Estates Land Act (I of 1908).<sup>4</sup>

**13. Effect of not claiming set-off.** — A defendant who has a claim for set-off is not bound to put it forward in answer to the suit against him and his omission to do so does not preclude him from bringing a separate suit in respect of it.<sup>1</sup> But if he does set up such claim, he must do so in respect of the *entire* amount due. He cannot claim a set-off in respect of a portion only, and subsequently sue for the balance.<sup>2</sup> There is, however, an exception to this rule. "In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains or is capable of obtaining an abatement of the price on that account, *he must be considered as having received satisfaction for the breach of contract*; and he is precluded from recovering in another action to that extent, *but no more*."<sup>3</sup>

*Illustration*

A, an agent, sued B his principal for recovery of money alleged to be due to him on account of advances made by him for purchase of chillies, giving credit in the plaint for the price of 82 bags of chillies belonging to B and sold by him. B then sued A in another Court for damages on the ground that the sale of the 82 bags was unauthorised. B's suit was stayed under Section 10 of the Code. He did not agree to have the question of damages tried by way of set-off in A's suit and a decree was passed in favour of A as claimed in the plaint. Then in B's suit A pleaded that B having already recovered a portion of the damages in his suit, namely, to the extent which he (A) had given credit in his plaint, the claim for the balance is barred. It was held that the suit was not barred on the principle stated above.<sup>4</sup>

**14. Court-fee.** — Before this Code was enacted the general trend of opinion among the several Courts was that *ad valorem* court-fee must be paid on a written statement pleading a set-off *under this rule*.<sup>1</sup> It has now been made clear by the

('97) AIR 1987 All 320 (321). (Suit for profits — Prior settlement of account between parties in respect of transactions other than profits — Agreement between them to set off sum due from plaintiff towards his share of profits—Court can recognize such set off already agreed upon though under Sch. 2, No. 10, Agra Tenancy Act Court cannot allow set-off in suit for profits — Plea of set-off is in effect plea of re-payment in such cases.)

2. ('98) 1 Oudh Cas 100 (102). (Suit for rent against thekadars — Sec. 140 applies.)

3. ('72) 18 Suth W R 339 (340).

4. Section 192 (e).

**Note 13**

1. ('15) AIR 1915 Mad 1213 (1213).

('19) AIR 1919 Lah 220 (220): 1919 Pun Re No. 74.

('26) AIR 1926 Mad 1020 (1021). (Same rule applies to cases of equitable set-off.)

('25) AIR 1925 Mad 880 (881). (Do.)

('89) AIR 1939 Pat 264 (265). (Landlord taking advances and buying goods from tenant—Under-standing to set off dues against rent—Rent suit by landlord — Tenant not claiming set-off, but filing cross-suit—Cross suit is not barred.)

[See ('28) AIR 1928 Bom 24 (25): 47 Bom 182. (Set-off can be the subject of a separate suit.)]

[See however ('20) AIR 1920 Mad 531 (532, 533). (Suit upon mortgage — Mortgagor not counter-claiming amounts due from mortgagees — Later suit in respect of it is barred.)]

2. ('05) 32 Cal 654 (657, 659, 660, 662).

3. (1841) 8 M & W 858 (871, 872), *Mondel v. Steel*. (1871) 6 Q B 687 (689), *Davis v. Hedges*.

4. ('25) AIR 1925 Mad 880 (882).

**Note 14**

1. ('92) 15 Mad 29 (34). (The written statement should be treated as a plaint for purposes of cross-claim.)

('89) 18 Bom 672 (673). (Written statement claiming set off is chargeable with court-fees chargeable for a plaint of that nature.)

('06) 10 Cal W N 199 (200).

('86) 8 All 396 (401).

('85) 7 All 284 (288). (Defendant not paying court-fee on the set off claimed — The excess should not be decreed in favour of the defendant — Per Duthoit, J.)

[But see ('04) 8 Cal W N 174 (178). (Defendant not paying court-fee on the set off claimed — *Obiter*.)]

('08) 2 Low Bur Rul 186 (190) (FB). (Written statement claiming set-off under S. 111, C. P. Code of 1882 need not bear court-fee stamps.)]

amendment of the Court-fees Act referred to in Schedule IV of this Code that court-fee must be paid on such statements, regarding them as plaints.<sup>2</sup>

**O. S. R. 6**  
**Notes 14-15**

It has been held in the undermentioned cases that written statements pleading *equitable set-off* are not chargeable with court-fee.<sup>3</sup> But the High Court of Madras has held that the word "set-off" in Article 1, Schedule I of the Court-fees Act includes also an equitable set-off and as such court-fee is payable on such set-off.<sup>4</sup> The same view has been held by the Allahabad High Court in the undermentioned decision<sup>5</sup> and also by the Nagpur High Court.<sup>6</sup> A plea of set-off should not be entertained by a Court until the court-fee with respect to it has been paid by the defendant.<sup>7</sup>

Although the proviso to Article 1, Schedule I of the Court-fees Act refers only to the maximum fee leviable on a plaint or a memorandum of appeal, there is no authority for charging a larger sum on a written statement pleading a set-off or counter-claim.<sup>8</sup>

No court-fee is payable on a written statement pleading an *adjustment* of the plaintiff's claim.<sup>9</sup>

**15. Counter-claim.** — A set-off is a statutory defence to a plaintiff's action; a counter-claim is substantially a cross action. The counter-claim need not be an action of the same nature as the original action or even analogous thereto.<sup>1</sup> Though there is no provision in the Code for making a counter-claim,<sup>2</sup> a Court has got the power to treat the counter-claim as the plaint in a cross suit and hear the two together if the counter-claim is properly stamped.<sup>3</sup> It has, however, been held by the Calcutta High

2. ('39) AIR 1933 Mad 203 (204).

('97-'01) 2 Upp Bur Rul 244.

('17) AIR 1917 Low Bur 179 (180).

[See ('39) AIR 1933 Mad 353 (353). (Defendant making claims as to items in account to be taken in suit for partition — No counter-claim put forward—Court-fee on sums claimed is not required.)]

('85) AIR 1935 Pat 110 (111). (Court-fee is payable on whole amount of set-off.)

[See however ('39) AIR 1933 Sind 247 (249). (Suit for accounts—Defendant claiming certain sum need not pay court-fee.)]

3. ('30) AIR 1930 All 875 (876).

('34) AIR 1934 All 115 (117).

('08) 1908 Pun Ro No. 85.

('87) AIR 1937 Lah 73 (75). (Claim for damages by defendant—Plaintiff's claim and damages arising out of same contract—No separate court-fee is necessary.)

4. ('85) AIR 1935 Mad 115 (115) : 58 Mad 398.

('88) AIR 1933 Mad 203 (204).

[But see ('07) 17 Mad L Jour 481 (482).]

5. ('38) AIR 1938 All 522 (523).

6. ('86) AIR 1936 Nag 290 (291) : I L R (1937) Nag 481.

7. ('17) AIR 1917 Low Bur 179 (180). (Where no Court-fee has been paid in the lower Court, Appellate Court cannot order payment of court-fee.)

('12) 15 Ind Cas 526 (528) (Oudh).

('36) AIR 1936 Pesh 57 (60).

[See also ('85) AIR 1935 Pat 110 (111). (Where the Court omitted to order the defendant to pay the court-fee on the written statement claiming the set off but subsequently at the stage of arguments ordered the court-fees to be paid and the same was paid—Held that the Court had the discretion under S. 149 to order the court-fees

to be paid at any stage of the suit and the order was proper.)]

[But see ('39) AIR 1939 Bom 386 (388). (Though a defendant pleading a set-off should fail to pay the necessary court-fees on his claim, the omission to pay the court-fees does not affect his claim to the set-off since he can be called upon to pay the necessary court-fees at any stage of the proceedings under S. 149, C. P. C.)]

8. ('30) AIR 1930 Oudh 140 (141) : 5 Luck 621.

9. ('87) AIR 1937 Lah 62 (62).

#### Note 15

1. (1881) 17 Ch D 174 (182), *Beddall v. Maitland*. (Per Try, J.)

('32) AIR 1932 Bom 617 (618). (Difference between set-off and counter-claim pointed out.)

[See ('23) AIR 1923 Bom 24 (25) : 47 Bom 182. (Every set-off can be pleaded as a counter-claim if the defendant so desires but every counter-claim cannot be pleaded as a set-off.)]

2. ('24) AIR 1924 Rang 346 (346) : 2 Rang 276.

[See ('30) AIR 1930 Bom 216 (216). (Rule 119-B of the Bombay High Court Rules provides for counter-claim being made.)]

3. ('24) AIR 1924 Rang 346 (346) : 2 Rang 276. (In a suit for possession of land, defendant counter-claimed on the strength of an agreement of sale in his favour.)

('85) AIR 1935 Rang 116 (117). (When the defendant fails to pay the court-fee upon his counter-claim in the trial Court, the filing of a stamp paper in the Appellate Court will not validate his counter-claim and a separate suit must be filed on the counter-claim.)

[See also ('34) AIR 1934 Rang 160 (161). (Suit by plaintiff and counter-claim by defendant—



**O. 8 R. 6** Court that it has no such power.<sup>4</sup>  
**Notes 15-16**

**16. Solicitor's lien for costs.** — "A solicitor has, at Common Law, and apart from any order of the Court or statute, a lien over property recovered or preserved or the proceeds of any judgments obtained for the clients by his exertions."<sup>1</sup> This lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 & 24 Vic., Ch. 127, by which statute the lien was very much extended.<sup>2</sup> It applies to property of every description including costs ordered to be paid to the client<sup>3</sup> except that it does not attach to real property.<sup>4</sup> But the Calcutta High Court has held in the undermentioned case<sup>5</sup> that it applies to immovable property also. This lien has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court, that is, until they are realised and paid off to the judgment-creditor.<sup>6</sup> The Solicitor's lien is a particular lien; it is, therefore, not available for the general balance of account between the solicitor and the client.<sup>7</sup> Although a defendant has the right to compromise with a plaintiff without the knowledge of the plaintiff's attorney, such compromise must be made with the honest intention of ending the litigation, and not with any design to deprive the attorney of his costs, and he cannot make a payment to the plaintiff under that compromise, if he has notice of the lien for the costs of the plaintiff's attorney.<sup>8</sup> As to the power of the Court to enforce the lien by summary procedure, see Note 38 to Section 35, *ante*.

Under sub-rule (2) of this rule a set-off cannot be made so as to affect the lien of the pleader in respect of his costs.<sup>9</sup> Thus, costs ordered to be paid by a petitioning-creditor to a debtor when an adjudication in bankruptcy is set aside, cannot be set-off to the prejudice of the solicitor's lien against the debts due to the petitioning-creditor.<sup>10</sup> But, it has been held by the Calcutta High Court that a solicitor's lien *upon a judgment* obtained by his client is only a claim or right to ask for the intervention of the Court for his protection when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs and that the lien is subject to all the equities between the client and the other parties interested in the

Withdrawal of suit by plaintiff—Counter-claim can be proceeded with as suit.)

(‘35) AIR 1935 Rang 284 (288). (A person who comes before the Court as plaintiff in general gives the Court jurisdiction to entertain a counter-claim, or in other words a cross-action against him.)]

4. (‘22) AIR 1922 Cal 1 (1).

[See (‘33) AIR 1933 P C 29 (32) : 60 Ind App 297 : 60 Cal 980 (PC). (Counsel admitted that in *moftassil* court a counter-claim is incompetent.)]

[See however (‘33) AIR 1933 Cal 27 (28) : 59 Cal 833.]

#### Note 16

1. (‘27) AIR 1927 Bom 542 (545) : 51 Bom 855. (1868) L R 4 Q B 153 (156), *Ex parte Morrison*. (‘73) 10 Beng L R 444 (447, 448). (Where a fund on which there is lien is attached, the order will be against the other party not to pay without notice to the attorney.)

(‘80) 4 Bom 853 (856). (Lien extends over translations of documents.)

2. (‘86) 10 Bom 248 (258).

3. (‘27) AIR 1927 Bom 542 (545) : 51 Bom 855.

4. (‘28) AIR 1928 Bom 108 (110) : 52 Bom 886. (‘27) AIR 1927 Bom 542 (545) : 51 Bom 855.

5. (‘17) AIR 1917 Cal 652 (654, 655) : 43 Cal 676.

6. (‘25) AIR 1925 Bom 851 (852) : 49 Bom 505. (‘87) 14 Cal 374 (375, 376).

7. (‘09) 4 Ind Cas 398 (399) : 33 Mad 255. (Money realized in one case cannot be appropriated for dues in another case.)

8. (‘06) 30 Bom 27 (33).

(‘35) AIR 1935 Cal 168 (172, 173) : 61 Cal 1005. (Bona fide compromise between parties—Court will not interfere for preserving solicitor's lien—But if it is collusive, Court will interfere.)

(‘98) 25 Cal 887 (890).

[See also (‘74) 12 Beng L R 110 (112, 118). (Where there is no fraud, the compromise will not be set aside at the instance of the attorney.)]

9. (‘06) 30 Bom 178 (195).

10. (‘30) AIR 1930 Bom 516 (517) : 55 Bom 877. (1867) 2 Ch 808 (812, 813), *Ex parte Cleland* : *In re Davies*.



property, so that it ought not to intercept the right claimed by the judgment-debtor to set off a prior decree which he had obtained against the attorney's client.<sup>11</sup>

**O. 8 R. 6**  
**Notes 16-18**

**17. Appeal.** — An appeal does not lie against an order on a preliminary issue disposing of the claim to a legal set-off, advanced by the defendant. The reason is that under O. 20 R. 19 only one decree can in such a case be drawn up and, therefore, it cannot be said that there is a conclusive adjudication within the meaning of Section 2, clause 2.<sup>1</sup> An objection cannot be taken up in appeal, for the first time, that a plea of equitable set-off cannot be entertained by the Court.<sup>2</sup>

The valuation of a claim of set-off is the amount claimed by the defendant and an appeal relating to a claim of set-off will lie to the High Court where it exceeds Rs. 5,000.<sup>3</sup> Where a claim of set-off is disposed of without demanding court-fees from the defendant and the lower Appellate Court decides that no court-fee is necessary, such an omission is only a mere irregularity within the meaning of Section 99 of the Code and is not a ground for reversing the decision in second appeal.<sup>4</sup>

**18. Limitation.** — See Note 6, *ante*.

**R. 7. [New.]** Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

**O. 8 R. 7**

Defence or set-off  
founded on separate  
grounds.

[R. S. C., O. 20 R. 7. See O. 7 R. 8.]

**R. 8. [New.]** Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

**O. 8 R. 8**

New ground of  
defence.

[R. S. C., O. 24 Rr. 1 and 2. See R. 9, *infra*.]

**1. Court can take notice of subsequent events.** — A Court can take cognizance of events which happen during the pendency of the litigation as a defence to the action.<sup>1</sup> Though a Court of appeal will not ordinarily take notice of any facts

11. ('17) AIR 1917 Cal 241 (242, 243): 43 Cal 982.  
[See also ('79) 4 Cal 742 (744).]

('32) AIR 1932 Bom 619 (622). (Costs allowed to plaintiff at preliminary stage—Ultimately larger sum found due from plaintiff—Solicitor's lien on costs cannot prevail.)

**Note 17**

1. ('17) AIR 1917 Lah 261 (265): 1917 Pun Re No. 62.

2. ('31) AIR 1931 Cal 358 (359).

3. ('71) 3 N W P H C R 114 (116).

('88) 10 All 587 (594).

4. ('13) 19 Ind Cas 918 (919) (Cal) (FB).

**Order 8 Rule 8 — Note 1**

1. ('28) AIR 1928 Bom 427 (430): 52 Bom 889.

('21) AIR 1921 Bom 310 (314): 45 Bom 245.

(Defendant can plead in his written statement an adjustment of the claim made after suit.)

[But see ('11) 10 Ind Cas 49 (50) (Cal).]

**O. 8 R. 8  
Note 1**

which may have arisen subsequent to the judgment of the lower Court, it will do so in exceptional cases where, by so doing, it can shorten litigation and best attain the ends of justice.<sup>3</sup> See also O. 7 R. 7, Note 4.

It has been held that there can be no limitation against a plea in defence.<sup>3</sup>

**O. 8 R. 9**

**R. 9.** [S. 112.] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

**Subsequent pleadings.**

[1877, S. 112; 1859, S. 122. See O. 6 R. 7.]

**1. Subsequent pleadings.** — This rule requires the leave of the Court before any party can present a further pleading after the written statement has been filed.<sup>1</sup> Even in the case of a minor defendant, he is not entitled, on attaining majority, to put in an additional written statement without leave of the Court.<sup>2</sup> As to when a party will be allowed to file a subsequent pleading and when not, see the undermentioned cases.<sup>3</sup> If the pleadings of either party are too vague, the Court may require such party to file a further and fuller statement under this rule.<sup>4</sup> It has been held by the High Court of Bombay in the undermentioned case<sup>5</sup> that where the defendant does not make a counter-claim or plead a set-off, the plaintiff cannot be called upon to put in a written statement in answer to the defendant's allegations. It is submitted that this decision is not correct.<sup>6</sup> An additional written statement filed long after the fixed date cannot be removed from the record unless the opposite party takes immediate steps for its removal.<sup>7</sup>

The additional written statement should not set up a new case or state facts inconsistent with the original written statement. See Notes to O. 6 R. 7.

2. ('07) 6 Cal L Jour 74 (78).

3. ('29) AIR 1929 All 77 (78).

**Order 8 Rule 9—Note 1**

1. ('25) AIR 1925 Bom 890 (892, 896).

('15) AIR 1915 Mad 984 (988).

2. ('35) AIR 1935 Mad 117 (117).

('37) AIR 1937 Pat 625 (626).

3. (1900) 24 Bom 408 (406). (Defendant was ignorant of true facts and was therefore allowed to file a subsequent pleading.)

('74) 22 Suth W R 377 (377). (Subsequent statement as explaining plaint—No prejudice to other party—Allowed.)

('89) 3 Beng L R App 11 (12). (Defendant allowed on condition of costs of the application of the other side being paid.)

('18) AIR 1918 Pat 230 (231). (Delay of more than a year—Refused.)

('08) 27 Bom 485 (491) : 30 Ind App 127 (PO). (After close of plaintiff's case not allowed.)

('80) 4 Bom 576 (578). (Cannot be allowed after the hearing is begun.)

Bourke P O 153 (Not allowed—No sufficient cause.)

('15) AIR 1915 Lah 449 (450). (Pleading piecemeal should be avoided as far as possible.)

4. ('90) 17 Cal 840 (848).

('69) 11 Suth W R 71 (72). (Additional written statement merely giving the names of two villages admittedly belonging to the suit property.)

('86) 5 Suth W R 50 (51). (Can only be called for by Court of original jurisdiction.)

5. ('20) AIR 1920 Bom 413 (413).

6. [See also ('25) AIR 1925 Bom 890 (892). (The observations of Marten, J., suggest that Court can call upon a plaintiff to file a written statement.)

7. ('85) 9 Bom 373 (381, 382).

**R. 10.** [S. 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

O. 8 R. 10

Procedure when party fails to present written statement called for by Court.

[1877, Ss. 113, 370; 1859, S. 106.]

### Synopsis

#### 1. Scope. | 2. Appeal.

#### Other Topics (miscellaneous)

"Pronounce judgment." See Note 1.

Written statement not filed — Court's power to decree suit.

See Note 1.

**1. Scope.** — It has been held by the High Court of Rangoon that the power given to the Court by this rule to pronounce judgment refers to a written statement which has been *demanded by the Court under Rule 9*.<sup>1</sup> But according to Mr. Justice Ayling of the High Court of Madras,<sup>2</sup> — and the Chief Court of Oudh<sup>3</sup> also seems to take the same view — this rule relates back to Rule 1, as well as to Rule 9, and therefore applies to written statements required by the Court *under Rule 1* as well. Mr. Justice Seshagiri Ayyar took a contrary view.

This rule applies only to a *specific* requirement by the Court to the filing of a written statement and not to *general direction* in the summons that such a statement may be filed.<sup>4</sup> The High Court of Bombay has held in the undermentioned case<sup>5</sup> that a Court has no power to call upon a plaintiff to put in a written statement except in answer to a set-off, and to dismiss the suit on his failure to do so. It has been already submitted in Notes to Rule 9 that this view is not correct. A conditional order, as for instance, an order directing a statement, *if any*, to be filed<sup>6</sup> or an order merely permitting a statement to be filed<sup>7</sup> will not entail the penalty imposed by this rule. Where a party files a written statement expressing his inability to supply the *particulars* asked for by the Court, it is not a failure to present a written statement within the meaning of this rule.<sup>8</sup>

The Court cannot strike out a defence for failure of the defendant to present a further written statement called for by it.<sup>9</sup> A judgment pronounced under this rule must satisfy the requirements of 'judgment' as defined in Section 2 sub-section 9 and, therefore, the Court should go into the case and pronounce a decision upon the facts so far as they are before it.<sup>10</sup> A plaintiff is not entitled to obtain a decree before the date on which the summons is returnable, even though the summons directs that the written statement should be filed on or before a day before such returnable date.<sup>11</sup>

#### Order 8 Rule 10 — Note 1

1. ('28) AIR 1928 Rang 261 (262) : 6 Rang 466.

2. ('18) AIR 1918 Mad 1168 (1164).

[But see (1865) 2 Mad H O R 311 (312). (Dissenting from in AIR 1918 Mad 1168).]

3. ('25) AIR 1925 Oudh 567 (568).

('12) 15 Ind Cas 212 (212) : 15 Oudh Cas 78.

4. ('25) AIR 1925 Oudh 567 (568).

5. ('29) AIR 1929 Bom 413 (413).

6. ('27) AIR 1927 Mad 1007 (1008).

7. ('87) 1887 Bom P J 81.

8. ('06) 16 Mad L Jour 80 (81, 32).

9. ('92) 1892 Pun Re No. 59, page 216.

[See ('37) AIR 1937 Nag 268 (269) : ILR (1937) Nag 519. (Court ordering further written statement after decision of preliminary issues—No written statement filed—Court refusing adjournment and proceeding ex parte—Order held injudicious as costs could have been saddled on defendant.)]

10. ('12) 15 Ind Cas 212 (212) : 15 Oudh Cas 78.

(Passing a mere decree without a judgment is a material irregularity.)

11. ('08) 82 Bom 534 (539). (Statement not filed.)

**O. 8 R. 10**  
**Notes 1-2**

The Bombay High Court has in the undermentioned case<sup>1a</sup> expressed the view that where a defendant is ordered to file a written statement within a certain time and he fails to do so, it is not justifiable to pass an order that the suit should proceed *ex parte* against him. According to the above decision, the failure of the defendant to file a written statement as required by the Court means only that he admits the allegations in the plaint, and he is entitled to appear and submit any argument open to him on the plaint, for instance, that the plaint discloses no cause of action or that the claim is time-barred.

**2. Appeal.** — An order *pronouncing* judgment against a party under this rule is appealable as an order under O. 43 R. 1 (b).<sup>1</sup> But an order *refusing to pronounce* a judgment under this rule is not appealable.<sup>2</sup>

**Local Amendments****ALLAHABAD**

Add the following Rules :

**O. 8 R. 11**  
**(Allahabad)**

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, written in English in block letters, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

**O. 8 R. 12**  
**(Allahabad)**

12. Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

**BOMBAY**

The following shall be *added* as Rules 11 and 12 :

**O. 8 R. 11**  
**(Bombay)**

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court, a memorandum in writing stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit:

Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under Section 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

**O. 8 R. 12**  
**(Bombay)**

Applicability of Rr. 20 and 22-26 of O. 7 to 12. Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule."

**LAHORE**

Add the following Rules :

**O. 8 R. 11**  
**(Lahore)**

"11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or

12. ('38) AIR 1938 Bom 470 (471).

**Note 2**

1. ('25) AIR 1925 Oudh 567 (567). (Where Court ought to have proceeded under O. 9 R. 6 instead of this rule an application under O. 9 R. 13

will lie.)

[See also ('01) 4 Oudh Cas 372 (373, 374).

('06) 16 Mad L Jour 30 (31). (Costs to be calculated as in an appeal from an order.)]

2. ('31) AIR 1931 Lah 77 (77).

other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

**O. 8 R. 11**  
(Lahore)

12. Rules 20, 22, 23, 24 and 25 of Order 7 shall apply, so far as may be, to addresses for service filed under the preceding rule."

**O. 8 R. 12**  
(Lahore)

**NOTE. Lahore Rule 11.**—This rule applies to defendants who are corporations as well as to other defendants.<sup>1</sup> The rule is mandatory so far as the filing of the proceeding stating the addresses for service is concerned; but the matter is left to the discretion of the Court and it is not bound to strike off the defence of the defaulting party in every case.<sup>2</sup>

## NAGPUR

Add the following as Rules 11 to 13:—

"11. Every defendant in a suit or opposite party in any proceedings, shall on the first day of his appearance in Court, file an address for service on him of any subsequent process. The address shall be within the local limits of the civil district in which the suit or petition is filed or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

**O. 8 R. 11**  
(Nagpur)

12. (1) If the defendant or the opposite party fails to file a registered address as required by Rule 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence.

**O. 8 R. 12**  
(Nagpur)

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where the Court has struck out the defence under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding :

Provided that where the decree is of such a nature that it cannot be set aside

### Order 8 Rule 11 (Lahore)

1. ('29) AIR 1929 Lah 459 (460).

2. ('29) AIR 1929 Lah 459 (460).

[See also ('35) AIR 1935 Lah 791 (792). (No

harm caused due to non-filing of address—Case going on normally—Address subsequently filed accepted as sufficient—Defence cannot be struck out—No *ex parte* decree can be passed.)

**O. 8 R. 12** as against such defendant or opposite party only it may be set aside as against all or  
**(Nagpur)** any of the other defendants or opposite parties.

**O. 8 R. 13** 13. Rules 20, 22 and 23 of Order 7 shall apply, so far as may be, to addressees  
**(Nagpur)** for service filed under Rule 11."

**N.-W.F.P.**

Add the following Rules :

**O. 8 R. 11** "11. Every party, whether original, added or substituted, who intends to  
**(N.-W.F.P.)** appear and defend any suit or original petition shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

**O. 8 R. 12** 12. Rules 20 and 22 of Order 7 shall apply, so far as may be, to addressees for  
**(N.-W.F.P.)** service, filed under the preceding rule."

**ODDH**

Add the following Rules :

**O. 8 R. 11** "11. Every defendant in a suit or opposite party in any proceeding shall, on the  
**(Oudh)** first day of his appearance in Court, file an address (to be called the "registered address") for service on him of any subsequent notice, summons or other process; and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence, or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court, *suo motu* or on the application of any party.

**O. 8 R. 12** 12. Rules 21, 23 and 25 to 27 of Order 7 shall apply, so far as may be, to  
**(Oudh)** addressees for service filed under the preceding rule, and Rule 24 shall, in the same manner, apply, but as if the words at the beginning, "In all cases to which Rule 23 does not apply" were omitted.

**O. 8 R. 13** 13. Nothing in Rules 11 and 12 shall apply to the notice prescribed by  
**(Oudh)** Order 21 Rule 22."

**PATNA**

Add the following Rules :

**O. 8 R. 11** "11. Every party, whether original, added or substituted, who appears in any  
**(Patna)** suit or other proceedings shall, at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

**O. 8 R. 12** 12. Rules 20 and 22 of Order 7 shall apply, so far as may be, to addressees for  
**(Patna)** service filed under the preceding rule."

**SIND**

Add the following Rules :

**O. 8 R. 11** 11. *Parties to file address.*—Every party whether original, added or substituted,  
**(Sind)** who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him, as the date of hearing, file in Court, a memorandum in writing stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had

not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just:

**O. 8 R. 11**  
(Sind)

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under Section 7 of the Dekkhan Agriculturists' Relief Act, 1879, or otherwise.

12. *Applicability of Rules 20 and 22-26 of Order 7 to addresses for service.*— Rules 20, 22, 23, 24, 25 and 26 of Order 7 shall apply, so far as may be, to addresses for service filed under the last preceding rule.

**O. 8 R. 12**  
(Sind)

NOTE. — Order 7 Rule 26 is now deleted by the Sind Court.

## ORDER IX.

### GENERAL

#### Synopsis

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Applicability of Order 9 to execution proceedings.</li> <li>2. Applicability of Order 9 to applications under Order 9 itself.</li> <li>3. Applicability of Order 9 to proceedings under local and special Acts.</li> </ol> | <ol style="list-style-type: none"> <li>4. Applicability of Order 9 to miscellaneous proceedings. See S. 141 and Notes thereto and O. 9 R. 9, Note 6.</li> <li>5. Failure of party to appear at adjourned hearing. See O. 17 R. 2.</li> </ol> |
|--|--|

**1. Applicability of Order 9 to execution proceedings.** — There is nothing in Order 21, which deals with execution of decrees and orders, specifically empowering the Court to apply Order 9, to execution proceedings. Hence, the provisions of Order 9 can apply, if at all, only by virtue of Section 141. In *Thakur Prasad v. Fakirullah*,<sup>1</sup> the Judicial Committee of the Privy Council held that the proceedings referred to in Section 647 of the Code of 1882 (now Section 141) included *original matters* such as proceedings in probates, guardianships, and so forth and did not include executions. Notwithstanding this decision of the Privy Council, it was still held in some cases<sup>2</sup> that Section 141 could be applied to make Order 9 apply to execution proceedings. The consensus of authorities in the several High Courts may, however, now be fairly taken to be that Order 9 does not apply to execution proceedings.<sup>3</sup> Thus, it has been

**Order 9**  
**General**

#### Order 9, General—Note 1

1. ('95) 17 All 106 (111) : 22 Ind App 44 (PC).
2. ('12) 13 Ind Cas 859 (860) (Lah). (Application for execution dismissed in default can be restored.)
- ('10) 7 Ind Cas 241 (241) (Cal). (S. 141 as now enacted includes proceedings in execution.)
- ('14) AIR 1914 Mad 162 (168, 169) : 37 Mad 462. (Orders though in execution, if decrees under S. 47, can be set aside under O. 9 R. 13.)
3. ('28) AIR 1928 All 460 (460) : 45 All 148.
- ('23) AIR 1923 All 544 (544). (AIR 1923 All 460, Followed.)
- ('33) AIR 1933 Mad 418 (422) : 56 Mad 490 (FB).
- ('33) AIR 1933 Lah 99 (101) : 18 Lah 761. (Execution application can however be restored under inherent powers of the Court.)
- ('29) AIR 1929 Bom 217 (219). (O. 9 R. 8 does

- not apply to execution proceedings.)
- ('32) AIR 1932 All 92 (94) : 53 All 715. (O. 9, R. 13 does not apply to application for setting aside ex parte order in execution proceedings.)
- ('94) 18 Bom 429 (431, 432).
- ('11) 11 Ind Cas 385 (386) (Cal).
- ('06) 10 Cal W N 839 (840). (O. 9 R. 9 has no application to execution proceedings.)
- ('25) AIR 1925 Cal 510 (510, 511).
- ('26) AIR 1926 Cal 735 (735).
- ('29) AIR 1929 Lah 744 (745).
- ('31) AIR 1931 Mad 656 (659) : 55 Mad 17 (FB).
- (Ex parte order under S. 47, C. P. O., though a decree is not an ex parte decree in a suit, hence O. 9 R. 13 does not apply.)
- ('27) AIR 1927 Mad 355 (355).
- ('26) AIR 1926 Mad 980 (981) : 50 Mad 67.

**Order 9  
General  
Notes 1-2**

held not to apply to proceedings under O. 21 R. 2,<sup>4</sup> or O. 21 R. 89,<sup>5</sup> or O. 21, R. 90,<sup>6</sup> or O. 21 Rr. 97 to 101.<sup>7</sup> For a full discussion, see Section 141, *ante*. When an execution application is dismissed for default the party can file a fresh application<sup>8</sup> and in a proper case can invoke the inherent powers of the Court for a re-hearing.<sup>9</sup> Under the new Rule 15 added by the Madras High Court, Rules 6, 13 and 14 of this Order have been declared to be applicable to those proceedings in execution falling within Section 47 of the Code in which notice to the opposite party is required to be given. See Rule 15 added by the Madras High Court, *infra*.

See also Order 9 Rule 9, Note 6.

**2. Applicability of Order 9 to applications under Order 9 itself.** — Where an application under R. 4 or R. 9 or R. 13 of this Order is itself dismissed for default, does a fresh application to restore that application lie? There is a conflict of opinion on this point. It has been held by the High Courts of Lahore,<sup>1</sup> Madras<sup>2</sup> and Rangoon,<sup>3</sup>

- (‘26) AIR 1926 Mad 412 (415).  
 (‘25) AIR 1925 Mad 126 (127).  
 (‘18) AIR 1918 Mad 1011 (1012).  
 (‘18) AIR 1918 Pat 67 (68) : 4 Pat L Jour 330.  
 (‘22) AIR 1922 Nag 267 (269) : 18 Nag L R 152.  
 (‘25) AIR 1925 Oudh 552 (555) : 28 Oudh Cas 158.  
 (‘28) AIR 1928 Oudh 478 (478). (Where a subsequent application for execution was barred Court under S. 151 restored the application to its file.)  
 (‘16) AIR 1916 Pat 331 (332).  
 (‘31) AIR 1931 Sind 97 (98) : 25 Sind L R 475 (FB).  
 (But inherent power *held* to exist to set aside ex parte orders passed in execution proceedings.)  
 [See (‘15) AIR 1915 Cal 539 (540).  
 (‘37) AIR 1937 Sind 273 (278) : 31 Sind L R 180.  
 (Application under O. 34 R. 5 is not execution proceeding—O. 9 Rr. 2 and 4 apply to such application.)]  
 [See also (‘15) AIR 1915 Mad 811 (812) : 38 Mad 199.]  
**[But see (‘24) AIR 1924 Mad 715 (715) : 47 Mad 651. (Case of claim petition.)]**  
 4. (‘20) AIR 1920 Cal 914 (915).  
 [See also (‘31) AIR 1931 Lah 505 (505). (Conceded and assumed.)]  
 5. (‘26) AIR 1926 Bom 377 (378) : 50 Bom 457.  
 (Application under O. 21 R. 89 is not an original proceeding.)  
 6. (‘21) AIR 1921 Pat 293 (294). (Inherent power to set aside ex parte order recognised.)  
 (‘27) AIR 1927 Cal 938 (939).  
 (‘26) AIR 1926 Lah 109 (109).  
 (‘19) AIR 1919 Pat 192 (193) : 4 Pat L Jour 135 (F B).  
 (‘31) AIR 1931 All 594 (595).  
 (‘38) AIR 1938 Mad 495 (495). (Court has inherent power to dismiss for default application under O. 21 R. 90.)  
 7. (‘26) AIR 1926 Mad 412 (414, 415).  
 (‘19) AIR 1919 Pat 540 (541). (Order under O. 21 Rr. 100 and 101 is not a suit. Hence O. 9 R. 4 inapplicable.)  
 (‘14) AIR 1914 Cal 126 (127) : 41 Cal 1. (Application under O. 21 R. 100—O. 9 R. 18 not applied.)  
**[But see (‘23) AIR 1923 Pat 239 (241) : 2 Pat 372. (Application under O. 21 R. 100 is an original matter in the nature of suit—O. 9 R. 9 *held* applicable.)]**

- (‘18) AIR 1918 Pat 486 (486) : 3 Pat L Jour 250.  
 (Application under O. 21 R. 100 — Rehearing under O. 9 can be obtained.)]  
 8. (‘23) AIR 1923 All 460 (460) : 45 All 148.  
 (‘18) AIR 1918 Pat 67 (68) : 4 Pat L Jour 330.  
 (‘22) AIR 1922 Oudh 201 (202).  
 (‘17) AIR 1917 Cal 81 (82, 83). (*Obiter*.)  
 [See also (‘20) AIR 1920 Cal 458 (459).  
 9. (‘28) AIR 1928 Cal 179 (179, 180). (Where Code does not provide a remedy nor does it prohibit the granting of it S. 151 is applicable.)  
 (‘33) AIR 1933 Lah 99 (101) : 13 Lah 761.  
 (‘33) AIR 1933 Nag 176 (176) : 29 Nag L R 176.  
 (Objection was restored under inherent powers.)  
 (‘21) AIR 1921 Sind 55 (56, 57) : 17 Sind L R 105.  
 (Application under O. 21 R. 90.)  
 (‘14) AIR 1914 Sind 61 (62) : 8 Sind L R 327.  
 (Execution application adjourned to 6th January was by mistake called on the 5th—Inherent power of restoration to be exercised.)  
 (‘29) AIR 1929 All 485 (487).  
 (‘24) AIR 1924 Lah 350 (350, 351).  
 (‘28) AIR 1928 All 301 (301). (Mistaken order of dismissal for default can be rescinded.)  
 (‘27) AIR 1927 Cal 420 (420).  
 (‘21) AIR 1921 Lah 67 (68) : 2 Lah 66.  
 (‘23) AIR 1923 Nag 18 (19, 20).  
 (‘39) AIR 1939 Lah 223 (223). (Court has inherent powers under S. 151 to restore application in execution, dismissed for default.)

**Note 2**

1. (‘19) AIR 1919 Lah 155 (156). (7 Nag L R 32, Followed.)  
 (‘20) AIR 1920 Lah 304 (304) : 1 Lah 339.  
 (Application for restoration of dismissed application was described as one for review.)  
 (‘27) AIR 1927 Lah 71 (71). (A second application for restoration is competent.)  
 (‘27) AIR 1927 Lah 904 (905). (The application for setting aside the dismissal of application under O. 9 R. 18 is not to be treated as original application for setting aside the ex parte decree.)  
 (‘29) AIR 1929 Lah 878 (878).  
 2. (‘26) AIR 1926 Mad 825 (826).  
 (‘26) AIR 1926 Mad 654 (654).  
 3. (‘26) AIR 1926 Rang 74 (75) : 3 Rang 584.  
 [See also (‘38) AIR 1938 Rang 406 (407). (The point was left undecided; however, it was held



the Judicial Commissioner's Court of Peshawar<sup>4</sup> and the Chief Court of Oudh<sup>5</sup> that such an application can be filed, the reason being that the proceedings contemplated under Order 9 are in the nature of an original suit and that by virtue of Section 141, Order 9 applies to them.<sup>6</sup> On the other hand, the High Courts of Bombay,<sup>7</sup> Calcutta<sup>8</sup> and Patna<sup>9</sup> have held that a *second application* to restore a prior application dismissed for default does not lie. But the High Court of Allahabad,<sup>10</sup> and the High Courts of Calcutta and Madras in some cases<sup>11</sup> have struck a *via media* and hold that the application for restoration can itself be treated as a *second application* for restoring the suit provided there is no bar by limitation. In some cases the same High Courts have held that in a proper case the Court can also restore a prior application dismissed for default under its *inherent power*.<sup>12</sup> See also the undermentioned case.<sup>13</sup>

It has been held by the Nagpur Judicial Commissioner's Court that an application for the restoration of a suit which application itself has been dismissed for default can be restored under the inherent power of the Court but not under O. 9 R. 9 read with Section 141.<sup>14</sup> The reason given is that O. 9 R. 9 creates a substantive right of applying to restore a suit dismissed for default and this right cannot be conferred by Section 141.

But no appeal lies under O. 43 R. 1 from an order refusing to restore an application for restoration of suit dismissed for default.<sup>15</sup>

### 3. Applicability of Order 9 to proceedings under local and special Acts. —

It is a general principle that once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code. (See Section 141 *infra*.) Hence, the provisions of this Order apply to an application to the Court under Section 84 of the Madras Hindu Religious Endowments Act of 1927 and the dismissal of such application for default can be set aside under this Order.<sup>1</sup>

**4. Applicability of Order 9 to miscellaneous proceedings. —** See Section 141 and the Notes thereto and Order 9 Rule 9, Note 6.

**5. Failure of party to appear at adjourned hearing. —** See O. 17 R. 2.

that the Court had inherent power to deal with application for setting aside order of dismissal.)]

4. ('34) AIR 1934 Posh 13 (14).

5. ('23) AIR 1923 Oudh 146 (146).

[See ('37) AIR 1937 Oudh 344 (346): 13 Luck 246. (An application to set aside the dismissal for default of a previous application for restoration under O. 9 R. 9, C. P. C., made the very next day after such dismissal is clearly within time, even though made more than thirty days after the dismissal of the suit for default.)]

6. ('26) AIR 1926 Mad 325 (326).

7. ('28) AIR 1928 Bom 386 (386).

8. ('29) AIR 1929 Cal 17 (18).

9. ('22) AIR 1922 Pat 121 (121): 4 Pat L Jour 287.

10. ('24) AIR 1924 All 503 (504): 46 All 319.

11. ('27) AIR 1927 Cal 534 (536): 54 Cal 405. (But if the application is not within time, then S. 151, C. P. C., may be invoked.)

('17) AIR 1917 Cal 548 (548): 44 Cal 950. (Second application is competent.)

('14) AIR 1914 Mad 438 (438).

[See ('23) AIR 1923 Cal 552 (552). (Successive applications for restoration are competent.)]

12. ('25) AIR 1925 All 773 (774, 775): 47 All 878.

('29) AIR 1929 All 624 (624).

('17) AIR 1917 All 125 (126, 127).

('27) AIR 1927 Cal 534 (536): 54 Cal 405.

13. ('36) AIR 1936 All 737 (738). (Order 9 R. 2 does not in terms apply to an application for restoration of suit dismissed for default.)

14. ('32) AIR 1932 Nag 101 (102): 28 Nag L R 83 (FB), (Overruling AIR 1928 Nag 293. 10 I O 705 must also be deemed as overruled by this decision.)

15. ('28) AIR 1923 Lah 302 (303).

('22) AIR 1922 Cal 572 (573).

('18) AIR 1918 Pat 612 (613): 2 Pat L Jour 720.

('22) AIR 1922 All 337 (337).

('24) AIR 1924 All 682 (683): 46 All 538.

('18) 19 Ind Cas 97 (98): 9 Nag L R 33.

### Notes 3

1. ('37) AIR 1937 Mad 653 (653): ILR (1938) Mad 216.

**O. 9 R. 1 APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE**

**R. 1.** [S. 96.] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

[1877, S. 96; 1859, S. 109.]

**1. Applicability of the Rule.** — This rule and Rule 2 of this Order apply to the Arakkan Hills.<sup>1</sup>

**O. 9 R. 2**

**R. 2.** [S. 97.] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

[1877, S. 97; 1861, S. 5.]

**Local Amendment****ALLAHABAD**

After the words, "for such service" insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant."

**Synopsis**

- |  |  |
|--|--|
| 1. Scope of the Rule.  | 4. Plaintiff's remedy after dismissal. |
| 2. "Defendant."  | 5. Appeal.                             |
| 3. Failure to pay court-fee or postal charges, when entails dismissal. | 6. Revision.                           |

**Other Topics (miscellaneous)**

On the day fixed. See Note 3.

Proviso. See Note 3.

**1. Scope of the Rule.** — The rule applies only to cases of plaintiff's failure to pay process fee or postal charges for service of summons on the defendant. Consequently, the Court cannot dismiss the suit under this rule for failure on the part of the plaintiff to furnish the correct address of the defendant.<sup>1</sup> The Allahabad High

**Order 9 Rule 1 — Note 1**

1. See The Arakkan Hills Civil Justice Regulation (VIII of 1874) and the Arakkan Hills District Laws Regulation, 1916 (1 of 1916), Sch. 1.

**Order 9 Rule 2 — Note 1**

1. ('27) AIR 1927 Lah 170 (170). (Nor for the failure of the plaintiff to accompany process-server.)

Court has held in the undermentioned case<sup>3</sup> that where the plaintiff failed to pay the process fee and the Court ordered him to pay a certain sum as damages and he failed to pay that also, and the Court dismissed the suit, such dismissal of the suit was under this rule.

The failure contemplated is not merely an omission to pay the requisite charges but also to pay the same *within the time fixed*.<sup>3</sup>

Where a suit is dismissed for default and an application for its restoration is dismissed for failure to pay the process fees, it has been held that the order dismissing the application falls under Rule 9 *infra* and not under this rule.<sup>4</sup>

This rule applies to an application under O. 34 R. 5 by virtue of Section 141 and such an application can be dismissed for non-payment of process fees.<sup>5</sup>

**2. "Defendant."** — The word '*defendant*' does not include the guardian *ad litem* of a minor defendant as he is not a defendant in the legal sense of the term and the mere fact that no process fee is paid for issuing notice to such a guardian is no ground for dismissing the suit under this rule,<sup>1</sup> especially where there are other major defendants in the suit.<sup>2</sup> Where the summons has been served upon a wrong person instead of on the real defendant, and he appears and denies his liability, the proper order to pass is to dismiss the suit with costs.<sup>3</sup>

**3. Failure to pay court-fee or postal charges — When entails dismissal.** — O. 48 R. 1, sub-rule 2 requires that the Court shall fix a time for payment of the process fee. And unless it so fixes a time for the deposit of the process fee<sup>1</sup> and gives the party reasonable time and opportunity to comply with its orders,<sup>2</sup> it cannot dismiss the suit. But mere ignorance on the part of the plaintiff's agent as to the proper Court in which the process fees ought to be deposited is no ground for not dismissing the suit.<sup>3</sup>

There is a conflict of opinion as to whether the failure on the part of the plaintiff to pay process fees for a *newly added defendant* will entail the dismissal of the whole suit. The High Court of Bombay has held that the whole suit ought to be dismissed even against the original defendant unless he waives his objection thereto.<sup>4</sup> But according to the Allahabad<sup>5</sup> and Patna<sup>6</sup> High Courts the dismissal should be only as against that *particular* defendant. According to the proviso, if notwithstanding the plaintiff's default in paying the process fees the defendant appears, the Court cannot

(<sup>'31</sup>) AIR 1931 Lah 655 (655). (O. 9 R. 5 applies to such a case.)

2. (<sup>'27</sup>) AIR 1927 All 464 (464).

3. (<sup>'11</sup>) 11 Ind Cas 906 (907) : 7 Nag L R 114.

[See (<sup>'35</sup>) 158 Ind Cas 250 (260) (Pesh). (It is clearly the duty of the Court when directing the deposit of money for the process fee to fix a time within which the fee is to be paid. When no such date is fixed, it is a material irregularity as the plaintiff is thereby deprived of a decision on the merits of his suit.)]

4. (<sup>'86</sup>) AIR 1936 All 787 (788).

5. (<sup>'87</sup>) AIR 1937 Sind 273 (273) : 31 Sind L R 180.

#### Note 2

1. (<sup>'11</sup>) 11 Ind Cas 317 (318) : 1912 Pun Re No. 35.

2. (<sup>'20</sup>) AIR 1920 Pat 820 (821). (The suit must be proceeded with against the major defendants.) [See (<sup>'87</sup>) AIR 1937 Oudh 502 (503). (The fact that the plaintiff through his negligence had failed to get a minor defendant properly served

and to get a guardian appointed for him, does not justify the dismissal of the suit under O. 9, R. 2, C. P. C., as against the other defendants who had been duly served.)]

3. (<sup>'80</sup>) 4 Bom 619 (623).

#### Note 3

1. (<sup>'24</sup>) AIR 1924 Nag 298 (299).

(<sup>'69</sup>) 11 Suth W R 290 (290). (Process fee for summoning witnesses.)

[See also (<sup>'33</sup>) AIR 1933 Pat 582 (583). (Non-payment of process fee required for fresh summons with the application is no ground for dismissal of suit.)]

2. (<sup>'20</sup>) AIR 1920 Cal 244 (244, 245). (Two days for paying process fees is not sufficient time.)

3. (<sup>'69</sup>) 11 Suth W R 417 (418).

4. (<sup>'68</sup>) 5 Bom H O R 118 (121). (New defendant was added by Court.)

5. (<sup>'80</sup>) 2 All 818 (819).

6. (<sup>'21</sup>) AIR 1921 Pat 422 (422).

**O. 9 R. 2  
Notes 3-6**

dismiss the suit.<sup>7</sup> It follows that the Court cannot dismiss the suit on a day previous to the date fixed in the summons for the appearance of the defendant.<sup>8</sup>

Where the plaintiff is prepared to pay the process fees but it is the Court which refuses to take it because according to its view the process fee is being deposited late, this rule does not strictly apply.<sup>9</sup>

A Court has no power to require the plaintiff to pay process fee before fixing the date for the appearance of the defendant; and where the Court does so, the failure of the plaintiff to comply with its order does not entail the dismissal of the suit under this rule.<sup>10</sup>

**4. Plaintiff's remedy after dismissal.** — The plaintiff can apply under Rule 4 to set aside the order of dismissal or may bring a fresh suit.<sup>1</sup>

**5. Appeal.** — The order of dismissal is not a decree within Section 2 (2) and no appeal lies therefrom.<sup>1</sup> The undermentioned decisions to the contrary<sup>2</sup> under the old Code are no longer good law.

**6. Revision.** — Where under O. 5 R. 10 as amended in the Punjab the plaintiff has an option to have the summons served in the ordinary way or by registered post and the Court ordered the plaintiff to pay both process fees and postal charges, the order is illegal and the suit cannot be dismissed for failure of the plaintiff to pay the postal charges. The High Court will in such a case, revise the order of dismissal.<sup>1</sup> Similarly, where the process fee was paid in sufficient time though not within the date fixed by the Court and the suit was dismissed, the High Court will interfere in revision.<sup>2</sup> For other instances of interference by the High Court, see the undermentioned cases.<sup>3</sup>

**O. 9 R. 3**

Where neither party appears, suit to be dismissed.

**R. 3. [S. 98.]** Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

[1877, Ss. 98, 99; 1859, S. 110.]

*Synopsis*

1. Where neither party appears.

2. "Appearance." See O. 9 R. 9 and O. 3 R. 1.

3. "When the suit is called on for hearing."

4. "The Court may make an order that the suit be dismissed."

5. Dismissal pending arbitration proceedings.

5a. Dismissal of suit for default after preliminary decree. See Note 3.

6. Appeal and review.

7. ('19) AIR 1919 Pat 872 (878).

('91) 15 Bom 160 (162, 168).

8. ('80) 2 All 818 (820).

9. ('86) AIR 1986 All 787 (789).

10. ('39) AIR 1939 Pat 160 (160).

**Note 4**

1. ('88) 9 Cal 163 (165).

**Note 5**

1. ('16) AIR 1916 All 326 (326) : 38 All 357.

('88) 9 Cal 627 (628).

[See ('11) 9 Ind Cas 484 (485) (All). (No appeal lies from order of Appellate Court restoring a suit dismissed for want of payment of process fee.)]

2. ('67) 7 Suth W R 386 (388).

(1865) 3 Suth W R Mis 28. (Appeal.)

**Note 6**

1. ('27) AIR 1927 Lah 157 (158).

2. ('22) AIR 1922 Lah 68 (68, 64).

3. ('19) AIR 1919 Pat 372 (378). (Process fee not paid — Defendant appearing but plaintiff not appearing on the date of hearing — Dismissal under O. 9 R. 8 proper and not under this rule.)

('08) 1908 Pun W R No. 65.

('80) AIR 1980 Lah 440 (441). (Failure to pay process fee — Dismissal of application for restoration of suit — Not open to revision under S. 115 — But relief granted under S. 151 as separate suit was barred.)

**1. Where neither party appears.** — A dismissal under this rule is justified only where neither party appears. Thus, if the plaintiff<sup>1</sup> or his agent<sup>2</sup> or his pleader duly instructed<sup>3</sup> is present, the fact that *no evidence is adduced* will not enable the Court to order a dismissal under this rule. If, however, both the parties are absent,<sup>4</sup> the mere presence of the pleaders *without instructions* is not an appearance and a dismissal under this rule is justified.<sup>5</sup>

Where the plaintiff and *some* of the defendants do not appear but the other defendants appear and the suit is dismissed, the dismissal, *in so far as it is against the absent defendants*, is under this rule, while, as against the defendant or defendants who appeared, it is under Rule 8.<sup>6</sup>

Where an application was filed by the respondent in an appeal praying that the appellant should be called upon to give security for the costs of the appeal and, on the day fixed for the hearing of the application, both parties were absent in consequence of which the application was rejected, it was held that the dismissal must be taken to be one under this rule read with Section 141.<sup>7</sup>

**2. "Appearance."** — See Order 9 Rule 9 and Order 3 Rule 1.

**3. "When the suit is called on for hearing."** — The hearing referred to is obviously the *first hearing* after the issue of the summons to the defendant,<sup>1</sup> and not necessarily a hearing of evidence.<sup>2</sup> But when read with O. 17 R. 2, *infra*, this rule may be applied to cases where the parties are absent at the *adjourned* hearings.<sup>3</sup> The rule may be applied where the parties are absent at a hearing after remand.<sup>4</sup>

But before there can be a dismissal under this rule it is essential that the suit should have been posted to a *specified day for hearing* and that the parties have notice thereof. The word 'hearing' refers to hearing of the case by the *Court* and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all.<sup>5</sup> It has also been held that where the date has been fixed by the clerk of the Court and not by the Judge, parties are not bound to attend on such date and failure to attend on such date will not justify dismissal of the suit for default of appearance.<sup>6</sup> It is not proper to dismiss a suit on a date

('32) AIR 1932 Oudh 106 (107). (Dismissal of a small cause suit under this rule—Revision lies under S. 25, Provincial Small Cause Courts Act.)

**Order 9 Rule 3 — Note 1**

1. ('18) AIR 1918 All 833 (335): 40 All 590. (One plaintiff present as the general attorney of all the other plaintiffs.)

[See also ('05) 1905 All W N 92 (92). (Plaintiff present but his witness was absent.)]

2. ('22) AIR 1922 Pat 504 (507). (Authorised agent with witness present in Court—Dismissal for non-appearance of pleader is illegal.)

3. ('20) AIR 1920 Pat 600 (601): 4 Pat L Jour 277. (Pleader present and asked for adjournment—No indication in the order dismissing the suit if the pleader was not ready to continue the suit on refusal of adjournment.)

('11) 9 Ind Cas 842 (844) (Cal).

4. ('34) AIR 1934 Pat 18 (19). (Non-appearance of parties on day fixed — Case governed by R. 8 and not by R. 5.)

5. ('11) 9 Ind Cas 842 (844) (Cal).

('38) AIR 1938 Cal 547 (548).

[See ('17) AIR 1917 Mad 196 (197). (Dismissal was on the adjourned hearing.)]

6. ('20) AIR 1920 Bom 54 (55): 44 Bom 767.

('26) AIR 1926 All 169 (170): 48 All 97. (Fresh suit is therefore not barred against absent defendants.)

('14) AIR 1914 Nag 20 (20): 10 Nag L R 39.

7. ('85) 7 All 542 (544).

**Note 3**

1. ('19) AIR 1919 Sind 89 (91): 13 Sind L R 149. ('22) AIR 1922 Pat 252 (254): 6 Pat L Jour 650. (The word "hearing" is used in different rules with a view to state different purposes for which a date for hearing is fixed.)

2. ('19) AIR 1919 Sind 89 (91): 13 Sind L R 149.

3. ('33) AIR 1933 Nag 234 (235, 236): 29 Nag L R 326. (Although the party has closed his case, it is his duty to appear at the adjourned hearing.)

4. ('70) 14 Suth W R 81 (82).

5. ('38) AIR 1938 Rang 360 (362).

6. ('34) AIR 1934 Lah 984 (984). (33 Pun L R 804, Followed.)

**O. 9 R. 8**  
**Notes 3-4**

of which the parties had no previous notice<sup>7</sup> or at a place not notified<sup>8</sup> or on a day fixed for considering only an application for amendment of the issues.<sup>9</sup> Similarly, when a day is fixed merely for the appearance of the guardian *ad litem* of a minor defendant<sup>10</sup> or for the attendance of the plaintiff only,<sup>11</sup> a dismissal of the suit on that day under this rule is not justified. A day fixed for judgment is not a day fixed for the hearing of the suit.<sup>12</sup> Where on a day fixed for the hearing of a preliminary issue, the onus of proof of which lies on the defendant, both the parties are absent, the Court ought not to dismiss the suit for default but should decide that issue against the defendant, especially in a case where a portion of the claim is admitted.<sup>13</sup> A date fixed solely as the last day for filing a list of witnesses is not a date fixed for 'hearing' and failure to file the list of witnesses within such date cannot entail dismissal of suit under this rule or Rule 8 *infra*.<sup>14</sup>

After a preliminary decree has been passed, the suit cannot be dismissed for default of appearance; the reason is that on the passing of the decree the parties acquire rights or incur liabilities which become fixed unless and until the decree is varied or set aside.<sup>15</sup> But although an order dismissing the suit for default of appearance after a preliminary decree has been passed is illegal unless such order is revoked or set aside, it cannot be *ignored*.<sup>16</sup>

**4. "The Court may make an order that the suit be dismissed."** — Under the old Code the expression used was "the suit shall be dismissed" and the Judge was

7. ('01) 14 C P L R 134 (134). (Such dismissal is illegal.)

[See also ('35) AIR 1935 Lah 163 (164). (Mere fact that District Judge put down in his order of remand that the parties were to appear before the Subordinate Judge on a certain date does not prove that this direction is actually conveyed to the counsel of the parties or to the parties by the counsel concerned—For absence of parties on such date there is sufficient cause within the meaning of R. 4 *infra*.)

('86) 165 Ind Cas 563 (564) (Lah). (Transfer of case to another Court without information to parties—Case decided in absence of parties—Application for restoration should be allowed.)]

8. ('18) 18 Ind Cas 280 (281) (Lah).

('04) 1904 Pun Re No. 87, page 121.

9. ('21) AIR 1921 Pat 96 (97); 6 Pat L Jour 381. (Only the application can be dismissed.)

('84) AIR 1934 Lah 287 (287, 288). (AIR 1921 Pat 96, Followed.)

[See ('27) AIR 1927 Sind 228 (229). (Date fixed for hearing an application in the suit—That application, and not the suit, can be dismissed.)]

10. ('28) 73 Ind Cas 559 (560) (Pat).

11. ('25) AIR 1925 Lah 96 (96).

('81) AIR 1981 Lah 69 (70).

('21) AIR 1921 Lah 820 (821). (Where no date was fixed for appearance of the defendant under Order 5 Rule 1, this rule does not apply.)

('86) AIR 1985 Lah 656 (656). (Unless a date has been fixed for the appearance of the defendant and neither party appears when the suit is called on for hearing on that date, O. 9 R. 8, O. P. C., would not apply.)

12. ('01) 1901 Pun Re No. 82, p. 267. (Non-

appearance of parties on that day—No ground for dismissal of suit.)

[See ('27) AIR 1927 Lah 888 (888). (Do.)]

13. ('29) AIR 1929 Lah 890 (891).

[See also ('14) AIR 1914 Mad 381 (382). (Parties agreeing to accept decision according to decision in another suit — Failure of parties to appear on adjourned date — Proper order is to proceed with suit under Order 17 Rule 3, and not to dismiss under this rule.)]

14. ('38) AIR 1938 Rang 360 (362). (The utmost result of the failure of a party to give a list of witnesses within the time fixed would be that the Court might decline to hear the evidence of any witnesses whom he might subsequently call; failure to file a list of witnesses by the date fixed can under no circumstances result in the dismissal of a suit.)

15. ('24) AIR 1924 P C 198 (200) : 4 Pat 61 : 51 Ind App 321 (P C).

('32) AIR 1932 Mad 519 (522).

('33) AIR 1933 Oudh 229 (230) : 8 Luck 496.

('36) AIR 1936 Lah 875 (876).

('38) AIR 1938 Pesh 27 (27). (The suit should be adjourned *sine die* and made revivable on payment of costs.)

[See also ('34) AIR 1934 Oudh 209 (210). (Application for final decree cannot be dismissed under this rule.)]

('27) AIR 1927 All 489 (440, 441) : 49 All 592. (Application for final decree dismissed for failure of decree-holder to furnish some particulars required by Court.)]

16. ('86) AIR 1986 Lah 875 (876). (Order appointing commissioner and for final decree does not amount to order setting aside order for dismissal in default.)

bound to dismiss the suit unless, for reasons to be recorded, he otherwise directed.<sup>1</sup> But under the present rule *a discretion* is given to the Court in the matter of dismissing the suit.<sup>2</sup>

**O. 9 R. 3**  
**Notes 4-6**

The Court has no power to *strike a case off its file* but can only make an order dismissing the suit.<sup>3</sup> Where, however, the parties state that the case is settled and at their request the case is struck off, it is not a dismissal for default under this rule.<sup>4</sup>

**5. Dismissal pending arbitration proceedings.** — When a suit is referred to arbitration and is pending before the arbitrator, the Court has no power to dismiss the suit for default under this rule unless an express order superseding the reference to arbitration has first been passed.<sup>1</sup>

**5a. Dismissal of suit for default after preliminary decree.** — See Note 3.

**6. Appeal and review.** — A dismissal under this rule is not a decree within Section 2 (2) and, therefore, no appeal lies.<sup>1</sup> The use of the word "order" makes it clear beyond doubt that the dismissal is not a decree.

It has been held in the undermentioned cases<sup>2</sup> that such an order is not open to review.

**R. 4.** [S. 99.] Where a suit is dismissed under rule 2 or

**O. 9 R. 4**

Plaintiff may bring  
fresh suit or Court may  
restore suit to file.

rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if

he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

[1877, Ss. 98, 99; 1859, S. 110.]

### Local Amendment

#### BOMBAY

Rule 4 shall be numbered Rule 4 (1) and the following sub-rule (2) shall be added to it, namely :

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this Rule."

#### Note 4

1. ('10) 8 Ind Cas 156 (157) (Mad).
- ('99) 23 Bom 657 (658). (Temporary appointment of the pleader as a Subordinate Judge was good reason for not dismissing the suit under Section 98.)
2. ('36) AIR 1936 Pat 437 (438).
3. ('87) 10 Mad 270 (271).
4. ('17) AIR 1917 Mad 495 (496, 497). (Striking off amounts to a withdrawal by the plaintiff.) [See ('68) 9 Suth W R 283 (284). (The court has discretion, to restore to its files any case which

it has itself removed therefrom undetermined.)]

#### Note 5

1. ('99) 1899 Pun Re No. 10, p. 52.

#### Note 6

1. ('02) 29 Cal 60 (62). (Dismissal under O. 9 R. 8.) Marsh 680, (Suit dismissed for default — Application for summons refused — No appeal against the latter order of refusal.)
2. ('98) 2 Cal W N 318 (319). (In this case the plaintiff had allowed his rights under O. 9 R. 4 to be barred.) ('99) 26 Cal 593 (600, 601). (Obiter.)

O. 9 R. 4  
Note 1

## Synopsis

1. Scope of the Rule.
2. "Sufficient cause."
3. Application under Rule 4 dismissed for default, if can be restored. See Order 9 General, Note 2.
4. Applicability of the Rule to execution proceedings. See Order 9 General, Note 1.
5. Applicability of the Rule to applications in forma pauperis.
6. Applicability of the Rule to insolvency proceedings.
- 6a. Applicability of the Rule to miscellaneous applications.
7. Notice to defendant.
8. Appeal.
9. Revision.
10. Limitation.

**1. Scope of the Rule.** — Where a suit is dismissed under Rule 2 or Rule 3, or under O. 17 R. 2 read with these rules, a *fresh suit* is not barred.<sup>1</sup> It may be brought notwithstanding the fact that no application for restoration has been made under this rule or even after an application under this rule has proved unsuccessful.<sup>2</sup> The two remedies are not mutually exclusive.<sup>3</sup> But the period covered by the restoration proceedings under this rule cannot be excluded under Section 14 of the Limitation Act for the purpose of the suit.<sup>4</sup>

It is only the Court which passes the order of dismissal that can set it aside under this rule.<sup>5</sup> Unlike Rules 7, 9 or 13 the present rule does not authorise the Court to impose any terms as to costs.<sup>6</sup> The effect of a restoration of the suit under this rule is to bring the suit back as regards parties to the same position in which it was at the time of dismissal.<sup>7</sup> The question whether ancillary orders which must be taken to fall along with the dismissal of the suit are restored when the suit is restored should, however, be decided with reference to the intention of the officer who passed the order restoring the suit and the terms of the order of restoration. If he intended to restore the suit and all the ancillary matters (such as injunction orders, etc.) connected with it, they are all restored. If he did not so intend, they are not restored. As a matter of general rule, the intention would be to restore the suit and all incidental matters.<sup>8</sup> Where there are more plaintiffs than one, the suit can be restored on the application

## Order 9 Rule 4 — Note 1

1. ('17) AIR 1917 Oudh 62 (63) : 20 Oudh Cas 66. (Suit dismissed under O. 9 R. 3.)
- ('25) AIR 1925 Nag 31 (31). (Do.)
- ('11) 9 Ind Cas 842 (844) (Cal). (Suit dismissed under S. 98 of C. P. Code of 1882.)
- ('79) 2 All 318 (320).
- ('29) AIR 1929 All 181 (191) : 50 All 837. (Suit dismissed under O. 9 R. 3.)
- ('75) 24 Suth W R 114 (115).
- ('69) 8 Beng L R App 130 (182, 183).
- [But see ('28) AIR 1928 Nag 220 (221). (Death of plaintiff — Fresh suit on the same cause of action by his legal representative after the period of 90 days allowed for bringing legal representatives on record, not maintainable.)]
2. ('21) 63 Ind Cas 289 (289) (All).
- ('26) AIR 1926 All 678 (678).
- ('87) AIR 1937 Oudh 262 (262) : 13 Luck 108. (Dismissal of the application for the restoration of original application under Sec. 4, U. P. Encumbered Estates Act, does not debar the person from making a second application under the Encumbered Estates Act.)
- ('87) AIR 1937 Pat 9 (11) : 15 Pat 716. (In the absence of some such provision as that with

which O. 9 R. 9, commences, a dismissal under O. 9 R. 3 would still not operate to preclude the plaintiff from suing again even if O. 9 R. 4, did not expressly save his right of suit. Rule 4 in effect does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit — Per Rowland, J.)

3. ('87) AIR 1937 Pat 9 (11) : 15 Pat 716.
- ('37) AIR 1937 Oudh 262 (262) : 13 Luck 108.
4. ('29) AIR 1929 Nag 219 (221) : 25 Nag L R 99.
5. ('20) AIR 1920 Lah 418 (419).
6. ('01) 26 Bom 201 (202).
7. ('24) AIR 1924 Cal 814 (815). (After the restoration it is competent to a particular plaintiff or plaintiffs to apply to be dismissed from the suit or to withdraw the suit.)
- ('09) 8 Ind Cas 484 (486) : 1909 Pun Re No. 31. (Suit when re-admitted must be held as instituted on the date when the plaint was originally filed and not on the date of its re-admission.)
- ('80) AIR 1930 All 168 (169). (Restoration of entire suit after dismissal for default and on application of one or more of several plaintiffs is not improper.)
8. ('34) AIR 1934 Mad 49 (51) : 57 Mad 308.



of *any one* of them.<sup>9</sup> Where a suit brought by a shebait in the name of an idol is dismissed for default under O. 9 R. 3, an application for restoration under this rule can be made by another shebait who is the shebait at the time of the application.<sup>10</sup>

**O. 9 R. 4**  
**Notes 1-5**

**2. "Sufficient cause."** — An order under this rule without giving the applicant an opportunity to show sufficient cause is *ultra vires*.<sup>1</sup> As to what is sufficient cause is a matter of discretion and no hard and fast rule can be laid down.<sup>2</sup> Where the plaintiff is prevented from attending Court due to unavoidable causes, *e. g.*, picketing by volunteers of Gandhiji, it was held that there was sufficient cause for non-appearance.<sup>3</sup> Similarly, where the plaintiff had been taken ill and his counsel was only a few minutes late, it was held that the suit should be restored to file.<sup>4</sup> A *bona fide* mistake which is not unreasonable is a sufficient cause to order restoration.<sup>5</sup> But the mere fact that the summons has been returned unserved on the defendant is no ground for setting aside the order of dismissal.<sup>6</sup> See also Notes under Rule 9.

If sufficient cause is shown for non-appearance, the Court is bound to restore the suit; it has no choice in the matter.<sup>7</sup> See also the undermentioned case.<sup>8</sup>

**3. Application under Rule 4 dismissed for default, if can be restored.**  
— See Order 9 General, Note 2.

**4. Applicability of the Rule to execution proceedings.** — See Order 9, General, Note 1.

**5. Applicability of the Rule to applications in forma pauperis.** — It has been held by the High Court of Rangoon, applying the provisions of Section 141 of the Code, that where, at the hearing of an application to sue in *forma pauperis*, neither party appears and the application is dismissed, a fresh application to sue in *forma pauperis* is not barred under the provisions of this rule.<sup>1</sup> But if the dismissal

9. ('24) AIR 1924 Cal 814 (815).

10. ('38) AIR 1938 Cal 547 (548). (The real plaintiff in the suit must be held to be the idol and not the shebait who was suing in his name.)

#### Note 2

1. ('89) 1889 Bom P J 216 (216).

2. (1865) 1865 Bourke (O C) 115. (Illness of the plaintiff supported by a medical certificate is sufficient cause.)

('27) AIR 1927 Lah 911 (912). (Plaintiff's statement on oath that process fee was paid but apparently mislaid in Court is sufficient.)

('01) 9 Bom L R 130 (131). (The application for restoration need not be accompanied by an affidavit.)

('26) AIR 1926 Lah 634 (634). (Absence not being intentional is a sufficient cause for restoration of a suit.)

('30) AIR 1930 Lah 70 (71). (Do.)

('85) 7 All 542 (545). (Delay of a few minutes ought to be excused.)

3. ('31) AIR 1931 Pat 87 (88).

4. ('34) AIR 1934 Lah 84 (84).

5. ('66) 3 Bom H O R O C 60 (62).

('29) AIR 1929 Lah 882 (882). (Mistake on the part of the plaintiff's agent as to the Court in which the case was to be heard.)

('32) AIR 1932 Lah 176 (176). (Mistake as to date of hearing due to misunderstanding.)

(1864) 2 Hydo 216 (216). (Absence owing to an understanding between the parties for an adjournment.)

('35) AIR 1935 Lah 163 (164). (Appellate Judge noting in order that parties are to appear before lower Court on certain date—No proof that either pleaders or parties were informed of it—For parties' absence on such date there is sufficient cause.)

('36) 165 Ind Cas 563 (564) (Lah). (Transfer of case to another Court without information to parties—Case decided in absence of party — Application for restoration should be allowed.)

6. ('26) AIR 1926 Cal 112 (112).

7. ('33) AIR 1933 Nag 39 (40); 28 Nag L R 295.

8. ('39) AIR 1939 Lah 592 (592); 41 Pun L R 571 (571). (In the matter of restoration of suits dismissed for default, Courts should be anxious to see that litigants obtain justice without being hampered by rules of procedure, unless such are imperative or there is contumacious obstruction or deliberate delay with a view deliberately to lengthen proceedings. The dismissal of suits without considering whether payment of costs will not meet the situation so far as the opposite side, if any, is concerned, must be deprecated.)

#### Note 5

1. ('26) AIR 1926 Rang 200 (201); 4 Rang 245.

('24) AIR 1924 Rang 161 (161).

**O. 9 R. 4** instead of being one under Rule 3 is one under Rule 8, a fresh application will be  
**Notes 3-10** barred.<sup>3</sup>

**6. Applicability of the Rule to insolvency proceedings.** — It was held in the undermentioned cases<sup>1</sup> that where an insolvency petition was dismissed on the analogy of Rule 2 for non-payment of process-fee, a fresh application for insolvency is not barred, by virtue of the provisions of this rule.

**6a. Applicability of the Rule to miscellaneous applications.** — An application for a final decree in a mortgage suit is not an application in execution, and by virtue of Section 141, this rule will apply to such applications also. Where an application for a final decree has been dismissed for non-payment of *batta*, the applicant can file a fresh application for the same.<sup>1</sup> When an application for amendment of a decree is dismissed for non-payment of *batta*, a fresh application for amendment can be made.<sup>2</sup> Where an application for adjudication as an insolvent is dismissed on account of the default of both the parties, an application can be made to restore the previous application.<sup>3</sup>

**7. Notice to defendant.** — Notice to defendant is not necessary for restoration under this rule.<sup>1</sup> Where, however, the suit is restored and a date is fixed for the hearing of the case, the defendant is, as of right entitled to a notice of such date.<sup>2</sup>

**8. Appeal.** — No appeal lies from any order passed under this rule.<sup>1</sup>

**9. Revision.** — The High Court of Lahore has held in the undermentioned case<sup>1</sup> that an order rejecting an application under this rule is not open to revision under Section 115, Civil Procedure Code, but that the High Court can interfere under its inherent powers.

**10. Limitation.** — Under Article 163 of the Limitation Act, 1908, the period of limitation prescribed for an application under this rule is thirty days from the date of dismissal. Time cannot be extended under Section 5 of the Limitation Act in the absence of any express provision made by the High Court under its rule-making powers.<sup>1</sup> Similarly, where an application under this rule is time-barred, the bar of limitation cannot be evaded by purporting to prefer an application under O. 47 R. 1.<sup>2</sup>

2. ('25) AIR 1925 Mad 986 (988).

**Note 6**

1. ('28) AIR 1928 Pat 116 (117).
- ('19) AIR 1919 Cal 108 (108). (Dismissal of application for restoration is no bar to presentation of fresh application.)

**Note 6a**

1. ('38) AIR 1938 Mad 55 (56) : 56 Mad 310.
2. ('38) AIR 1938 Pat 208 (208) : 12 Pat 179.
3. ('38) AIR 1938 Nag 39 (40) : 28 Nag L R 295. (Restoration application itself dismissed without entering into merits—Fresh application for restoration will lie.)

**Note 7**

1. ('12) 17 Ind Cas 292 (293) (All). (This rule is also applicable to the Appellate Court.)
- ('23) AIR 1923 Oudh 55 (55) : 24 Oudh Cas 347.
2. ('88) AIR 1938 All 522 (522, 523) : 55 All 684.

**Note 8**

1. ('17) AIR 1917 Pat 593 (593).
- ('18) AIR 1918 All 176 (177).

('18) AIR 1918 Cal 164 (164).

('19) AIR 1919 Cal 125 (125). (In this case there is both an appeal and a rule.)

('10) 6 Ind Cas 464 (464) (All).

('87) 10 Mad 270 (271).

('11) 9 Ind Cas 238 (238) (Lah).

**Note 9**

1. ('30) AIR 1930 Lah 440 (441).

[But see ('36) 165 Ind Cas 563 (564) (Lah). (Transfer of suit to another Court without notice to plaintiff—Suit dismissed for default—Restoration application dismissed—Court acts with material irregularity in the exercise of its jurisdiction and High Court can interfere in revision.)]

**Note 10**

1. ('29) AIR 1929 All 127 (128) : 51 All 487.

('28) AIR 1928 Mad 556 (557).

See also sub-rule (2) asked by the Bombay High Court.

2. ('33) AIR 1933 Pat 557 (558).

**R. 5. [S. 99A.]** *“(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that —***O. 9 R. 5**

Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.

*issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the*

*officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that —*

*(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or*

*(b) such defendant is avoiding service of process, or*

*(c) there is any other sufficient cause for extending the time,*

*in which case the Court may extend the time for making such application for such period as it thinks fit.*

*(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.*

a. Substituted by the Code of Civil Procedure (Amendment) Act, XXIV of 1920, Section 2, for the original sub-rule (1).

### Synopsis

1. Legislative changes after 1908.

2. “Period of three months,” computation of.

3. Fresh summons, when granted.

4. Failure to take fresh summons does not discharge the defendant from any liability.

5. Appeal.

#### Other Topics (miscellaneous)

Fresh suit. See Note 4.

Order not decree. See Note 5.

Order under this rule — Whether res judicata. See Note 4.

**1. Legislative changes after 1908.** — Sub-rule (1) has been newly substituted for the old sub-rule by the Amending Act, XXIV of 1920, thus effecting the following important changes —

(1) The period during which the plaintiff may remain without applying for fresh summons is reduced from one year to *three months*.

(2) The words “*shall* make an order” have been used in the place of the words “*may* make an order.”

(3) Provision has been made in sub-clause (c) for extension of time for making the application referred to.

**2. “Period of three months,” computation of.** — Under the old Code the period fixed was one year<sup>1</sup> and it was calculated, not from the filing of the plaint, but

#### Order 9 Rule 5 — Note 2

1. (‘10) 5 Ind Cas 587 (588) (Cal). (But Court was

not bound to wait for the whole period as the Rule is only an enabling provision.)

**O. 9 R. 5  
Notes 2-5**

from the return of the summons unserved.<sup>2</sup> The question also arose whether the period was to be calculated from the date of the return of the serving-officer or from the date of the return of the officer whose duty it was to certify to the Court the return of the serving-officer. It was held in the undermentioned case<sup>3</sup> that the period was to be calculated from the date of the return made by the latter officer. Effect has been given to that decision in the present rule. A dismissal of a suit under this rule before the expiry of the period of three months is premature and irregular.<sup>4</sup>

**3. Fresh summons, when granted.** — The plaintiff must apply for fresh summons within the prescribed period, i. e., three months from the date of the return of non-service on the defendant.<sup>1</sup> If he wants an extension of time he has to apply to the Court within three months and satisfy the Court as to any of the circumstances mentioned in sub-clauses (a), (b) and (c).<sup>3</sup> See also the undermentioned case.<sup>3</sup>

**4. Failure to take fresh summons does not discharge the defendant from any liability.** — Failure on the part of the plaintiff to take fresh summons and the consequent dismissal of the suit does not take away the liability of the defendant and does not operate as *res judicata* in a fresh suit against him.<sup>1</sup> Nor can a co-defendant plead that he is only a surety and that, as the other defendant who is the principal debtor is not served, he is not liable.<sup>2</sup> Where, however, the records of a suit were consigned to the record-room owing to the non-service of summons on one of the defendants, a subsequent suit against the same defendant on the same cause of action was held to be barred on the ground that the suit must be deemed to be still pending.<sup>3</sup>

**5. Appeal.** — The words "shall make an order that the suit be dismissed" in the place of "may dismiss the suit" occurring in the old Code make it perfectly clear that the dismissal under this rule is not appealable as a *decree*. This rule does not apply to appeals as Order 41 contains specific rules covering corresponding cases that arise in appeal.<sup>1</sup>

**O. 9 R. 6**

**R. 6. [S. 100.] (1)** Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then —

Procedure when only plaintiff appears.

When summons duly served.

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte* ;

2. ('05) 7 Bom L R 928 (929).

3. ('89) 18 Bom 500 (502).

4. ('83) AIR 1983 Pat 557 (558).

('81) AIR 1981 Mad 795 (797).

[See also ('83) AIR 1983 Pat 582 (583).]

**Note 3**

1. ('16) AIR 1916 Cal 507 (509).

('01) 3 Bom L R 402 (404).

('81) AIR 1981 Lah 655 (655). (Case of want of correct address of defendant.)

2. ('09) 18 Cal W N 75n.

1 Ind Jour (N. S.) 224.

('78) 8 Cal 812 (818).

('75) 15 Beng L R App 12 (14). (Laches of plaintiff will disentitle him to fresh summons.)

3. ('86) 88 Pun L R 197 (197). (An order staying

proceedings under O. 9 R. 5, O. P. Code, is illegal, where the report on the summons which was attempted to be served is that the defendant is absconding. Proper course is to order substituted service.)

**Note 4**

1. ('06) 28 All 749 (751, 752).

2. ('90) 14 Bom 267 (269).

('14) AIR 1914 Bom 242 (242) : 39 Bom 52.

('91) 1891 Bom P J 63 (68).

[But see ('18) AIR 1918 Upp Bur 1 (2) : 3 Upp Bur 62.]

3. ('17) AIR 1917 Lah 211 (211).

**Note 5**

1. ('27) AIR 1927 Bom 66 (69, 70) : 50 Bom 815. (Per Fawcett, J.)

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

O. 9 R. 6  
Notes 1-2

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

[1877, Ss. 100, 101; 1859, Ss. 111, 112, 113.]

### Synopsis

1. Scope of the Rule.
2. *Ex parte* decree.
3. Remedies in the case of an *ex parte* decree.
4. Subsequent appearance of defendant pending suit. See Rule 7.
5. Second summons — Clause (b).
6. Sufficient time — Clause (c).

### Other Topics (miscellaneous)

Adjourned hearing—Applicability of rule to. See Note 1.

Appeal. See Note 3.  
Order 9 Rule 6 and O. 17 R. 2. See Note 1.

**1. Scope of the Rule.** — This rule contemplates the hearing of the suit on the day fixed in the summons, whereas O. 17 R. 2 contemplates the hearing of the suit on some later date to which the hearing may be adjourned.<sup>1</sup> Thus, if the defendant had already appeared in answer to the summons but fails to appear at the adjourned hearing, the case falls under O. 17 R. 2,<sup>2</sup> though the procedure contemplated in either case is the same.<sup>3</sup> When an appearance under Order 9 is in question the word "hearing" means the *first day of the hearing*.<sup>4</sup>

The fact that the summons may have directed the defendant to file a written statement does not authorise the Court to proceed under O. 8 R. 10; if the defendant does not appear, the proper procedure is that prescribed under this rule.<sup>5</sup>

**2. *Ex parte* decree.** — The plaintiff is not entitled to have the suit declared *ex parte* before the returnable date fixed in the summons.<sup>1</sup> Before proceeding *ex parte* the Court must be satisfied that there is due service of summons on the defendant.<sup>2</sup>

#### Order 9 Rule 6 — Note 1

1. ('22) AIR 1922 Pat 485 (487, 488) : 1 Pat 188. ('37) AIR 1937 All 847 (348).
2. ('14) AIR 1914 Cal 860 (861) : 41 Cal 956. ('78) 2 All 67 (70, 71) : 5 Ind App 288 (P O). ('31) AIR 1931 All 708 (704).
3. ('22) AIR 1922 Pat 485 (487) : 1 Pat 188.
4. ('27) AIR 1927 Mad 799 (800).

('85) 7 All 538 (540).

('37) AIR 1937 All 347 (348).

5. ('25) AIR 1925 Oudh 567 (568).

#### Note 2

1. ('08) 32 Bom 534 (539).
2. (1900) 28 All 99 (100).
- ('69) 12 Suth W R 210 (211, 212).
- ('80) 5 Cal 353 (355).

**O. 8 R. 6  
Notes 2-6**

An *ex parte* proceeding ought not to be taken on the basis of service effected by registered post.<sup>3</sup> The *onus* of proving due service is, of course, on the plaintiff in the first instance.<sup>4</sup>

The Code does not prescribe any procedure to be followed in the case of an *ex parte* suit. The practice is that no issues are framed, though the plaintiff is called upon to prove his case.<sup>5</sup> The plaintiff is bound to prove his case to the satisfaction of the Court and his burden is not lightened because the defendant is absent.<sup>6</sup> Except in suits relating to negotiable instruments, as under O. 37 R. 2, evidence should be adduced by the plaintiff<sup>7</sup> and a *prima facie* case made out.<sup>8</sup> The Court is bound to consider the interests of the absent defendant<sup>9</sup> and not to rely on evidence otherwise unreliable simply because the case is *ex parte*.<sup>10</sup>

**3. Remedies in the case of an *ex parte* decree.** — A defendant against whom an *ex parte* decree has been passed can —

- (1) apply under Rule 13, *infra*, to set aside the *ex parte* decree, or
- (2) appeal from the decree under Section 96, or
- (3) apply for a review under O. 47 R. 1.<sup>1</sup>

As to when a suit can be brought to set aside an *ex parte* decree, see Note 12 to Rule 13. As to the limitation for applications under Rule 13, see Note 28 thereto.

**4. Subsequent appearance of defendant pending suit.** — See Rule 7.

**5. Second summons — Clause (b).** — If it is not proved that there was due service, the Court is bound to order fresh summons for the defendant. If the non-service or failure to effect due service is due to plaintiff's *default* the Court is bound to order him to pay the costs of the postponement under sub-rule 2.<sup>1</sup>

**6. Sufficient time — Clause (c).** — The words '*duly served*' mean served in sufficient time to enable the defendant to appear in person or by a pleader<sup>1</sup> and the Court is bound under sub-clause (c) to direct fresh summons if he is not served in sufficient time.

If the defendant though not served in sufficient time nevertheless appears and asks for time, the Court is not justified in refusing it and proceeding *ex parte*. By his appearing he should not be placed in a worse position than he would be in if he had not appeared at all.<sup>2</sup>

('90) 1890 Bom P J 186 (186). (Ex parte decision against a defendant, who has never been served with notice of suit, is bad.)

3. ('26) AIR 1926 Lah 579 (580).

4. ('25) AIR 1925 Cal 801 (802) : 52 Cal 458. (1900) 23 All 99 (100).

5. ('28) AIR 1928 Nag 88 (84). (But Court requiring proof under O. 8 R. 5 must state points to be proved in the form of issues.)

('28) AIR 1928 Nag 165 (166). (Proper procedure to be followed in *ex parte* case stated.)

6. ('24) AIR 1924 Cal 806 (806).

('29) AIR 1929 All 612 (618).

('37) 169 Ind Cas 226 (227) (Oudh).

7. ('17) AIR 1917 Cal 269 (271, 273 and 274) : 43 Cal 1001.

8. ('71) 15 Suth W R 508 (504).

('26) AIR 1926 Oudh 192 (193).

('66) 1866 Pun Re No. 85, p. 90.

9. ('24) AIR 1924 Cal 647 (648).

10. ('17) AIR 1917 Oudh 194 (196).

**Note 3**

1. ('74) 22 Suth W R 213 (214). (Can apply for a review.)

('86) 9 Mad 445 (447). (Can appeal.)

(1900) 23 All 99 (100, 101, 104). (Do.)

('17) AIR 1917 All 475 (476) : 39 All 143. (Do.)

**Note 5**

1. ('94) 18 Bom 59 (60).

('81) AIR 1981 Pat 420 (420, 421). (Plaintiff not bound to supply identifier to serve defendant—Plaintiff duly paying process fee—Non-service is not due to plaintiff's default—Suit ought not to be dismissed.)

**Note 6**

1. (1900-02) 1 Low Bur Rul 226 (227, 228).

('70) 7 Bom H.O R A O 188 (189).

2. ('72) 18 Suth W R 141 (142).

**R. 7. [S. 101.]** Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

**O. 9 R. 7**

to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

[1877, Ss. 100, 101; 1859, S. 111.]

**Synopsis**

**1. Scope of the Rule. | 2. "Assigns good cause."**

**1. Scope of the Rule.** — The underlying principle of this rule is that until a suit is actually called and so long as an *ex parte* decree is not passed, the defendant is entitled to come in and defend the suit.<sup>1</sup> The Courts should be liberal in construing this rule and should not take a stringent view of the defendant's absence.<sup>2</sup>

The rejection of an application under this rule is no bar to an application under Rule 13 after the passing of an *ex parte* decree.<sup>3</sup>

**2. "Assigns good cause."** — If the defendant wants to set aside the order placing him *ex parte* and be relegated to the stage at which the suit was, when he absented himself, then he has to assign good cause for his previous absence. But if he merely wants to take part in the proceedings *at the stage* at which it is when he appears, it is not necessary to get the previous order placing him *ex parte* set aside. The reason is that the rule is not intended to be penal and by the very fact of his appearance the proceedings cease to be *ex parte* thenceforth.<sup>1</sup>

Though the rule gives a discretion to the Court to impose terms, failure to do so is not an irregular or improper exercise of discretion such as to justify interference in revision.<sup>2</sup>

**Order 9 Rule 7 — Note 1**

1. ('22) AIR 1922 Bom 845 (845).  
(72) 9 Beng L R App 15 (16).  
(22) AIR 1922 All 110 (111).  
[See ('24) AIR 1924 Cal 806 (808).]  
[See also ('81) 5 Bom 184 (188).]
2. ('81) AIR 1981 Oudh 159 (160).
3. ('98) 21 Mad 824 (825).  
(96) 10 C P L R 45 (46).  
(82) 8 Cal 272 (274).

**Note 2**

1. ('81) AIR 1981 Nag 122 (123); 27 Nag L R 50.  
(26) AIR 1926 Sind 181 (184).  
(28) AIR 1928 Mad 211 (212).  
(25) AIR 1925 Mad 1274 (1275).  
(27) AIR 1927 Mad 1197 (1197); 51 Mad 597. (Defendant filing written statement and absenting himself — He is not debarred to come in at the stage at which the case is.)  
(22) AIR 1922 All 88 (84).  
[See ('81) AIR 1981 Lah 616 (616). (Ex parte defendant appearing and not asking for re-hearing of prior proceedings—Court has no jurisdiction to order costs against him.)]

tion to order costs against him.)]  
[See also ('89) AIR 1939 Mad 885 (885). (Though it is the practice in the mofussil to pass an order declaring a defendant *ex parte*, the Code does not, in terms, provide for an application to set aside that order. All that R. 7 of O. 9 provides is that the defendant may be heard in answer to the suit. It is only when a decree has been passed that an application in terms to set aside that decree is contemplated in R. 13. There is no justification for imposing on the defendant who appears at the adjourned hearing, any restriction to the effect that he is entitled only to cross-examine the witnesses on the other side and is not entitled to lead any evidence on his own side—So also there is no reason to deny the defendant an opportunity to file a written statement at that stage — Mere fact that on new statement additional issues may have to be framed does not amount to re-opening anything that has happened.)]

- [But see ('29) AIR 1929 Sind 46 (46, 48).  
(28) AIR 1928 Oudh 177 (178); 26 Oudh Cas 10.]
2. ('20) AIR 1920 Mad 218 (215).

O. 9 R. 8

**R. 8. [S. 102.]** Where the defendant appears and the

Procedure where defendant only appears.

plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

[1877, Ss. 102, 103; 1859, S. 114.]

*Synopsis*

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. Appearance. See Rule 9.</li> <li>3. "When a suit is called on for hearing."</li> <li>4. More plaintiffs than one.</li> <li>5. More defendants than one.</li> </ol> | <ol style="list-style-type: none"> <li>6. "Shall make an order that the suit be dismissed."</li> <li>7. Unless the defendant admits.</li> <li>8. Effect of dismissal under this Rule.</li> <li>9. Revision.</li> </ol> |
|---|--|

*Other Topics (miscellaneous)*

Appeal, when lies. See Notes 3, 6 and 7.  
Dismiss the suit. See Note 3.

Procedure when the plaintiff dies. See Note 1.  
Shall pass a decree. See Note 7.

**1. Scope of the Rule.** — This rule deals with the procedure to be followed when the plaintiff does not appear and the defendant alone appears. In such a case, the only thing that the defendant is entitled to claim is to have the plaintiff's suit dismissed. He is not entitled to call evidence to disprove charges of fraud, etc., made against him in the plaint.<sup>1</sup>

The Court has no power to dismiss a suit for default under this rule where the plaintiff *dies*. Such an order of dismissal is a nullity, the reason being that the rules applicable to a defaulter cannot be applied to a dead man.<sup>2</sup> Similarly, a dismissal under this rule is not proper if the plaintiff has been adjudicated *insolvent* before the hearing, as there is none on the record who is bound to appear; the Court should, in such a case, act under Order 22 Rule 8.<sup>3</sup>

Where a reference to arbitration in a suit provided that the arbitrator should hear evidence and determine the case and that if one of the parties failed to appear, he should have power to proceed *ex parte*, the arbitrator cannot, on failure of one of the parties to appear, act under the provisions of this rule.<sup>4</sup>

**2. Appearance.** — See Notes under the same heading in Rule 9, *infra*.

**3. "When a suit is called on for hearing."** — The hearing of the suit may be either on the day named in the summons or on a subsequent day to which the hearing

**Order 9 Rule 8 — Note 1**

1. ('12) 17 Ind Cas 87 (87) : 40 Cal 119.
2. ('18) 19 Ind Cas 526 (527) : 35 All 381; 40 Ind App 151 : 16 Oudh Cas 194 (PC).
- ('19) AIR 1919 Lah 447 (447) : 1918 Pun Re No. 96.
- ('24) AIR 1924 Oudh 114 (114). (Order passed under this rule after plaintiff's death is a nullity.)
- ('80) AIR 1980 Oudh 8 (5) : 5 Luck 241.
- ('85) AIR 1985 Nag 189 (190) : 31 Nag L R 374.

(The dismissal can be set aside without a formal application to that effect being made by the legal representative of the deceased plaintiff under O. 9 R. 9. An application by the legal representative to bring him on record falls under O. 22 R. 8.)

3. ('27) AIR 1927 Cal 76 (77, 78) : 53 Cal 844.
4. ('18) AIR 1918 Cal 247 (247). (He should hear the other party before making award.)



may be adjourned.<sup>1</sup> The date fixed for the settlement of issues is as much a day fixed for the hearing as any other date fixed.<sup>2</sup>

**O. 9 R. 8  
Note 3**

A dismissal of a suit at an *adjourned hearing*, for default of plaintiff's appearance is under the provisions of O. 17 R. 2 read with this rule.<sup>3</sup> As will be seen from the provisions of Order 17 *infra*, a dismissal under Rule 2 of that Order can be set aside under the provisions of Order 9 and the suit restored,<sup>4</sup> while, if the dismissal is under Rule 3 of that Order the remedy of the party aggrieved is only by way of appeal or review and not by an application for restoration under O. 9 R. 9.<sup>5</sup>

A Court will not be justified in dismissing a suit under this rule where the evidence on record is sufficient to decree the claim of the plaintiff,<sup>6</sup> or where the evidence has been completely recorded and nothing remains to be done except to hear arguments,<sup>7</sup> or where the suit was adjourned in the course of arguments,<sup>8</sup> or for pronouncing judgment.<sup>9</sup> Similarly, where part of the plaintiff's claim was fully determined by a preliminary order and the rest of the claim was abandoned, the Court is not justified in dismissing the suit for default.<sup>10</sup> A failure to amend the plaint as per order of Court and to pay costs of the adjournment does not justify a dismissal of the suit for default after the evidence is finished.<sup>11</sup>

It is not proper for the Court to dismiss the suit on a day not fixed for the hearing of the suit<sup>12</sup> as, for example, when the day was fixed for the appointment of a guardian *ad litem* of a minor defendant,<sup>13</sup> or on a day which is not duly notified to

### Note 3

1. ('68) 4 Mad H O R 56 (59).
2. ('18) AIR 1918 Pat 62 (62).
2. ('25) AIR 1925 Oudh 682 (682).
- ('22) AIR 1922 Mad 416 (416).
3. ('22) AIR 1922 All 68 (68).
- ('34) AIR 1934 Mad 199 (199).
- ('96) 20 Bom 736 (744).
- ('80) 1880 Pun Re No. 41, page 88.
- ('02) 12 Mad L Jour 478 (474).
- ('25) AIR 1925 Oudh 433 (434).
- ('10) 6 Ind Cas 233 (234, 235) : 34 Mad 97.
- ('09) 5 Low Bur Rul 75 (76).
- ('17) AIR 1917 All 136 (136, 137).
- ('84) 7 Mad 41 (42).
- ('28) AIR 1923 Pat 530 (531).
- ('08) 1 Sind L R 224 (225).
- ('07) 34 Cal 235 (236, 237, 239).
- ('18) AIR 1918 Cal 330 (331).
- ('32) AIR 1932 Lah 477 (478). (Default on date fixed for hearing of the objections to award.)
- ('29) 116 Ind-Cas 752 (752) (All).
4. ('87) AIR 1937 Rang 437 (438).
- [See also ('39) AIR 1939 Nag 213 (213) : 1 L R (1939) Nag 574. (If an order is made under O. 17 R. 2 read with O. 9 R. 8, then it is as though it were an order under O. 9 R. 8 and is not appealable at all.)]
5. ('76) 1 Mad 287 (288).
- ('15) AIR 1915 Mad 16 (17).
- [See ('26) AIR 1926 All 729 (730).]
6. ('05) 7 Bom L R 261 (262).
- ('09) 3 Ind Cas 683 (684) : 5 Low Bur Rul 75.
7. ('81) 3 All 292 (294). (Order appealable.)
8. ('31) AIR 1931 Bom 111 (113).
9. ('11) 11 Ind Cas 842 (842, 843) (Lah).
10. ('10) 6 Ind Cas 592 (593, 594) : 37 Cal 426 : 37 Ind App 80 (P C).
11. ('26) AIR 1926 Lah 571 (571).
12. ('29) AIR 1929 Lah 374 (375).
- ('70) 14 Suth W R 401 (402). (Suit remanded—A day was fixed which was not notified to the parties—Dismissal of the suit on such a day was held to be improper.)
- ('36) AIR 1936 Lah 759 (760). (Date fixed merely for filing objections against the report of the commissioner is not date fixed for hearing.)
- ('38) AIR 1938 Rang 360 (362). (Date fixed for filing list of witnesses is not date fixed for hearing.)
- ('37) AIR 1937 Lah 118 (118). (Day fixed for payment of costs of adjournment by defendant to plaintiff—Not date fixed for hearing.)
- ('36) AIR 1936 Lah 280 (281). (An order dismissing the suit of the plaintiff for default on a date fixed for the submission of the report of the commissioner as to the market value of the property in suit for purposes of Court-fees, is without jurisdiction, as such date is not the date of the hearing within the meaning of O. 9 R. 8.)
- ('35) AIR 1935 Pesh 186 (188).
13. ('11) 10 Ind Cas 813 (814) : 33 All 560.
- ('24) AIR 1924 Pat 714 (715).
- ('22) AIR 1922 Pat 252 (254, 255) : 6 Pat L Jour 650.
- ('28) 73 Ind Cas 559 (560) (Pat.)

**O. 9 R. 8**  
**Notes 3-5**

the parties,<sup>14</sup> or on holidays.<sup>15</sup> The word 'hearing' does not mean only the recording of evidence. It means the hearing of the suit before the Court and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all.<sup>16</sup> The Court should not hastily dismiss a suit for non-appearance when the suit is pending reference to arbitration and when the arbitrator had applied for extension of time to make the award.<sup>17</sup> Where a commissioner has been appointed and he has not made his report, the suit cannot be heard until the commissioner has finished his work and there can be no dismissal for default.<sup>18</sup> After a decree has once been made, a suit cannot be dismissed for default.<sup>19</sup> Thus, there can be no dismissal under this rule after a preliminary decree for partition; and if an order is so made, it is passed without jurisdiction.<sup>20</sup> The Court should in such cases adjourn the suit *sine die* with liberty to the plaintiff to apply to restore the suit to the list on payment of costs.<sup>21</sup> Where on an amendment of the plaint being allowed, the plaintiff is directed to give the value of the property (relief as to which has been allowed to be added by amendment) and to put in deficit court-fee, the proper order to pass on non-compliance is an order *rejecting the plaint* and not one dismissing the suit for default.<sup>22</sup>

**4. More plaintiffs than one.**—This rule is meant to provide for a case where a single plaintiff does not appear or, where there are several plaintiffs, and *all* of them do not appear.<sup>1</sup> Cases, where *some only* of several plaintiffs do not appear, are provided for in Rule 10, *infra*.

**5. More defendants than one.**—Under this rule there can be a partial or total dismissal for default.<sup>1</sup> As has been seen in the Notes to Rule 3 *supra*, so far as the

14. ('26) 96 Ind Cas 245 (245) (Lah).

(34) AIR 1934 Lah 91 (91). (Transferee Court issuing notice to plaintiff and his counsel to appear on certain day—Notice on plaintiff not served—Notice on counsel served but he refused to accept notice—Trial Court holding service on counsel good and dismissing suit—Procedure held to be unfair.)

(13) 18 Ind Cas 280 (281) (Lah). (Case heard in camp and not at headquarters—No notice to parties.)

(66) 2 Bom H O R 381 (382).

(28) AIR 1928 Lah 481 (482).

[See ('28) AIR 1928 All 79 (80). (Notice of hearing date not given to defendant—Ex parte decree must be set aside.)]

15. ('90) 1890 Pun Re No. 86. (The Court can do business on holiday but it cannot make the parties to appear on that day without their consent.)

[See ('15) AIR 1915 Lah 476 (477). (Hearing fixed on holiday—Case taken up on next day and dismissed—Dismissal not proper.)]

16. ('88) AIR 1938 Rang 360 (362).

17. ('10) 8 Ind Cas 224 (224) (Lah).

[See also ('37) AIR 1937 Pesh 49 (50). (Matter referred to arbitration—Day fixed for umpire's report—Plaintiff absent on that date—Court cannot dismiss suit for default under O. 9 R. 8.)]

18. ('20) AIR 1920 Cal 204 (205).

(84) AIR 1934 Lah 56 (57).

19. ('24) AIR 1924 P O 198 (200) : 51 Ind App 321 : 4 Pat 61 (PC). (Unless the decree is reversed on appeal.)

(32) AIR 1932 Mad 519 (522). (Do.)

(33) AIR 1933 Sind 200 (201, 202) : 28 Sind L R 167. (Do.—Dismissal for default after the passing of the preliminary decree in the partition suit.)

(27) AIR 1927 Oudh 49 (50). (Do.)

20. ('25) AIR 1925 Pat 433 (434). (Delay in producing commissioner's fee—Suit dismissed.)

(30) AIR 1930 Mad 158 (158) : 53 Mad 395.

(36) AIR 1936 Lah 875 (876). (The Court cannot, however, ignore that order and take further proceedings in the suit, unless it is set aside in due course of law, that is to say, either by review or by an application to set aside the dismissal in default or by an appeal or revision. An order appointing a commissioner to effect partition cannot be deemed to be tantamount to an order setting aside the dismissal of the suit in default.) [See also ('36) AIR 1936 Lah 759 (760). (Dismissal of suit for failure to appear on date fixed for filing objections to report of commissioner appointed in pursuance of preliminary decree for accounts is erroneous.)]

21. ('28) AIR 1928 Mad 968 (964). (Where the decision in AIR 1924 P C 198 was interpreted to lay down this proposition.)

22. ('35) AIR 1935 Cal 764 (765).

**Note 4**

1. ('21) AIR 1921 Cal 176 (177) : 48 Cal 57.

[See also ('31) AIR 1931 Mad 590 (591) : 54 Mad 770. (Suit under O. 1 R. 8—Non-appearance of persons not plaintiffs *eo nomine*—No dismissal of suit.)]

**Note 5**

1. ('25) AIR 1925 All 425 (426).

defendant or defendants who appear are concerned, the order of dismissal will be one under this rule and will bar a fresh suit against them. With regard to the defendants who are absent, the dismissal will be under Rule 3 and a fresh suit is not barred.<sup>2</sup> Even if the defendant appears and applies for time, the dismissal would fall only under this rule and not under Rule 3.<sup>3</sup>

**O. 9 R. 8**  
**Notes 5-7**

**6. "Shall make an order that the suit be dismissed."**— These words were substituted under the present Code to make it clear that the dismissal is not a decree but only an *order* which is not appealable.<sup>1</sup> The earlier decisions<sup>2</sup> which held that the dismissal under this rule was a decree are now no longer law.

The Court has no option under this rule but to dismiss the suit<sup>3</sup> and is not justified in enquiring into the merits of the case<sup>4</sup> or receive evidence or record any statement from the defendant.<sup>5</sup> While dismissing under this rule, the Court has no jurisdiction to add any proviso in the order, as for example, that the order shall not prejudice the interest of the minor plaintiff.<sup>6</sup> Striking off the suit is not a proper mode of dismissing a suit under this rule.<sup>7</sup>

A filed a suit against B for recovery of a certain amount of money which had been paid under protest, and also for damages for wrongful attachment. The Court framed a preliminary issue on the question whether the suit, so far as the return of the money was concerned, disclosed a cause of action, and after hearing arguments dismissed that part of the claim with costs and directed the suit to proceed as regards the claim for damages. No decree was drawn up in respect of the portion dismissed. When the suit came on for hearing the plaintiff was absent and the Court dismissed the *whole* suit for default under this rule. It was held by the Privy Council<sup>8</sup> that the dismissal for default under this rule was wrong so far as the recovery of money was concerned, inasmuch as a final decision had been passed thereon on the merits, and that, therefore, an appeal lay so far as such portion was concerned.

**7. Unless the defendant admits.** — When the defendant admits the claim of the plaintiff either in whole or in part, the Court cannot dismiss the suit but must pass a decree for the amount admitted.<sup>1</sup>

Where, however, the admission of the defendant is not in reality an admission of the claim of the plaintiff, *e. g.*, where the plaintiff claims to pre-empt on a payment of Rs. 1500 and the defendant admits the right of the plaintiff to pre-empt but states

2. ('26) AIR 1926 All 169 (170) : 48 All 97.

3. ('28) AIR 1928 Pat 335 (336) : 7 Pat 333.

**Note 6**

1. ('18) 20 Ind Cas 1 (2) (Cal).

('25) AIR 1925 Oudh 485 (486) : 28 Oudh Cas 124.

*Even in the following cases, decided prior to 1908, it was held that an order dismissing a suit for default of appearance is not a decree and therefore not appealable :*

('02) 29 Cal 60 (62).

('68) 10 Suth W R 348 (348).

('02) 5 Oudh Cas 294 (296).

('04) 4 Low Bur Rul 17 (28) (FB).

('02) 12 Mad L Jour 478 (474).

('08) 81 Mad 157 (159).

('07) 1907 Pun Re No. 121, page 550 (FB).

2. ('87) 9 All 427 (428).

('04) 8 Cal W N 313 (314).

('89) 1889 Pun Re No. 32.

('97) 1897 Pun Re No. 60.

('91) 1 Mad L Jour 385 (387).

[See ('73) 21 Suth W R 124 (124).]

3. ('39) AIR 1939 Nag 213 (214) : 1 L R (1939) Nag 574.

4. ('21) AIR 1921 Pat 325 (326).

('15) AIR 1915 All 139 (140) : 37 All 460.

5. ('13) 20 Ind Cas 1 (1) (Cal).

('20) AIR 1920 All 193 (193).

('12) 17 Ind Cas 87 (87) : 40 Cal 119.

[See ('75) 24 Suth W R 141 (141).]

6. ('21) AIR 1921 Pat 103 (103) : 6 Pat L Jour 317.

7. ('72) 17 Suth W R 219 (220).

8. ('23) AIR 1923 P C 114 (116) : 50 Ind App 162 : 4 Lah 284 (P C). (*Vide* quotation from the judgment of Lord Moulton, in second appeal before the Board, between the same parties.)

**Note 7**

1. ('21) AIR 1921 Sind 50 (51) : 15 Sind L R 172.

('25) AIR 1925 Pat 712 (713).

[See also ('09) 3 Ind Cas 992 (993) : 38 Bom 475.]

**O. 9 R. 8  
Notes 7-9**

that the price is Rs. 12,000, the Court cannot pass a decree in favour of the plaintiff under this rule for pre-emption on payment of Rs. 12,000 but must, on default by the plaintiff, dismiss the suit.<sup>2</sup>

The word 'claim' is not necessarily synonymous with the amount sued for. It may refer to the right claimed irrespective of the amount stated in the relief column.<sup>3</sup> A decree passed on the admission of the defendant is appealable.<sup>4</sup>

**8. Effect of dismissal under this Rule.** — Unlike the dismissal of a suit under Rule 3, a dismissal under this rule precludes a fresh *suit* on the same cause of action.<sup>1</sup> But two other remedies are open to the plaintiff —

- (1) to apply under Rule 9 for restoration of the suit, or
- (2) to apply for a review of the order.<sup>2</sup>

It is not necessary that the plaintiff should apply under Rule 9 before applying for a review<sup>3</sup> and there is nothing in the Code to limit the parties to one particular remedy. But a review will not lie except on the grounds mentioned in O. 47 R. 1. It has been held by the High Court of Bombay in the undermentioned case<sup>4</sup> that where a suit is dismissed under O. 9 R. 8 there could be no such grounds for review as those mentioned in O. 47 R. 1 inasmuch as the fact that the applicant was absent when the suit was called on for hearing was neither a discovery of any new and important matter, nor an error apparent on the face of the record, nor a ground analogous to any of those specified in the rule. There is a conflict of opinion as to whether a plaintiff who has failed to make an application within thirty days under O. 9 R. 9 can be allowed to prefer an application for review. The High Courts of Patna<sup>5</sup> and Lahore<sup>6</sup> have held that he cannot be allowed to do so, on the ground that the law of limitation should not be allowed to be evaded in that way. The High Courts of Madras<sup>7</sup> and Calcutta,<sup>8</sup> on the other hand, have held that such an application would lie and that the fact that the plaintiff will get a longer period of limitation by the adoption of a particular remedy is no ground for refusing him relief.

It has been held by the Lahore High Court<sup>9</sup> that a Court has inherent power to restore a suit which has been dismissed in default owing to a mistake of the Court itself.

**9. Revision.** — Where the Court refuses to act under this rule in a case to which the rule applies<sup>1</sup> or acts under this rule illegally or with material irregularity,<sup>2</sup> a revision will lie.

2. ('21) 60 Ind Cas 724 (724) (Lah).

3. ('17) AIR 1917 Mad 782 (784).

4. ('12) 15 Ind Cas 601 (602) (Cal).

**Note 8**

1. ('25) AIR 1925 Mad 986 (988).

('16) AIR 1916 Cal 791 (791, 792).

2. (25) AIR 1925 Lah 517 (518).

('28) AIR 1928 Rang 177 (178) : 6 Rang 254.

('75) 7 N W P H O R 126 (130).

3. ('99) 26 Cal 598 (601).

('19) AIR 1919 Mad 844 (844).

4. ('25) AIR 1925 Bom 521 (522) : 49 Bom 839.

[See however ('23) AIR 1923 Bom 395 (395).]

5. ('17) AIR 1917 Pat 673 (673, 674) : 1 Pat L Jour 547.

('33) AIR 1933 Pat 557 (558).

('30) AIR 1920 Pat 491 (491).

6. ('25) AIR 1925 Lah 517 (518). (Application for restoration of suit made but dismissed as barred by

limitation—Subsequent application for review of judgment held not competent.)

('97) 1897 Pun Re No. 15, p. 54.

7. ('19) AIR 1919 Mad 844 (844). (Following 26 Cal 598.)

8. ('99) 26 Cal 598 (601).

9. ('36) AIR 1936 Lah 759 (760). (AIR 1928 Lah 534 and 6 I C 208, Followed.)

**Note 9**

1. ('19) AIR 1919 Pat 372 (373). (Process fee not paid but plaintiff appearing and applying for time to file written statement—Plaintiff absent—Court dismissing suit under O. 9 R. 2 instead of under O. 9 R. 8—This amounts to refusal to exercise jurisdiction.)

2. ('21) AIR 1921 Lah 189 (140). (Dismissal of suit for default—Order mentioning that plaintiff was present but that he subsequently went away—Order held improper.)

**R. 9.** [S. 103.] (1) Where a suit<sup>6</sup> is wholly or partly dismissed under rule 8, the plaintiff<sup>7</sup> shall be precluded from bringing a fresh suit<sup>5</sup> in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause<sup>8</sup> for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

[1877, Ss. 103, 108, 109, 588; 1859, S. 119. See O. 22 R. 9.]

#### Local Amendments

##### BOMBAY

Add the following as sub-rule (3) :

"(3) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

##### CALCUTTA

*Re-number* sub-rule (2) as sub-rule (3) and *insert* after the words "notice of the application" the words "with a copy thereof (or concise statements as the case may be)."

*Insert* the following as sub-rule (2) :

"The plaintiff shall, for service on the opposite parties, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties, or,

(ii) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

##### LAHORE

Add the following proviso to sub-rule (1) :

Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.

##### N.-W.F.P.

Same proviso as that added by the Lahore High Court is added.

### Synopsis

- |  |   |
|--|---|
| 1. Scope of the Rule.                            | 9. Restoration of suit in favour of one of several plaintiffs—Whether can operate in favour of all. |
| 2. "Appearance," meaning of.                     | 10. Inherent power of Court to order restoration. See Note 2 to Section 151.                        |
| 3. Appearance in person. See O. 8 R. 1, Note 4.  | 10a. Conditional order of restoration.  |
| 4. Appearance by pleader. See O. 8 R. 1, Note 6. | 11. Limitation.   |
| 5. Bar of fresh suit.                            | 12. Appeal.   |
| 6. "Suit," meaning of.                           | 13. Revision.   |
| 7. Minor plaintiff.                              |   |
| 8. "Sufficient cause."                           |   |

**O. 9 R. 9**  
**Notes 1-2**

*Other Topics (miscellaneous)*

- Applicability to other proceedings. See Notes 6 and 8. Rule applicable only when dismissal under R. 8. See Note 1.
- Letters Patent Appeal. See Note 12. Same cause of action. See Note 5.

**1. Scope of the Rule.** — The remedy provided for by this rule is not open to a plaintiff whose suit has been dismissed for any reason, other than default of appearance under Rule 8.<sup>1</sup> Hence, no application lies under this rule where the dismissal is under O. 17 R. 3<sup>2</sup> or O. 11 R. 21,<sup>3</sup> or where the dismissal is due to a failure on the part of the plaintiff to adduce evidence,<sup>4</sup> or where the plaint is rejected under O. 7 R. 11 for failure to pay deficient court-fees.<sup>5</sup> The rule applies only to suits and not to appeals.<sup>6</sup> It applies also to suits under Section 9 of the Specific Relief Act, 1877, which are dismissed for default. That Section bars only a review and not an application for rehearing.<sup>7</sup> As to the restoration of appeals dismissed for default of appearance of the appellants, see Order 41 Rule 19.

The Court cannot *suo motu* order a restoration without an application on the part of the plaintiff.<sup>8</sup> The word "plaintiff" has been held to include his legal representatives who can also therefore apply under this rule.<sup>9</sup> No fresh *vakalatnama* is necessary for an application under this rule.<sup>10</sup>

The effect of restoration under O. 9 R. 9 is to bring the suit, as regards parties, to the exact position in which it was at the time of dismissal.<sup>11</sup>

See also Note 6, *infra*.

**2. "Appearance," meaning of.** — The term "appearance" has nowhere been defined in the Code and it must be understood in reference to the particular subject-matter to which it relates.<sup>1</sup> "Appearance" in Order 9 means either —

- (a) by the party in person, or
- (b) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some other person able to do so.<sup>2</sup>

For a full discussion, see Order 3 Rule 1, *ante*.

**Order 9 Rule 9 — Note 1**

1. ('15) AIR 1915 All 196 (196).
- ('21) AIR 1921 Mad 417 (418). (Default under O. 10 R. 4 not covered by Order 9.)  
[See *contra* ('92) AIR 1932 All 595 (596). (Default under O. 10 R. 4 is covered by Order 9.)]
2. ('69) 4 Mad H C R 56 (59).
- ('85) AIR 1935 All 210 (212).
3. ('25) AIR 1925 Rang 218 (218) : 3 Rang 63. (Appeal or review, the proper remedy.)
4. ('33) AIR 1933 All 539 (540).
- ('17) AIR 1917 Pat 688 (688).
- ('78) 5 N W P H C R 74 (76).
5. ('29) AIR 1929 Mad 344 (345). (Plaintiff absent on the day fixed for payment of additional court-fees—Dismissal of the suit held to be under O. 7 R. 11 and not under O. 9 R. 8.)  
[See ('23) AIR 1923 Pat 354 (354) : 2 Pat 504. (Point conceded.)]
- ('82) AIR 1932 Pat 11 (12). (Plaint in former suit rejected under O. 7 R. 11—Fresh suit filed on the same cause of action — District Judge holding second suit barred under this rule—Held by High Court that this rule did not apply.)]

6. (1864) 1864 Suth W R Misc 21 (21).
7. ('82) 4 Mad 217 (218).
8. ('25) AIR 1925 Oudh 105 (106). (Plaintiff applied for restoration as against one out of two defendants — The Court also restored the suit against the other defendant and that too beyond the period of limitation—Held, order of restoration as against the other defendant was *ultra vires*.)
- ('22) AIR 1922 Oudh 160 (160) : 25 Oudh Cas 67.
9. ('08) 6 Oudh Cas 34 (36, 38).  
[See ('91) 1891 Pun Re No. 117, p. 527. (Plaintiff's suit dismissed for default under O. 9 R. 8 —Plaintiff's representatives cannot bring a fresh suit.)]
10. ('90) 1890 Bom P J 124 (124). (Plaintiff himself need not make the application—Application by pleader is competent.)
11. ('24) AIR 1924 Cal 814 (815).  
('19) AIR 1919 Cal 40 (42).

**Note 2**

1. ('07) 34 Cal 408 (415) (F B).
2. ('99) 23 Bom 414 (421, 422). (Besides these two modes of appearance there is a third mode of

**3. Appearance in person.** — See Order 3 Rule 1 Note 4.

**4. Appearance by pleader.** — See Order 3 Rule 1 Note 6.

**O. 9 R. 9  
Notes 3-5**

**5. Bar of fresh suit.** — Where a suit is dismissed for default, it cannot be said to have been *heard* and decided on the merits and therefore cannot operate as *res judicata*.<sup>1</sup> But the plaintiff is, under the specific provisions of this rule, barred from bringing a fresh suit on the *same cause of action*;<sup>2</sup> and the fact that the *mode of relief* claimed in the subsequent suit is different will not be a ground for not applying the bar under this rule.<sup>3</sup> Thus, a suit on the basis of entries in the plaintiff's account book, in respect of the same sum of money for which a prior suit on a promissory note given therefor had been dismissed for default, will be barred under this rule.<sup>4</sup> Similarly, where a suit filed by the voluntary liquidator of a company against an alleged share-holder for the recovery of a sum of money due to the company is dismissed for default under this rule, a subsequent application by the official liquidator to have the name of the defendant placed in the list of contributories in respect of the same claim is barred.<sup>5</sup>

Where the cause of action in the subsequent suit is *different* from that in the first suit, this rule will not apply.<sup>6</sup> Thus, a suit for partition dismissed for default under this rule does not bar a subsequent suit for partition. The reason is that the right to enforce partition is a *continuous* right which is a legal incident of a joint tenancy and which endures so long as the joint tenancy continues.<sup>7</sup> See Note 36 to

appearance, viz., appearance by a party's recognized agent.)

('28) AIR 1928 Mad 891 (894). (Mere attendance of pleader is no "appearance".)

#### Note 5

1. ('10) 5 Ind Cas 298 (300) (Cal).

('14) AIR 1914 All 222 (223).

('82) 6 Bom 482 (486).

('35) AIR 1935 Cal 212 (216, 217) : 62 Cal 15. (Where the suit is dismissed for want of prosecution under the provisions of Ch. 10, R. 36 of Calcutta High Court Rules and Orders (Original Side), the plaintiff is not debarred from bringing a fresh suit.)

See also Note 106 to S. 11.

[See also ('91) 13 All 53 (54, 55, 62) : 17 Ind App 150 (P C). (Previous suit dismissed for want of evidence.)]

2. ('16) AIR 1916 Cal 791 (791). (A Court while dismissing a suit for non-prosecution under O. 9 R. 8 imposed a condition that such dismissal will not be a bar to any fresh suit—*Held* fresh suit barred under this rule in spite of the condition.)

('88) 9 Cal 426 (429).

('01) 25 Bom 82 (84, 85).

('16) AIR 1916 Lah 273 (273, 274) : 1916 Pun Re No. 66.

('29) AIR 1929 Pat 685 (689, 691) : 9 Pat 447. (Suit for declaration of title dismissed for default—Subsequent suit for possession on the same facts barred.)

('39) AIR 1939 Nag 145 (146). (Where a plaintiff's suit alleging that defendant had forcibly and illegally taken possession of certain land and

tank, that defendant's possession constituted a trespass and praying that the defendant be ejected from the land and tank is dismissed under O. 9 R. 8, a subsequent suit alleging forcible and wrongful possession and praying for possession of same land is barred because the cause of action is the same and not a continuing one.)

3. ('28) AIR 1928 Rang 73 (74) : 5 Rang 785.

('26) AIR 1926 Lah 562 (563).

('88) 15 Cal 422 (430, 431) : 15 Ind App 66 (PC). (In the first suit sub-proprietary right claimed while in the second suit superior proprietary right was claimed.)

4. ('20) AIR 1920 All 340 (341) : 42 All 193.

5. ('20) AIR 1920 Lah 43 (44) : 1 Lah 237. (Such application partakes of the nature of suit.)

6. ('20) AIR 1920 Cal 407 (408).

('33) AIR 1933 Lah 365 (368) : 14 Lah 485.

('15) AIR 1915 All 395 (395, 396).

('23) AIR 1923 All 409 (410) : 45 All 81.

('20) AIR 1920 Mad 710 (711, 712). (First suit for declaration—Second suit for partition and separate possession.)

('17) AIR 1917 Cal 11 (11).

('14) AIR 1914 All 222 (223).

('27) AIR 1927 Pat 375 (376) : 7 Pat 28. (Fresh suit for enhancement of rent of the same tenure *held* not barred.)

('25) AIR 1925 Nag 366 (368). (Even one different fact makes causes of action different.)

('86) 10 Bom 28 (30). (This rule should be strictly construed.)

7. ('06) 28 All 627 (629).

('26) AIR 1926 Mad 1018 (1018) : 49 Mad 930.



**O. 9 R. 9**  
**Notes 5-6**

Section 11, *ante*. As regards suits for redemption, it was held by the Privy Council in *Shanker Baksh v. Daya Shanker*<sup>8</sup> that where a first suit for redemption was dismissed for default under this rule, a second suit for redemption will be barred as being based on the same cause of action. The Allahabad<sup>9</sup> and Bombay<sup>10</sup> High Courts have, however, distinguished the said decision of the Privy Council on the ground that their Lordships did not consider the effect of Section 60 of the Transfer of Property Act, and that the effect of that Section is not to bar a second suit for redemption.

The rule does not apply unless the plaintiff in the prior suit is the plaintiff in the subsequent suit.<sup>11</sup> Thus, a dismissal for default of a suit by a Hindu widow in respect of her deceased husband's estate is no bar to a fresh suit by the reversioner in respect of the same matter.<sup>12</sup> The rule only precludes a fresh *suit*; it does not preclude a plea raised by a defendant in a suit.<sup>13</sup> The bar of a fresh suit under this rule applies only where the suit has been dismissed for default under Rule 8 and not otherwise.<sup>14</sup>

**6. "Suit," meaning of.** — According to the High Courts of Allahabad<sup>1</sup> and Calcutta<sup>2</sup> the rule is plainly intended to apply only to *suits* and not to *applications*, such as applications for probate. See also the undermentioned decision.<sup>3</sup> But the High Court of Madras<sup>4</sup> has held that the present rule applies to those applications which, under Section 83 of the Probate and Administration Act, are *treated as suits*. So also, it has been held by the High Court of Madras that this rule read along with Section 141 applies to an application for leave to sue as pauper, and where such application is dismissed for default of appearance, it can be restored under this rule.<sup>5</sup> It has further been held by that Court that where an application for restoration of a petition is maintainable by virtue of Section 141 of the Code, the Court cannot decline to consider the application on its merits on the ground that the applicant has another remedy open to him.<sup>6</sup> The Lahore High Court has also held that an application for probate

(<sup>35</sup>) AIR 1935 Mad 458 (459).

[See (<sup>28</sup>) AIR 1928 Rang 73 (74, 75) : 5 Rang 785.

(<sup>06</sup>) 10 Cal W N 899 (840). (Application for execution of preliminary decree for partition dismissed for default—This rule inapplicable.)]

8. (<sup>88</sup>) 15 Cal 422 (431) : 15 Ind App 66 (PC).

[See also (<sup>07</sup>) 1907 Pun Re No. 43, p. 179.

(<sup>05</sup>) 1905 Pun Re No. 32, p. 121.]

9. (<sup>09</sup>) 2 Ind Cas 630 (631, 632) (All).

10. (<sup>28</sup>) AIR 1928 Bom 67 (67) : 52 Bom 111. (Order 9 Rule 9 does not override provisions of S. 60, T. P. Act.)

11. (<sup>10</sup>) 5 Ind Cas 698 (699) : 33 Mad 31.

(<sup>33</sup>) AIR 1933 Lah 365 (368) : 14 Lah 485.

(1900) 2 Bom L R 206 (210).

[See (<sup>29</sup>) AIR 1929 All 861 (862). (Mortgagees fraudulently allowing suit to be dismissed for default—Attaching creditors purchasing mortgagee interest subsequently are not bound by dismissal.)]

12. (<sup>84</sup>) 1884 Pun Re No. 80, p. 216.

13. (<sup>38</sup>) 42 Cal W N 853 (854). (Suit on a first mortgage—Third mortgagee who was impleaded as one of the defendants claiming priority over second mortgagee under S. 78 of the T. P. Act—Suit previously filed by third mortgagee to obtain a declaration of his priority dismissed for default—Third mortgagee not prevented from raising contention as to priority in this suit.)

14. (<sup>35</sup>) AIR 1935 Cal 764 (766). (Amendment

of plaint allowed—Plaintiff directed to give value of property and put in deficit court-fee—Non-compliance with order—Suit dismissed for default on rejecting permission to withdraw under O. 23 R. 1—Proper order is rejection of plaint—Fresh suit is not barred by O. 23 R. 1, O. 9 R. 9, O. 2 R. 2.)

**Note 6**

1. (<sup>15</sup>) AIR 1915 All 172 (173) : 37 All 380. (Sec. 151, O. P. Code, held applicable.)

2. (<sup>10</sup>) 7 Ind Cas 126 (129) (Cal).

(<sup>26</sup>) AIR 1926 Cal 1057 (1057) : 53 Cal 578.

3. (<sup>37</sup>) AIR 1937 Sind 273 (278) : 31 Sind L R 180. (The words "the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action" in O. 9 R. 9, are not applicable to an application under O. 34 R. 5 and an application is not barred because a previous one has been dismissed for default under O. 9 R. 9: Per Davis J. C. *Obiter*.)

4. (<sup>19</sup>) AIR 1919 Mad 112 (112).

5. (<sup>39</sup>) AIR 1939 Mad 681 (681). (AIR 1933 Mad 5, Followed.)

[See also (<sup>37</sup>) AIR 1937 Mad 653 (653) : I L R (1938) Mad 216. (Order 9 applies to an application made for setting aside the dismissal of a petition made under S. 84 of the Madras Hindu Religious Endowments Act.)]

6. (<sup>39</sup>) AIR 1939 Mad 681 (681).



dismissed for default of appearance can be restored under this rule.<sup>7</sup> But the same High Court has held that an application under Section 292 of the Succession Act of 1925 is in the nature of an execution proceeding and that, therefore, Section 141 does not make this rule applicable to such an application. So, it has been held by that Court that where such an application is dismissed for default, a fresh application can be made.<sup>9</sup>

In the undermentioned case,<sup>9</sup> it was held by the Oudh Chief Court that an application under Section 47 of the Code stands on the same footing as a suit and that where such an application is dismissed for default of appearance, a fresh application on the same allegations is not maintainable.

The bar under this rule does not apply to a fresh application for adjudication as insolvent after the dismissal of a prior application for default.<sup>10</sup> An order of annulment passed under Section 43, sub-section 1 of the Provincial Insolvency Act of 1920 cannot be set aside by virtue of the provisions of Order 9.<sup>11</sup> The reason is that Section 10, clause (2) of the Provincial Insolvency Act itself provides for a remedy in such cases.

The rule does not apply to applications under Section 158 of the Bengal Tenancy Act.<sup>12</sup>

See also Note 5 to Section 2, sub-clause (2), Note 21 to Section 11, and Order 9, "General."

**7. Minor plaintiff.**—A suit by a minor is liable to be dismissed for default of appearance on the part of the next friend<sup>1</sup> and the provisions of this rule cannot be nullified because the plaintiff happens to be a minor.<sup>2</sup> But where the next friend is guilty of *gross negligence* in the conduct of the suit, the minor can bring a fresh suit, notwithstanding this rule, either himself after attaining majority or through another next friend.<sup>3</sup> He can also apply under this rule for setting aside the order of dismissal.<sup>4</sup> See also Note 8 *infra* under the sub-heading "Absence of next friend of minor plaintiff."

**8. "Sufficient cause."**—The only ground for restoring a suit under this rule is the existence of a sufficient cause for the non-appearance of the party at the time the suit was called on for hearing.<sup>1</sup> The term "sufficient cause" has not been defined

7. ('86) AIR 1936 Lah 868 (864). (17 All 106, AIR 1919 Mad 112 and 20 I O 281, Relied on; AIR 1936 Lah 712, Affirmed.)
8. ('85) AIR 1935 Lah 145 (145).
9. ('87) AIR 1937 Oudh 337 (338): 13 Luck 309. (The combined effect of Ss. 2(2) and 47, C. P. C., is that an application under S. 47 stands on the footing of a suit and the determination of such an application is tantamount to a decree.)
10. ('27) AIR 1927 Mad 579 (580).
11. ('26) AIR 1926 Mad 942 (943): 49 Mad 985.
12. ('28) AIR 1928 Pat 381 (382, 384): 2 Pat 192. (The rule applies only to suits.)

#### Note 7

1. ('10) 8 Ind Cas 547 (547) (Lah).
2. ('21) AIR 1921 Sind 200 (202): 17 Sind L R 41. (Fresh suit through different next friend held barred.)
3. ('95) 22 Cal 8 (14).
4. ('15) AIR 1915 Mad 52 (52). ('25) AIR 1925 Mad 774 (775).

#### Note 8

1. ('10) 4 Low Bur Rul 221 (222). ('38) AIR 1938 Lah 169 (171). (If there is no sufficient cause, suit cannot be restored as a matter of grace.)
2. ('38) AIR 1938 Pesh 59 (60). (Suit cannot be restored under inherent powers in the absence of sufficient cause.)
3. ('27) 106 Ind Cas 821 (821, 822) (Lah). (The applicant must however be given opportunity to adduce evidence in support of his allegations.)
4. ('35) AIR 1935 Pesh 145 (146).
5. ('38) AIR 1938 Cal 74 (75): I L R (1938) 1 Cal 213. (In an application for restoration under O. 9 R. 9, the plaintiff must show some fact which was either not known to the Court when it dismissed the suit, or at least at that stage lacked satisfactory proof.)
6. [See ('76) 1876 Pun Re No. 118, p. 235. (It is enough if he shows sufficient cause for his absence.)
7. ('29) 117 Ind Cas 382 (382) (Lah). (Application to restore case dismissed for default—Applicant is bound to explain counsel's absence.)]

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**Note 8**

anywhere.<sup>3</sup> It is a question of fact depending upon the circumstances of each case<sup>3</sup> and is not subject to any hard and fast rule, except that the Court must exercise a judicial discretion in the matter.<sup>4</sup> In the undermentioned case,<sup>5</sup> the Rangoon High Court held that under this rule if "sufficient cause" is shown, the Court is bound to restore the suit, while if "sufficient cause" is not shown the matter is in the discretion of the Court. It is submitted with respect that the view that the Court has power to restore a suit even where it holds that sufficient cause has not been shown is open to question.

*Absence of party.*—A generous construction should be placed on the enactment to restore a suit dismissed for default,<sup>6</sup> and a party should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part.<sup>7</sup> The test to be applied as a general rule is to see whether the party applying, honestly intended to be present at the hearing of the suit and did his best to do so.<sup>8</sup> The High Court of Allahabad has, in the undermentioned case,<sup>9</sup> held that even though the plaintiff was negligent enough to start for the last train and missed it, the suit ought to be restored, observing that negligence is human and not irreparable and can be amply compensated by costs. The following grounds have been held to amount to sufficient cause for the absence of the party—

(1) A *bona fide* mistake which is not unreasonable or for which the party is not responsible.<sup>10</sup> Thus, where the bench clerk gave a wrong date of hearing,<sup>11</sup> or

2. ('27) AIR 1927 Lah 622 (624).

3. ('27) AIR 1927 Lah 622 (624).

('84) AIR 1934 Nag 183 (186) : 31 Nag LR 32.

('79) 1879 Pun Ro No. 26, p. 64.

('22) AIR 1922 Pat 485 (488) : 1 Pat 188. (Suit to remove the defendant from mahantship—Court appointing receiver, but refusing to direct him to furnish defendant with funds—Held sufficient cause.)

('12) 13 Ind Cas 468 (468) (Lah). (Petition dismissed in the early part of the day owing to the temporary absence of the party or pleader—Absence explained—Suit must be restored.)

('30) AIR 1930 Lah 943 (943). (Suit dismissed in the early part of the day—Party *pardanashin* lady—Her counsel engaged elsewhere—Court ought to restore suit.)

('29) AIR 1929 All 599 (599) : 51 All 908. (Plaintiff appearing on same day and satisfying Court for his non-appearance is a sufficient cause.)

('28) AIR 1928 Nag 75 (76). (Default in appearance owing to party's missing the train is sufficient cause.)

('27) AIR 1927 Lah 40 (41). (Late arrival of train is sufficient cause.)

('85) AIR 1935 Sind 198 (200).

[See ('92) 1892 Bom P J 104 (104). (Misapprehension as to date of hearing—Sufficient cause.)]

4. ('29) AIR 1929 Lah 96 (99, 100) : 10 Lah 570.

('24) AIR 1924 Oudh 389 (390) : 27 Oudh Cas 103. (Court should not surrender its discretion to the dictation of parties.)

('29) AIR 1929 Bom 250 (250). (Dissenting from the view expressed in AIR 1925 Bom 423 and AIR 1924 Bom 892 that when a party arrives late on the same day, the suit must, as a rule of practice, be restored on payment of costs—To the same effect is AIR 1928 Bom 480.)

('88) AIR 1938 Bom 199 (204) (S B). (To restore a proceeding is a matter of discretion—It is

undesirable for Court to act on precedents in such a matter.)

5. ('36) AIR 1936 Rang 335 (336).

6. ('06) 30 Mad 274 (276).

('15) AIR 1915 Mad 16 (17).

('05) 1905 Pun Re No. 72, p. 283.

('17) AIR 1917 All 290 (290).

7. ('23) AIR 1923 Mad 63 (64) : 46 Mad 60.

('38) AIR 1938 Bom 199 (202) (S B).

('36) AIR 1936 Rang 335 (336).

[See ('34) AIR 1934 Nag 101 (102). (Case adjourned for plaintiff's reply—Reply filed and also application for amendment—Court requiring further statements—Pleader unable to make them—Court holding plaintiff as absent and dismissing suit—Order of dismissal *held ultra vires* and was sufficient cause for restoring case.)]

8. ('23) AIR 1923 Mad 63 (64) : 46 Mad 60. (The fact that by some human possibility the defendant could have been present in time does not affect his right to have the *ex parte* decree set aside.)

('33) AIR 1933 Cal 73 (74). (Plaintiff's strenuous attempt to get witnesses to Court is sufficient cause.)

('36) AIR 1936 Rang 335 (336).

('38) AIR 1938 Bom 199 (201, 202) (S B).

('36) AIR 1936 Rang 204 (206). (Non-appearance on account of missing of train.)

[See ('34) AIR 1934 Lah 416 (416). (Puncture of tyre on the way to Court is sufficient cause.)]

9. ('25) AIR 1925 All 601 (601).

[See also ('36) AIR 1936 Rang 204 (206).]

10. ('96) 23 Cal 991 (995).

('33) AIR 1933 All 276 (276). (Date of adjourned hearing not given to party or his counsel.)

(1865) 3 Bom H O R 60 (62).

11. ('24) AIR 1924 Rang 271 (272).

('27) AIR 1927 Rang 46 (47) : 4 Rang 406.

where the suit was dismissed on a date not fixed for hearing,<sup>12</sup> or where the day fixed for hearing was a holiday,<sup>13</sup> or where the suit was transferred without notice to the parties,<sup>14</sup> or where no proper notice of hearing was served on the party,<sup>15</sup> or where the suit was called on after 5 P. M. on the day of hearing,<sup>16</sup> or where the absence was due to some confusion regarding the observance of a local holiday,<sup>17</sup> the suit was ordered to be restored.

(2) Where the plaintiff was prevented from appearing owing to a breach in the railway line.<sup>18</sup>

(3) Where the plaintiff was prevented from appearing owing to illness.<sup>19</sup>

(4) Where the agent of the plaintiff left the Court after attending to some cases of the plaintiff under the *bona fide* belief that the plaintiff had no more cases that day.<sup>20</sup>

(5) Where the plaintiff was present but went away to answer imperative calls of nature.<sup>21</sup>

(6) Where the party is prevented from appearing owing to the fraud of the opposite party.<sup>22</sup>

(7) Where in a land acquisition case the Collector who was a party admitted receipt of notice of the proceeding but did not attend owing to pressure of work.<sup>23</sup>

See also the undermentioned cases.<sup>24</sup>

The following have been held not to amount to sufficient cause within the meaning of this rule —

(1) Where the non-appearance is wilful and deliberate.<sup>25</sup>

12. ('69) 12 Suth W R 428 (429).

('80) AIR 1930 Cal 251 (251).

13. ('15) AIR 1915 Lah 476 (477).

14. ('34) AIR 1934 Lah 91 (91). (Notice of transfer served on counsel but he declining to appear for him any longer.)

('88) AIR 1933 Lah 558 (559) : 14 Lah 240.

('23) AIR 1923 Lah 444 (445).

[See also ('33) AIR 1933 Lah 114 (115).]

15. ('27) AIR 1927 Lah 365 (365). (Case decided with reference to O. 41 R. 19.)

('26) AIR 1926 Mad 1210 (1211). (Case pertaining to appeal.)

('17) AIR 1917 Lah 399 (400). (Notice not duly served—Knowledge as to date of hearing of appeal cannot be presumed.)

('19) AIR 1919 Lah 32 (33).

('16) AIR 1916 All 326 (327).

16. ('22) AIR 1922 All 72 (73) : 44 All 325.

('33) AIR 1933 All 652 (654). (Court hours from 6 A. M. to noon—Judge unable to attend during those hours—Case disposed of in absence of defendant after Court hours—Application for restoration should be granted.)

17. ('28) AIR 1928 All 549 (550).

18. ('28) AIR 1928 Mad 68 (64) : 46 Mad 60.

[See ('80) 8 Bom 28 (31). (Sudden closing of telegraph communication—Inability to communicate with pleader.)]

19. ('26) AIR 1926 Lah 541 (542).

('35) AIR 1935 Pat 119 (120). (Person not in fit condition to attend Court on account of operation having been performed on him is sufficient

cause—It is not for the Court to argue that there was no hurry for the operation and that the petitioner could have waited for a week more.)

('09) 5 Ind Cas 23 (26) : 33 Mad 241.

[See also ('34) AIR 1934 All 163 (164) : 56 All 578.]

20. ('29) AIR 1929 Rang 224 (224).

21. ('26) 96 Ind Cas 402 (403) (Lah).

22. ('72) 18 Suth W R 457 (457).

23. ('27) AIR 1927 Rang 150 (153) : 5 Rang 80.

24. ('36) AIR 1936 Rang 204 (206). (Non-appearance on account of missing the train is due to sufficient cause.)

('88) AIR 1988 Cal 789 (790). (Three suits filed by petitioners—Petitioner taking all necessary steps to bring them to hearing, by filing documents, citing witnesses and paying cost of local investigation—Petitioners applying for adjournment on the ground that their witnesses were unable to attend—Court refusing adjournment and dismissing suit for default—Application by petitioners under O. 9 R. 9 also rejected—Held that lower Court had exercised its jurisdiction wrongly in dismissing petitioner's application under O. 9 R. 9 and in affirming decision dismissing suit for default.)

('88) AIR 1988 Lah 295 (295). (Breakdown of lorry on way is sufficient reason for non-appearance.)

('37) AIR 1937 Pat 85 (86). (Application for time to compromise by both parties—Rejection and *ex parte* decree—Application to set aside—Held, there was sufficient cause.)

25. ('05) 1905 Pun Re No. 46, page 164.

('21) AIR 1921 Mad 617 (618).

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**Note 8**

(2) Where the party deliberately takes the risk of not obtaining a carriage in time<sup>26</sup> or fails to be in time to catch the train.<sup>27</sup>

(3) Where he leaves the Court-house to attend to his other business without instructing his pleader<sup>28</sup> or thinking that a part-heard case will take some more time.<sup>29</sup>

(4) Illness of a near relation of the party.<sup>30</sup>

See also the undermentioned decision.<sup>31</sup>

*Absence of next friend of minor plaintiff.* — It has been held in the under-mentioned cases of the High Court of Madras<sup>32</sup> that if the next friend is absent at the trial, *through whatever cause it may be*, then that *fact alone* is a sufficient reason for setting aside an order of dismissal passed against the minor plaintiff. This view has, however, been held in a later case<sup>33</sup> as being too wide and that unless any concrete fact is alleged from which an inference can fairly be drawn that the failure of the next friend to appear has in any way prejudiced the interest of the minor, the Court is not bound to restore the suit. The Oudh Chief Court<sup>34</sup> has also held that the fact of the minority of a plaintiff is not *by itself* a sufficient cause for setting aside any order of dismissal that may have been passed owing to the absence of the next friend irrespective of the reasons for such absence.

See also Note 20 to Order 9 Rule 13.

*Absence of pleader.* — In the case of absence of the pleader it should be considered whether there was a *bona fide* and reasonable attempt on the part of the vakil to put in appearance; and due regard must be had to the exigencies of his professional duties.<sup>35</sup> Thus, where the pleader was sitting in the adjoining court-room and did not hear the suit being called but soon after dismissal appeared and applied for restoration,<sup>36</sup> or where the pleader was sitting in the bar-room and by the time he could come up the case was called and dismissed,<sup>37</sup> or when the suit was called for hearing the party or his agent went to fetch his pleader who was engaged in a different

(90) 1890 Pun Re No. 71, page 194.

26. ('21) AIR 1921 Sind 55 (57): 17 Sind L R 105.

27. ('18) 19 Ind Cas 294 (234) (Cal).

28. ('15) AIR 1915 Cal 539 (541).

29. ('89) 13 Bom 12 (14).

30. ('98) 2 Cal W N 490 (491).

[See ('24) AIR 1924 Pat 271 (272): 2 Pat 784.]

[But see ('21) AIR 1921 All 264 (265). (Respondent a lady—Her agent failing to attend Court due to illness of daughters—Held sufficient cause.)]

31. ('35) AIR 1935 Sind 198 (200). (Party arriving late in Court and finding suit dismissed—Whether suit should be restored on payment of costs depends on facts and circumstances—Party appearing late—No application for restoration filed on same day—Application filed seven days hence—Held that in all the circumstances of the case suit should not be restored.)

32. ('34) AIR 1934 Mad 616 (617).

(35) AIR 1935 Mad 196 (197).

33. ('35) 68 Mad L Jour (Notes of Recent Cases) 16.

[See also ('35) AIR 1935 Mad 565 (567): 58 Mad 929. (The principle that where a suit on behalf of a minor has been dismissed owing to the absence of the next friend or that where a suit has been decreed *ex parte* against a minor in the absence of his guardian ad litem, the suit must be restored as a matter of course on application

does not apply to cases where the absence of the next friend or guardian has not been due to *bona fide* negligence but has been due to a manoeuvre to gain some advantage in the litigation.)]

34. ('39) 1939 O W N 787 (790, 791). (The question of what is sufficient cause within the meaning of O. 9 R. 9 has to be decided with reference to various circumstances and the fact of the minority of the plaintiff is only one of such circumstances to be taken note of.)

35. ('29) AIR 1929 Lah 96 (100): 10 Lah 570.

(34) AIR 1934 Pesh 13 (14). (Application dismissed for default owing to prior evidence case on cause list being postponed at the end of the day—Application should be restored.)

(38) AIR 1938 Nag 870 (871). (Clerk left in court-room to watch and inform pleader who was waiting in bar room—Clerk failing to do so—Held sufficient cause for restoring suit.)

36. ('27) AIR 1927 Sind 228 (229).

[See also ('87) AIR 1987 Lah 118 (119). (Dismissal for default—Restoration—Date fixed for payment of adjournment costs—Party ill and his pleader though present in Court failing to hear case being called—Suit dismissed for default—Case not one to which O. 9 R. 8 applied as the day was not fixed for hearing—Case was one which ought to be restored.)]

37. ('24) AIR 1924 Oudh 406 (406).

Court and the Court in the meantime dismissed the suit,<sup>38</sup> it was held that there was sufficient cause for non-appearance. Similarly, when the pleader could not attend owing to illness and had no time to make fresh arrangements,<sup>39</sup> or where the pleader who had left the headquarters had entrusted the brief to another pleader who was also unavoidably absent,<sup>40</sup> it was held that there was sufficient cause for non-appearance. Where the absence of the vakil is due to a *bona fide* mistake, e. g., where the vakil noted in his diary the date of hearing which was on the 23rd of March as 23rd of April,<sup>41</sup> or where by the mistake of the pleader the party did not get intimation in time,<sup>42</sup> the suit was ordered to be restored to file. But the mere absence of a party's pleader<sup>43</sup> or the fact that the pleader was engaged elsewhere<sup>44</sup> does not amount to sufficient cause. The fact that in the District Court pleaders take up cases in different Courts and cannot be present at one and the same time in all the Courts,<sup>45</sup> or a mere misjudgment on the part of the counsel who does not state that he was engaged elsewhere,<sup>46</sup> or the mere fact that the agent or vakil was negligent,<sup>47</sup> will not suffice. It has been held by the Nagpur High Court<sup>48</sup> that if a party does all that he is required to do under the law to retain a pleader and the pleader fails to appear, it must be held that there is sufficient cause for the non-appearance of the party.

The mere fact that a party is contemplating to file an appeal against the preliminary decree will be no sufficient ground for restoring the final decree passed *ex parte*.<sup>49</sup>

**9. Restoration of suit in favour of one of several plaintiffs — Whether can operate in favour of all.** — An order under this rule restoring a suit dismissed for default on the application of one of several plaintiffs may, if the Court so directs, operate in favour of all the plaintiffs though they have not applied for restoration.<sup>1</sup>

**10. Inherent power of Court to order restoration.** — See Note 2 to Section 151, *ante*.

**10a. Conditional order of restoration.** — An order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directing that in case of default the application for restoration is to stand dismissed is legal and valid. The effect of the order on default being made in the payment of the costs is that the application stands dismissed and

38. ('23) AIR 1923 All 189 (189).

('92) AIR 1932 All 450 (451).

('26) AIR 1926 Lah 650 (651).

('26) 98 Ind Cas 211 (211) (Mad).

('28) AIR 1928 Lah 454 (454).

39. ('96) 1896 Bom P J 422 (423).

40. ('07) 11 Cal W N 430 (432). (Proceedings under the Land Acquisition Act.)

41. ('29) AIR 1929 Lah 69 (69).

(1864) 2 Bom H C R 267 (269).

42. ('28) AIR 1928 Mad 581 (581).

('37) 1937 Mad W N 976 (976). (Where the counsel for the defendant does not inform him of the posting of the suit to a particular date, thinking that that posting was merely formal and not for trial, it can fairly be said that the defendant was prevented by sufficient cause from appearing, within the meaning of O. 9 R. 13.)

[See also ('88) AIR 1938 Lah 114 (115). (Case remanded to trial Court — Notice of date of hearing directed to be served both on defendant

and on his counsel—Notice served on the latter and not on former—Counsel believing in good faith that defendant would personally be served and not informing defendant.]]

43. ('21) AIR 1921 Nag 3 (4).

44. ('75) 24 Suth W R 141 (141).

('32) AIR 1932 Bom 634 (635). (Held in this case that it should however be restored on terms under Court's inherent powers.)

('27) AIR 1927 Lah 791 (791).

45. ('27) AIR 1927 Oudh 211 (211).

46. ('27) AIR 1927 Lah 224 (224).

47. ('29) AIR 1929 Lah 148 (149).

48. ('38) AIR 1938 Nag 870 (871). (Held that neither party nor pleader is to be blamed for negligence of clerk of pleader.)

('86) AIR 1936 Nag 85 (86).

49. ('28) AIR 1928 All 192 (192).

#### Note 9

1. ('19) AIR 1919 Oudh 4 (6) : 23 Oudh Cas 18.

**O. 9 R. 9** the Court is thereafter *functus officio* and cannot extend the time for payment of the **Notes 10a-13** costs.<sup>1</sup> See also Notes to Section 148, *ante*.

**11. Limitation.** — An application for restoration under this rule should be made within 30 days of the order of dismissal for default (see Limitation Act, Article 163). The Court has no power, inherent or otherwise, to extend the period of limitation prescribed therefor,<sup>1</sup> and if the Court restores an application presented after time the High Court can interfere in revision as the order is one made without jurisdiction.<sup>2</sup> Section 5 of the Limitation Act does not apply to this rule<sup>3</sup> unless the High Court has extended its application by a rule framed under Section 122. The Bombay High Court has added a proviso extending the application of Section 5 to this rule.<sup>4</sup>

A mere notice that an application is going to be moved on a future date will not prevent the running of limitation.<sup>5</sup>

**12. Appeal.** — The *dismissal* of an application under this rule is appealable under O. 43 R. 1 clause (c),<sup>1</sup> but no appeal lies from an order *granting* an application.<sup>2</sup> Nor can the propriety of such an order be questioned in the regular appeal preferred against the decree eventually passed, as the order does not affect the merits of the case within the meaning of Section 105.<sup>3</sup> But the dismissal of an application under this rule need not be on the *merits* and an appeal will lie also from an order dismissing such an application for non-prosecution.<sup>4</sup>

An order made by a Judge on the original side of the High Court rejecting an application for restoration is a "judgment" within the meaning of Clause 15 of the Letters Patent, and is appealable,<sup>5</sup> whereas an order granting an application has been held not to be a "judgment" within that Clause.<sup>6</sup>

**13. Revision.** — A revision lies to the High Court against an order granting an application under this rule.<sup>1</sup> Thus, where a trial Court found that the grounds alleged were not sufficient but ordered restoration as a matter of grace,<sup>2</sup> or where the order is

#### Note 10a

1. ('36) AIR 1936 All 477 (478).

#### Note 11

1. ('02) 1902 Pun Re No. 83, page 335.  
('28) AIR 1928 Nag 91 (92): 23 Nag L R 183.  
('24) AIR 1924 Rang 274 (275).  
('78) 1878 Pun Re No. 32, page 130.  
[See also ('36) AIR 1936 Lah 495 (496).]
2. ('31) AIR 1931 Cal 819 (820).  
('20) AIR 1920 Pat 491 (491). (Exercising powers under O. 47 R. 1 to get over limitation—*Held* to be without jurisdiction.)  
[But see ('18) AIR 1918 Pat 390 (391): 3 Pat L Jour 376.]
3. ('02) 1902 Pun Re No. 83, page 335.  
('25) AIR 1925 Bom 521 (521): 49 Bom 899.
4. ('29) AIR 1929 Bom 262 (263): 53 Bom 458.
5. ('08) 31 Cal 150 (154).

#### Note 12

1. ('20) AIR 1920 All 219 (219).  
('87) 1887 All W N 65 (66).  
('22) 15 Ind Cas 34 (34) (All).  
('26) AIR 1926 Cal 246 (246).  
('37) AIR 1937 Oudh 844 (347): 13 Luck 246.  
(Application for restoration of suit under O. 9 R. 9 dismissed for default — Application to restore such application rejected — Order of rejection is appealable under O. 43 R. 1 (c) read with

#### Section 141.)

- (('88) AIR 1938 Bom 199 (202) (S B). (If the Court exercises its discretion on a wrong basis, the Appellate Court will interfere and make the necessary orders: Per Beaumont, C. J.)
- (('36) AIR 1936 Lah 863 (864). (Application for probate dismissed for default — Order is appealable — AIR 1936 Lah 712, Affirmed.)  
[See also ('15) AIR 1915 Cal 610 (610).]
2. ('13) 20 Ind Cas 281 (282): 7 Low Bur Rul 24.  
('80) 5 Cal 711 (712).
3. ('97-1901) 2 Upp Bur Rul 287.
4. ('36) AIR 1936 All 737 (739).
5. ('16) AIR 1916 Cal 361 (366): 48 Cal 857.
6. ('22) AIR 1922 Cal 407 (407): 49 Cal 616.

#### Note 13

1. ('15) AIR 1915 All 289 (390).  
('39) AIR 1938 Lah 169 (171). (It is not an interlocutory order.)  
('28) 107 Ind Cas 395 (396) (Lah). (Do.)  
('25) AIR 1925 Rang 218 (218): 3 Rang 63.  
[But see ('38) AIR 1938 Oudh 381 (388). (The order can be questioned in appeal under Section 105.)]
2. ('25) AIR 1925 Mad 209 (210, 211).  
('12) 14 Ind Cas 221 (224) (Oudh). (Also application presented out of time.)  
[But see ('19) AIR 1919 Cal 979 (980).]

made without jurisdiction, or an erroneous refusal to exercise jurisdiction,<sup>3</sup> or the order is made summarily without recording evidence<sup>4</sup> or reasons,<sup>5</sup> it has been held that a revision lies. The question what is sufficient cause is a matter in the Court's discretion and the High Court will not ordinarily interfere in revision with the exercise of such discretion.<sup>6</sup>

Where an application for restoration of a suit does not fall under this rule, an order refusing such application is open to revision by the High Court, the reason being that such an order is not appealable under O. 43 R. 1, clause (c).<sup>7</sup>

**O. 9 R. 9  
Note 13**

**R. 10.** [S. 105.] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

**O. 9 R. 10**

**Procedure in case of non-attendance of one or more of several plaintiffs.**

[1877, S. 105; 1859, S. 116.]

### *Synopsis*

#### **1. Non-attendance of plaintiffs. | 2. Appeal.**

**1. Non-attendance of plaintiffs.**—Under this rule the Court has a discretion to permit the suit to proceed in the same way as if *all* the plaintiffs have appeared.<sup>1</sup> Where the dismissal is in contravention of this rule a revision lies.<sup>2</sup>

**2. Appeal.**—On the date of hearing, one of the plaintiffs alone appeared and applied for an adjournment. The Court rejected the application and dismissed the suit. It was held that as one of the plaintiffs was present it cannot be said that the order of dismissal was one for default and that it amounted to a decree from which an appeal lay.<sup>1</sup>

**R. 11.** [S. 106.] Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

**O. 9 R. 11**

**Procedure in case of non-attendance of one or more of several defendants.**

[1877, S. 106; 1859, S. 116.]

3. ('18) AIR 1918 Pat 351 (352) : 3 Pat L Jour 355.

[See ('84) AIR 1984 Mad 669 (669).]

4. ('18) AIR 1918 Cal 380 (381).

('28) AIR 1928 Mad 177 (178).

5. ('81) AIR 1981 All 452 (452). (No proof or finding as to sufficient cause.)

[See also ('19) 53 Ind Cas 69 (70) (U P B R).]

6. ('07) 80 Mad 274 (276).

('38) AIR 1988 All 118 (120).

('21) AIR 1921 Sind 50 (50) : 15 Sind L R 172.

('22) AIR 1922 Lah 290 (290) : 3 Lah 79.

('24) AIR 1924 Oudh 30 (30) : 26 Oudh Cas 194.

('35) AIR 1935 All 437 (438).

7. ('35) AIR 1935 Pesh 186 (189).

#### **Order 9 Rule 10 — Note 1**

1. ('21) AIR 1921 Cal 176 (177) : 48 Cal 57.

2. ('19) AIR 1919 Pat 36 (37) : 4 Pat L Jour 152.

#### **Note 2**

1. ('18) AIR 1918 Pat 376 (376).



**O. 9 R. 11**  
**Note 1**

**1. Non-attendance of defendants.** — The rule contemplates that a decree may be a contested one as against some of the defendants and *ex parte* as against the rest;<sup>1</sup> but the decree is liable to be set aside on an application by the *ex parte* defendant or defendants.<sup>2</sup> The Court should, under this rule, pass such order as it thinks fit against the absent defendants. Where no such order is passed against them but a decree is passed simply against some defendants, the decree is not *ex parte* against the absent defendants and cannot be re-opened under Rule 13.<sup>3</sup>

The Court should not pass a decree in an *ex parte* case, without any proof whatever by the plaintiff; it should consider the interests of the absent party.<sup>4</sup>

**O. 9 R. 12**

**R. 12. [S. 107.]** Where a plaintiff or defendant, who has

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

[1877, S. 107; 1859, S. 117. See Ss. 132, 133, O. 3 R. 1, O. 5, R. 3, O. 10 R. 4 and O. 29 R. 3.]

*Synopsis*

**1. Scope of the Rule.**

**2. "Subject to all the provisions of the foregoing Rules."**

*Other Topics (miscellaneous)*

Non-appearance on adjourned date — Effect. See Note 1.

Sufficient cause for non-appearance. See Note 1.

**1. Scope of the Rule.** — The words "under the provisions of Section 66 or Section 436" after the words "appear in person" which occurred in the old Code<sup>1</sup> have now been omitted. The result is that the rule applies to *all cases* where the Court has ordered a person to appear, whether or not the Court is specifically empowered to do so.<sup>2</sup> Where there is a failure to attend on the part of a party, the fact that his pleader is present<sup>3</sup> or the party ordered to appear happens to be the next friend of a minor plaintiff,<sup>4</sup> will not prevent the Court from acting under this rule. But all the same, the dismissal for non-attendance being a highly penal matter, it ought not to be inflicted on a party unless there is a distinct order to attend and upon proof that the party had deliberately disobeyed the same.<sup>5</sup> An opportunity should be given to prove the cause

**Order 9 Rule 11 — Note 1**

1. ('07) 6 Cal L Jour 226 (231).
- ('19) AIR 1919 Cal 217 (218).
- ('69) 12 Suth W R 876 (877).
2. ('71) 15 Suth W R 210 (210).
3. ('68) 9 Suth W R 597 (597).
4. ('24) AIR 1924 Cal 647 (648).

**Order 9 Rule 12 — Note 1**

1. ('98) 6 C P L R 83 (83).
2. ('12) 17 Ind Cas 762 (762) (Mad).

('32) AIR 1932 All 595 (596). (Order to appear under O. 10 R. 4 — Dismissal for default of appearance on his failure to appear.)

('28) AIR 1928 Oudh 262 (263).

3. ('18) AIR 1918 Mad 1256 (1257); 41 Mad 256.

('82) AIR 1982 Mad 414 (414).

4. ('20) AIR 1920 Mad 213 (215).

[But see ('12) 17 Ind Cas 762 (762) (Mad).]

5. ('72) 17 Suth W R 141 (142).

('88) AIR 1988 Mad 821 (822).



of his non-appearance.<sup>6</sup> Thus, when plaintiff was ordered to appear on a *particular day* and the case was not taken up that day, the Court ought not to dismiss the suit for failure of the plaintiff to appear on a subsequent day to which the case was adjourned.<sup>7</sup> Where one of several plaintiffs fails to appear in obedience to the order of Court, the suit cannot be dismissed as against other co-plaintiffs also.<sup>8</sup>

**O. 9 R. 12.**  
**Notes 1-2.**

2. "Subject to all the provisions of the foregoing Rules." — These words indicate that the Court can act under the provisions of the foregoing rules, *i. e.*, dismiss the suit for default or proceed *ex parte*. The very fact that the Court is empowered to proceed under the foregoing rules also indicates that the party aggrieved has the corresponding right of applying for restoration either under Rule 9 or Rule 13 as the case may be.<sup>1</sup>

### SETTING ASIDE DECREES EX PARTE

**R. 13.** [S. 108.] In a case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the

**O. 9 R. 13:**

Setting aside decree *ex parte* against defendant.

Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

[1877, Ss. 108, 109, 588 ; 1859, S. 119.]

### Local Amendments

#### ALLAHABAD

Add the following further proviso :

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

#### BOMBAY

Re-number Rule 13 as Rule 13 (1) and add the following sub-rule :

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule."

6. ('17) AIR 1917 Oudh 127 (128).

7. ('17) AIR 1217 All 95 (96) : 89 All 476.

8. ('19) AIR 1919 Pat 36 (37) : 4 Pat L Jour 152.  
(One of several plaintiffs ordered to appear in person — On his failure to so appear, suit should be dismissed as against him only.)

('26) AIR 1926 Lah 577 (578). (Newly added co-plaintiff failing to appear — Suit cannot be dismissed against the original plaintiff.)

#### Note 2

1. ('32) AIR 1932 All 595 (596).

**O. 9 R. 13 CALCUTTA**

*Re-number* Rule 13 as Rule 13 (1) and *add* the following as sub-rule (2):

"(2) The defendant shall, for service on the opposite party, present along with his application under this rule either —

(i) as many copies thereof on plain paper as there are opposite parties, or

(ii) if the Court by reason of the length of the application or the number of the opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements."

**MADRAS**

(1). *Re-number* Rule 13 as Rule 13 (1) and *insert* the following as proviso to sub-rule (1):

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

(2). *Add* the following as sub-rule (2) to Rule 13:

"(2) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

**NAGPUR**

(1). *Add* the following as an additional proviso:

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

*Explanation.* — Where a summons has been served under O. 5 R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

(2). For the words "he was prevented by any sufficient cause from appearing," the words "there was sufficient cause for his failure to appear" shall be *substituted*.

(3). Existing Rule 13 shall be *re-numbered* as Rule 13 (1) and the following shall be *inserted* as sub-rule (2), namely:

"(2) the provisions of Section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1)."

**N.-W.F.P.**

*Add* the following as an additional proviso:

"Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."

**ODDH**

*Between* the words "was not duly served or that" and the words "he was prevented by any sufficient cause," *insert* the words "notwithstanding due service of the summons," and *add* the following further proviso:

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim."

*Explanation.* — Where a summons had been served under O. 5 R. 15 on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

**O. 9 R. 13**  
**Note 1**

**RANGOON**

(1). *Add* the following as second proviso :

"Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

(2). *Substitute* "decree or order" for "decree" wherever this word occurs in Rule 13.

**SIND**

*Add* the following further proviso :

"Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

*Synopsis*

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Applicability to execution proceedings.<br/>See Note 1 to O. 9, General.</li> <li>4. Decree passed by the Presidency Court of Small Causes.</li> <li>5. Decree passed by the Provincial Court of Small Causes.</li> <li>6. When a decree can be said to be <i>ex parte</i>.</li> <li>7. Where a written statement is filed.</li> <li>8. Remedies in the case of an <i>ex parte</i> decree.</li> <li>9. Whether the remedies are concurrent.</li> <li>10. Hearing of application pending appeal.</li> <li>11. Hearing of application after disposal of appeal.</li> <li>12. Suit to set aside an <i>ex parte</i> decree — <i>Ex parte</i> decree obtained by fraud.</li> <li>13. Application to be made to the Court which passed the decree.</li> <li>14. Fresh vakalatnama, if necessary.</li> </ol> | <ol style="list-style-type: none"> <li>15. Who can apply to set aside.</li> <li>16. Application by the legal representative of the defendant.</li> <li>17. Grounds for setting aside an <i>ex parte</i> decree.</li> <li>18. Summons not duly served.</li> <li>19. Sufficient cause.</li> <li>20. Minor defendant.</li> <li>21. Decree having been satisfied.</li> <li>22. "Upon such terms as to costs," etc.</li> <li>23. Proviso to the Rule.</li> <li>24. Inherent power of Court to set aside an <i>ex parte</i> decree. See Note 2 to Section 151.</li> <li>25. Effect of setting aside the <i>ex parte</i> decree.</li> <li>26. <i>Ex parte</i> decree against a firm.</li> <li>27. Dismissal of an application to set aside an <i>ex parte</i> decree, if can be restored. See Note 2 to O. 9, General.</li> <li>28. Limitation.</li> <li>29. Appeal.</li> <li>30. Revision.</li> </ol> |
|---|---|

*Other Topics (miscellaneous)*

"Against him." See Note 23.  
Applications under this rule, how far proceedings in the suit. See Note 2.

Question as to service of summons on defendant decided—Fresh suit attacking it, if barred. See Note 12.

**1. Legislative changes. —**

The words "as against him" after the words "shall make an order setting aside the decree" have been newly added with a view to make it clear that the *ex parte* decree can only be set aside in favour of the defendant against whom it has been passed, unless it be that the proviso applies.<sup>1</sup>

The proviso to the rule is also new.

**Order 9 Rule 13 — Note 1**

1. See the Statement of Objects and Reasons.

**O. 9 R. 13**  
**Notes 2-4**

**2. Scope of the Rule.** — The object of the rule is to ensure, within reasonable limits as to public convenience, that every defendant shall have a hearing,<sup>1</sup> and to place the successful applicant in the same position in which he would have been if no decree had been passed against him.<sup>2</sup> An application under this rule is not strictly speaking an application for a re-hearing although it may result in it.<sup>3</sup> The proceedings contemplated are not merely a branch of the suit which terminated when the *ex parte* decree was passed; the suit itself does not revive until after the proceedings in the application are terminated successfully.<sup>4</sup> The rule applies to suits<sup>5</sup> and not to appeals<sup>6</sup> inasmuch as separate and corresponding provisions have been made in Order 41 therefor. This rule applies to orders passed *ex parte* in insolvency proceedings under the Provincial Insolvency Act, V of 1920, by virtue of Section 5 of that Act<sup>7</sup> and also to decrees in arbitration proceedings under Schedule II of the Code.<sup>8</sup>

An order setting aside an *ex parte* decree is a judgment within the meaning of Section 2, sub-section 9 *ante* and cannot therefore "be altered or added to, save as provided by Section 152 or on review."<sup>9</sup> See Order 20 Rule 3.

Although it is the practice of the mofussil Courts to pass an order declaring a defendant *ex parte*, the Code does not in terms provide for an application to *set aside* such order. It is only when a *decree* has been passed that an application to set aside such decree has been expressly provided for by the Code.<sup>10</sup>

**3. Applicability to execution proceedings.** — See Note 1 to Order 9, General and also the undermentioned cases.<sup>1</sup>

**4. Decree passed by the Presidency Court of Small Causes.** — Section 37 of the Presidency Small Cause Courts Act, XV of 1882, declaring the finality of small cause decrees, does not apply to an *ex parte* decree and an application will consequently lie under this rule to set it aside.<sup>1</sup> Where an application is made under this rule and is dismissed, an application cannot be made under Section 38 of that Act for a new trial.<sup>2</sup> It was held in the case noted below<sup>3</sup> that under the rules framed by the Calcutta

**Note 2**

1. ('95) 22 Cal 981 (984).
2. ('08) 31 Mad 454 (455).
3. ('94) 19 Bom 208 (210).
4. ('27) AIR 1927 Lah 200 (207) : 8 Lah 54.
5. *Proceedings resulting in final decree are continuation of and part of suits governed by this rule. Vide the followings cases :*
6. ('29) AIR 1929 All 279 (280) : 51 All 634.
7. ('12) 13 Ind Cas 374 (374) (Cal).
8. ('10) 5 Ind Cas 387 (388) (Cal). (Final decree for mesne profits—Not execution proceeding.)
9. ('10) 6 Ind Cas 306 (307) (Cal).
10. ('19) AIR 1919 Mad 964 (965).
11. ('22) AIR 1922 Nag 175 (178).

*Proceedings for personal decree in mortgage suits are also part and in the nature of suits governed by this rule. Vide the following cases :*

1. ('80) AIR 1930 All 841 (843) : 52 All 889.
2. ('05) 1 Nag L R 143 (145).
3. [See also ('24) AIR 1924 Oudh 80 (80, 81) : 26 Oudh Cas 194. (A case under O. 9 R. 9.)]
4. [But see ('06) 9 Oudh Cas 288 (288).]

6. ('69) 1 Ind Jour (O. S.) 68.

7. ('67) 7 Suth W R 425 (426).

8. ('82) AIR 1932 Mad 68 (65).

9. ('82) AIR 1932 Lah 522 (523). (Application is therefore governed by Art. 164, Limitation Act.)

10. ('27) AIR 1927 Mad 897 (898).

[See also ('08) 7 Cal L Jour 268 (269).]

[But see ('04) 8 Cal W N 468 (469, 470). (*Ex parte* order of adjudication as insolvent can be set aside only under inherent powers.)]

8. ('28) AIR 1928 Mad 969 (971).

9. ('22) AIR 1922 Pat 376 (378) : 1 Pat 48.

10. ('16) AIR 1916 All 51 (51) : 38 All 297.

11. ('25) AIR 1925 Cal 1010 (1011). (A decree on the face of it *inter partes* cannot be treated as *ex parte*.)

[See also ('14) AIR 1914 Sind 148 (148) : 8 Sind L R 110. (Under the Arbitration Act.)]

[See however ('24) AIR 1924 Pat 603 (604) : 3 Pat 839. (Decree itself not an *ex parte* decree.)]

9. ('33) AIR 1933 Oudh 385 (386).

10. ('39) AIR 1939 Mad 385 (385).

**Note 3**

1. ('34) AIR 1934 Mad 699 (699). (*Held not applicable.*)

2. ('39) AIR 1939 Rang 115 (116) : 1939 Rang L R 134. (O. 9 R. 18 has no application to execution proceedings but only to decrees in suits or in proceedings in administration or guardianship akin to suits.)

**Note 4**

1. ('92) 17 Bom 507 (509).

2. ('05) 8 Cal L Jour 199 (201).

3. ('03) 30 Cal 588 (592).

High Court, the *Registrar* of the Court of Presidency Small Causes had no jurisdiction to entertain an application under this rule.

**O. 9 R. 13**  
**Notes 4-6**

**5. Decree passed by the Provincial Court of Small Causes.** — Section 17 of the Provincial Small Cause Courts Act (IX of 1887) requires the deposit of the decretal amount or the furnishing of security as a condition precedent to the entertaining of an application to set aside an *ex parte* decree.<sup>1</sup> Where security is furnished within the period of limitation but on its being found to be insufficient the deficiency is made up after the expiry of limitation, the provisions of Section 17 of the Provincial Small Cause Courts Act should be held to be complied with.<sup>2</sup>

Even where the Small Cause Court by which an *ex parte* decree was passed has been abolished, the requirements under Section 17 as to deposit or security should be complied with in the case of an application to set aside the *ex parte* decree.<sup>3</sup>

An order setting aside an *ex parte* decree of a Provincial Small Cause Court is one passed *under the Code*.<sup>4</sup>

See also the Authors' Commentaries on the Limitation Act, Article 164, Note 3.

**6. When a decree can be said to be ex parte.** — The present rule is limited to decrees made *ex parte* under the provisions of Order 9 and does not govern other decrees, though *ex parte*, unless Order 9 has been extended to those decrees by other provisions in the Code.<sup>1</sup> Thus, where a suit is decided under O. 17 R. 3<sup>2</sup> or O. 11 R. 21, the decree is not *ex parte* so as to entitle the defendant to apply under this rule. The reason is that the Court is not *empowered* under those rules to proceed under Order 9. The decree referred to is clearly a decree passed either at the first hearing under Rule 6 of this Order<sup>3</sup> or at an adjourned hearing under O. 17 R. 2 read with Rule 9.<sup>4</sup> Under O. 17 R. 2 specific provision is made for the Court to proceed under Order 9 and the

**Note 5**

1. ('06) 28 All 470 (472).
- ('34) AIR 1934 Nag 43 (43).
- ('10) 6 Ind Cas 400 (400) : 34 Mad 88.
- ('04) 8 Cal W N 355 (356).
- ('08) 5 All L Jour 295 (297).
- ('98) 2 Cal W N 693 (695).
- ('17) AIR 1917 All 484 (485) : 38 All 425. (Transfer of suit from Court of Small Causes to another Court — The latter is to be deemed Small Cause Court under S. 24, C. P. C.)
- ('85) AIR 1935 Pesh 159 (160). (Deposit not made in time—Application not maintainable.)
- ('38) 1938 All L Jour 742 (745). (Applicant depositing security of property instead of cash—Deposit made after thirty days of knowledge—Decree held could not be set aside.)
2. ('37) AIR 1937 Oudh 206 (207). (*Ex parte* decree in small cause suit—Application to set it aside filed with security bond—Security found insufficient — Deficiency made good after limitation for application — Application held still maintainable.)
- ('86) AIR 1936 Oudh 407 (409) : 12 Luck 287. [See also ('86) AIR 1936 All 871 (372). (Court ordering deposit of decretal amount—Court can condone delay in making deposit and extend the time.)
- ('86) AIR 1936 Mad 524 (524). (Delay in furnishing full security due to Court's action—Judgment-debtor should not be penalised.)]

3. ('34) AIR 1934 All 943 (944). (Proceeding for setting aside *ex parte* decree of Small Cause Court is governed by S. 17, Provincial Small Cause Courts Act, and not by C. P. C. even after Court of Small Causes is abolished.)
4. ('35) AIR 1935 Mad 380 (381) : 58 Mad 687 (FB).

**Note 6**

1. ('98) 2 Cal W N 676 (679).
2. ('12) 14 Ind Cas 119 (120) (All).
- ('18) AIR 1918 Mad 787 (788).
- ('11) 10 Ind Cas 770 (771) (Low Bur).
- ('22) AIR 1922 All 497 (499).
- ('15) AIR 1915 Mad 864 (865).
- ('18) AIR 1918 Pat 256 (257) : 3 Pat L Jour 481.
- ('68) 4 Mad H C R 254 (257).
- ('68) 4 Mad H C R 56 (59).
- ('25) AIR 1925 Mad 316 (317).
- ('08) 35 Cal 1023 (1027).
- ('35) AIR 1935 Mad 210 (211) : 58 Mad 817.
- ('36) AIR 1936 All 670 (671).
3. ('09) 2 Ind Cas 67 (68) (Cal).
- ('96) 18 All 241 (244). (Appearance by pleader with *vakalat* signed by a third person applying for adjournment — Adjournment refused — Decree passed is *ex parte*.)
4. ('28) AIR 1928 All 551 (552) : 45 All 618.
- ('79) 4 Cal 318 (321).
- ('96) 28 Cal 788 (753, 756, 759) (FB).
- ('14) AIR 1914 Cal 360 (361) : 41 Cal 956.
- ('25) AIR 1925 Oudh 360 (360).
- ('82) 8 Cal 272 (274).

**O. 9 R. 13**  
**Notes 6-7**

aggrieved party is also entitled in such a case to the remedy provided for by this rule.<sup>5</sup> A decree passed on default of appearance of the defendant at the hearing of a remanded suit is nevertheless an *ex parte* decree.<sup>6</sup> Similarly, a *final* decree passed in the absence of the defendant is an *ex parte* decree within the meaning of this rule.<sup>7</sup>

A decree cannot be *ex parte* when there is evidence already on record and the Court goes into the *merits* before decreeing the suit.<sup>8</sup> Thus, where both the parties have let in their evidence and nothing remains to be done except arguments, the Court ought not to proceed to pass an *ex parte* decree.<sup>9</sup> Similarly, where the defendant who has been summoned as a witness by the plaintiff fails to appear, the Court is not justified in passing an *ex parte* decree when the pleader for the defendant is ready to proceed with the case.<sup>10</sup> Where the defendant actually appears, a mere failure on his part to adduce *evidence* will not make the decree passed an *ex parte* decree.<sup>11</sup> A defendant's pleader on the day fixed for trial filed an additional written statement and applied for a fresh issue being framed. On such issue being framed, he applied for an adjournment and on adjournment being refused, reported no instructions and the trial proceeded. It was held that the acts of the pleader in filing the additional written statement and applying for the framing of a fresh issue were acts done by him in the conduct of the suit and towards the progress of the suit which had then been called on for hearing and that they constituted an appearance.<sup>12</sup>

Where a compromise decree is passed in a suit and a party applies to set it aside on the ground that the applicant was no party to the compromise and that he had given no authority to file the compromise, there is a conflict of opinion as to whether the application can be treated as one under this rule, for which see the undermentioned cases.<sup>13</sup>

The recitals on the record are not conclusive as to the character of the decree<sup>14</sup> and the defendant is entitled to show that the decree is, as a matter of fact, *ex parte*.<sup>15</sup>

**7. Where a written statement is filed.**— Where the defendant has filed a written statement in the case but fails to appear when the suit is called on for hearing, the decree passed is nevertheless an *ex parte* decree and can be set aside under this rule.<sup>1</sup>

5. ('96) 20 Bom 380 (382).

('83) AIR 1933 Nag 370 (372) : 30 Nag L R 94.

('95) 1895 Pun Re No. 82, p. 391.

('09) 1 Ind Cas 741 (741) : 36 Cal 189.

('96) 23 Cal 738 (753, 756) (FB).

('86) AIR 1936 All 619 (621).

6. ('69) 1869 Pun Re No. 3.

7. ('39) AIR 1939 Oudh 111 (112) : 14 Luck 435.

8. ('16) AIR 1916 Oudh 835 (335, 336).

('31) AIR 1931 All 294 (301) : 53 All 612 (FB).

(1865) 2 Suth W R 1 (1).

('69) 3 Beng L R App 121 (122).

[See also ('75) 1 Bom 217 (218). (Issues framed in presence of defendant's pleader — Plaintiff's witnesses also cross-examined — Decree not *ex parte* though written statement was not filed.)

9. ('24) AIR 1924 Lah 224 (225).

10. ('09) 3 Ind Cas 45 (45) (Bom).

11. ('12) 16 Ind Cas 911 (912) (Cal).

[See also ('88) AIR 1938 Bom 470 (471). (Defendant directed to file written statement—On his failure to do so within the time fixed, Court ordering that the case should be heard *ex parte* —Order only meaning that the case should be heard in the absence of written statement and

defendant and pleader present at hearing of suit and not prevented in any way from addressing Court—Decree is not *ex parte*.)

12. ('35) AIR 1935 Mad 210 (211) : 58 Mad 817.

(A party who has appeared by his pleader cannot be allowed to claim to be *ex parte* from the moment that his pleader when called upon to enter upon his defence, or in anticipation of that stage of the trial, has reported to the Court that he has no instructions.)

13. ('18) AIR 1918 Cal 322 (323). (Yes.)

('06) 3 Cal L Jour 158 (159). (Yes.)

('16) AIR 1916 Cal 821 (821). (No.)

('16) AIR 1916 Cal 50 (50). (No.)

('70) 14 Suth W R 299 (300). (No.)

14. ('13) 20 Ind Cas 67 (68) (Cal).

('23) AIR 1923 Lah 281 (281).

('87) AIR 1937 Pat 17 (18). (If it is found that a particular defendant was not present at the time of the hearing of suit, the decree must be taken to be *ex parte* against him, in spite of the fact that decree as drawn up mentions his presence.)

15. ('97) 1 Cal W N cxxvii (cxxviii).

**Note 7**

1. ('09) 4 Ind Cas 1167 (1167) : 31 Mad 505.

**8. Remedies in the case of an ex parte decree.** — A defendant against whom an *ex parte* decree has been passed has four courses open to him, *viz.* —

- (1) to apply under this rule to set aside the *ex parte* decree,<sup>1</sup> or
- (2) to apply for a review,<sup>2</sup> or
- (3) to appeal from the decree,<sup>3</sup> or
- (4) to institute a suit on the ground of fraud.<sup>4</sup>

See also Note 12 to Section 96.

**9. Whether the remedies are concurrent.** — As to whether and how far the remedies 1 and 3 referred to in Note 8 above are *concurrent*, see Note 12 to Section 96.

The defendant may apply for a review without applying under this rule<sup>1</sup> or even after an application under this rule has been rejected.<sup>2</sup> According to the High Courts of Calcutta<sup>3</sup> and Madras<sup>4</sup> the fact that an application for a review is made at a time when an application under this rule would be barred by limitation, is no ground for refusing a review. But the High Court of Lahore<sup>5</sup> has held *contra*, namely that no review can be granted in such a case and that the defendant cannot be allowed to evade the law of limitation. It is submitted that the former view is correct. If the party is entitled to a review, he is equally entitled to apply for the same within the period of limitation proscribed *therefor* and not for any other application.

**10. Hearing of application pending appeal.** — As has been seen in Note 12 to Section 96 *ante*, the mere filing of an appeal does not take away the jurisdiction of the trial Court to entertain an application under this rule. In fact, such an application ought to be presented to the Court which passed the decree,<sup>1</sup> for, the decree continues to be the decree of the primary Court until it is reversed, confirmed or varied in appeal.<sup>2</sup> The proceedings under this rule and in an appeal are entirely distinct in their scope and purpose and there is no possibility of any conflict between the judgments to be pronounced in the two proceedings.<sup>3</sup>

Where a decree is *ex parte* against some defendants and contested against the rest, and the contesting defendants alone appeal without impleading the *ex parte* defendants as respondents, the application by the *ex parte* defendants ought to be

('69) 1 N W P H C R 154 (154).

('71) 6 Beng L R 688 (690, 691).

('25) AIR 1925 Oudh 717 (717, 718).

[But see ('69) 11 Suth W R 5 (5).

('81) 3 Mad 264 (265).]

#### Note 8

1. ('29) AIR 1929 Cal 322 (325) : 56 Cal 21.

('20) AIR 1920 Lah 408 (409) : 1 Lah 344.

('74) 22 Suth W R 218 (214).

2. ('84) 6 All 65 (66).

('10) 8 Ind Cas 616 (618) (Bom).

('83) 13 Cal L Rep 254 (255).

('99) 3 Cal W N 375 (377).

('11) 10 Ind Cas 894 (895) (Cal).

('19) AIR 1919 Mad 844 (844).

('69) 12 Suth W R 195 (197).

('07) 3 Nag L R 55 (65).

[See ('06) 9 Oudh Cas 35 (37).]

3. ('81) 3 Mad 264 (265).

('85) AIR 1985 Mad 196 (198). (Revision will lie in the case of a small cause suit.)

('66) 6 Suth W R 86 (87).

('78) 2 All 67 (70, 71) : 5 Ind App 288 (PC).

('22) AIR 1922 Bom 267 (267) : 46 Bom 184.

4. ('09) 1 Ind Cas 86 (88) (Cal).

#### Note 9

1. ('12) 15 Ind Cas 554 (554) (Cal).

2. ('73) 20 Suth W R 284 (284). (Without an application being made for review, a Judge has no power to alter or amend his judgment *proprio motu*.)

3. ('12) 16 Cal W N 643 (644).

4. ('20) AIR 1920 Mad 633 (634).

5. ('12) 13 Ind Cas 318 (319) (Lah).

('20) AIR 1920 Lah 261 (262).

#### Note 10

1. ('21) AIR 1921 Mad 568 (568, 569) : 44 Mad 731.

('09) 32 Mad 416 (420) (FB).

('24) AIR 1924 Lah 224 (225). (An appeal from the *ex parte* decree does not affect the appeal from an order rejecting an application for setting aside the *ex parte* decree.)

('09) 3 Ind Cas 468 (469) (Cal). (Mere filing an appeal does not preclude application under this rule.)

('11) 9 Ind Cas 189 (192) : 38 Cal 394.

('15) AIR 1915 Cal 413 (414).

('17) AIR 1917 Nag 26 (28) : 14 Nag L R 36.

2. ('15) AIR 1915 Cal 418 (414).

3. ('08) 12 Cal W N 885 (887).

**O. 9 R. 13**  
**Notes 10-11**

made only to the trial Court.<sup>4</sup> Even if the *ex parte* defendants have been impleaded as *pro forma* respondents in appeal, it has been held by the Allahabad<sup>5</sup> and Madras<sup>6</sup> High Courts that the proper Court to which application ought to be made is the trial Court; the proper course in such a case is to get an adjournment of the hearing of the appeal to enable the party to apply to the trial Court, and not wait till the disposal of the appeal.

**11. Hearing of application after disposal of appeal.** — As has been seen already in Note 12 to Section 96, where an *ex parte* decree has been confirmed in appeal, the Court of first instance has no jurisdiction to entertain or dispose of an application to set aside the decree, and if it does so its action is *ultra vires*.<sup>1</sup> The reason is that the decree of the trial Court becomes superseded or *merged* in that of the Appellate Court<sup>2</sup> and the result of allowing an application would be to interfere with the decree of a superior Court, *viz.*, the Appellate Court.<sup>3</sup> The same principle will apply where an application in revision had been preferred against the decree and such application has been decided.<sup>4</sup> The High Court of Madras has, however, held in a recent decision<sup>5</sup> that even after the disposal of the appeal the trial Court has jurisdiction to entertain and dispose of such an application. It is submitted that this view is opposed to the decision of the Privy Council in *Brij Narain v. Tejpal Bikram*,<sup>6</sup> and is not correct on principle.

But where the decree of the trial Court is not superseded or does not get *merged* in the appellate decree, the trial Court has power to entertain and deal with the application to set aside the *ex parte* decree. Thus, where the appeal is dismissed for *default*, there is no decree of the Appellate Court which can be said to supersede the decree of the trial Court so as to prevent the defendant from applying to the trial Court.<sup>7</sup> Similarly, where the appeal is dismissed as having *abated* by reason of the omission of the appellant to implead the legal representatives of the deceased respondents, there is no merger of the decree of the trial Court in the decree of the Appellate Court.<sup>8</sup> Again, when the *ex parte* defendants are not *impleaded as parties* to the appeal by other defendants, the decree of the Appellate Court does not prevent them from applying to the trial Court under this rule.<sup>9</sup> Where the *ex parte* decree declares the liability of two defendants separately and specifically and one of the

4. ('21) AIR 1921 Cal 248 (249) : 48 Cal 153.

('17) AIR 1917 All 298 (299).

('18) AIR 1918 Mad 665 (666).

('32) AIR 1932 All 340 (342) : 54 All 423.

5. ('24) AIR 1924 All 173 (175).

6. ('22) AIR 1922 Mad 33 (33, 34).

**Note 11**

1. ('10) 6 Ind Cas 205 (205) (All).

('07) 80 Mad 535 (536).

('17) AIR 1917 Cal 728 (730) : 44 Cal 954.

('87) AIR 1937 Cal 548 (550). (Test to determine whether decree of trial Court has merged in appellate decree stated.)

('37) AIR 1937 Nag 381 (382). (Simultaneous application under O. 9 R. 13 and appeal from *ex parte* decree — Appeal dismissed under O. 41, R. 11—Decree of lower Court ceases to exist—Appellant should ask Appellate Court to stay proceedings or to take over to itself under S. 24 (1) (b), C. P. C., applications under O. 9 R. 13 —Original Court is right in dismissing application to set aside *ex parte* decree.)

2. ('15) AIR 1915 All 2 (3) : 37 All 203.

('23) AIR 1923 Pat 331 (334, 336, 337).

('29) AIR 1929 Oudh 35 (35) : 4 Luck 201.

('21) AIR 1921 Oudh 141 (142) : 24 Oudh Cas 282.

('12) 15 Ind Cas 565 (566) : 8 Nag L R 51.

('01) 1901 Pun Re No. 4, page 11.

(1900) 1900 Pun Re No. 30, page 101.

('26) AIR 1926 Cal 344 (344, 345).

('17) AIR 1917 Cal 728 (730) : 44 Cal 954.

('16) AIR 1916 Cal 225 (226).

('10) 5 Ind Cas 525 (527) (Cal).

('37) AIR 1937 Nag 381 (382).

3. ('09) 1 Ind Cas 136 (137) (Cal).

4. ('84) AIR 1934 All 134 (136) : 56 All 608.

5. ('27) AIR 1927 Mad 722 (723, 724).

6. ('10) 87 Ind App 70 (77) : 32 All 295 (PC).

7. ('17) AIR 1917 All 392 (398) : 39 All 898.

8. ('24) AIR 1924 Cal 880 (882, 885) : 51 Cal 715.

('21) AIR 1921 Cal 248 (249) : 48 Cal 153.

9. ('11) 12 Ind Cas 669 (671) (Cal).

('17) AIR 1917 All 281 (289) : 39 All 13.

('12) 13 Ind Cas 377 (380) (Cal).

('32) AIR 1932 Cal 773 (774) : 36 Cal WN 747 (749).



defendants appeals against the decree, an application by the other defendant to set aside the *ex parte* decree may be made to the trial Court.<sup>10</sup>

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Notes 11-12

In the case of an application to set aside an *ex parte final* decree, it is only the original Court which passed the decree and not the Appellate Court which confirmed the *preliminary* decree that has got the jurisdiction to entertain the application.<sup>11</sup>

**12. Suit to set aside an *ex parte* decree—*Ex parte* decree obtained by fraud.** — As has been seen in Note 61 to Section 9, fraud vitiates the most solemn transactions. A suit will, therefore, lie to set aside an *ex parte* decree on the ground of fraud.<sup>1</sup> Thus, if the plaintiff suppresses the fact of a compromise effected and obtains an *ex parte* decree, the decree can be set aside by a separate suit.<sup>2</sup> If the decree is tainted with fraud, any sale which has taken place in pursuance of the decree can also be set aside.<sup>3</sup> But the fraud alleged *must be extraneous* to everything which has been adjudicated upon by the Court and the defendant cannot be allowed to get round the rule of *res judicata* by simply proving that the *ex parte* judgment is wrong.<sup>4</sup> The falsity of the claim on which the former suit was based will not in itself amount to fraud in obtaining the decree in such suit and a suit will not lie to set aside the decree on the ground of such falsity.<sup>5</sup> But it has been held that where non-service of summons in the previous suit has not been found to be fraudulent, it is permissible to go into the merits of the previous suit to see if there was a motive for wilful or fraudulent suppression of the notice or summons in order to obtain a decree based on a false claim.<sup>6</sup>

In a suit to set aside the *ex parte* decree on the ground of fraud, the *onus* lies on the party suing to show that there was some fraud in relation to the proceedings of the Court.<sup>7</sup> The mere fact that a decree is *ex parte* does not show that there has been no service of summons. On the other hand, the presumption is that the Court

(‘88) AIR 1938 Oudh 11 (12).

[See also (‘32) AIR 1932 All 340 (341) : 54 All 423. (Case where defendant was made a party in appeal but was not served with *ex parte* notice of appeal.)

(‘11) 12 Ind Cas 669 (672) (Cal). (*Ex parte* decree against some defendants — Plaintiff’s appeal against contesting defendants only — Self-contained appellate decree — *Ex parte* defendants can apply to lower Court to set aside decree.)]

10. (‘32) AIR 1932 All 340 (341) : 54 All 423.

[See also (‘34) AIR 1934 Lah 1016 (1017). (The fact that a person has been impleaded as a *pro forma* respondent in the appeal does not in any way affect the jurisdiction of the trial Court so far as the setting aside of the *ex parte* decree against such person is concerned.)]

11. (‘16) AIR 1916 Low Bur 20 (21) : 8 Low Bur Rul 450.

**Note 12**

1. (‘20) AIR 1920 Lah 164 (165).

(‘88) AIR 1938 Rang 123 (123). (Plaintiff must clearly and specifically set out in the plaint the fraud that is alleged.)

(‘23) AIR 1923 Cal 425 (426).

(‘11) 11 Ind Cas 626 (628) : 38 Cal 936. (Court must rip up the whole matter for determining whether there has been fraud in the procurement of the decree.)

(‘20) AIR 1920 Bom 851 (852).

(‘27) AIR 1927 Rang 281 (282) : 5 Rang 471.

(‘26) AIR 1926 Nag 388 (388, 389).

(‘26) AIR 1926 Bom 63 (63).

[See (‘35) AIR 1935 Nag 66 (67) : 31 Nag L R 159. (Where a plaintiff suing for the recovery of purchase price of goods omits to state in the plaint, that goods remain in his possession, such omission does not amount to any fraud or false averment so as to enable defendant to sue for setting aside an *ex parte* decree.)]

2. (‘14) AIR 1914 Mad 158 (159).

(1857) 8 Moo Ind App 91 (102) (PC).

3. (‘07) 5 Cal L Jour 328 (331).

(1900) 27 Cal 197 (200).

4. (‘16) AIR 1916 Mad 364 (365) : 38 Mad 203.

5. (‘27) AIR 1927 Pat 183 (185) : 6 Pat 458.

(‘36) AIR 1936 Pat 135 (136).

(‘37) AIR 1937 Pat 384 (384).

(‘37) AIR 1937 Sind 18 (19) : 30 Sind L R 405.

6. (‘36) A I R 1936 Pat 135 (136). (A I R 1927 Pat 183, Followed.)

[See also (‘37) AIR 1937 Pat 384 (385).]

7. (‘20) AIR 1920 Pat 246 (248).

(‘16) AIR 1916 All 93 (95).

(‘20) AIR 1920 Cal 126 (129).

(‘26) AIR 1926 Lah 86 (86, 87).

(‘37) AIR 1937 Pat 384 (384). (Onus is on plaintiff to prove that non-service of processes in former suit was due to fraud— If non-service is not found in itself to be fraudulent then it is necessary to go into question whether original claim was fraudulent or not.)

**O. 9 R. 13  
Note 12**

was satisfied as to due service of summons before proceeding *ex parte*.<sup>8</sup>

A suit is maintainable notwithstanding the fact that it has not been preceded by an application under this rule<sup>9</sup> or that an application was filed under this rule and proved infructuous.<sup>10</sup> But, where the question raised in the suit has already been decided adversely to the applicant in an application under this rule, such decision will operate as *res judicata* and will bar the re-opening of the same question in the suit.<sup>11</sup> Further, no suit can be entertained where the only question submitted is one that could, and should have been dealt with under this rule.<sup>12</sup> For instance, where the only fraud alleged is *bare non-service of summons*, no suit can succeed.<sup>13</sup> It is quite a different matter, however, where the *whole suit* is attacked on the ground of fraud and the incident of improper or defective service is relied on as *one* of the *indicia* of fraud.<sup>14</sup> As the Judicial Committee observed in *Khagendra Nath v. Pran Nath* (I. L. R. 29 Calcutta 395), O. 9 R. 13 assumes the existence of a real suit and has no application where the suit itself is attacked on the ground of fraud and the fraudulent and violent incidents of its progress, *e. g.*, at the stage of service are treated as parts and *indicia* of a whole. A fraudulent suppression in the matter of the service of summons can afford a sufficient ground for setting aside the *ex parte* decree.<sup>15</sup> Thus, where the plaintiff got summons served on a wrong person suppressing the father's name of the real defendant, and knowing full well that the defendant was not a partner got him impleaded as a partner, it was held that the decree was tainted with fraud.<sup>16</sup> Similarly, where the plaintiff falsely and intentionally represented to the Court that the defendant was away in a distant place and got substituted service effected, the decree passed in the case was held to be vitiated by fraud.<sup>17</sup>

8. ('23) AIR 1923 Pat 406 (407).

9. ('17) AIR 1917 Upp Bur 9 (10) : 2 Upp Bur  
Rul 106.

('25) AIR 1925 Rang 200 (201) : 3 Rang 65.

('16) AIR 1916 Cal 876 (878).

10. ('12) 14 Ind Cas 845 (846) (Cal).

('88) AIR 1938 Rang 123 (128).

('24) AIR 1924 Pat 241 (242).

('01) 28 Cal 475 (478) (P C).

('99) 21 All 289 (290).

('09) 1 Ind Cas 86 (88) (Cal).

('36) AIR 1936 Mad 161 (163) : 59 Mad 770.

11. ('37) AIR 1937 Lah 614 (615). (*Ex parte* decree — Application to set aside, on ground of fraud in service of summons, dismissed—Appeal also dismissed—Subsequent suit on same ground, held barred by *res judicata*.)

('35) AIR 1935 Pat 458 (458) : 14 Pat 489. (Decision in an application under O. 9 R. 13 that the summons was duly served is *res judicata* and no further suit will lie on the ground that the summons had been fraudulently suppressed.)

12. ('14) AIR 1914 Sind 63 (63) : 8 Sind L R 81.

('38) AIR 1938 Cal 274 (277) : 60 Cal 98. (Plaintiff giving wrong address of defendant, but taking no part in service of summons—Service is not deliberately suppressed nor is decree obtained by fraud.)

('10) 8 Ind Cas 599 (600) (Low Bur).

[See also ('37) AIR 1937 Lah 614 (615). (Application under this rule dismissed—Suit on same ground held barred by *res judicata*.)]

13. ('28) AIR 1928 Pat 327 (329).

('35) AIR 1935 Cal 95 (96). (Fraudulent suppression

must be proved.)

('10) 7 Ind Cas 163 (163) (Cal).

('07) 29 All 212 (213).

('12) 16 Ind Cas 5 (6) (All).

('10) 5 Ind Cas 198 (199, 200) : 37 Cal 197.

('90) AIR 1930 Sind 298 (299) : 24 Sind L R 292.

('35) AIR 1935 Cal 95 (96). (Proof of non-service of summons is not sufficient to set aside decree — Fraudulent suppression of summons and fraud of defendant must be proved).

('37) AIR 1937 Pat 384 (384). (Decree passed by competent Court cannot be set aside by suit simply on the ground that there was no service of summons or notices—It may, from the circumstances of a case, be established that the non-service of summons was itself fraudulent.)

('36) AIR 1936 Pat 185 (186).

14. ('1902) 29 Cal 895 (400) : 29 Ind App 99 (P C).

('28) AIR 1928 Pat 242 (244) : 2 Pat 335.

('17) AIR 1917 Pat 161 (168).

15. ('10) 5 Ind Cas 198 (199, 200) : 37 Cal 197.

'94) 21 Cal 605 (609).

'20) AIR 1920 Cal 773 (774).

'17) AIR 1917 Pat 529 (530).

'15) AIR 1915 All 163 (163) : 37 All 189.

[See ('37) AIR 1937 Cal 738 (739). (No proper service as required by Section 148 (g), Bengal Tenancy Act — Separate suit to set aside rent decree does not lie, unless there is fraud regarding service or Court is kept in ignorance of real state of affairs.)]

16. ('22) AIR 1922 Sind 20 (21) : 16 Sind L R 109.

17. ('14) AIR 1914 Lah 450 (459) : 1914 Pun Re No. 65.

The mere fact that the *ex parte* decree has been procured by *false or perjured evidence* is no ground for setting it aside. Something more should be proved in support of the allegation of fraud.<sup>18</sup>

**O. 9 R. 13  
Notes 12-16**

Where the very question of fraud has been already in issue and agitated between the same parties and decided upon in an application under this rule, the decision will operate as *res judicata* in a separate suit.<sup>19</sup>

The question whether the original suit itself is revived after the *ex parte* decree in that suit has been set aside in a subsequent suit, depends on the issues and the actual decision in the later suit.<sup>20</sup>

If the *ex parte* decree be not set aside it is final and will operate as *res judicata*.<sup>21</sup>

See also Note 19 to Section 11.

**13. Application to be made to the Court which passed the decree.** — The rule requires an *application* by the defendant for an order to set aside the decree.<sup>1</sup> The application under this rule ought to be made to the Court which passed the decree though the presiding Judge may be different.<sup>2</sup> Where, however, by reason of territorial re-adjustment, the Court itself becomes different, the defendant is not debarred from applying to the Court which is seised of the matter.<sup>3</sup>

According to the undermentioned case of the High Court of Madras<sup>4</sup> an application should be made only to the trial Court even after *disposal* of the appeal against the *ex parte* decree. This view, as has been seen in Note 11 above, cannot be accepted as correct. In an earlier decision of the same High Court<sup>5</sup> it was held that the High Court can, in second appeal, entertain an application for setting aside an *ex parte* decree passed by the trial Court.

An application under this rule is not bad merely because it omits to give the names of some of the decree-holders.<sup>6</sup>

**14. Fresh vakalatnama, if necessary.** — A pleader who had duly appeared in the suit is not obliged to file a fresh *vakalatnama* for the purpose of an application under this rule.<sup>1</sup>

**15. Who can apply to set aside.** — The application under this rule is not limited to the case of a *sole* defendant who has not appeared or, where there are more defendants than one, none of them had appeared; *any one of several defendants* against

18. ('27) AIR 1927 Cal 84 (86).

('20) AIR 1920 Pat 741 (741) : 5 Pat L Jour 259.

('19) AIR 1919 Cal 652 (652).

('25) AIR 1925 Cal 663 (664).

('15) AIR 1915 Cal 69 (69).

('19) AIR 1921 Mad 1044 (1046) : 41 Mad 743 (FB).

('19) AIR 1919 Oudh 272 (275) : 22 Oudh Cas 60.

('86) AIR 1936 Sind 212 (212).

19. ('17) AIR 1917 Cal 649 (651).

('18) AIR 1918 Cal 125 (126).

('17) AIR 1917 Mad 894 (895).

('24) AIR 1924 Pat 238 (239) : 2 Pat 833.

('07) 29 All 608 (612).

('21) AIR 1921 Pat 12 (18) : 6 Pat L Jour 1.

('24) AIR 1924 Pat 769 (770).

('97) 24 Cal 546 (549, 550).

20. ('81) AIR 1931 Pat 204 (205) : 10 Pat 516 (FB).

21. ('14) AIR 1914 All 886 (889).

('10) 8 Ind Cas 282 (283) (Lah).

('10) 6 Ind Cas 860 (860) (Cal).

('20) AIR 1920 Lah 88 (89).

**Note 13**

1. ('36) AIR 1936 Oudh 50 (51) : 11 Luck 519. (Mortgage decree — Execution — *Ex parte* order against judgment-debtor amounting to decree — Decree-holder's application under O. 34 R. 6 opposed by judgment-debtor filing written statement — No request to set aside *ex parte* decree — Written statement held could not be treated as application under O. 9 R. 13.)

2. ('68) 10 Suth W R 156 (157).

('90) 1890 Pun Re No. 158, page 516.

3. ('22) AIR 1922 Mad 10 (12) : 40 Mad 1.

4. ('27) AIR 1927 Mad 722 (723, 724).

5. ('16) AIR 1916 Mad 641 (641).

6. ('35) AIR 1935 Cal 506 (507) : 62 Cal 1057.

**Note 14**

1. ('22) AIR 1922 Bom 207 (209) : 47 Bom 11.

**O. 9 R. 13** whom the decree is *ex parte* can apply.<sup>1</sup> The words "against the defendant" do not  
**Notes 16-17** necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside; they are comprehensive enough to include a case in which the decree *adversely affects* the rights of a contesting defendant. Thus, where the real question is whether the plaintiff or the contesting defendants are really entitled to the claim in suit and an *ex parte* decree is passed, the contesting defendants are competent to apply under this rule.<sup>2</sup> But a person who is not a party though he may be interested in the suit is not entitled to apply under this rule.<sup>3</sup> Nor can a person who though a formal party but against whom nothing is said in the operative portion of the decree<sup>4</sup> or who has been expressly exempted from the decree, apply under this rule.<sup>5</sup> It follows that a person against whom the suit is dismissed cannot apply.<sup>6</sup>

The Court cannot *suo motu* set aside an *ex parte* decree without there being an application by the party.<sup>7</sup>

**16. Application by the legal representative of the defendant.** — When a defendant dies after an *ex parte* decree is made against him, his legal representative can apply under this rule to set it aside.<sup>1</sup> The reason is that the legal representative enjoys the same rights and liabilities as the original defendant. The contrary view expressed in the undermentioned cases<sup>2</sup> that the provision only authorises applications by the *defendant against whom an ex parte* decree was passed is not correct under the present Code having regard to Section 146.

Where proceedings under this rule have been already initiated by the defendant, his legal representative is entitled to continue the same.<sup>3</sup> See also Section 146, Notes 2 and 7 for fuller discussion.

**17. Grounds for setting aside an ex parte decree.** — In an application under this rule, the Court has to satisfy itself (a) whether the summons has not been duly served or (b) whether the applicant has been prevented by sufficient cause from appearing.<sup>1</sup> The words in the rule are imperative and if either of these conditions is satisfied, the Court is bound to set aside the *ex parte* decree and cannot refuse it on any other ground.<sup>2</sup> Thus, the fact that the defendant did not take out summons to his witnesses is no ground for refusing the application if otherwise the conditions of this rule are satisfied.<sup>3</sup> Conversely, where either of these conditions is not satisfied the Court has *no jurisdiction* to grant the application for any other reason.<sup>4</sup> Thus, where a suit

#### Note 15

1. ('04) 8 Cal W N 621 (625).
2. ('34) AIR 1934 All 168 (164) : 56 All 578.
3. ('26) AIR 1926 Cal 1015 (1015).
4. ('04) 1 All L Jour 470 (472).
5. ('21) 61 Ind Cas 484 (485) (All).
6. ('11) 11 Ind Cas 141 (142) (All).
7. ('27) AIR 1927 Mad 227 (228). (Some defendants sailing with plaintiff—Withdrawal ordered in their absence—Petition by them to set it aside and allow them to continue the suit—Not sustainable.)

7. ('27) AIR 1927 Lah 372 (372).

#### Note 16

1. ('28) AIR 1928 All 80 (80).
2. ('02) 29 Cal 88 (85).
3. ('08) 1908 Pun Re No. 36, page 113.
4. ('15) AIR 1915 Mad 1204 (1205) : 21 Ind Cas 568 (569) : 38 Mad 442. (Executor of a deceased

defendant can apply.)

1. ('25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299. (Legal representative can apply though not brought on record.)
2. ('05) 28 Mad 861 (862).
3. ('99) 21 All 274 (276).
3. ('07) 29 All 574 (575).

#### Note 17

1. ('25) AIR 1925 Lah 577 (577).
2. ('85) AIR 1935 All 565 (566).
2. ('99) 26 Cal 267 (272).
3. ('25) AIR 1925 Cal 627 (628) : 52 Cal 179.
4. ('66) 5 Suth W R Miso 11 (12).
5. ('28) AIR 1928 Nag 75 (76).
6. ('80) AIR 1980 Rang 152 (152).
7. ('88) AIR 1988 All 601 (608).
8. ('81) AIR 1981 All 294 (296) : 58 All 612 (FB).
9. ('16) AIR 1916 Mad 487 (488).
10. ('18) 18 Ind Cas 860 (862) (Mad).

is restored to file under Rule 9, *ante*, and the Court passes an *ex parte* decree on the same day on account of the fact that the defendant was not ready to go on with the trial, it has been held that the decree could not be set aside under this rule.<sup>5</sup> In such a case the decree is, however, illegal and can be set aside in appeal or revision as the case may be.

The Court should decide upon evidence<sup>6</sup> or proper affidavits<sup>7</sup> and come to a definite finding as to the facts alleged in the application.<sup>8</sup> An application under this rule in rent suits under the Bengal Tenancy Act,<sup>9</sup> and the Orissa Tenancy Act<sup>10</sup> must contain a statement of the injury sustained by the applicant by the *ex parte* decree, and must also be accompanied by a deposit in Court of the amount of rent admitted due by the applicant unless the Court otherwise directs.

See also the undermentioned case<sup>11</sup> decided under the further proviso added by the High Court of Allahabad.

**18. Summons not duly served.** — The *onus* of proving that the summons has not been duly served is upon the applicant claiming the benefit of this rule.<sup>1</sup> If he makes out that the necessary proof of due service required by Rule 6 was not given before the Court proceeded *ex parte*, the decree ought to be set aside.<sup>2</sup> But a mere assertion of ignorance on the part of the defendant is not enough to prove want of due service.<sup>3</sup> The Court must decide the matter upon enquiry and upon evidence.<sup>4</sup>

Although in the first instance the *onus* lies on the applicant, it will shift to the opposite party where the service is not on the defendant personally but on his *gumasta*, and he must show that the provisions of O. 5 R. 12 or R. 13 were complied with.<sup>5</sup> It is necessary in each case for the Court to see that the serving officer has used

**O. 9 R. 13**  
**Notes 17-18**

(‘36) AIR 1936 Mad 49 (49). (If the Court sets the decree aside on terms on the ground that he has a good defence, that order is without jurisdiction.)

(‘38) AIR 1938 Cal 797 (798). (Defendant served with summons months before suit fixed for *ex parte* hearing — Being absent when suit heard *ex parte* decree passed — Applying same day for time to file statement — *Ex parte* decree held could not be set aside.)

(‘87) AIR 1937 All 691 (699). (An applicant seeking to avail himself of the rule must comply with the conditions laid down in the rule, i. e., he must satisfy the Court either that the summons was not duly served or that he was prevented by any sufficient cause from appearing in Court when the suit was called on for hearing.) [See (‘36) AIR 1936 Mad 524 (524). (Where a Court decides to set aside an *ex parte* decree under O. 9 R. 13 although it is not obligatory on the Court to state reasons why *ex parte* decree should be set aside, it is most desirable that it should state why it thinks the *ex parte* decree should be set aside.)]

5. (‘35) AIR 1935 Mad 196 (197).

6. (‘25) AIR 1925 Mad 1264 (1265).

7. (‘18) 21 Ind Cas 457 (457) (Mad).

8. (‘26) AIR 1926 Oudh 118 (119).

(‘20) AIR 1920 Pat 621 (622).

9. The Bengal Tenancy Act (VIII of 1885), Section 158-A.

(‘21) AIR 1921 Pat 284 (286).

10. The Orissa Tenancy Act (II of 1918), S. 205.

11. (‘38) AIR 1938 All 165 (166). (*Ex parte* de-

crea—Irregularity in service of summons—Defendant aware of hearing — No ground for setting aside.)

**Note 18**

1. (‘24) AIR 1924 Pat 446 (447) : 3 Pat 236.

(‘33) AIR 1933 Lah 288 (289).

(‘33) AIR 1933 Rang 156 (157).

(‘28) AIR 1928 Mad 655 (655).

(‘75) 24 Suth W R 262 (262).

(‘28) AIR 1928 Nag 80 (80) : 22 Nag L R 166.

2. (‘01) 23 All 99 (100, 101).

3. (‘26) AIR 1926 Mad 558 (559).

(‘28) 108 Ind Cas 753 (754) (Mad).

4. (‘11) 9 Ind Cas 31 (82) (All).

(‘23) AIR 1923 Mad 27 (28).

(‘74) 21 Suth W R 242 (243).

(‘66) 6 Suth W R Misc 36 (37).

(‘35) AIR 1935 Pesh 137 (139). (Decree passed *ex parte* on substituted service — Application to set aside — Applicant must be given chance to prove that he has not been served according to law.) [See (‘35) AIR 1935 All 499 (500). (Where a fraud is committed on a defendant in that notice of the proceedings is not served on him at all or there is some misrepresentation which makes him believe that the nature of the proceeding is different from what it really is, the defendant has really had no opportunity to appear before the Court and put his case before it. A fraud of this kind has always been held to vitiate the entire proceedings and invalidate the *ex parte* order, which might have been passed against the absent defendant.)]

5. (‘18) 21 Ind Cas 922 (922, 923) (Mad).

**O. 9 R. 13**  
**Note 18**

all due and reasonable diligence with a view to find out the defendant before affixing the summons.<sup>6</sup>

Although the words "duly served" would *appear* to relate to the method of service, yet, a summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceeding which is contemplated and having no reference to the order ultimately passed because, under such circumstances, service, even if effected, is a mere sham.<sup>7</sup> Where the summons has not been served because it contained the wrong name of the defendant's father,<sup>8</sup> or where the summons is served, not upon the defendant, but on his brother,<sup>9</sup> or where the service is by registered post and the defendant denies receipt of the same,<sup>10</sup> or where, in the case of a substituted service, there is nothing on record to show that the provisions of O. 5 Rr. 19 and 20 were complied with,<sup>11</sup> or where the order for substituted service was obtained by misrepresentation or fraud,<sup>12</sup> or where the defendant is not served in sufficient time to enable him to appear and defend,<sup>13</sup> the Court is justified in setting aside the *ex parte* decree. The un rebutted oath of the applicant that he was not served has been held to be sufficient proof of non-service.<sup>14</sup> The affidavit of the serving officer is admissible in evidence to show service of summons. But when service is denied it is desirable that the serving officer is put in the witness-box so that he can be cross-examined by the party denying service.<sup>15</sup>

Appearance before the registration of suit in a proceeding for the appointment of a guardian *ad litem* does not dispense with the service of suit summons.<sup>16</sup> Where the summons has not been duly served the fact that the defendant *knew* of the suit will be no ground for not restoring the suit.<sup>17</sup> Where, however, the defendant has refused the summons<sup>18</sup> or has wilfully or carelessly failed to appear after due service,<sup>19</sup> the *ex parte* decree cannot be set aside. Similarly, a mere *irregularity* in service of summons on a co-defendant<sup>20</sup> or on the defendant himself, where he has *waived* the irregularity by accepting the summons, is not sufficient to set aside the *ex parte* decree.<sup>21</sup>

6. ('26) AIR 1926 Cal 827 (330, 338).

('24) AIR 1924 Lah 233 (233).

('18) AIR 1918 All 331 (331).

7. ('24) AIR 1924 All 818 (823) : 46 All 864.

8. ('91) 1891 Bom P J 142 (142).

9. ('11) 9 Ind Cas 763 (763) (Mad).

[See also ('37) AIR 1937 Pat 17 (19). (A service of summons on the karta is not a service on other members of the family who are impleaded in suit as they may have their own defence to make.)

('35) AIR 1935 All 660 (662). (Summons intended for a *pardanashin* lady served on a male member, when the lady is inside the house—Service not sufficient.)]

10. ('22) AIR 1922 Bom 377 (377) : 46 Bom 130.

('36) AIR 1936 Pesh 199 (200). (There is no legal justification for proceeding *ex parte* against the defendant on the ground that the summons was sent to him by post irrespective of the fact whether he received it or not. And O. 9 R. 13 as amended by the Judicial Commissioner's Court, Peshawar, does not apply to an *ex parte* decree so passed. For, that rule applies only when there is irregularity in the service of summons. In this case there is no service of summons.)

11. ('28) AIR 1928 Lah 799 (800).

('24) AIR 1924 Lah 191 (191).

('30) AIR 1930 Lah 560 (560).

[See also ('34) AIR 1934 Cal 745 (747). (Even though substituted service may be considered as personal service on the defendants under the provisions of O. 5 R. 20 this cannot preclude the defendants from afterwards showing that in fact there had been no service on them at all and that the order for substituted service was procured on misrepresentation of facts.)]

12. ('34) AIR 1934 Cal 745 (747).

('35) AIR 1935 Lah 129 (129).

13. ('70) 7 Bom H C R A C 138 (139).

('05) 27 All 192 (193, 194).

('70) 14 Suth W R 401 (402).

('11) 11 Ind Cas 433 (434) (Sind).

('78) 2 Bom 449 (452).

14. ('24) AIR 1924 Rang 336 (336).

('70) 18 Suth W R 237 (239).

15. ('36) AIR 1936 Mad 660 (661) : 59 Mad 1049.

16. ('18) 18 Ind Cas 711 (712) : 35 All 163.

17. ('16) AIR 1916 Cal 181 (184) : 43 Cal 447.

('32) AIR 1932 Pat 150 (152).

18. ('25) AIR 1925 Nag 856 (857).

19. ('73) 10 Beng L R 68 (70, 71).

20. ('69) 8 Beng L R App 7 (9).

21. ('14) AIR 1914 Nag 73 (74) : 10 Nag L R 144.

The summons referred to is the first summons issued to the defendant giving him notice of suit and not of any *application* made during the course of the suit.<sup>22</sup>

**O. 9 R. 13**  
**Notes 18-20**

See also Order 5 generally.

**19. Sufficient cause.** — See Order 9 Rule 9 Notes 8, “sufficient cause.” It may, among other things, include a fraudulent suppression of summons from the knowledge of the defendant.<sup>1</sup>

**20. Minor defendant.** — If a minor defendant *is properly represented* in the suit an *ex parte* decree is as binding upon him as a decree in a contested suit,<sup>1</sup> and cannot be set aside on the ground that he has not been served with the notice of the intention to appoint a court-officer as guardian *ad litem*.<sup>2</sup> As to whether a minor can apply to set aside an *ex parte* decree where *he has not been properly represented*, there is a conflict of judicial opinion. The High Court of Madras<sup>3</sup> and the Judicial Commissioner's Court of Nagpur<sup>4</sup> have held that the minor in such a case cannot be regarded as a *party* to the suit at all, that the decree passed is in effect a *nullity* and the Court cannot re-open the suit under this rule. On the other hand, the High Court of Allahabad,<sup>5</sup> and the Chief Court of Oudh<sup>6</sup> have held that he is entitled to apply under this rule. In the undermentioned case<sup>7</sup> decided by the Patna High Court the Judges differed on this point.

But the mere fact that the guardian did not appear or that the court-guardian failed to appear owing to want of instructions,<sup>8</sup> or that there are mere irregularities in the matter of the appointment of a guardian,<sup>9</sup> is not a sufficient ground for setting aside the *ex parte* decree. But it has been held that where the guardian has wrongfully or negligently allowed a claim against a minor to be decreed *ex parte*, the decree can be set aside under this rule.<sup>10</sup> See also Note 8 to Order 9 Rule 9.

It is, however, open to the minor to impeach an *ex parte* decree got against him by a *separate suit* in cases where he can show that the guardian has been guilty of *fraud* or gross negligence<sup>11</sup> and if his interests were prejudiced thereby.<sup>12</sup> The fact that he has not applied under this rule is no bar to the suit.<sup>13</sup>

22. ('23) AIR 1923 Nag 13 (15).

**Note 19**

1. ('31) AIR 1931 Pat 204 (205) : 10 Pat 516 (FB).  
[See also ('80) 6 Cal L Rep 69 (70).]

**Note 20**

1. ('17) AIR 1917 Pat 700 (700).
2. ('24) AIR 1924 Pat 772 (773).
- (18) AIR 1918 Mad 545 (547).
3. ('24) AIR 1924 Mad 489 (489).
- (20) AIR 1920 Mad 713 (714).
4. ('22) AIR 1922 Nag 249 (250) : 18 Nag L R 138.
5. ('28) AIR 1923 All 213 (214).
- (33) AIR 1933 All 116 (117) : 55 All 136.
6. ('27) AIR 1927 Oudh 173 (174).
7. ('19) AIR 1919 Pat 61 (64). (Per Jwala Prasad, J.—Minor is entitled to apply—But Mullick, J. has held that the decree is a nullity.)
8. ('01) 5 Cal W N 58 (59).
- (07) 9 Bom L R 1099 (1101).
- (36) AIR 1936 Mad 961 (962). (More absence of guardian is no ground for setting aside *ex parte* decree when there is nothing to show that the guardian has betrayed the minor's interests.)
- (35) AIR 1935 Mad 435 (436) : 58 Mad 1045. (More absence of guardian is no ground for setting aside *ex parte* decree.)

[But see ('35) AIR 1935 Mad 196 (197). (Suit by minor dismissed for default should be restored whether next friend had sufficient cause or not for non-appearance.)]

9. ('12) 15 Ind Cas 903 (904) (All).
- (26) AIR 1926 All 545 (545) : 49 All 128 (FB).
10. ('35) AIR 1935 Mad 435 (436) : 58 Mad 1045. (But where the minor defendant has no case to put forward and the guardian absents himself only on account of his realising this, the *ex parte* decree cannot be set aside.)
- (36) AIR 1936 Mad 961 (962). (Do.)
- (34) AIR 1934 Mad 428 (429) : 57 Mad 1069. (6 Cal L Rep 69, Followed.)
- [See also ('34) AIR 1934 Mad 616 (617).
- (35) AIR 1935 Mad 565 (567) : 58 Mad 929. (When absence of guardian is not due to *bona fide* negligence but is due to manoeuvre to gain some advantage in the litigation, the above principle does not apply and the decree cannot be set aside.)]
11. ('95) 19 Bom 571 (576).
- (18) AIR 1918 Nag 187 (191).
- (1900) 24 Bom 547 (552).
- (86) 12 Cal 69 (76).
12. ('31) AIR 1931 Mad 6 (7).
13. ('15) AIR 1915 All 62 (64) : 37 All 179.



**O. 9 R. 13**  
**Notes 20-23**

See also the undermentioned case.<sup>14</sup>

**21. Decree having been satisfied.** — The fact that an *ex parte* decree has been satisfied does not disentitle the defendant from applying under this rule.<sup>1</sup>

**22. "Upon such terms as to costs," etc.** — The Court has a wide discretion in imposing such terms on the applicant as it thinks fit before setting aside the *ex parte* decree; thus, it may order him to deposit the decretal amount in Court especially when the *bona fides* of his defence are not free from doubt<sup>1</sup> or it may order the payment of costs.<sup>2</sup> It may also impose a condition that the applicant should find a surety who would be responsible for any amount that may be found due by him under any decree that may be subsequently passed<sup>3</sup> and direct that the security should be in cash or in property.<sup>4</sup> Where the conditions are not strictly carried out the order becomes inoperative and the *ex parte* decree will remain valid.<sup>5</sup> The Court can extend the time fixed for payment of the costs or of the decree amount either under Section 148 or under its inherent powers.<sup>6</sup> The Court ought not, however, to impose very onerous terms on the applicant.<sup>7</sup>

An order giving time to pay the decree amount under this rule does not of itself operate as a stay of execution of the *ex parte* decree.<sup>8</sup>

See also Note 30 below.

**23. Proviso to the Rule.** — It cannot be laid down as an inflexible rule that whenever an order is made under this rule its effect is to set aside the *whole* decree. The true test is whether the suit as framed can be maintained and a decree made in favour of the plaintiff, even if the other defendant or defendants against whom the decree has been made *ex parte* were not impleaded as parties.<sup>1</sup> Thus, where *A* filed a suit for rent under the Bengal Tenancy Act against *X*, *Y* and *Z* and a decree was passed *ex parte* against all the defendants, but *Z* applied to have the *ex parte* decree set aside on the ground that she was not duly served with summons, it was held that the whole decree should not be set aside inasmuch as a decree for the *whole rent* could have been passed against *X* and *Y* alone without impleading *Z*.<sup>2</sup>

But where the decree is of such a nature that it cannot be set aside only against the defendant applying under this rule, it may be set aside wholly against all the defendants including those who have not applied or even those against whom a decree has been passed on the merits.<sup>3</sup> The following are some of the classes of cases in which the decree cannot be set aside only as against the defendant applying without setting it aside as against the other defendants also —

14. ('37) AIR 1937 All 552 (556). (Where proceedings taken to appoint a *guardian ad litem* for a minor in a suit have been declared to be invalid, and the suit cannot proceed unless such proceedings are properly initiated and completed, the Court whose duty ultimately is to appoint such a guardian has inherent power under S. 151, C. P. C., to revive the suit.)

**Note 21**

1. ('99) 23 Bom 716 (718).

**Note 22.**

1. ('26) AIR 1926 Sind 50 (51).

('08) 7 Cal W N 59n.

2. ('20) AIR 1920 Pat 660 (661): 5 Pat L Jour 420.

('92) 1892 All W N 216 (217).

3. ('99) 26 Cal 222 (223, 224).

4. ('24) AIR 1924 Oudh 181 (181).

5. ('04) 1904 Pun Re No. 60, p. 174.

('22) AIR 1922 Oudh 14 (15).

('26) AIR 1926 Oudh 481 (482).

6. ('18) AIR 1918 Mad 638 (639).

('14) AIR 1914 All 55 (56): 36 All 77.

7. ('24) AIR 1924 Oudh 229 (229).

('33) AIR 1933 All 601 (602).

14 Bur L R 214.

8. ('17) AIR 1917 Mad 187 (187).

**Note 23**

1. ('07) 6 Cal L Jour 226 (229, 231).

('12) 15 Ind Cas 260 (262) (Cal).

2. ('28) AIR 1928 Cal 397 (398).

3. ('38) AIR 1938 Lah 823 (824). (Suit against a firm through *G*, one of the partners, making *G* also a defendant—On *G*'s failure to appear on date of hearing *ex parte* decree passed against the firm and *G*—*G* applying for setting aside the *ex parte* decree on the ground that he was not properly served—Held that the Court should under



1. *Where the decree is joint and indivisible.*<sup>4</sup>

*Illustration*

A, B and C, who are coparceners of a joint Hindu family, together execute a mortgage to X. X files a suit against all of them. C alone is served, but none of them appear and an *ex parte* decree is passed against all. A and B alone apply under this rule for setting aside the decree. Here the decree being *one and indivisible* it ought to be set aside against C also.<sup>5</sup>

Where the decree is not joint and indivisible,<sup>6</sup> e. g., where the suit is to obtain possession of separate items of properties from separate sets of defendants,<sup>7</sup> or where the decree itself is divisible and each of the defendants has separate defence, the whole decree need not be set aside.<sup>8</sup>

2. *Where the decree proceeds on a ground common to all the defendants.*<sup>9</sup>

*Illustration*

A sues B and C on a promissory note. B is the principal debtor and C is the surety. An *ex parte* decree is passed against both. B alone applies to set aside the decree and shows sufficient cause for his absence. The decree ought to be set aside against C also as the liability of both is based on a common ground.<sup>10</sup>

Where, however, the decree does not proceed on a common ground<sup>11</sup> and the defence of the several defendants is distinct or peculiar to each of them,<sup>12</sup> the whole decree ought not to be set aside. Thus, where A sues B and C on a promissory note, on the allegation that B is the executant of the promissory note and that B and C (his nephew) are members of an undivided Hindu family of which B is the manager, and after the passing of an *ex parte* decree against both C alone applies to set aside the decree, the proper course is to set aside the decree only as against C and not as against B also inasmuch as his liability is based on the ground that he executed the promissory note while the liability of C is based on the distinct ground that the debt was binding upon him and his defence is peculiar and not common to that of B.<sup>13</sup>

3. *Where it is necessary that the whole decree should be re-opened in the interests of justice*<sup>14</sup> or, in other words, where the relief which the applicant is entitled to cannot effectively be given except by setting aside the decree against the other defendants also.

Thus, in the case of an *ex parte* decree against several mortgagors, it has been held that the better course would be to set aside the decree against all the defendants.<sup>15</sup>

*Illustration*

A files a suit against B, C and D on a mortgage bond and gets an *ex parte* decree against all of them. B alone applies to set aside the decree. Neither in the mortgage bond nor in the plaint nor in the decree is there any specification of the shares and liabilities of the several defendants. The decree ought to be set aside against all the defendants.<sup>16</sup>

the proviso to O. 9 R 13, set aside the *ex parte* decree against both the firm and G.)

4. ('07) 6 Cal L Jour 226 (227, 231).

(27) AIR 1927 Mad 550 (550). (The fact that decree is a compromise one makes no difference.)

(36) AIR 1936 Lah 243 (243). (*Ex parte* decree against Hindu father and son on basis of trust deed executed by them.)

(34) AIR 1934 All 1051 (1052).

(37) AIR 1937 Pat 17 (20). (A mortgage debt being indivisible, a mortgage decree passed *ex parte* cannot be set aside in part, because complications will arise at the time of execution and anomalous results may follow.)

5. [See (1900) 5 Cal W N 58 (59).]

6. ('26) AIR 1926 Mad 256 (257).

7. ('21) AIR 1921 Mad 451 (451).

('08) 31 Mad 454 (456, 457, 458).

8. ('01) 6 Cal W N 109 (110).

9. ('71) 15 Suth W R 371 (371).

10. ('17) AIR 1917 Lah 194 (195).

('14) AIR 1914 Oudh 220 (220).

11. ('03) 26 Mad 604 (606).

12. ('25) AIR 1925 Oudh 181 (182).

('07) 6 Cal L Jour 226 (232).

13. ('03) 26 Mad 604 (605, 606).

14. ('07) 5 Cal L Jour 202 (203).

15. ('11) 9 Ind Cas 975 (976): 33 All 264: 38 Ind App 87 (PO).

('18) AIR 1918 Cal 179 (180).

16. ('80) AIR 1980 Cal 700 (701).

**O. 9 R. 13**  
**Notes 23-25**

4. When the suit would result in two inconsistent decrees if the *ex parte* decree be not set aside against the other defendants also.<sup>17</sup>

#### Illustrations

(i) *X* sues *A* and *B*, two joint executants of a promissory note, for the recovery of the amount due thereunder. *B* has, as a matter of fact, paid the amount due to *X*. *B* is not served and does not appear and *A*, who is served also does not appear and an *ex parte* decree is passed against both. *B* applies to set aside the decree. Can the decree be set aside against *A* also? Yes. The reason is that, if *B* succeeds at the hearing in proving the payment, the result of not setting aside the decree against *A* also would be two inconsistent decrees.<sup>18</sup>

(ii) *A* sues *B* and *C* alleging that they are in joint possession of a certain immovable property and asking for a declaration that he is in joint possession with them. *B* alone is served but not *C* and there is an *ex parte* decree against both. *C* applies for a re-hearing under this rule. The decree ought to be set aside against *B* also because if *C* establishes at the hearing that *A* has no title whatsoever to the property, the result will be two inconsistent decrees one against *B* and another against *C*.<sup>19</sup>

The principle above referred to equally applies to cases where the decree is *ex parte* against some of the defendants and contested against the rest.<sup>20</sup> Thus, where the decree is one and indivisible, it can be set aside against all,<sup>21</sup> but where it is divisible it can be set aside only as against the defendant applying.<sup>22</sup> The undermentioned cases<sup>23</sup> which lay down that the whole decree cannot be set aside where some defendants contest the suit are, it is submitted, not correct.

See also the undermentioned case.<sup>24</sup>

**24. Inherent power of Court to set aside an *ex parte* decree.** — See Note 2 to Section 151.

**25. Effect of setting aside the *ex parte* decree.** — The effect of setting aside an *ex parte* decree is to restore the parties to the position they previously occupied<sup>1</sup> and the Court should proceed to decide the suit as it stood before the decree.<sup>2</sup> The trial of the suit should commence *de novo* as against the persons in whose favour the decree was set aside and the evidence that had been taken in the *ex parte* proceedings

17. ('02) 24 All 383 (388) (FB).

('96) AIR 1936 Lah 243 (249).

18. ('02) 24 All 383 (388) (FB).

19. ('02) 24 All 383 (388) (FB).

20. ('98) 25 Cal 155 (156, 157). (Decree means whole decree as can be seen from the words "the Court shall appoint a day for proceeding with the suit".)

('10) 5 Ind Cas 284 (285) (All).

('02) 24 All 383 (400) (FB).

[See ('04) 8 Cal W N 621 (625).]

21. ('07) 6 Cal L Jour 226 (229, 231).

('84) 151 Ind Cas 963 (964) (All).

('24) AIR 1924 Pat 771 (772). (Suit on a mortgage bond—Defendants jointly liable.)

('98) 25 Cal 155 (157, 160). (Suit on a pro-note against several heirs of a deceased executant.)

22. (1900) 4 Cal W N 456 (458). (Suit for declaration of title against *A* and for possession against *B*.)

23. ('02) 15 C P L R 179 (183).

('94) 18 Bom 142 (143).

('67) 7 Suth W R 237 (237).

('67) 8 Suth W R 260 (261).

('27) AIR 1927 Sind 245 (247).

('18) 18 Ind Cas 327 (327) (Lah). (This was however a case in which the proviso did not apply.)

('06) 3 Cal L Jour 160 (162).

24. ('36) AIR 1936 Rang 2 (4). (Suit against *A*, *B* and *C*—*A* defending suit and *B* and *C* remaining *ex parte*—Decision in favour of *A* — Appeal by plaintiff—Appellate Court reversing decision in favour of *A* without entering into merits on ground that he had no *locus standi* to defend the suit and had been improperly joined as a defendant in the suit—Appellate Court remanding suit to give further opportunity to *B* and *C* to defend the suit if they desired to do so — Held that the order was not proper and that it is against the ordinary principles of justice to allow a further opportunity to a defendant when he has allowed the suit to be decided *ex parte* against him.)

#### Note 25

1. ('18) AIR 1918 Cal 883 (883).

('39) AIR 1933 Pesh 24 (26). (*Ex parte* decree in suit under Sec. 77 of the Registration Act and document registered — Subsequent setting aside of *ex parte* decree—Registration also is *ipso facto* cancelled.)

('34) AIR 1934 Lah 45 (46).

('29) AIR 1928 Mad 969 (971). (Proceedings during non-appearance of defendant are not binding when an *ex parte* decree is set aside.)

2. ('07) 17 Mad L Jour 81 (82).

should not be used against them.<sup>3</sup> Any attachment that has been issued<sup>4</sup> or any sale that has taken place in pursuance of the *ex parte* decree<sup>5</sup> becomes null and void and the Court can also order restitution<sup>6</sup> except as against a stranger auction-purchaser, of anything taken in execution of the decree.

But, the setting aside of an *ex parte final* decree does not have the effect of vacating the preliminary decree.<sup>7</sup>

**26. Ex parte decree against a firm.** — An *ex parte* decree passed against a firm after it has been served in the manner contemplated by Order 30 cannot be set aside on the application of a partner who alleges that he has not been duly served; it can never be said that a decree against a firm is *ex parte* against one of its partners because he has not appeared.<sup>1</sup> Where, however, the applicant denies that he is a partner of the firm along with other defendants, the Court can enquire into the matter and set aside the decree.<sup>2</sup> See also the undermentioned case.<sup>3</sup>

**27. Dismissal of an application to set aside an *ex parte* decree, if can be restored.** — See Note 2 to Order 9, General.

**28. Limitation.** — In an application under this rule the Court has first of all to see that the application is presented within the prescribed period of limitation.<sup>1</sup> The Article applicable is 164 of the Indian Limitation Act, IX of 1908, under which the defendant can apply within thirty days from the date of the decree or, where the summons is not duly served, within thirty days from the date of his knowledge of the decree.<sup>2</sup> The Court has no power, inherent or otherwise, to enlarge the period of limitation.<sup>3</sup> Section 5 of the Limitation Act is not applicable to this rule unless the High Court under its rule-making powers extends its application.<sup>4</sup> The Bombay, Madras and Nagpur High Courts have added a proviso to this rule, extending Section 5 of the Limitation Act to applications under this rule.<sup>5</sup> Section 22 of the Limitation Act does not apply to this rule.<sup>6</sup> Nor can the time spent in prosecuting an application

3. ('12) 16 Ind Cas 96 (97) (Mad).

('69) 12 Suth W R 130 (131).

4. ('06) 29 Mad 175 (176).

('68) 10 Suth W R 99 (99).

5. ('98) 25 Cal 175 (178).

('16) AIR 1916 Mad 706 (707).

('17) AIR 1917 Cal 564 (565).

('09) 9 Ind Cas 30 (31) (Cal).

6. ('06) 8 Cal L Jour 181 (182).

7. ('24) AIR 1924 Mad 890 (891).

#### Note 26

1. ('24) AIR 1924 Bom 366 (367) : 47 Bom 778.

2. ('10) 8 Ind Cas 448 (449) (Low Bur).

3. ('98) AIR 1938 Lah 823 (824). (Suit by or against firm — Addition of partners' names is not obligatory — Suit against firm through *G* — *G* also added as defendant — On *G*'s failure to appear suit decreed *ex parte* — Application for setting aside *ex parte* decree — Decree ought to be set aside both against firm and *G* and not only against firm.)

#### Note 28

1. ('25) AIR 1925 Lah 577 (577).

('24) AIR 1924 Mad 890 (891).

('69) 11 Suth W R 810 (810).

('78) 1878 Pun Re No. 82, page 130 (FB).

('15) AIR 1915 All 240 (241).

('21) AIR 1921 Pat 69 (71, 72) : 5 Pat L Jour 460.

[See also ('01) 5 Cal W N 816 (817). (Application presented in time — Re-presented after amendment beyond time — Not barred.)]

2. ('16) AIR 1916 Cal 651 (652).

('32) AIR 1932 Lah 522 (523). (Application to set aside *ex parte* order of adjudication in insolvency.)

('38) AIR 1938 Pat 279 (279) : 17 Pat 745. (Application is to be filed within 30 days from knowledge of decree and not of suit.)

('32) AIR 1932 Oudh 326 (327). (Summons duly served — Starting point of limitation is date of the decree.)

[See also ('07) 30 Mad 535 (536).]

3. ('77) 26 Suth W R 99 (100).

('34) AIR 1934 Nag 43 (44). (This case was decided in 1931 — In 1932 the Nagpur High Court has framed sub-rule 2 by which provisions of S. 5, Limitation Act, are made applicable to applications under this rule.)

('22) AIR 1922 Pat 479 (480) : 1 Pat 277.

('36) AIR 1936 Rang 305 (305).

4. ('17) AIR 1917 Mad 957 (957) : 40 Mad 105.

('38) AIR 1938 Rang 110 (111).

('25) AIR 1925 Rang 187 (188) : 2 Rang 655.

5. ('29) AIR 1929 Bom 262 (263) : 53 Bom 453.

('25) AIR 1925 Mad 14 (17) : 47 Mad 824 (FB).

6. ('28) AIR 1928 Pat 88 (88) : 6 Pat L Jour 463.

**O. 9 R. 18**  
**Notes 28-29**

under this rule be excluded in computing the period of limitation for appeals.<sup>7</sup>

The *onus* of proving that the application is within thirty days of the knowledge of the decree is upon the applicant.<sup>8</sup> But a *vague* knowledge that some decree has been passed by some Court is not enough to start limitation against the applicant.<sup>9</sup> In the case of an application to set aside an *ex parte final* decree, it has been held that limitation starts from the *date of the decree* as it is not necessary to give a fresh notice before the passing of the final decree.<sup>10</sup>

"*Duly served*" in Article 164 means served in such a manner as to give the defendant information of the proceedings taken against him.<sup>11</sup> In the case of a *substituted* service, time begins to run from the *date of the decree* as the service is deemed to be due service,<sup>12</sup> unless the defendant can show that the circumstances under which substituted service could legally be ordered did not exist.<sup>13</sup>

See also the undermentioned cases.<sup>14</sup>

**29. Appeal.** — The rule contemplates three classes of orders<sup>1</sup>—

- (1) Order *setting aside* the *ex parte* decree.
- (2) Order *setting aside* the *ex parte* decree on certain terms.
- (3) Order *rejecting* the application to set aside the *ex parte* decree.

No appeal lies from an order falling under class 1.<sup>2</sup> As to whether an *error, defect or irregularity* in passing such an order can be made a ground of objection under Section 105 of the Code in an appeal from the final decree, see Note 6 to Section 105, *supra*. But when the order was passed without *jurisdiction*, it was held in the undermentioned cases<sup>3</sup> under the Code of 1877, that it could be objected to in appeal.

In the *second class* of cases where the Court passes a conditional order, *e. g.*, where, on the failure of the applicant to comply with certain terms it is ordered that the petition will stand dismissed, the question arises whether the order by itself is appealable. It has been held by the High Courts of Bombay, Rangoon and Madras

7. ('96) 23 Cal 825 (827).

8. ('28) 109 Ind Cas 82 (82) (Lah).

('32) 139 Ind Cas 131 (131) (Lah).

('24) AIR 1924 Lah 603 (604).

('24) AIR 1924 Pat 36 (36).

('36) AIR 1936 Rang 305 (305).

('88) AIR 1938 Cal 535 (537). (The *onus* cannot be shifted by the bare denial of knowledge made by the defendant.)

[See ('35) AIR 1935 Pesh 137 (139). (The words "or where the summons was not duly served" connote an inquiry into the due service of the summons which can only be found out by giving a chance to the petitioner to prove that he has not been served according to law.)]

9. ('28) AIR 1928 Bom 198 (198) : 47 Bom 485.

('81) AIR 1931 Nag 119 (120) : 27 Nag L R 53.

('26) 92 Ind Cas 295 (296) (Nag).

('26) AIR 1926 Mad 81 (83).

('37) AIR 1937 Pat 17 (19).

10. ('31) AIR 1931 Lah 268 (269).

11. ('17) AIR 1917 Sind 27 (28) : 11 Sind L R 71.

('31) AIR 1931 Mad 813 (817) : 55 Mad 223.

[See ('32) AIR 1932 Lah 589 (540, 541).]

[See also ('27) AIR 1927 Mad 507 (507). (The word "duly" is not equivalent to "personally.")]

12. ('25) AIR 1925 Lah 639 (639).

13. ('13) 19 Ind Cas 425 (426) : 9 Nag L R 35.

14. ('35) AIR 1935 Cal 506 (507) : 62 Cal 1057.

(Application not had merely because the notice of the application was served on some of the decree-holders after the period of limitation.)

('35) AIR 1935 Pesh 7 (8). (The summons referred to in Art. 164 is the summons for the first hearing of the case, and there is no essential difference between the case where a suit is adjourned owing to the absence of the presiding officer or some other cause and a case in which a suit is remanded for retrial by the Appellate Court. The underlying principle in such cases is that where the existence of the suit has been brought to the notice of the defendants by due service of summons on them, it is their duty thereafter to inform themselves of what is being done in the case.)

**Note 29**

1. ('27) AIR 1927 Bom 1 (3) : 51 Bom 67 (FB).

2. ('89) 16 Cal 426 (426).

('78) 1 All 748 (750) (F B).

('05) 1905 Pun Re No. 103, p. 308.

('97) 19 All 855 (856).

('27) AIR 1927 Lah 775 (776).

('19) AIR 1919 All 426 (427).

3. ('77) 2 Cal 114 (115).

('71) 15 Suth W R 175 (176).

that the rejection referred to in O. 43 R. 1, clause (d) signifies an *immediate rejection* and not a conditional or prospective rejection<sup>4</sup> and, therefore, it is only the *final order* passed on failure to fulfil the conditions imposed that is appealable. The High Court of Allahabad<sup>5</sup> has, however, taken a contrary view.

**O. 9 R. 13**  
**Notes 29-30**

In the *third class* of cases the order is appealable under O. 43 R. 1, clause (d),<sup>6</sup> whether the rejection is on the merits or on default.<sup>7</sup> The Appellate Court may in such an appeal remand the application for enquiry.<sup>8</sup> The fact that a final decree has been passed in the case is no ground for refusing to entertain an appeal from an order rejecting an application to set aside an *ex parte* preliminary decree as, in the present Code, the two decrees are independent and separate.<sup>9</sup> As has been seen in Note 12 to Section 96, *ante*, where an application to set aside an *ex parte* decree has been dismissed on the merits, the propriety of the order of dismissal cannot be questioned in the appeal from the *ex parte* decree itself. But such finality of the order dismissing the application under this rule is confined to matters which are within the scope of this rule. Therefore, the Appellate Court in hearing an appeal from the *ex parte* decree is not precluded from considering and deciding the question whether under the circumstances of the case it would not have been better, in the interests of justice, for the trial Court to have adjourned the case.<sup>10</sup> Where, on an application to set aside an *ex parte* decree being dismissed for default, an application for the restoration of such application is also dismissed, no appeal lies from the latter order of dismissal.<sup>11</sup>

See also the undermentioned cases.<sup>12</sup>

**30. Revision.** — An order setting aside an *ex parte* decree not being appealable, a revision will lie therefrom if the conditions of Section 115 of the Code are satisfied.<sup>1</sup>

- (71) 8 Bom H O R A C 44 (47).
- (74) 22 Suth W R 5 (6).
- (75) 23 Suth W R 147 (148).
- (71) 15 Suth W R 315 (317). (But the objection will be too late in special appeal.)
- 4. ('18) AIR 1918 Mad 257 (258). (Setting aside on Letters Patent Appeal, AIR 1917 Mad 596.)
- (38) AIR 1938 Rang 63 (64).
- (84) AIR 1934 Rang 192 (193).
- (25) AIR 1925 Mad 1182 (1183).
- (27) AIR 1927 Bom 1 (3) : 51 Bom 67 (F B). (Overruling AIR 1926 Bom 353.)
- 5. ('14) AIR 1914 All 386 (337). (Case decided under O. 9 R. 9.)
- 6. ('78) 2 Bom 644 (648, 649).
- 7. ('29) AIR 1929 Pat 529 (530) : 8 Pat 533.
- (27) AIR 1927 Pat 240 (240, 241) : 6 Pat 474.
- (16) AIR 1916 Cal 391 (391).
- (17) AIR 1917 Cal 548 (549).
- (17) AIR 1917 Cal 558 (559).
- (24) AIR 1924 Lah 281 (281).
- (27) AIR 1927 Lah 883 (884).
- 8. ('01) 28 All 220 (226) : 28 Ind App 28 (P C).
- (31) AIR 1931 Mad 813 (817, 820) : 55 Mad 223.
- 9. ('28) AIR 1928 Cal 720 (721).
- [But see ('25) AIR 1925 Cal 790 (791).]
- 10. ('87) AIR 1937 Mad 922 (927, 928). (No doubt the Court before interfering in such cases in its appellate jurisdiction must be satisfied that there has been no kind of default on the client's part and that the circumstances were such as to leave the client helpless to proceed further with the

- conduct of the case.)
- 11. ('35) AIR 1935 Mad 609 (610) : 58 Mad 814.
- 12. ('26) AIR 1926 Cal 816 (816). (Order refusing to set aside an *ex parte* decree in a reference under the Land Acquisition Act—Not appealable.)
- (32) AIR 1932 Cal 558 (561) : 59 Cal 1057. (Do.)
- (32) AIR 1932 Cal 687 (688). (Bengal Tenancy Act (1885), S. 153—Application under O. 9 R. 13 in suit for rent of less than Rs. 50 rejected — No appeal.)
- (22) AIR 1922 All 50 (50). (Small Cause decree *ex parte*—Successor not empowered—Decree is final.)
- (36) AIR 1936 Cal 485 (488) : 1 L R (1937) 1 Cal 135. (Rent suit valued at less than Rs. 50 decreed *ex parte* by Munsif having final jurisdiction under S. 153 (b), Bengal Tenancy Act—Application for setting aside *ex parte* decree rejected by another Munsif not having final jurisdiction — Order rejecting application is appealable.)

#### Notes 30

- 1. ('25) AIR 1925 All 610 (611) : 48 All 175 (FB).
- (33) AIR 1933 Rang 110 (111). (Re-opening time-barred *ex parte* decree by lower Court amounts to exercise of jurisdiction not vested in it by law.)
- (15) AIR 1915 Mad 492 (492).
- (33) AIR 1933 Rang 156 (156). (Order refusing to re-open suit decreed *ex parte* set aside in appeal — Revision lies from such order.)
- (88) AIR 1938 Sind 76 (78) : 32 Sind L R 703. (Order setting aside *ex parte* decree under O. 9 R. 13 is case decided and revision therefore lies.)
- [See ('39) AIR 1939 Oudh 111 (112) : 14 Luck 435. (No illegality or irregularity committed by

**O. 9 R, 13**  
**Notes 30**

Where the order of the lower Court is passed in defiance of the provisions of this rule,<sup>2</sup> *e. g.*, where the Court refuses to set aside the *ex parte* decree even though the summons has not been properly served,<sup>3</sup> or where the lower Court refuses to exercise its jurisdiction,<sup>4</sup> or where it decides the application on an erroneous view of the law of limitation,<sup>5</sup> or where it has not given a finding as to sufficient cause<sup>6</sup> or did not make any enquiry,<sup>7</sup> a revision will lie.

But a revision is not competent where there are other remedies open to the aggrieved party.<sup>8</sup> It has been held in the undermentioned case<sup>9</sup> that as a second appeal lies to the High Court from an *ex parte* decree, no revision lies from an order refusing to set aside the *ex parte* decree, the reason given being that such a case cannot be said to be one in which no appeal lies to the High Court within the meaning of Section 115. The High Court will not interfere with a finding of fact as to sufficient cause or otherwise<sup>10</sup> or interfere with any of the conditions imposed by the Court in the exercise of its discretion.<sup>11</sup> Similarly, where the party has acquiesced in the order of the trial Court by accepting costs, he cannot apply for a revision.<sup>12</sup>

Court in setting it aside—No interference in revision.]]

2. ('81) AIR 1981 All 294 (302); 53 All 612 (FB). ('25) AIR 1925 Nag 356 (357).

('12) 15 Ind Cas 367 (368) (Mad).

('20) AIR 1920 Pat 621 (622). (On a consideration of the merits of the decree.)

('27) AIR 1927 Mad 722 (724). (When decree against several defendants was set aside on application by some, without finding that decree was indivisible.)

(1900) 4 Cal W N 456 (458) (Do.)

('97) 25 Cal 155 (158) (Do.)

('36) AIR 1936 Lah 243 (248). (Non-compliance with proviso to rule.)

[See however ('12) 15 Ind Cas 260 (262) (Cal).]

3. ('09) 1 Ind Cas 163 (163) (All).

4. ('25) AIR 1925 All 267 (268, 270); 47 All 140.

5. ('01) 8 Bom L R 567 (569).

[See also ('18) AIR 1918 Lah 268 (268). (Erroneous view on burden of proof as to want of knowledge.)]

6. ('31) 1981 Mad W N 289 (240).

('15) AIR 1915 Mad 492 (492).

('20) 54 Ind Cas 965 (966) (Pat).

7. ('06) 1906 Upp Bur Rul C. P. C. 42.

('14) AIR 1914 Cal 872 (873).

[See also ('20) AIR 1920 Oudh 220 (220); 23 Oudh Cas 104. (Ground taken by defendant not gone into, but disposal on ground not taken.)

('27) AIR 1927 Mad 507 (508).]

8. ('28) 113 Ind Cas 409 (409) (Mad).

('92) 1892 Pun Re No. 125.

('14) AIR 1914 Mad 685 (685).

[See ('88) AIR 1988 Mad 217 (217). (Order declaring party *ex parte* made and decree passed — Decree not appealed against within time — Application under S. 115, C. P. O., for setting aside order declaring him *ex parte*—High Court has no jurisdiction to interfere with order.)]

9. ('87) AIR 1987 All 691 (693, 694).

10. ('12) 16 Ind Cas 1 (2); 84 All 592.

('26) AIR 1926 Pat 29 (30).

('24) AIR 1924 Pat 816 (816).

('37) AIR 1987 All 691 (692). (The question, whether a litigant is prevented by sufficient

cause from appearing when a suit is called on for hearing, being essentially one of fact, High Court cannot interfere in its revisional jurisdiction when the Courts below come to a certain conclusion upon the question.)

('35) AIR 1935 All 437 (438). (It is a matter of discretion as to whether a Small Cause Court should or should not allow restoration of a suit which was decreed *ex parte*. Where it refuses to allow restoration holding that the grounds alleged were not sufficient, the High Court will not interfere in revision.)

('38) AIR 1938 Nag 370 (373). (It is true that whether there was sufficient cause for non-appearance is a question of fact and the High Court cannot interfere in such matter in revision in the absence of perversity or something of the like nature. But where the Judge has concentrated his attention on the negligence of counsel instead of on the conduct of the party, interference is called for.)

[See also ('86) AIR 1986 Pat 490 (491). (Summons duly served on defendant—Suit transferred at defendant's instance to another Court—*Ex parte* decree—District Judge in appeal restoring case to file on sufficient ground — Plaintiff claiming interference on ground that Courts below did not decide question of limitation as it was case of defendant having been served — Case held to be one of non-service and circumstances held did not justify interference in revision.)]

11. ('26) AIR 1926 All 142 (143); 48 All 199.

12. ('26) AIR 1926 Lah 637 (637).

('28) 110 Ind Cas 528 (529) (Mad).

('27) AIR 1927 Lah 55 (55, 56).

('38) AIR 1938 Mad 603 (604).

[See ('36) AIR 1936 Mad 49 (50). (But where the order setting aside the *ex parte* decree was without jurisdiction, the acceptance of the costs will not preclude the plaintiff from questioning the decree.)

('34) AIR 1984 All 10 (11). (*Ex parte* decree set aside on payment of costs—Pleader of plaintiff accepting costs but filing revision petition—Held there was nothing to show acquiescence

A dismissal of an application under this rule cannot be said to be a denial of the right of fair trial so as to justify the interference of the High Court under Section 107 of the Government of India Act of 1915.<sup>13</sup> (See now Section 224 of the Government of India Act of 1935, under which the revisional powers of the High Court have been taken away.)

**O. 9 R. 13**  
**Note 30**

**No decree to be set aside without notice to opposite party.** **R. 14.** [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party.

**O. 9 R. 14**

[1877, S. 109.]

### Local Amendment

#### CALCUTTA

*Cancel* the word "thereof" and *substitute* therefor the following words:

"together with a copy thereof (or concise statement as the case may be)."

**1. Notice to opposite party.** — The rule is imperative that no *ex parte* decree can be set aside without notice to the opposite party so as to give him an opportunity to be heard.<sup>1</sup> A mere oral notice given to a pleader who appeared in execution proceedings in connection with the same decree but who was different from the pleader who appeared in the suit<sup>2</sup> or a service on plaintiff's pleader in the absence of any order of the Court,<sup>3</sup> or a service on plaintiff's *chela*<sup>4</sup> has been held to be not sufficient.

The words "*opposite party*" mean such of the parties to the suit as are interested in opposing the application. The words do not include a court auction-purchaser<sup>5</sup> or an attaching decree-holder who has attached the *ex parte* decree<sup>6</sup> or a co-defendant in a case.<sup>7</sup>

### Local Amendments

#### BOMBAY

*Add* the following as Rule 15:

"R. 15. In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an 'appeal.'"

**O. 9 R. 15**  
**(Bombay)**

#### MADRAS

*Add* the following:

"15. (1) Rules 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings

Setting aside *ex parte* in execution falling within Section 47 of the Code in which orders in execution. notice to the opposite party is required under the provisions of the Code.

**O. 9 R. 15**  
**(Madras)**

and plaintiff not estopped from applying in revision.)]

13. ('26) AIR 1926 Pat 37 (38).

[See also ('20) AIR 1920 Pat 568 (570). (The High Court, while refusing to interfere with an order of refusal to set aside an *ex parte* decree, set aside a portion of the *ex parte* decree itself which was manifestly wrong.)]

#### Order 9 Rule 14 — Note 1

1. ('13) 19 Ind Cas 240 (241) (Mad).

('20) AIR 1920 Oudh 220 (220): 23 Oudh Cas 104.

('06) 1906 Upp Bur Rul O P C 42.

('84) AIR 1934 Pat 396 (397). (Representation—Principle of, cannot be applied against R. 14.)

2. ('13) 19 Ind Cas 241 (242) (Mad).

3. ('21) 63 Ind Cas 47 (48) (Pat).

4. ('20) AIR 1920 Oudh 220 (220): 23 Oudh Cas 104.

5. ('99) 26 Cal 267 (270).

('36) AIR 1936 All 410 (410). (Person impleaded as defendant in mortgage suit by reason of being subsequent purchaser of part of mortgaged property is not opposite party—Service of notice on him is not necessary — The mere fact that he subsequently purchases a portion of the property in execution of the *ex parte* decree is no reason for regarding him as a person benefited by the decree itself.)

6. ('10) 7 Ind Cas 66 (66) (Mad).

7. ('27) AIR 1927 Cal 692 (693): 55 Cal 78.



**O. 9 R. 15**  
(Madras)

(2) Subject to the provisions of sub-rule (2) of Rule 13, an application under this rule shall be made within thirty days of the date of the order, or, where the notice was not duly served, of the date when the applicant has knowledge of the order."

NOTE.—The above rule which was made in March 1938 is not retrospective in effect and does not apply to *ex parte* orders passed prior to its coming into force.<sup>1</sup>

## ORDER X.

### EXAMINATION OF PARTIES BY THE COURT

**O. 10 R. 1**

**R. 1. [S. 117.]** At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Ascertainment whether allegations in pleadings are admitted or denied.

[1877, S. 114.]

### Synopsis

1. "Shall ascertain."

2. Effect of statements by party or his pleader.

1. "Shall ascertain."—The powers which this Order vests in the Civil Courts are mainly intended to draw by *viva voce* examination, the real points in controversy between the parties and thus prevent the real matter in dispute remaining undecided or left out of consideration.<sup>1</sup> The proper way of clearing up the pleadings after the plaint and the written statement are filed is that provided by this rule, the provisions of which are peremptory.<sup>2</sup> Permitting parties to file a series of written statements against each other is not justified under this rule.<sup>3</sup> An examination under this rule is not necessary or proper where the pleadings on the record are complete and clear.<sup>4</sup>

2. Effect of statements by party or his pleader. — The party or his pleader is bound to answer questions put by the Court; but he can properly refuse to make admissions about matters not directly involved in the suit especially when the questions are put at the suggestion of the opposite party whose object is to get useful answers for a contemplated litigation.<sup>1</sup>

The admission of a party is conclusive against him<sup>2</sup> but is not evidence against the opposite party.<sup>3</sup>

#### Order 9 Rule 15 (Madras)

1. ('35) AIR 1935 Mad 714 (715).

('35) AIR 1935 Mad 585 (586).

#### Order 10 Rule 1 — Note 1

1. ('24) AIR 1924 Nag 191 (195).

2. ('22) AIR 1922 Oudh 178 (188, 189).

3. ('22) AIR 1922 Oudh 178 (188, 189).

('96) 9 C P L R 11 (11); (A remand was made on this ground.)

('22) AIR 1922 Oudh 80 (81) : 24 Oudh Cas 848.

('29) AIR 1929 Bom 418 (418).

4. ('26) 92 Ind Cas 1006 (1007) (Lah).

('09) 4 Ind Cas 632 (637) (Lah). (Examination of a party after closing of the case condemned.)

#### Note 2

1. ('30) AIR 1930 Lah 229 (230).

2. ('26) AIR 1926 All 710 (710) : 49 All 219.

3. ('30) AIR 1930 Lah 947 (948).



The Court must record the admissions or denials made under this rule<sup>4</sup> but cannot act upon the answers recorded and pass final judgment in the suit without framing issues in the case.<sup>5</sup>

**O. 10 R. 1  
Note 2**

As to the effect of admissions by pleader, see Order 3 Rule 4.

Where all the defendants confess judgment, it is permissible for the Court to record a joint statement of all the defendants and pass a decree on admission.<sup>6</sup>

**R. 2.** [S. 118.] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

**O. 10 R. 2**

**Oralexamination  
of party or compa-  
nion of party.**

[1877, Ss. 118, 119; 1859, S. 125.]

**1. Oral examination.** — The object of the examination under this rule is to ascertain the *matters in dispute* and not to take evidence or to ascertain what is to be the evidence in the case.<sup>1</sup> It is not intended to be a substitute for a regular examination on oath<sup>2</sup> but is intended to help the elucidation of what is *obscure and vague* in the plaint; the allegations of facts contained in the oral examination under this rule cannot be read into the plaint and thus enlarge its scope.<sup>3</sup> "The power under this rule is intended to be used by the Judge only where he finds it necessary to obtain from a party information on any *material questions relating to the suit*, and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in Order 18."<sup>4</sup> A statement made by a party under this rule is binding on him to the same extent as the statement made by his pleader would be binding on him. But a statement made by a person who accompanies the pleader to look after the case on behalf of the party would not necessarily bind the party on whose behalf he appears.<sup>5</sup>

Where a defendant appears by a pleader the fact that he does not file a written statement does not warrant the trial of the suit *ex parte*. The Judge should proceed under this rule and ascertain what are the matters in dispute and then proceed with the suit.<sup>6</sup>

See also the undermentioned case<sup>7</sup> under the old Code of 1859.

4. ('22) AIR 1922 Oudh 178 (188, 189).
5. ('05) 1906 All W N 170 (170).
- ('82) 13 Cal L Rep 266 (271); 10 Ind App 74 (PC).
- ('92-96) 2 Upp Bur Rul 245 (248). (A case under Upper Burma Civil Justice Regulation.)
6. ('84) AIR 1984 Lah 540 (541).

**Order 10 Rule 2 — Note 1**

1. ('26) AIR 1926 All 411 (412).
- ( '05) 2 All L Jour 777 (778).
2. ('26) AIR 1926 All 411 (412).
- ( '05) 2 All L Jour 777 (778).
3. ('02) 1902 All W N 35 (38).
4. ('31) AIR 1931 P C 175 (176, 177) (PC).
5. ('26) AIR 1926 All 411 (412).
- ( '05) 2 All L Jour 777 (778).
6. (1865) 2 Mad H C R 311 (312).
7. ('69) 12 Suth W R 207 (208).

O. 10 R. 3

**R. 3.** [S. 119.] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examination to be written.

[1877, S. 119; 1859, S. 125.]

a. This rule does not apply to the Chief Court of Oudh: *vide* Oudh Courts Act (U. P. Act IV of 1925), Section 16 (2).

**1. Applicability to Chartered High Courts.** — This rule does not apply to Chartered High Courts in the exercise of their Ordinary or Extraordinary Original Civil Jurisdiction. See O. 49 R. 3, clause (2). The applicability of this rule has been excluded by the undermentioned special and local laws.<sup>1</sup>

O. 10 R. 4

**R. 4.** [S. 120.] (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

[1877, S. 120; 1859, S. 127. See O. 5 R. 3.]

### Synopsis

1. Scope of the Rule.
2. Order for personal appearance.
3. Refusal or inability of pleader to answer.  
See Notes 2 and 4.

4. Effect of non-attendance without lawful excuse.
5. Effect of dismissal under this Rule.
6. Appeal.

**1. Scope of the Rule.** — The intention of the rule is to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties, but also, if possible, to get admissions so as to narrow down the issues.<sup>1</sup>

#### Order 10 Rule 3 — Note 1

1. The Oudh Courts Act (IV of 1925), S. 16; The N.-W. F. Province Law and Justice Regulation (VII of 1901), S. 46 (Repealed by Reg. 1 of 1931, S. 88); The Rangoon Small Cause Courts Act (VI of 1920), S. 111.  
See also Order 50, C. P. C., as to Provincial Small Cause Courts generally.

#### Order 10 Rule 4 — Note 1

1. ('08) 5 Bom L R 687 (688). ('88) AIR 1938 All 517 (519). (Pleader or agent not refusing or unable to answer material questions — Court cannot order personal attendance — Such order in absence of inability or refusal is irregular and can be rectified under S. 151 and Order 47 Rule 1.)

**2. Order for personal appearance.** — An order under this rule directing a party to appear in person can be passed only where the Court finds that there is a *material question* relating to the suit that has to be answered by such party or his pleader, and the pleader refuses or is unable to answer such question.<sup>1</sup>

**O. 10 R. 4**  
**Notes 2-4**

The order should be specific and sufficiently explicit<sup>2</sup> and must state the reasons therefor. A mere statement that "it is necessary that the defendant should appear in person" is not sufficient.<sup>3</sup> The Court has, however, a discretion to decide which of the parties ought to answer the question.<sup>4</sup>

**3. Refusal or inability of pleader to answer.** — See Note 2 above and Note 4 below.

**4. Effect of non-attendance without lawful excuse.** — Where the party directed to appear by the Court under this rule fails to appear in person *without lawful excuse*, the Court may pronounce judgment against him.<sup>1</sup> Where one party has failed to appear without lawful excuse but others have appeared, the Court cannot pronounce judgment against the persons who have so appeared.<sup>2</sup> It has been held by the High Court of Madras that this rule is a self-contained one applicable to all cases where a party has been ordered to attend for his examination under this rule and that where a judgment is pronounced against a party for failure to attend as directed, the order must be taken to have been made only under this rule, and not under the provisions of O. 9, even though the Court purported to pass the order under those provisions.<sup>3</sup> On the other hand, the High Court of Allahabad has held that where the party directed to appear and his pleader are both absent on the day appointed, the Court dismissing the suit must be taken to have acted only under the provisions of Order 9, even though it purported to act under this rule.<sup>4</sup> The reason given is that where the party and his pleader are both absent it could not be said that the party failed to attend *without lawful excuse*, and unless it could be said so, the Court cannot act under this rule.<sup>5</sup>

A person exempted under the Code from appearance in Court has a lawful excuse for not appearing in Court as directed.<sup>6</sup>

The Court is not bound to pass a decree against the defaulting party but may pass any order in relation to the suit as it deems fit.<sup>7</sup>

In a suit for rent, defendant pleaded discharge but was prepared to withdraw the plea if the plaintiff would himself depose that there was no discharge. The Court ordered her appearance under this rule. It was held that the proper procedure would

#### Note 2

1. ('18) AIR 1918 Oudh 429 (429): 21 Oudh Cas 252.

('99) 23 Bom 318 (320).

('74) 22 Suth W R 270 (271).

('08) 5 Bom L R 687 (688).

[See also ('82) AIR 1982 Nag 135 (136): 28 Nag L R 146. (Personal appearance of plaintiff can be ordered only under this rule or O. 5 R. 3.)]

2. ('72) 17 Suth W R 141 (142).

('78) 20 Suth W R 165 (166).

3. ('09) 2 Ind Cas 468 (464) (All).

4. ('08) 5 Bom L R 687 (688).

#### Note 4

1. (1865) 2 Suth W R 161 (161).

('08) 5 Bom L R 687 (688, 689).

('38) AIR 1938 Lah 922 (924).

2. (1864) 1 Suth W R 25 (25). (Case decided under S. 170 of the Code of 1859 corresponding to O. 16 R. 20.)

(1864) 1 Suth W R 168 (169, 170).

3. ('21) AIR 1921 Mad 417 (418).

4. ('17) AIR 1917 All 186 (186).

[See also ('82) AIR 1982 All 595 (596). (Court can dismiss suit for default of plaintiff's appearance under this rule—Such suit can also be restored under O. 9 R. 9.)]

5. ('96) 1896 Bom P J 628 (628).

6. Marsh 627.

7. ('70) 2 N W P H C R 67.

**O. 10 R. 4** have been to take the defendant's evidence of the discharge and decide on the merit  
**Notes 4-6** and that the Court had no reason to summon the plaintiff under this rule.<sup>3</sup>

See also the undermentioned cases<sup>9</sup> under the Code of 1859.

**5. Effect of dismissal under this Rule.**—A dismissal of a suit under this rule operates as *res judicata* in the subsequent suit on the same subject-matter.<sup>1</sup> A dismissal of a suit for *redemption* under this rule does not, however, according to the High Court of Bombay, bar a subsequent suit for redemption of the same mortgage inasmuch as the relationship of the mortgagor and the mortgagee continues and is not extinguished by the fact of the dismissal of the suit.<sup>2</sup> As to whether and when a decision in a suit for redemption bars a subsequent suit for redemption generally, see Section 11, Note 40.

**6. Appeal.**—Under the old Code there was a conflict of views with regard to the appealability of the order under paragraph 1 of Section 120 of the old Code which corresponded to sub-rule (1) of this rule.<sup>1</sup>

Under the present Code an appeal lies from an order pronouncing judgment under sub-rule (2) of this rule: *vide* O. 43 R. 1, clause (a).

But an order *striking off the defence* of one of the defendants for his failure to appear in person when ultimately the Court passed a final order decreeing the suit against all the defendants, is not open to appeal.<sup>2</sup>

## ORDER XI.

### DISCOVERY AND INSPECTION

**O. 11 R. 1**

**R. 1:** [S. 121.] In any suit the plaintiff or defendant by leave of the Court<sup>12</sup> may deliver interrogatories in writing for the examination of the opposite parties<sup>11</sup> or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question<sup>5</sup> in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination<sup>4</sup> of a witness.

[R. S. C., O. 31 R. 1.]

8. ('26) 98 Ind Cas 723 (723) (Mad).

9. ('69) 12 Suth W R 242 (242).

('69) 12 Suth W R 369 (370).

('71) 15 Suth W R 253 (254).

('73) 20 Suth W R 165 (166).

(1865) 2 Bom H C R 340 (341).

#### Note 5

1. ('11) 11 Ind Cas 986 (986) (Bom).

2. ('29) AIR 1929 Bom 116 (119).

#### Note 6

1. ('09) 2 Ind Cas 463 (464) (All). (Yes.)

(1900) 3 Oudh Cas 81 (82). (No.)

2. ('17) AIR 1917 All 300 (300) : 39 All 450.

## Synopsis

**O. 11 R. 1**  
**Notes 1-2**

- |  |  |
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| <ol style="list-style-type: none"> <li>1. Discovery and inspection — General.</li> <li>2. Scope of the Rule as to interrogatories.</li> <li>3. Interrogatories and pleadings.</li> <li>4. Interrogatories and cross-examination.</li> <li>5. Interrogatories must be as to relevant facts.</li> <li>6. Interrogatories as to evidence or witnesses.</li> <li>7. Names of persons.</li> </ol> | <ol style="list-style-type: none"> <li>8. Interrogatories on questions of law.</li> <li>9. Time for the delivery of interrogatories.</li> <li>10. Against whom interrogatories may be allowed.</li> <li>11. Opposite parties—A minor or lunatic.</li> <li>12. Leave of Court.</li> <li>13. Impleading party for discovery.</li> <li>14. Probate proceedings.</li> <li>15. Land acquisition and other proceedings.</li> </ol> |
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### Other Topics (miscellaneous)

Interrogatories as to foreign law. See Note 8.      Points on which interrogatories may be allowed.  
Object of interrogatories. See Note 2.                      See Notes 2, 3 and 7.

**1. Discovery and inspection—General.**—After the issues have been framed and the suit is posted for trial, each party naturally begins to ask himself how he shall prove his case. For the purpose of *maintaining his own case* or for *destroying the case of the adversary* he may require information from the latter as to facts, or as to documents in the possession or power of such adversary relevant to the issue. Where information is wanted as to *facts*, the party is allowed to administer to his adversary a string of questions to be answered by him. The questions are called "*interrogatories*." The Judge goes through the proposed questions first to see if they are proper at that stage of the proceedings and if they are, compels the other party to answer them on oath before trial. This is called *discovery* of facts by the adversary. If the party wants information from his adversary as to documents material to the issues, he may apply for an order compelling the other party to make a list of all documents which are in his possession or power, and, in certain circumstances, to permit him to inspect and take copies of those documents before the trial. This disclosure is known as *discovery of documents*. Discovery of facts and documents often tends to save expense and shorten litigation.

**2. Scope of the Rule as to interrogatories.** — The main object of interrogatories is to save expense by enabling a party to obtain from his opponent information as to facts material to the questions in dispute between them, and to obtain admissions of any facts which he has to prove on any issue which is raised between them.<sup>1</sup> As a general rule, interrogatories will be allowed whenever the answers to them will serve either to *maintain the case* of the party administering them or to *destroy the case* of the adversary.<sup>2</sup> An *admission* of the adversary will serve to maintain the case of the party administering the interrogatory, or the answer might be destructive of his own case. But can an interrogatory be allowed which is merely intended to ascertain the *nature of the opponent's case* for the purpose of meeting such case beforehand? In the undermentioned cases under the old Code<sup>3</sup> it was held that it cannot. The reason given was that, where the pleadings were vague and case of the parties not clear, there were other provisions of the Code such as O. 8 R. 7 and O. 14 Rr. 1 and 2 under which the Court could clear up the position and that it was not therefore permissible for the

#### Order 11 Rule 1—Note 2

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| <ol style="list-style-type: none"> <li>1. (1882) 20 Ch D 519 (531), Attorney-General v. Maskil.</li> <li>(21) AIR 1921 Mad 381 (382).</li> <li>(86) 10 Bom 167 (172).</li> </ol> | <ol style="list-style-type: none"> <li>2. (1890) 24 Q B D 445 (447), Henne v. Wright.</li> <li>(1906) 1 K B 403 (416), Plymouth Mutual Co., Co-operative Society v. Traders Publishing Association.</li> <li>3. ('90) 17 Cal 840 (847, 848).</li> </ol> |
|--|---|

**O. 11 R. 1**  
**Notes 2-5**

opposite party to obtain such information by *discovery*. Under the present Code, however, it has been held that in view of the fact that the present Order is now the same as Order 31 of the Rules of the Supreme Court, interrogatories can be administered in the same manner as is done in England, even for discovering the *nature* of the opponent's case.<sup>4</sup>

**3. Interrogatories and pleadings.** — From what has been said before, it is clear that interrogatories as to the truth or untruth of statements of facts made in the pleadings are admissible.<sup>1</sup> A party is entitled to interrogate his opponent with a view to ascertain what case he has to meet and the facts relied on, and to limit the generality of the pleadings and find out what is really in issue.<sup>2</sup> But the interrogatories are not like pleadings, confined to the material facts on which the parties intend to rely. Either party may interrogate as to any link in the chain of evidence necessary to support his own case, inasmuch as the question is relevant as leading up to a matter in question in the suit.<sup>3</sup> Thus, if a defendant denies that he wrote a material document, he may be asked if other documents produced to him are not in his handwriting, though such documents have nothing to do with the suit but will be used for comparison of handwriting.<sup>4</sup> Similarly, a defendant is entitled to ask the plaintiff in a suit on a *hundi* which the defendant denies, to state in what form the consideration for the *hundi* was paid, the particulars of the place where the defendants drew or accepted the *hundi* and where and by whom the *hundi* was presented for payment.<sup>5</sup> But, where in a suit on a promissory note, the defendant pleads want of consideration, the onus of proof lies on him and he cannot escape from the onus of proof without laying any evidentiary basis, by seeking to get admissions from the plaintiff by interrogatories.<sup>6</sup>

**4. Interrogatories and cross-examination.** — Interrogatories can be allowed only where they relate to any *matters in question in the suit*. Interrogatories, therefore, which are really in the nature of cross-examination, such as questions put only to test the credibility of the party interrogated, will not be allowed.<sup>1</sup>

**5. Interrogatories must be as to relevant facts.** — Interrogatories must be confined to facts which are relevant to the matters in question in the suit. They are not confined to facts *directly in issue*.<sup>1</sup> Where, however, the issue was on what terms the defendant and A had purchased certain properties, interrogatories as to the terms on which they had purchased *other properties* are irrelevant and will not be allowed.<sup>2</sup> Similarly, in a suit seeking to charge defendants as agents, where the existence of the agency is the real issue, interrogatories as to *private transactions* are irrelevant.<sup>3</sup> So

(195) 23 Cal 117 (124, 125).

4. ('14) AIR 1914 Cal 767 (767) : 41 Cal 6.

**Note 3**

1. (1882) 20 Ch D 519 (527), Attorney-General v. Gaskil.

(1885) 29 Ch D 29 (42), Bidder v. Bridges.

2. (1877) 7 Ch D 435 (449), Saunders v. Jones.

('34) AIR 1934 Nag 181 (182).

(1878) 38 L T 44, Ashley v. Taylor.

3. (1882) 20 Ch D 519 (528), Attorney-General v. Gaskil.

4. (1885) 15 Q B D 499 (440), Jones v. Richards.

5. ('14) AIR 1914 Cal 767 (767) : 41 Cal 6.

6. ('88) AIR 1938 Mad 298 (299).

**Note 4**

1. ('12) 17 Ind Cas 152 (154) : 37 Bom 347.

(1895) 1 Ch 884 (898), Kennedy v. Dodson.

(1879) 5 C P D 47 (49, 50), Sheward v. Lonsdale.

(1878) 3 Q B D 654 (656), Allhuson v. Labouchere.

(1881) 18 Ch D 477 (486), Parker v. Wells.

**Note 5**

1. (1886) 17 Q B D 154 (162), Marriott v. Chamberlain. (Cited in 12 Cal L Jour 505.)

(1911) 2 Ch 71 (76, 83), Nash v. Lagton.

(1914) 2 Ch 129 (130), Osram Lamp Works Ltd. v. Gabriel Lamp Co.

2. (1895) 1 Ch 884 (898), Kennedy v. Dodson.

3. (1874) 9 Ch 376 (378), Great Western Colliery Co. v. Tucker.

also the procedure of delivering interrogatories in order to prove the contents of documents which have been held inadmissible in evidence is entirely misconceived.<sup>4</sup>

**O. 11 R. 1**  
**Notes 5-9**

**6. Interrogatories as to evidence or witnesses.** — "The purpose of interrogatories is not to enable a litigant to come into Court knowing how his opponent is going to prove his case. He is not entitled to ask what his opponent's evidence is going to be."<sup>1</sup> Interrogatories, therefore, as to the *evidence* which a party intends to adduce in support of his case, or the contents of his brief or as to the names of his witnesses are not permissible.<sup>2</sup> Thus, where in a suit for damages, the defendant wanted the plaintiff to "state how your estimate of damages to the amount of Rs. 13,000 mentioned in the 8th paragraph of the plaint is arrived at," it was held that the plaintiff was not bound to answer it.<sup>3</sup> Similarly, questions as to the names of the persons in whose presence this or that event took place will not be allowed.<sup>4</sup> The reason is that the allowing of such questions would enable the other party to tamper with the witnesses or to manufacture evidence in contradiction and so shape the case as to defeat justice.<sup>5</sup>

**7. Names of persons.** — As has been seen in the previous Note, questions as to the names of the persons in whose presence an event has taken place will not generally be allowed, but where the name and address of a person is a *material fact*, it must be disclosed, although the party may thereby have to disclose the names of his witnesses.<sup>1</sup> Thus, in actions for the infringement of trade-marks or patents, the defendant is entitled to discovery of the names of "diverse persons" alleged in the plaint to have been induced to purchase the defendant's goods as the plaintiff's.<sup>2</sup> But in an action for damages arising from the bite of a dog, the Court refused to allow interrogatories to be put to the plaintiff as to persons alleged to have been previously bitten.<sup>3</sup>

Interrogatories with a view to ascertain whether *some person other than the defendant is liable*, will not be allowed.<sup>4</sup>

**8. Interrogatories on questions of law.** — Interrogatories must be as to questions of *fact* and must not ask for conclusions of law, inferences of facts, or construction of documents.<sup>1</sup> A question relating to *foreign law* will not be allowed unless the party ordered to answer is an expert in that law.<sup>2</sup>

**9. Time for the delivery of interrogatories.** — Interrogatories will not, as a general rule, be allowed until after the defence is filed as, until then, it is not known

4. ('34) AIR 1934 Nag 181 (182).

(Cited in 38 Cal 237.)

(1895) 1 Ch 439 (447, 448), Re Strachan.

**Note 6**

**Note 7**

1. (1911) 2 K B 725 (732), Knapp v. Harvey.  
(Per Buckley, L. J.)

2. (1885) 29 Ch D 29 (37), Bidder v. Bridges.

('38) AIR 1933 Cal 151 (153).

(1911) 2 K B 725 (730), Knapp v. Harvey.

('17) AIR 1917 Cal 658 (658).

[See also ('12) 17 Ind Cas 152 (154) : 37 Bom 347.]

3. ('87) 14 Cal 708 (706).

4. (1877) 8 Ex D 335 (337), Eade v. Jacobs.  
(More fully reported in 37 L T 621.)

(1879) 18 Ch D 375 (379), Lyon v. Tweddell.

[See also (1879) 18 Ch D 370 (374), Johns v. James.]

5. (1880) 16 Ch D 93 (100), Benbow v. Low.

1. (1886) 17 Q B D 154 (161, 162), Marriott v. Chamberlain. (Cited in 12 Cal L Jour 505.)

(1914) 2 Ch 129 (133), Osram Lamp works, Limited v. Gabriel Lamp Co.

2. (1883) 22 Ch D 629 (632), Birch v. Mather.

3. (1911) 2 K B 725 (730), Knapp v. Harvey.

4. (1916) 2 Ch 245 (249), Sebright v. Hanbury.

**Note 8**

1. ('96) 23 Cal 117 (123).

(1844) 8 Beav 22 (23), Flight v. Robinson.

(1869) 4 Ch App 673 (679), Hoffmann v. Postill.

2. (1924) 1 K B 111 (115), Perlak Petroleum Maachappij v. Deen.

**O. 11 R. 1**  
**Notes 9-12**

what are the matters in dispute.<sup>1</sup> In the Chancery Division of the High Court of England a plaintiff was formerly often allowed to deliver interrogatories with his statement of claim.<sup>2</sup> This is, however, not the practice now.

**10. Against whom interrogatories may be allowed.** — The general rule is that the right to deliver and the liability to answer interrogatories are confined to the *parties* to the suit.<sup>1</sup> But a person, who is not *actually* a party, if in *substance* a party, may be asked to answer interrogatories. Thus, in a suit by an *agent*, an order may be obtained against the *principal* who is the real plaintiff provided the agent has no individual interest of his own in the suit.<sup>2</sup> A stranger to the suit, however, cannot be compelled to answer an interrogatory.<sup>3</sup> Thus, no interrogatories can be administered to a witness.<sup>4</sup> As to the procedure where a party is a corporation, see Rule 5, *infra*.

**11. Opposite parties — A minor or lunatic.** — The words "opposite parties" mean parties between whom there is some right to be adjusted in the action or proceeding.<sup>1</sup> Thus, a defendant may deliver interrogatories to another co-defendant if there is some question or issue between them.<sup>2</sup>

Similarly, where *A* and *B* are co-defendants in a suit but *B* colludes with the plaintiff, he may be regarded as a "party opposite" to *A* and the latter can, therefore, deliver interrogatories to *B*.<sup>3</sup> But *B* cannot in such a case be regarded as a party opposite to the *plaintiff* though he is a defendant; the plaintiff cannot, therefore, deliver interrogatories to *B*.<sup>4</sup> No interrogatories can be served on an *ex parte* defendant.<sup>5</sup>

Where a party to a suit is a minor or lunatic, interrogatories may be served on his next friend or guardian *ad litem* as the case may be. See Rule 23 *infra*.

**12. Leave of Court.** — This rule contemplates: (1) leave to interrogate, and (2) the service of the interrogatories through the Court. It is the duty of the Court to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage *what questions* the party interrogated should be compelled to answer. An application for leave should be made like other applications, and the order should be "that the applicant be at liberty to interrogate."<sup>1</sup> An order granting leave to deliver interrogatories is not an order to *answer* interrogatories, that is, an order requiring the other party to answer them; that party may have good

**Note 9**

1. (1876) 1 Q B D 442 (444, 445), *Mercier v. Cotton*. (Plaintiff.)
- (1876) 2 Ch D 704 (705), *Disney v. Longbourne*. (Defendant.)
2. (1878) 9 Ch D 616 (617), *Harbord v. Monk*.

**Note 10**

1. (1889) 22 Q B D 262 (265), *Straker v. Reynolds*. (1872) 7 Ch App 812 (813), *Hadley v. McDougall*.
2. (1892) 2 Q B 324 (326), *Willis & Co. v. Baddeley*.
3. (1900) 10 T L R 434 (451), *Williams v. Ingram*.
4. (1882) 20 Ch D 519 (530), *Attorney-General v. Gaskil*.
- (1928) AIR 1928 Lah 282 (283). (Refusal to issue interrogatories—No revision.)

**Note 11**

1. (1886) 18 Q B D 193 (197, 198), *Shaw v. Smith*.

(1890) 15 Ch D 162 (164), *Molloy v. Kilby*.

(1886) 16 Q B D 125 (128), *Brown v. Watkins*. (Co-defendants between whom there was no question or issue were held not to be "opposite parties".)

(1897) 2 Q B 124 (127), *Spokes v. Grosvenor and West End Hotel Co.* (Action by a shareholder in a company against directors, claiming damages to be paid to the company—The company made defendant — *Held*, that the company were an "other party".)

2. (1886) 18 Q B D 193 (198, 200), *Shaw v. Smith*.

(1890) 15 Ch D 162 (164), *Molloy v. Kilby*.

(1913) 2 Ch 375 (388), *Birchall v. Birch*.

3. ('99) 17 Bom 384 (388).

4. ('21) AIR 1921 Mad 881 (881).

5. ('21) AIR 1921 Mad 881 (881, 882).

**Note 12**

1. ('80) 5 Cal 707 (709).



grounds for refusing to answer them or some of them.<sup>2</sup> He has a right to come into Court and ask that the order be re-considered, and, if found to have been wrong, set aside. If the interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court may interfere at any stage. In other cases, the party might omit to answer the interrogatories to which he objects at his peril, or he may file his affidavit in answer, stating in it his objections to answer such questions as he objects to; and in such a case an interrogating party, if dissatisfied, can apply under Rule 11, *infra*.<sup>3</sup>

**O. 11 R. 1**  
**Notes 12-15**

**13. Impleading party for discovery.** — A person should not be made a party to an action merely for the purpose of getting discovery, however important the discovery might prove to be.<sup>1</sup>

**14. Probate proceedings.** — This Order applies to probate proceedings by virtue of Section 266 of the Succession Act, XXXIX of 1925. The Judge can direct an executor on delivery of interrogatories to make a full discovery of the assets of the deceased. Strictest relevancy may not be required and the Judge has got power to exclude anything which is offensive or improper.<sup>1</sup>

**15. Land acquisition and other proceedings.** — This Order applies to proceedings under the Land Acquisition Act, I of 1894, by virtue of Section 53 of that Act<sup>1</sup> and to enquiries into election matters by commissioners under the Indian Elections Offences and Inquiries Act, XXXIX of 1920 (Section 5). Some of the rules of this Order have been excluded from application to proceedings under the undermentioned Local Acts.<sup>2</sup>

**R. 2. [New.]** On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

**O. 11 R. 2**

Particular interrogatories to be submitted.

[R. S. C., O. 31 R. 2.]

2. ('91) 18 Cal 420 (421).

3. ('80) 5 Cal 707 (710).

**Note 13**

1. ('93) 17 Bom 341 (348) : 20 Ind App 1 (P C).  
( '86) 10 Bom 167 (170) (P C).  
(1891) 2 Q B 241 (247), *Bonchand v. Macfarlane*.  
(1878) 9 Ch D 552 (555), *Wilson v. Church*.

**Note 14**

1. ('16) AIR 1916 Cal 958 (954) : 43 Cal 300.

**Note 15**

1. ('10) 8 Ind Cas 107 (113) : 38 Cal 230. (An order for discovery of documents made.)

2. The Bengal Tenancy Act (VIII of 1885), S. 148. (Suits for recovery of rent); the Orissa Tenancy Act (II of 1913), S. 198 (Do); the Madras Estates Land Act (I of 1908), S. 192.

**O. 11 R. 2**  
**Note 1**

1. "As the Court shall consider necessary." — The Court under this rule has no power to *settle* the interrogatories but to state merely *what interrogatories* should be administered.<sup>1</sup>

The practice in England is that it is obligatory to draw up the proposed interrogatories and to deliver a copy of them to the opposite party with notice. It is necessary also to give a copy for the Master to consider and initial. The Judge or the Master has a discretion to allow or refuse leave to interrogate,<sup>2</sup> and the Master's discretion will not be interfered with unless he acts on a wrong principle.<sup>3</sup> He will also consider any offer to deliver particulars or to make admissions or produce documents that may be made. If he decides to allow interrogatories at all, the Master will consider the particular interrogatories sought to be delivered and will hear arguments on both sides for and against allowing any particular question. Leave should be given as to such only of the interrogatories as the Court considers necessary either for disposing fairly of the suit or for saving costs. Interrogatories as to the contents of documents cannot be said to be necessary either for disposing fairly of the suit or for saving costs.<sup>4</sup> The reason is that, under the Evidence Act, the contents of a document may not, except when secondary evidence is admissible, be proved by oral evidence. In running down cases, interrogatories relating to the details of the accident are not ordinarily necessary and will not be allowed except under special circumstances for the purpose of disposing fairly of the suit or for saving costs.<sup>5</sup> The opposite party need not be served personally;<sup>6</sup> it is sufficient if his solicitor is served.<sup>7</sup>

The grant of leave to one party to deliver interrogatories to another does not, as has been seen in Note 12 to Rule 1 *ante*, amount to an order requiring the other party to answer them. It is not a decision which has to be obeyed. The party may have good grounds of objections under Rule 6.<sup>8</sup>

An order disallowing interrogatories is not a decree and is not open to appeal. The Judicial Commissioner's Court of Nagpur has held that it is a "case decided" and is open to revision, provided the conditions of Section 115 are satisfied.<sup>9</sup> According to the Judicial Commissioner's Court of Sind the order is not revisable inasmuch as the party adversely affected has another remedy by way of appeal from the final decision of the Court.<sup>10</sup>

**O. 11 R. 3**

**R. 3. [S. 123.]** In adjusting the costs of the suit inquiry

**Costs of interrogatories.**

shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either

**Order 11 Rule 2 — Note 1**

1. (1894) 28 Sol Jo 388, *Toy v. Willoughby*. (Per Chitty, J.)
- (16) AIR 1916 Cal 953 (954):48 Cal 800.
2. (1906) 1906 W N 57 (58), *Codd v. Delap*.
3. (1920) 1 K B 659 (666), *Griebart v. Morris*.
4. ('84) AIR 1934 Nag 151 (182).
5. (1920) 1 K B 659 (668), *Griebart v. Morris*.
- (1888) 1888 W N 196 (196), *Jones v. London*

**Road Car & Company.**

6. (1874) 30 L T 867, *Little v. Roberts*.
7. (1878) 47 L J Ch 609 (610), *Re Mulcaster*.
8. ('91) 18 Cal 420 (421).
- (26) AIR 1926 All 553 (553).
9. ('84) AIR 1984 Nag 181 (182). (Allowing leave to deliver interrogatories which are not necessary is a material irregularity.)
10. ('20) AIR 1920 Sind 1 (5) : 14 Sind L B 93.

with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

O. 11 R. 3  
Note 1

[R. S. C., O. 31 R. 3.]

**1. Costs.** — Ordinarily the costs of an application will be dealt with on the application and be costs in the suit. This rule makes a special provision for ordering the party at fault to pay costs in *any event* irrespective of the result of the suit. See Section 35.

The Court has power to order under the corresponding English rule that costs of a *viva voce* examination under R. 11 be paid by the party examined in any event,<sup>1</sup> but the costs of an oppressive *viva voce* examination may be ordered to be paid by the party delivering the interrogatory.<sup>2</sup>

**R. 4.** [New.] Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

Form of interrogatories.

O. 11 R. 4

[R. S. C., O. 31 R. 4.]

**R. 5.** [S. 124.] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

Corporations.

O. 11 R. 5

[R. S. C., O. 31 R. 5.]

**1. Corporations and companies.** — The secretary of a corporation or company is, as a rule, the person to be interrogated.<sup>1</sup> But the Court may issue delivery of interrogatories to be answered by any other officer of the company.<sup>2</sup> Before issuing such an order, however, the Judge must be satisfied that the officer selected by the party has a competent knowledge of the facts and the means of answering

**Order 11 Rule 3 — Note 1**

1. (1882) 9 Q B D 168 (170), *Vicary v. G. N. Ry. Company*.
2. (1884) 54 L J Ch 207 (208), *Litchfield v. Jones*.

**Order 11 Rule 5 — Note 1**

1. (1880) 16 Q B D 58 (59), *In re Alexandra Palace*

Company.

2. (1896) 2 Q B 153 (156), *Chaddock v. British South Africa Co.* (Form of the order under this rule.)

(1892) 3 Ch 70 (74), *Attorney-General v. North Metropolitan Tramways Co.*

**O. 11 R. 5** the questions.<sup>3</sup> The officer interrogated is bound to answer only with reference to  
**Note 1** knowledge acquired in the course of his employment and on inquiries of other officers who have acquired their knowledge in the same way.<sup>4</sup> There is no obligation on the part of the officer either to disclose his knowledge or to obtain or disclose the knowledge of other agents or servants of the company acquired by him or them *otherwise than in the course of his or their employment.*<sup>5</sup>

The answer of the officer is the answer of the company and can be read as admission which binds the company.<sup>6</sup>

A foreign State has been held to be a corporation for the purposes of this rule.<sup>7</sup>

**O. 11 R. 6**

**R. 6.** [S. 125.] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

[1877, S. 125; R. S. C., O. 31 R. 6.]

### Synopsis

1. Scope of the Rule.
2. Scandalous interrogatories.
3. Irrelevant interrogatories.
4. Not exhibited *bona fide*.

5. "Not sufficiently material at that stage."
6. "Any other ground."
7. Fishing interrogatories.
8. Wagering contracts.
9. Defamation.

**1. Scope of the Rule.** — This rule enables the party interrogated to file his objections, and indicate the grounds of objection which he might take.<sup>1</sup> The party taking such objection is entitled to have it adjudicated upon by the Court and a clear and specific order passed directing him to answer such of the interrogatories as the Court holds to be relevant. The mere fact that he could apply under Rule 7 to have the interrogatories set aside or struck out does not take away his right to have his objection adjudicated upon.<sup>2</sup>

**2. Scandalous interrogatories.** — Questions irrelevant to the matters in issue and taken for the purpose of abusing, insulting or degrading the opposite party are scandalous interrogatories and are not permissible. But nothing can be scandalous

3. (1879) 13 Ch D 97 (99), *Barkely v. Standard Dis. Co.*

4. (1900) 2 Ch 1(8), *Welsbach Co. v. New Sunlight Co.*

(1878) 3 Q B D 315 (321), *Southmark v. Quick.*

5. (1900) 2 Ch 1 (10), *Welsbach Co. v. New Sunlight Co.*

6. (1896) 2 Q B 153 (158), *Chaddock v. British South Africa Co.*

7. (1875) 1 Ch D 171(174), *Republic of Costa Rica*

*v. Erlanger.* (Referred to in 22 Cal 757; 16 All 259.)

### Order 11 Rule 6 — Note 1

1. ('80) 5 Cal 707 (710).

('80) 5 Cal L Rep 171 (171). (Where interrogatories have been administered for the examination of a witness by one party, the other party, if he objects to any of the questions, must make his objections on the face of his cross interrogatories.)

[See ('96) 28 Cal 117 (124).]

2. ('18) AIR 1918 All 308 (304, 305).

which is *relevant*<sup>1</sup> even though tending to criminate the person interrogated.<sup>2</sup>

**O. 11 R. 6**  
**Notes 2-6**

**3. Irrelevant interrogatories.** — As a general rule, the question taken must be *relevant* to the matter in issue,<sup>1</sup> though it need not be *confined* to the *facts in issue*.<sup>2</sup> Thus, interrogatories asking plaintiff whether similar charges as that made in the suit had not been made against him previously in a newspaper, and whether he had contradicted them or taken any notice of them on that occasion, are clearly *irrelevant*.<sup>3</sup> Similarly, in a suit by A for a declaration that he and the defendant purchased a certain land as co-partners, interrogatories relating to the arrangements under which *other purchases* had been made by them together are irrelevant.<sup>4</sup> In no case will interrogatories be allowed if the defence at which they aim would be no defence in law to the suit.<sup>5</sup>

**4. Not exhibited bona fide.** — Where the questions, though relevant, are not put *bona fide* for the purposes of the present action but for other and ulterior objects, *e. g.*, in view of a future litigation, they will be disallowed by the Court.<sup>1</sup>

**5. "Not sufficiently material at that stage."** — The word "material" means more than relevant. A fact may be *relevant* but not *material at a particular stage*.<sup>1</sup> The question of materiality must be tested by reference to the case made by the pleadings and to what will be in issue at the hearing. Generally, "the Court is unwilling before *the right to relief* is established to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff if he succeeds in establishing his title to relief."<sup>2</sup> Similarly, the Court is not justified in ordering a plaintiff to answer interrogatories which are in the nature of eliciting evidence, before the defendant has filed his written statement.<sup>3</sup> Compare Rule 20, which makes a provision for the postponement of discovery till after determination of issue or question. Nevertheless the Court has a discretion to order discovery at once on other grounds.<sup>4</sup>

**6. "Any other ground."** — These words mean grounds *ejusdem generis* with those specified.<sup>1</sup> They will include the following grounds —

- (a) that the questions are criminatory ;
- (b) that they relate to privileged communications between the party and his legal advisers ;

#### Note 2

1. (1894) 10 T L R 254 (371), *Kemble v. Hope*. (1878) 8 Ch D 645 (653), *Fisher v. Owen*. (Referred in 14 Cal W N 153.)
2. (1878) 8 Q B D 654 (660), *Allhusen v. Labouchere*.
- (1906) 1906 A C 434 (437), *National Association v. Smiths*.
- (1878) 8 Ch D 645 (653), *Fisher v. Owen*. (Referred in 14 Cal W N 153.)
- (1884) 10 P D 122 (130), *Harvey v. Lovekin*.
- (1875) 10 Q B 217 (218), *Greenfield v. Reay*.

#### Note 3

1. (1895) 1 Ch 334 (338, 340), *Kennedy v. Dodson*.
2. (1886) 17 QBD 154 (163), *Harriott v. Chamberlain*. (Referred in 12 Cal L Jour 505—Confirmed in (1911) 2 Ch 71, *Nash v. Layton* — Question regarding previous money-lending transactions.)
3. (1886) 2 T L R 682, *Pankhurst v. Hamilton*.

4. (1895) 1 Ch D 334, (338) *Kennedy v. Dodson*. (1917) 1917 W N 319 (319), *Blair v. Haycock Cadle Co*.

5. (1890) 24 Q B D 573 (577) *Rogers & Co., v. Lambert & Co*.

#### Note 4

1. (1905) 2 K B 523 (526), *Edmundson v. Birch & Co. Ltd*.
- (1875) 44 L J Ch 305 (308), *Heugh v. Garrett*.
- (1920) 1 K B 336 (339), *Chapman v. Leach*.

#### Note 5

1. ('87) 14 Cal 703 (706).
2. (1881) 18 Ch D 477 (486), *Parker v. Wells*. (Suit for breach of trust—Denial of trust—Question as to account of profits of trust premature.) (1888) 37 Ch D 184 (187), *Tennessy v. Clark*. (Amount of damages.)
3. ('32) A1R 1932 Mad 316 (317).
4. ('84) 10 Cal 808 (814).
- ('02) 4 Bom L R 342 (348).

#### Note 6

1. (1878) 8 Ch D 645 (657), *Fisher v. Owen*. (Cited in 14 Cal W N 153.)

**O. 11 R. 6**  
**Notes 6-9**

- (c) that they relate to a party's evidence, and  
 (d) that they are injurious to public interests.

In general, questions excluded by Sections 121 to 129 of the Evidence Act and which could not be asked if the party were in the witness-box cannot also be taken as interrogatories.<sup>2</sup> Questions relating to communications made for the purpose of litigation between third persons and the legal adviser of a party or between third persons and the party for the purpose of submission to the adviser,<sup>3</sup> or questions offending against a rule of public policy may also be objected to.<sup>4</sup> Similarly, it is open to an assessee of income-tax to object to answering interrogatories on statements made by him in income-tax proceedings on the ground that they are privileged.<sup>5</sup> But even if no objection is taken by the party it is the duty of the Court to consider whether a rule of public policy does not prevent the disclosure of the documents or of the information sought.<sup>6</sup>

**7. Fishing interrogatories.** — The questions asked must not be "fishing," that is to say, they must refer to some definite and existing state of circumstances and must not be put merely in the hope of discovering some flaw in the opponent's case<sup>1</sup> or with the object of filling up blanks in the interrogator's own pleadings.<sup>2</sup> Thus, where the plaintiff was charged with having used certain blasphemous words, interrogatories tending to show that, if he did not use those words on the particular occasion, still he had on other occasions said something very much like it, are merely "fishing" interrogatories and will be disallowed.<sup>3</sup>

**8. Wagering contracts.** — In cases where the defence of wagering is set up, the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit; the reason is that it will be "manifestly unfair to compel a man to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case."<sup>1</sup>

**9. Defamation.** — Where, in a plaint in an action for slander, publication to one named person and also to various other persons unnamed is alleged, it is not permissible to ask the defendant whether he spoke the words complained of to any person or persons *other* than the person named and the names of other persons if any. Such an interrogatory is a fishing interrogatory the object of which is to find out some cause of action or defence other than that specifically alleged.<sup>1</sup> So also the defendant in a libel case will not, as a rule, be allowed before he has given particulars to interrogate or get discovery for the purpose of finding out whether he has a defence or not.<sup>2</sup>

2. ('90) 15 Bom 7 (10).

3. ('05) 7 Bom L R 709 (711, 712).

4. (1888) 21 Q B D 509 (521), *Hennessy v. Wright*.  
 (Cited in 27 Bom 189.)

5. ('84) AIR 1934 Nag 181 (182).

6. ('02) 4 Bom L R 842 (850).

**Note 7**

1. ('90) 17 Cal 840 (848, 849).

(1888) 24 Q B D 445 (448), *Hennessy v. Wright*.  
 (1913) 2 K B 193 (197, 199), *Barham v. Lord*

*Huntingfield*.

2. ('14) AIR 1914 Cal 767 (768) : 41 Cal 6.

3. (1886) 2 T L R 682, *Pankhurst v. Hamilton*.

**Note 8**

1. ('18) 17 Ind Cas 152 (154) : 37 Bom 847.

**Note 9**

1. (1913) 2 K B 193 (199), *Barham v. Huntingfield*.

2. (1898) 2 Q B 188 (188), *Tuerenbery v. Labouchere*.

(1908) 2 K B 151 (161), *Arnold v. Bottomley*.

**R. 7. [New.]** Any interrogatories may be set aside on **O. 11 R. 7**

**Setting aside and striking out interrogatories.** the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

[R. S. C., O. 31 R. 7. (Annulled in 1917).]

**1. Setting aside or striking out interrogatories.** — Interrogatories must not be oppressive or exceed the legitimate requirements of the particular occasion.<sup>1</sup> Thus, interrogatories as to profits requiring a search through business books of several years when it is absolutely irrelevant in a suit for a declaration,<sup>2</sup> or as to an *innuendo* and the names of all the persons to whom the libel had been published in a libel action,<sup>3</sup> or as to a secret manufacturing process, have all been held to be vexatious and oppressive.<sup>4</sup> The mere *irrelevancy* of the interrogatory is no ground for setting aside the interrogatory under this rule. The party has to proceed under Rule 6.

**R. 8. [S. 126.]** Interrogatories shall be answered by **O. 11 R. 8**

**Affidavit in answer, filing.** affidavit to be filed within ten days, or within such other time as the Court may allow.

[1877, S. 126, R. S. C., O. 31 R. 8. See R. 9 below.]

**1. Matters within the knowledge of party's agent or servant.** — The party interrogated cannot escape giving an answer by saying that he has no *personal* knowledge as to matters inquired into.<sup>1</sup> He is bound to obtain the information from his agents or servants, if such knowledge has been acquired by them in the ordinary course of their employment. He can, however, show that it would be unreasonable to require him to do so in any particular case, as for instance, where either his agents or servants have left his employment or where it would occasion unreasonable expense or an unreasonable amount of delay or the like to get such information.<sup>2</sup> A party's banker or solicitor is his agent within the meaning of this rule.<sup>3</sup> As has been seen in the Notes to Rule 5 *ante*, a party need not disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment.<sup>4</sup>

**Order 11 Rule 7 — Note 1**

1. (1893) 1 Q B 5 (13), *Oppenheim v. Sheffield*.  
(1884) 32 W R (Eng) 558, *Grumbrecht v. Parry*.  
(Affirming 49 L T 570 : 5 Asp M O 176.)
2. (1881) 18 Ch D 477 (484), *Parker v. Wells*.
3. (1910) 1 K B 754 (757), *Heaton v. Goldney*.
4. (1890) 45 Ch D 623 (628), *Asworth v. Roberts*.

**Order 11 Rule 8 — Note 1**

1. (1884) 28 Ch D 287 (290), *Foakes v. Webb*.

(1878) 3 Q B D 315 (321), *Southwark & Vauxhall Water Co. v. Quick*. (Cited in 15 Bom 7.)

2. (1882) 10 Q B D 161 (171), *Bolekov Vaughan & Co. v. Fisher*.  
(1883) 24 Ch D 110 (113), *Rashotham v. Shropshire Union Railway and Canal Co*.
3. (1895) 2 Ch 111 (115), *Alliolt v. Smith*.
4. (1900) 2 Ch 1 (10, 11), *Walsbach Incandescent Gas Light Co. v. Sunlight Incandescent Co*.

O. 11 R. 9

**R. 9.** [New.] An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Form of affidavit  
in answer.

[R. S. C., O. 31 R. 9.]

**1. Affidavit in answer.** — As a rule, the answers should be divided into paragraphs numbered consecutively and each interrogatory should be dealt with separately in a separate paragraph.

O. 11 R. 10

**R. 10.** [New.] No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

No exception to  
be taken.

[*Cf.* R. S. C., O. 31 R. 10 (Annulled in 1917).]

O. 11 R. 11

**R. 11.** [S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

Order to answer or  
answer further.

[1877, S. 127; R. S. C., O. 31 R. 11.]

### Synopsis

1. Scope of the Rule.

2. "Answers insufficiently."

3. Further answer may be declined  
on the ground of privilege.

4. *Viva voce* examination.

**1. Scope of the Rule.** — It is only under this rule that the Court is to decide whether the party interrogated must answer or not and to pass an *order* requiring him to answer or to answer further, as the case may be, the interrogatories delivered to him.<sup>1</sup> In the absence of such an order under this rule, no action can be taken against the defaulting party under Rule 21.<sup>2</sup>

Order 11 Rule 11—Note 1

1. ('26) AIR 1926 All 553 (553).

2. ('26) AIR 1926 All 553 (553).

('05) 8 Oudh Cas 172 (172, 173).



The application for further answer to interrogatories ought to *specify* the interrogatories or parts of interrogatories to which further answers are required.<sup>3</sup> When the answers to all interrogatories are properly objected to, a further answer in respect of all of them can be asked for.<sup>4</sup>

**O. 11 R. 11**  
**Notes 1-4**

**2. "Answers insufficiently."**—The general rule is that the person answering must answer *sufficiently*. Sufficiency and not the *truth* of the answer is the point to be considered at this stage.<sup>1</sup> The answer must be confined to answering the question put. Any necessary or reasonable explanation or qualification without which the answer would be unfair or incomplete or misleading may be added.<sup>2</sup> Thus, if a party is asked whether he did not make a particular affidavit, he may answer that he did, but that he has since found out that it was inaccurate.<sup>3</sup> But the addition of an irrelevant or otherwise objectionable matter may make the answer embarrassing and prevent the party who asks for it from using it without having thrust upon him irrelevant matters as part of it; the answer in such a case will be considered insufficient and a further answer will be ordered.<sup>4</sup>

**3. Further answer may be declined on the ground of privilege.**—The privilege on the ground of which further answer may be declined, must be one which can be properly claimed in law; the Court will not require further answer to be put in unless it is clearly satisfied either from the nature of the subject-matter for which privilege is claimed or from statements in the answer itself or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated. The mere existence of reasonable suspicion which is sufficient to justify the Court in requiring a *further affidavit of documents* is not enough in the case of a claim for *privilege*.<sup>1</sup> See also the undermentioned case.<sup>2</sup>

**4. Viva voce examination.**—An order may be made requiring the party to further answer the interrogatories by *viva voce* examination. This procedure is, however, adopted only in exceptional cases.<sup>1</sup> A roving examination should not be allowed in such *viva voce* examination.<sup>2</sup>

**R. 12.** [S. 129, para. 1.] Any party<sup>14</sup> may, without filing any affidavit,<sup>2</sup> apply to the Court for an order directing any other party<sup>13</sup> to any suit to make discovery on oath of the documents which are or have been in his possession<sup>11</sup> or power, relating to any matter in question<sup>11</sup> therein. On the hearing of such application the Court may either refuse<sup>1</sup> or adjourn the same,<sup>2</sup> if satisfied that such

**O. 11 R. 12**

**Application for discovery of documents.**

3. (1879) 27 W R (Eng) 575, *Anstey v. North & South Woolwich Sub-way & Co.*

(1876) 24 W R (Eng) 783, *Chesterfield and Boythorpe Colliery Co. v. Black.*

4. (1881) 50 L J Ch 496 (496). *Furber v. King.*

**Note 2**

1. (1884) 27 Ch D 1 (21), *Lyell v. Kennedy.*

(1885) 2 T L R 122, *Field v. Bennet.*

(1869) 4 Ch 673 (678), *Hoffman v. Postill.*

2. (1884) 33 W R (Eng) 44, *Lyell v. Kennedy* (No. 4).

(1884) 27 Ch D 1 (15), *Lyell v. Kennedy* (No. 8).

3. (1884) 27 Ch D 1 (14), *Lyell v. Kennedy.*

4. (1884) 27 Ch D 1 (16), *Lyell v. Kennedy.*

(1873) 9 O P 9 (12), *Peyton v. Harting.*

**Note 3**

1. (1884) 27 Ch D 1 (21), *Lyell v. Kennedy.*

2. ('34) AIR 1984 Nag 181 (182). (Interrogatories as to contents of statement of assessee in income-tax proceedings—Objection to answer is proper.)

**Note 4**

1. (1882) 9 Q BD 168 (170), *Vicary v. G. N. Ry. Co.*

2. (1884) 51 L T 572, *Litchfield v. Jones.*

- O. 11 R. 12** discovery is not necessary, or not necessary at that stage of the suit or make such order, either generally or limited to certain classes of documents,<sup>1</sup> as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1877, S. 129 ; R. S. C., O. 31 R. 12.]

- O. 11 R. 13** **R. 13.** [S. 129, para. 2.] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

[R. S. C., O. 31 R. 13.]

## RULES 12 & 13.

### *Synopsis*

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|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rules.</li> <li>2. Application for discovery of documents may be made without affidavit.</li> <li>3. Grounds of objection to discover documents.</li> <li>4. Professional or legal privilege.</li> <li>5. Documents relating solely to the case of the party giving discovery.</li> <li>6. Documents not in the sole possession of the party.</li> <li>7. Documents held in possession as agent of third party.</li> <li>8. Documents incriminating party.</li> <li>9. Where production of public official documents is injurious to public interests.</li> <li>10. Court may inspect a privileged document.</li> <li>11. Contents of affidavit of documents.</li> <li>12. Sufficient description of documents.</li> </ol> | <ol style="list-style-type: none"> <li>13. Against whom order for discovery may be made.</li> <li>14. Any party.</li> <li>15. Benamidar.</li> <li>16. Corporation.</li> <li>17. Crown.</li> <li>18. Foreign Prince or State.</li> <li>19. Several defendants and plaintiffs. See Note 11.</li> <li>20. Next friend of minor or lunatic.</li> <li>21. Advocate-General.</li> <li>22. Official Liquidator.</li> <li>23. Marine insurance.</li> <li>24. Affidavit of documents, if conclusive — Further affidavit.</li> <li>25. Effect of non-disclosure of documents.</li> <li>26. Right to seal part of documents.</li> </ol> |
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### *Other Topics (miscellaneous)*

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|--|---|
| <p>Affidavit in the case of several plaintiffs or defendants. See Note 11.</p> <p>Court's discretion under the rule. See Note 2.</p> <p>Discovery from a co-defendant or co-plaintiff. See Note 13.</p> <p>Documents in possession of a party either jointly with others or with no proprietary interest. See Note 11.</p> | <p>"Document," meaning of. See Note 11.</p> <p>Duties of attorneys in respect of affidavit of documents. See Note 11.</p> <p>"Matter in question," meaning of. See Note 11.</p> <p>Possession of agent. See Note 6.</p> <p>Production of documents. See Note 1.</p> |
|--|---|

**1. Scope of the Rules.** — These rules deal with the second branch of discovery, *viz.*, the discovery of *documents*. They enable a party to apply to the Court for the purpose of compelling his opponent to disclose the documents he has in his possession or power,<sup>1</sup> and the object of this procedure is two-fold : (1) to secure as far as possible that all material documents are disclosed by putting the opposite party on oath as to the documents in his possession or power with the consequent penalties attaching to a false oath, and (2) to put an end to what might otherwise lead to a protracted inquiry as to the material documents actually in the possession or under the control of the opposite party.<sup>2</sup>

The right to have the *existence* of a document disclosed in the affidavit of documents under these rules does not necessarily involve any right to have it produced for *inspection*; nor is a protection from *production for inspection* a sufficient reason for not disclosing its *existence*. The rule does not alter the principles relating to the production of documents but gives the Court a discretion to refuse the discovery of documents when there is no reasonable prospect of its being of any use,<sup>3</sup> or to limit the nature and extent of the discovery.<sup>4</sup>

These rules do not preclude an application under Rule 18, sub-rule 2.<sup>5</sup>

**2. Application for discovery of documents may be made without affidavit.** — An application under Rule 12 need not be supported by an affidavit as is generally required in the case of other applications.<sup>1</sup> The Court has power either to refuse or adjourn the application and, in exercising its discretion, it is guided by the pleadings and the nature of the action. The party who applies must, where there is contest, show that he has a good cause of action and that the documents are relevant to the case.<sup>2</sup>

**3. Grounds of objection to discover documents.** — A party against whom an order for discovery of documents has been made by the Court cannot object to *specify* the existence of the documents.<sup>1</sup> He is also, as a general rule, bound to *produce* every document in his possession or power which is material or relevant to the suit, unless it is covered by some established privilege.<sup>2</sup> The fact that a document was written on a privileged occasion, in the special sense in which that term is used in actions of defamation, is no reason for refusing to produce it : it is not, on that ground, privileged from inspection.<sup>3</sup> But there are several classes of documents which have been recognized as being privileged from production. These may be dealt with in the following order —

- (1) Documents protected by professional or legal privilege.
- (2) Documents relating solely to the case of the party giving discovery.
- (3) Documents not in the sole possession of the party giving discovery.
- (4) Documents in the possession of a party only as agent or on behalf of another.

#### Order 11 Rules 12 & 13 — Note 1

1. ('95) 28 Cal 117 (125).
2. ('20) AIR 1920 Pat 181 (187); 5 Pat L Jour 550.
3. (1887) 87 Ch D 284 (287), *Downing v. Falmouth United Sewerage Board*.
4. (1887) 87 Ch D 284 (287), *Downing v. Falmouth United Sewerage Board*.
5. ('11) 12 Ind Cas 12 (18); 38 Cal 428.

#### Note 2

1. ('95) 28 Cal 117 (125).

('24) AIR 1924 All 510 (511) : 46 All 417.

('22) AIR 1922 All 1 (4) : 44 All 202.

[See (1887) 87 Ch D 284 (288), *Downing v. Falmouth United Sewerage Board*.

2. ('97) 2 Cal W N 17 (18).

#### Note 3

1. (1881) 45 Law Times 360 (361), *Swanston v. Lishman*.

2. (1876) 2 Ch D 644 (656), *Anderson v. Bank of British Columbia*. (Cited in G Bom 572.)

3. (1880) 5 Ex D 108 (112), *Webb v. East*.

**Order 11  
Rr. 12 & 13  
Notes 3-4**

(5) Documents tending to criminate or expose to forfeiture.

(6) Documents protected on the ground of public policy.

**4. Professional or legal privilege.** — A communication between parties and their legal advisers has always been protected from disclosure even at the risk of the possibility of truth being concealed thereby.<sup>1</sup> The object of the rule is to enable persons to obtain legal advice safely and effectually.<sup>2</sup> A party is thus not bound to produce any confidential communication between him and his legal advisers.<sup>3</sup> It is necessary, however, to distinguish between documents and communications that are privileged irrespective of whether litigation was contemplated or was pending and those that are privileged only where litigation was contemplated or was pending at the time when they came into existence. The first class of cases will cover the following documents —

(1) Letters and communications passing between a party or his predecessors-in-title, and his or their legal advisers provided they are *confidential* and written to, or by the solicitor or legal adviser in his professional capacity for the purpose of getting legal advice or assistance.<sup>4</sup> If the communications are not made *confidentially* there is no privilege.<sup>5</sup>

(2) Such letters and communications made *through a clerk or agent* employed by the legal adviser or the client for the purpose of conveying information to or from the legal advisers.<sup>6</sup>

(3) Letters and communications between a solicitor and his partner or professional agent<sup>7</sup> but not between solicitors for opposite parties.<sup>8</sup>

(4) Instructions and briefs to counsel and counsel's briefs and notes.<sup>9</sup>

The second class of documents will cover the following —

(1) Communications between a solicitor and a *non-professional* agent or a third party, directly or through an agent and made with a view to pending or contemplated litigation and for the purpose of getting or giving advice or for obtaining or collecting evidence.<sup>10</sup>

(2) Communications between the client and a *non-professional* agent or third party, which are made in answer to inquiries made by the party as the agent for or at

**Note 4**

1. Halsbury, Vol. II, page 72.

2. (1881) 17 Ch D 675 (681, 682), *Wheeler v. Le Marchant*.

(1901) 1901 App Cas 196 (200), *Bullivant v. Attorney-General*.

3. ('91) 15 Bom 7 (10).

('27) AIR 1927 Bom 367 (367, 368).

4. (1891) 1891 P 286 (289), *O'Shea v. Wood*.

(1878) 4 Ex D 49 (53), *Gardner v. Irvin*.

(1889) 23 Ch D 387 (404), *Kennedy v. Lyell*.

(1878) 3 Q B D 315 (318), *Southwark & Vauxhall Water Co. v. Quick*. (Statement of facts drawn up by the client for submission to his solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information for the conduct of his case.)

(1918) 3 K B 850 (856), *Birmingham and Midland Motor Omnibus Co. v. London & North-Western Ry. Co.* (Do.)

(1918) 2 K B 565 (568), *Feuerherd v. London General Omnibus Co.* (Do.)

('80) 4 Bom 576 (582). (Statements laid by

clients before counsel for the the purpose of obtaining legal advice.)

(1888) 3 Times Rep 578, *Ward v. Marshal*. (Entries in the solicitor's diary of communications between himself and his client.)

5. (1874) 30 Law Times 585, *Original Hartlepool Collieries Co. v. Moon*. (Affirming 30 Law Times 193.)

('79) 3 Bom 91 (93).

('94) 18 Bom 263 (272).

('03) 5 Bom L R 122 (123).

6. (1881) 17 Ch D 675 (682, 684), *Wheeler v. Le Marchant*.

7. (1876) 34 Law Times 531, *Mostyn v. West Mostyn Coal & Iron Co.*

(1827) 4 Russ 190 (191), *Hughes v. Biddulph*.

8. (1851) 21 L J Ch 10, *Gore v. Harris*.

(1862) 32 Beav 162 (166), *Ford v. Tennant*.

9. (1876) 34 Law Times 531, *Mostyn v. West Mastyn Coal Co.*

(1911) 1911 P 181 (184), *Curtis v. Beaney*.

10. (1876) 2 Ch D 644 (650), *Anderson v. Bank of British Columbia*. (Cited in 6 Bom 572.)

the request or suggestion of his solicitor, or without any such request, but *for the purpose of being laid before the legal adviser* for the purpose of advice in respect of a pending or contemplated litigation.<sup>11</sup> But a mere communication between a principal and agent, though confidential, is not privileged<sup>12</sup> even after litigation has commenced and legal advice has been taken as to its course.<sup>13</sup> Similarly, the reports made by a servant to his master are not privileged though they may relate to the subject-matter of the suit.<sup>14</sup>

(3) The correspondence between co-defendants after the institution of a suit is not, as a general rule, privileged from production; but where one of the co-defendants is agent or solicitor for the other co-defendant, the communications between them are privileged.<sup>15</sup> Where one of the trustees of a will is a solicitor and acts as a solicitor for the trustees, communications between him and his co-trustees, which would be privileged if he were not a co-trustee, are privileged.<sup>16</sup>

No privilege attaches to communications between a client and his legal adviser made in furtherance of a fraudulent or illegal purpose which is definitely alleged in the pleadings or in the affidavits.<sup>17</sup> The privilege is confined to *legal advice* and does not extend to communications between a party and his medical<sup>18</sup> or spiritual<sup>19</sup> adviser or non-professional friend or adviser.<sup>20</sup> See Sections 126 to 129 of the Evidence Act.

### 5. Documents relating solely to the case of the party giving discovery.

—A party will not be compelled to produce for inspection documents which he swears, relate to his own case, and do not relate to or tend to support the case of his opponent, and do not impeach his own case.<sup>1</sup> Thus, he need not produce any document which he can swear, relates solely to his own *title* to any real property and to contain nothing which tends to establish the title of his opponent.<sup>2</sup>

*Documents disclosing party's evidence.*—A party cannot be compelled to produce documents which form the *exclusive evidence* of his own case or title.<sup>3</sup> But they must not, in any way, tend to prove or support the adversary's title;<sup>4</sup> if they are necessary to support the adversary's case<sup>5</sup> or may be evidence for the adversary as well,<sup>6</sup> their production cannot be refused. In order to claim this privilege, the party may state in his affidavit that the document constitutes evidence of his own case or title, that they contain nothing *supporting or tending to support the adversary's case or title* and that they contain nothing *impeaching his own case or title*.<sup>7</sup> But a party is

11. (1876) 2 Ch D 644 (648, 650), *Anderson v. Bank of Br. Columbia*. (Cited in 6 Bom 572.)

12. (1878) 2 Bom 453 (456), *Wallace v. Jafferson*. (85) 11 Cal 655 (657).

13. ('91) 15 Bom 7 (10). ('95) 22 Cal 105 (111).

14. ('27) AIR 1927 Bom 367 (367, 368).

15. (1878) 16 Eq 112 (115), *Hamilton v. Nott*. (Co-defendant.)

16. (1919) 1 Ch 320 (342), *Whitworth In re*. (1873) 16 Eq 112 (115), *Hamilton v. Nott*.

17. (1901) 1901 App Cas 196 (200, 201), *Bullivant v. Attorney-General*.

(1919) 1 Ch 320 (335-338), *Whitworth, In re*.

18. (1881) 17 Ch D 675 (681), *Wheeler v. Le Marchant*.

19. (1876) 2 Ch D 644 (650), *Anderson v. Bank of Br. Columbia*. (Cited in 6 Bom 572.)

20. (1874) 18 Eq 649 (654), *Smith v. Daniell*.

(Cited in 4 Bom 576.)

### Note 5

1. (1881) 7 Q B D 400 (404), *Bewicke v. Graham*. (1893) 2 Q B 432 (437), *Budden v. Wilkinson*.

2. (1880) 14 Ch D 158 (161), *Egremont Burial Board v. Egremont Iron Ore Co*. ('31) AIR 1931 Pat 426 (428): 10 Pat 630.

3. (1893) 2 Q B 432 (435), *Budden v. Wilkinson*. (1897) 2 Q B 62 (65), *Frenkenstein v. Guvin's Co*. ('27) AIR 1927 Bom 367 (367).

4. ('93) 17 Bom 581 (584).

5. ('84) 10 Cal 808 (814).

6. (1842) 1 Y & C Ch Cas 631 (651), *Combe v. London Corporation*.

7. (1882) 10 Q B D 191 (203), *Attorney-General v. Emerson*. (Cited in 15 Bom 7.)

(1899) 2 Q B 478 (484), *Attorney-General v. Citizens of Newcastle*.

('07) 30 Mad 230 (231).

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not confined to the affidavit in which the claim is first set up; he is entitled to put in and use a further affidavit in support of his claim of privilege.<sup>8</sup>

Opinions upon, or steps taken in reference to, a suit in which the plaintiff and defendant are putting forward opposing contentions cannot be said to relate solely to the case of the plaintiffs.<sup>9</sup>

**6. Documents not in the sole possession of the party.** — The rule of the Court of Chancery in England is thus laid down by Lord Cottenham in *Taylor v. Rundell*<sup>1</sup>:

"If a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it and this, for two reasons: the one is that a party will not be ordered to do that which he cannot or may not be able to do, the other is that another party not present has an interest in the document which the Court cannot deal with."

Thus, it was held that a partner or his agent cannot be asked to produce documents belonging to partnership where the other partners are not before the Court.<sup>2</sup> But in a similar case in the High Court of Bombay,<sup>3</sup> Sir Charles Sargent, C. J., held that the case before him did not fall within either of the reasons mentioned above, that the defendants (partners), physically speaking, could produce the document and that legally speaking, they *represented the other partners* for the purpose of production of documents as there was no other person having an interest distinct from their own interest.

For the purpose of the disclosure of the existence of documents, "possession" includes possession by an agent of the party giving the discovery.<sup>4</sup>

**7. Documents held in possession as agent of third party.** — No party can be compelled to produce documents of which he is not the owner but of which he has the custody as the agent of a third party who is not a party to the action, as where the documents are in the possession of a party as a trustee or as a mortgagee regarding title-deeds of mortgagor, etc.<sup>1</sup>

**8. Documents incriminating party.** — It is a good ground of privilege that the document, if *produced*, would tend to criminate the party producing them. But this objection does not apply to the *discovery* of the documents.<sup>1</sup>

See, however, Section 132 of the Evidence Act.

**9. Where production of public official document is injurious to public interests.** — Public official documents need not be produced when an objection is taken in the affidavit of documents by the head of the department or by some responsible officer;<sup>1</sup> the mere fact that the documents are official or confidential is not enough to protect them; in case of doubt the Judge may, in his discretion, adjourn

8. ('94) 22 Cal 105 (110), (Citing (1876) L R 1 C.P.D. 471, *McCorquodale v. Bell*.)

9. ('91) 15 Bom 7 (11).

(1876) 1 Q B D 423 (427), *Bustros v. White*. (Cited in 15 Bom 7.)

(1882) 10 Q B D 191 (204), *Attorney-General v. Emerson*. (Cited in 15 Bom 7.)

**Note 6**

1. (1841) 5 Jur 1129. (Cited in 1 Bom 496.)

[See also (1871) 7 Ch App 312 (313), *Hadley v. McDougall*.]

2. (1841) 5 Jur 1129, *Taylor v. Rundell*. (Cited in 1 Bom 496.)

(1849) 14 Jur 467, *Reid v. Langlois*. (Cited in 1 Bom 496.)

3. ('76) 1 Bom 496 (498, 499).

4. (1881) 45 L T 360 (361), *Swanston v. Lishman*.  
**Note 7**

1. (1886) 18 Beav 457 (461), *Few v. Guppy*.  
**Note 8**

1. (1897) 2 Q B 124 (130), *Spokes v. Grosvenor Hotel & Co*.

(1906) 1906 App Cas 484 (487), *National Association of Operative Plasterers v. Smithies*.

**Note 9**

1. ('04) 27 Bom 189 (216).  
 (1888) 21 Q B D 509 (521), *Hennessy v. Wright*.

the question to the trial.<sup>2</sup> But, as a general rule, if the objection is taken by the proper person, the Court will not go behind it, the foundation of the rule being that the information cannot be disclosed without injury to the public interest. See also the Evidence Act, Sections 123 and 124 and the undermentioned case of the Privy Council.<sup>3</sup>

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**10. Court may inspect a privileged document.** — Where privilege is claimed by a party, the Court may inspect the document to decide whether the privilege claimed is proper and valid.<sup>1</sup> See Rule 19, sub-rule (2).

**11. Contents of affidavit of documents.** — A party who is ordered under Rule 12 to make discovery on oath should set forth in his affidavit all documents which *are or have been* in his possession or power relating to the matter in question.<sup>1</sup> A document may be described as a writing or printing capable of being read, no matter what the material is upon which it is impressed or inscribed.<sup>2</sup> The expression "matter in question" means a question or issue in dispute in the action, and not the thing about which question or issue arises; thus, in an action to recover possession of land, it means the plaintiff's alleged title and not the land.<sup>3</sup> Every document which will throw any light on the case is a document relating to a matter in dispute in the suit.<sup>4</sup> It is not confined to such as would be *admissible in evidence*<sup>5</sup> but includes all documents containing information which may either directly or indirectly enable the party seeking discovery, either to advance his own case or damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences.<sup>6</sup> Every such document must be included in the affidavit of documents even if the party is in possession thereof *jointly with others* or even if he has therein no property at all, provided they are in his corporeal possession. As regards documents which are not, but *had been* in the party's possession, he must state what has become of them. It is always desirable to adopt the form given in the Code as otherwise an affidavit may be regarded as insufficient.<sup>7</sup> When the affidavit is insufficient, a summons may be taken to consider its sufficiency.<sup>8</sup>

Ordinarily, an affidavit of documents must be made by the party himself; but the Court may in special cases allow the affidavit to be made by the agent of the party.<sup>9</sup> Where there are several plaintiffs all of them must ordinarily join in the affidavit.<sup>10</sup> It is possible on a proper case being made out that the order may be limited to a particular party.<sup>11</sup> In the case of a *pardanashin* lady it is doubtful if a verification is necessary.<sup>12</sup> It is the duty of an attorney to be very careful in ascertaining from his client, who has to make an affidavit of documents, exactly what materials and documents are in his possession. It is further his duty the moment he finds that there are other documents which have not been disclosed, at the very earliest moment, to bring those documents to the notice of his opponent and give him an opportunity of inspecting them.<sup>13</sup>

2. (1916) 1 K B 822 (830), Asiatic Petroleum Co. v. Anglo Persian Oil Co.  
3. ('31) AIR 1931 P C 254 (257, 258) (PC).

#### Note 10

1. (1900) 1 Ch 376 (383), Milbank v. Milbank.  
(‘31) AIR 1931 P C 254 (259, 261) (PC).

#### Note 11

1. ('86) 8 All 265 (267).  
2. (1908) 2 K B 883 (886), R. v. Daya. (Sealed packet may be a "document.")  
See also S. 8 (16) of the General Clauses Act.  
3. (1879) 40 L T 815 (821), Phillips v. Phillips.  
4. (1875) 1 Q B D 188 (141), Hutchinson v.

Glover. (Affirmed in 38 L T 834.)

5. (1882) 11 Q B D 55 (62, 63), Compagnie Financière v. Peruvian Guano Co. (Per Brett, L. J.)  
6. (1882) 11 Q B D 55 (63), Compagnie Financière v. Peruvian Guano Co.  
7. ('98) 2 Cal W N 17 (17).  
8. ('75) 1 Cal 178 (179).  
9. ('84) AIR 1934 Pat 693 (694).  
10. ('90) 15 Bom 7 (9).  
(1885) 29 Ch D 899 (901), Fendall v. O'Connell.  
11. ('90) 15 Bom 7 (9). (*Obiter.*)  
12. ('86) 8 All 265 (267).  
13. ('21) AIR 1921 Cal 267 (269). (No action was taken under the Legal Practitioners Act.)

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**12. Sufficient description of documents.** — It is necessary that there should be a *sufficient description* of documents in the schedule annexed to the affidavit of documents. It is sufficient, however, if the documents are described in such a manner as to enable enforcement of production, if ordered.<sup>1</sup> Where a party claims to withhold documents or letters on the ground of privilege, a less degree of particularity will suffice; it is not necessary to give such description as will enable the opponent to know its *contents*.<sup>2</sup>

If the documents are not numerous the most advisable course is to set out each of them separately and number them in the margin of the schedule. But if there are numerous documents of the same class or description, it is not necessary to number each of them separately; it will be proper to tie them up in bundles and number the documents or otherwise earmark them in such a way that the other party may ask for those which he wants to inspect.<sup>3</sup>

**13. Against whom order for discovery may be made.** — As a general rule, discovery is confined to the parties only<sup>1</sup> and does not apply to third parties.<sup>2</sup> The words "any party" and "any other party" in Rule 12 contemplate *opposite parties* within the meaning of Rule 1.<sup>3</sup> See Note 11 to Rule 1, and Notes 14 to 21 below.

**14. Any party.** — In a suit brought by a nominal plaintiff, the persons really interested may be ordered to give discovery and the suit may be stayed unless they give such discovery.<sup>1</sup> So also where a principal residing abroad is the real plaintiff, but is suing through his agent, the defendant is entitled to have the action stayed until such discovery is made as the real plaintiff would have been obliged to make, had he been the plaintiff on the record.<sup>2</sup>

**15. Benamidar.** — Where a person uses the name of another as a nominal plaintiff only for the purpose of bringing an action in which he alone is really interested, the *real* plaintiff may be called on to give discovery.<sup>1</sup> But the nominal plaintiff also will be liable to make an affidavit of documents.<sup>2</sup>

**16. Corporation.** — The Court has power to order an officer of a company or corporation to give discovery.<sup>1</sup> A public body cannot burke discovery on the ground that there are a large number of papers, the production of which would flood the Court.<sup>2</sup>

**17. Crown.** — The Crown has a right of discovery as against a subject but cannot be compelled to give discovery,<sup>1</sup> though as a matter of practice it does give

**Note 12**

1. (1878) 4 Q B D 85 (89), Taylor v. Batten.
- (1893) 2 Q B D 432 (438), Budden v. Wilkinson.
2. (1877) 97 L T 469 (470), Kain v. Farrer.
- (1878) 4 Ex D 49 (58), Gardner v. Irvin. (Letters — Dates and names of writers not necessary.)
3. (1884) 26 Ch D 470 (472), Hill v. Hart-Davis.
- (1882) 21 Ch D 835 (836), Walker v. Poole.
- (186) 12 Cal 265 (267).
- (1891) 1 Ch 509 (522), Cooke v. Smith.

**Note 13**

1. (1906) 2 K B 217 (224), James Nelson & Sons v. Nelson Line.
2. (1900) 16 T L R 494 (451), Williams v. Ingram. (Affirmed in 16 T L R 451.)
3. ('32) AIR 1992 Cal 72 (72, 73): 58 Cal 1091. (No contest between co-defendants—Not opposite parties.)

**Note 14**

1. (1906) 2 K B 217 (226, 227), James Nelson & Sons v. Nelson Line.
- (1892) 2 Q B 324 (326), Willis v. Baddeley.
2. (1892) 2 Q B 324 (326, 327), Willis v. Baddeley.

**Note 15**

1. (1892) 2 Q B 324 (326), Willis v. Baddeley.
2. (1881) 7 Q B 553 (555), Willson v. Rafalovitch. (Cited in 15 Bom 7.)

**Note 16**

1. (1875) 1875 W N 220 (220), Cooke v. Oceanic. (1885) 30 Ch D 189 (191), Dykes v. Stephens. (The case of a company is not the same as that of an infant.)
2. ('22) AIR 1922 All 1 (4): 44 All 202.

**Note 17**

1. (1897) 2 Q B 884 (388), Attorney-General v. Newcastle Corporation.



discovery by way of a list of documents in the same way as a subject would be bound to give, unless some principle of public interest is involved.<sup>2</sup>

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**18. Foreign Prince or State.** — A foreign Sovereign or State is also bound to give discovery like any other suitor<sup>1</sup> and the suit will be stayed until a proper person is named to give it.<sup>2</sup>

**19. Several defendants and plaintiffs.** — See Note 11.

**20. Next friend of minor or lunatic.** — The next friend of a minor or lunatic may be called upon to file an affidavit of documents : see Rule 23, *infra*.

**21. Advocate-General.** — The Advocate-General cannot be called upon to make discovery on oath in a suit filed by him at the instance of relators under Section 92, Civil Procedure Code. But an affidavit of documents may be required from the latter.<sup>1</sup>

**22. Official Liquidator.** — As an officer of the Court, the Official Liquidator must not ordinarily be compelled to make an affidavit of documents in his possession. The proper course is to apply to him for inspection in the first instance, and on his refusal, to apply to the Court.<sup>1</sup> The same rule would seem to apply to the Official Receivers and Assignees under the Insolvency Acts.

**23. Marine insurance.** — In actions on policies of marine insurance, the defendant underwriters are entitled to apply for and obtain, as a matter of course, an order for the production of all material documents and papers relating to the insurance, not only from the *plaintiff* and all persons interested in the proceedings but *all other persons* who are in possession of such documents or papers.<sup>1</sup> This does not, of course, include the underwriters themselves: but in an action brought by a mortgagee of a ship on a policy of marine insurance a mortgagor who has sailed the ship as the managing owner has been held to be a person who should produce the ship's papers.<sup>2</sup> The practice extends to all actions on policies which are substantially marine policies whether on a ship or cargo.<sup>3</sup>

**24. Affidavit of documents, if conclusive — Further affidavit.** — The affidavit of documents filed by a party against whom an order for discovery has been passed is conclusive, and must be accepted by the party seeking discovery as true, both with regard to the documents that are, or have been, in the possession or power of the party making discovery,<sup>1</sup> and as to their relevancy,<sup>2</sup> unless there is something like an answer in cross-examination or some other documentary evidence showing

(1921) 3 K B 1 (12), *Re La Societe Les Affreteurs Reunis and the Shipping Controller*.

2. (1897) 2 Q B 384 (395), *Attorney-General v. Newcastle Corporation*.

#### Note 18

1. (1898) 1 Ch 190 (195), *South African Republic v. Compagnie Franco Belge*.

(1878) 16 Eq 179 (181), *Liberia Republic v. Imperial Bank*.

2. (1875) 1 Ch D 171 (174), *Costa Rica Republic v. Erlanger*.

(1875) 20 Eq 140 (141), *Peru Republic v. Weguelin*.

(1867) 2 Ch App 582 (590), *United States of America v. Wagner*.

#### Note 21

1. ('06) 30 Bom 474 (476).

#### Note 22

1. (1883) 22 Ch D 714 (720), *Mutual Society In re*.

#### Note 23

1. (1898) 2 Q B 187 (191, 192, 193), *China Traders Insurance Co. v. Royal Exchange Assurance Corporation*.

(1924) 1 K B 79 (86), *Teneria Moderna Franco Espa Nola v. New Zealand Insurance Co.*

2. (1877) 2 Ex D 472 (474), *West of England Bank v. Canton Insurance Co.*

3. (1898) 2 Q B 187 (191), *China Traders Insurance Company v. Royal Exchange Assurance Corporation*.

#### Note 24

1. ('20) AIR 1920 Pat 131 (134, 135).

('24) AIR 1924 All 510 (511) : 46 All 417.

[See (1878) 4 Ex D 49 (53), *Gardner v. Irvin*.]

2. (1893) 2 Q B 432 (433), *Budden v. Wilkinson*.

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conclusively that there are other documents. It is also conclusive as to the grounds stated in support of a claim for privilege from production.<sup>3</sup> The party seeking discovery cannot, for the purpose of obtaining a further affidavit or inspection of documents for which privilege is claimed, adduce evidence or otherwise show that the affidavit of documents is insufficient or untrue.<sup>4</sup> Nor, as a rule, can he interrogate with a view to show that the affidavit is untrue.<sup>5</sup> There are two cases, however, where the affidavit of the document can be controverted —

(1) Where, from the *affidavit itself*, or from the documents referred to therein, or from admissions made either in pleadings or otherwise, it appears that the party making discovery has or has had other relevant documents in his possession or power.<sup>6</sup>

(2) Where the basis on which the first affidavit has been made turns out to have been wrong; in other words, where the party making the affidavit has misconceived his case so that the Court is practically certain that if he had conceived properly and acted on a correct view of the law he would have disclosed further documents.<sup>7</sup>

In a suit for ejectment the Court will not as a rule go behind the affidavit and where, in such a suit, either party claims to refuse production on the ground that the documents relate solely to his own title and do not in any way tend to prove or support the title of the opposite party, the Court cannot go behind the affidavit and enquire whether his statement is true or not.<sup>8</sup> But in a suit for the recovery of the price of materials supplied to the defendant in which the defence was that the materials were defective, the Court ordered the production of the engineer's report referred to in his pleadings, where his statement showed that the report was not of the character described by the defendant.<sup>9</sup>

**25. Effect of non-disclosure of documents.** — Where no application is made under this rule, a party is not bound to produce any document. He is entitled to refrain from producing any document which he considers irrelevant and no adverse presumption can be drawn against the party from its non-production<sup>1</sup> except where, from the nature and circumstances of the case, it is the imperative duty on his part to produce them,<sup>2</sup> but where an order is made against a party for discovery and he alleges as to some of the documents that they have been destroyed or may have perished, he is bound to give evidence of diligent search for them. In the absence of such evidence, a presumption that, if produced, they will be unfavourable to that party will arise.<sup>3</sup>

3. (1893) 2 Q B 432 (433), Budden v. Wilkinson.  
(1881) 7 Q B D 400 (404), Bewicke v. Graham.

4. (1878) 4 Ex D 49 (53), Gardner v. Irvin.  
(1889) 23 Q B D 287 (291, 292), Morris v. Edwards.

(1886) 17 Q B D 101 (106), Nicholl v. Wheeler.  
(1885) 29 Ch D 307 (314, 315), Hall v. Truman.

5. (1886) 17 Q B D 101 (106), Nicholl v. Wheeler.

6. (1880) 5 Q B D 556 (558), Jones v. Monte Video Gas Co.

(1882) 11 Q B D 55 (59), Compagnie Financiere v. Peruvian Guano Co.

(1885) 29 Ch D 307 (315), Hall v. Truman.

(1868) 8 Ch App 809 (811), Wright v. Pitt. (Referred in 1 Cal 178).

(1863) 82 L J Ch 676 (677), Noel v. Noel. (Case of reasonable suspicion.)

(175) 1 Cal 178 (179).

(199) 17 Bom 384 (388). (Mere suspicion not sufficient.)

(1910) 1 K B 904 (912, 913), Kent Coal Concessions v. Duguid.

7. (1912) 1 K B 369 (376), British Association of Glass Bottle Manufacturers Ltd. v. Nettlefold. (Affirmed in (1912) AC 709).

(197) 2 Cal W N 17 (17).

8. (193) 17 Bom 581 (583, 584).

(1889) 23 Q B D 287 (290), Morris v. Edwards. (Affirmed in (1890) 15 App Cas 309).

9. (195) 22 Cal 105 (110, 111).

#### **Note 25**

1. (115) AIR 1915 P C 96 (98): 37 All 557: 42 Ind App 202 (PC).

2. (117) AIR 1917 P C 6 (8): 40 Mad 402: 44 Ind App 98 (PC).

3. (117) AIR 1917 P C 1 (4) (PC).

**26. Right to seal part of documents.** — A party may seal up such portions of the documents produced by him as he swears are privileged. He must, however, specify what parts of the documents referred to he claims to seal up and the grounds upon which the claim is based.<sup>1</sup> The rule is the same with regard to portions of documents which do not relate to the matters in question.<sup>2</sup> The party making discovery has the option either to disclose such portions in his affidavit or to disclose the whole and state that such portion alone is relevant and to seal up the rest.<sup>3</sup> When the right of the party to seal up parts of the document is contested, the Court will appoint an officer to whom the party desiring inspection is to state in confidence why he wants to inspect any portion of the documents sealed, and the officer, after looking at the documents as to whether and in what way the part noted or desired to be noted is material to the case, should make a report for the orders of the Court.<sup>4</sup> The Court can also order the sealed parts to be unfastened for its personal inspection.<sup>5</sup>

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**R. 14.** [S. 130.] It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

**O. 11 R. 14**

[1877, S. 130, R. S. C., O. 31 R. 14.]

### Synopsis

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|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Possession or power."</li> <li>3. "Relating to any matter in question in such suit."</li> <li>4. Effect of Sections 163 and 164 of the Evidence Act.</li> </ol> | <ol style="list-style-type: none"> <li>5. Waiver of privilege.</li> <li>6. Partner.</li> <li>7. Copies of documents produced, if can be taken. See Rule 15.</li> <li>8. Revision.</li> </ol> |
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### Other Topics (miscellaneous)

Court's powers as to production. See Note 1.  
Effect of non-production. See Note 4.  
Mere production not evidence. See Note 1.

"Production" distinguished from "discovery or inspection." See Note 1.  
Third person not a party to the suit. See Note 1.

**1. Scope of the Rule.** — An order for *production* of documents under this rule is quite different from an order for *discovery* under Rule 12 or an order for *inspection* under Rule 18, *infra*,<sup>1</sup> or for an order for answering *interrogatories* under Rule 11, *ante*.<sup>2</sup> A party must set out every document in his possession or power where an order

#### Note 26

1. ('98) 20 Cal 587 (589).
2. ('97) 8 Cal W N 495 (497).
3. (1872) 7 Ch 686 (694), *Kettlewell v. Barstow*. (1888) 25 Ch 247 (249), *Pickering v. Pickering*. (1888) 58 L T 601, *Jones v. Andrews*.
4. ('95) 28 Cal 117 (126).
5. ('79) 4 Cal 885 (886).

5. ('01) 28 Cal 424 (426).

#### Order 11 Rule 14 — Note 1

1. ('24) AIR 1922 Mad 582 (583). (Rule 21 inapplicable.) ('28) 112 Ind Cas 285 (285) (All). ('12) 14 Ind Cas 51 (52) (All).
2. ('22) AIR 1922 All 285 (287):44 All 566. (Rule 21 inapplicable and defence not to be struck off.)

**O. 11 R. 14**  
**Notes 1-2**

for discovery has been passed against him; but he is not bound to produce them unless an order for production has been passed against him.<sup>3</sup> An order for production can only be made after an order for discovery has been made under Rule 12.<sup>4</sup> The mere production of the documents does not give an immediate and indefeasible right of inspection to the other party.<sup>5</sup> Nor does such document become *ipso facto* a piece of evidence in the case.<sup>6</sup>

Under this rule the Court acts of its own motion and not on the application of any party.<sup>7</sup> It cannot, however, delegate the exercise of the power under this rule to a commissioner.<sup>8</sup> No order should be made against a party unless he has directly or indirectly admitted the document to be in his possession or power<sup>9</sup> and unless such documents are in *existence*.<sup>10</sup> The words "at any time during the pendency of the suit" show that an order for production can be made even *before the issues are framed*.<sup>11</sup>

It was held in the undermentioned case<sup>12</sup> of the Bombay High Court that a Court has no discretion to refuse production unless the documents are privileged. But in a later case of the same High Court<sup>13</sup> it has been held that the Court *has* a discretion in compelling production of documents even though they are privileged. An order for production must be a *written summons* on the party for such production and not a mere *verbal order*.<sup>14</sup> It must not be a general order that all the documents in the defendant's possession should be produced<sup>15</sup> except where the general description is sufficient for the identification of the documents or books sought to be produced.<sup>16</sup>

Where the documents are produced in obedience to the order of the Court, the Court can deal with them in such manner as appears to it to be just.<sup>17</sup>

The power to compel the production of documents has been extended to tribunals acting under various local Acts.<sup>18</sup>

**2. "Possession or power."** — The words "possession or power," as a general rule, mean *exclusive possession*.<sup>1</sup> They also mean *legal possession*,<sup>2</sup> i. e., a right and power to deal with the documents.<sup>3</sup> There is no power to compel a party to produce documents not in his control or possession, or documents the possession of which he has parted with before the date of the application. A person who claims a lien upon a deed has generally the right to refuse production thereof.<sup>4</sup> Where a Collector acts as

3. (1881) 45 L T 360 (361), *Swanston v. Lishman*.

4. ('23) AIR 1923 Pat 337 (338).

5. ('24) AIR 1924 Mad 846 (846, 847); 47 Mad 934.

6. ('21) AIR 1921 Lah 828 (830).

7. ('29) AIR 1929 All 83 (83).

(89) 1889 Pun Re No. 80, page 300.

8. ('09) 4 Ind Cas 364 (367) (Cal).

9. ('20) AIR 1920 Pat 131 (135); 5 Pat L Jour 550.

10. ('92) 1892 Pun Re No. 59, page 216.

11. ('09) 4 Ind Cas 364 (366) (Cal).

12. ('78) 2 Bom 458 (456).

13. ('05) 7 Bom L R 709 (711).

14. (1864) 1864 Suth W R (Cap No) 164 (165).

(98) 1898 Pun Re No. 58, page 191.

15. ('98) 1898 Pun Re No. 58, p. 191.

16. ('22) 65 Ind Cas 661 (664) (Lah).

17. ('07) 30 Mad 230 (230).

(98) 1898 Pun Re No. 58, page 191.

18. See Bengal Land Registration Act (VII of 1876), S. 53; Bengal Sanitary Drainage Act (VIII of 1895), S. 29; Bengal Survey Act (V of 1875) S. 50; the Calcutta Improvement Act (V of 1911), S. 71 (c); the Chota Nagpur Tenancy Act (Bengal Act, VI of 1908), S. 265 (8); the

Broach and Kaira Incumbered Estates Act (Bombay Act XXI of 1881), S. 35; the Bombay Local Boards Act (VI of 1923), S. 128 (2); the Sind Incumbered Estates Act (Bombay Act XX of 1896), S. 37; the Burma Boundaries Act (V of 1880), S. 15; the Burma Forest Act (IV of 1902), S. 9 (i) (b); the Orissa Tenancy Act (II of 1913), S. 67 (10); the Oudh Taluqdars' Relief Act, (XXIV of 1870), S. 14; the Sikh Gurdwaras and Shrines Act (Punjab Act VI of 1922), S. 24 (4); the Bundelkhand Encumbered Estates Act (U. P. Act I of 1903), S. 34; the U. P. Town Improvement Act (II of 1914), S. 56 (c).

**Note 2**

1. (1872) 7 Ch App 312, *Hadley v. Macdougall*.

2. (1849) 1 Mac & G 627 (636), *Reid v. Langlois*.  
(Cited in 1 Bom 496.)

3. (1883) 10 QBD 465 (467), *Kearley v. Phillips*.  
(Cited in 9 Bom L R 569.)

(1889) 1889 Cr J Ph 114 (125), *Murray v. Walter*.  
(Cited in 1 Bom 496.)

4. (1848) 7 Hare 299 (304, 305), *Griffith v. Bickels*.  
(Cited in 5 B H O R (OC) 152.)

(1868) 5 Bom H C R (OC) 152 (155).

the agent of the Secretary of State for India in Council in a particular suit, it cannot be said that every document in the possession of the Collector in one capacity or other is in his possession in his capacity as agent of the Secretary of State for India in Council in such suit. No order can therefore be made for the production of documents which are not in the possession of the Collector in his capacity as the agent of the Secretary of State for India in Council in the suit.<sup>5</sup> Documents filed in Court are not in the possession or power of a party; they are in the possession and power of the Court.<sup>6</sup>

**3. "Relating to any matter in question in such suit."** — The order under this rule is to be limited to such documents alone as relate to the *matters in dispute* and the Court must, before it makes the order, determine, for the purpose thereof, what are the matters in question in the suit.<sup>1</sup> Every document which will throw any light on the case comes within the meaning of these words.<sup>2</sup> Where, in a suit on a promissory note, the defendant puts in no defence, it is impossible to say whether it is necessary to examine the plaintiff's accounts or not and hence, in such cases, there is no justification for an order directing the plaintiff to produce his accounts.<sup>3</sup> In a suit for accounts, the Court cannot under this rule call upon the defendant to show in detail the income and expenditure of the estate in suit until the decision of the suit. In other words, a Judge cannot invoke the aid of this rule for the purpose of *bringing into existence* a document which may be useful for the case.<sup>4</sup> Copies of income-tax returns cannot be ordered to be produced under this Section as such returns are confidential documents under Section 54 of the Income-tax Act.<sup>5</sup>

**4. Effect of Sections 163 and 164 of the Evidence Act.** — These Sections appear in the chapter dealing with the examination of witnesses at the trial of the suit. Under Section 163, when a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the former party, he is bound to give it as evidence if the latter party requires him to do so. Under Section 164, when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court. In the undermentioned case<sup>1</sup> the High Court of Madras raised, but did not decide, the question whether Section 163 was applicable to documents produced under the discovery procedure enacted in this rule or whether it only applied to documents produced after the trial had begun.

**5. Waiver of privilege.** — A party may waive his privilege and produce the documents for which he can claim exemption.<sup>1</sup> Such waiver may be either with reference to the *whole* document or to a *portion* thereof.<sup>2</sup> Where a party expressly refers to documents in the pleadings as the source of his own information and knowledge of facts relevant to the suit and then sets up these facts by way of answer to the plaintiff's claim, he cannot afterwards contend that the documents are confidential and intended

5. ('89) AIR 1989 Mad 52 (52, 53).

6. ('86) AIR 1986 Nag 180 (181) : I L R (1986) Nag 142.

**Note 3**

1. ('09) 4 Ind Cas 864 (866) (Cal). (Relating to any matter in question in such suit.)  
(1882) 11 Q B D 55 (62). *Compagnie Financiere v. Peruvian Guano Co.*  
(12) 14 Ind Cas 51 (52) (Cal).

2. (1882) 11 Q B D 55 (62). *Compagnie Financiere v. Peruvian Guano Co.*

3. ('87) AIR 1987 Nag 186 (187) : I L R (1987)

Nag 266. (Until it is known what the plea is and what the points at issue are it is impossible to say that the plaintiff's accounts are relevant.)

4. ('12) 14 Ind Cas 51 (52) (Cal).

5. ('88) AIR 1988 Rang 276 (277) : 1988 Rang L R 248.

**Note 4**

1. ('28) AIR 1928 Mad 607 (608).

**Note 5**

1. (1898) 1 Q B 759 (761). *Calcraft v. Guest.*

2. (1884) 27 Ch D 1 (24). *Lycell v. Kennedy.*

**O. 11 R. 14**  
**Notes 5-8**

merely for his legal advisers or for the purpose of evidence in the case,<sup>3</sup> but the fact that a portion of a privileged document is read to the plaintiff's solicitor by the defendant's solicitor does not amount to a waiver of the privilege as regards the parts not so read.<sup>4</sup>

**6. Partner.** — One partner of a firm represents the other partners for the purpose of production of documents<sup>1</sup> and a notice to one is notice to all the defendants when they are sued as a firm.<sup>2</sup>

**7. Copies of documents produced, if can be taken.** — See Rule 15 below.

**8. Revision.** — Orders granting<sup>1</sup> or refusing<sup>2</sup> production are discretionary orders which will not be interfered with in revision except where the lower Court has not understood the provisions of the rule<sup>3</sup> or has acted on an erroneous assumption<sup>4</sup> or makes the order without jurisdiction<sup>5</sup> or under such circumstances as are likely to cause irreparable injury to one of the litigants.<sup>6</sup>

**O. 11 R. 15**

**R. 15.** [S. 131.] Every party to a suit shall be entitled

*Inspection of documents referred to in pleadings or affidavits.*

at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

[1877, S. 131; R. S. C., O. 31 R. 15. See R. 16.]

### *Synopsis*

**1. Scope of the Rule.**

**2. "At any time."**

**3. Documents referred to in the pleadings or affidavits.**

3. ('95) 22 Cal 105 (111).

4. ('80) 4 Bom 631 (634).

**Note 6**

1. ('76) 1 Bom 496 (499).

('22) 65 Ind Cas 661 (664) (Lah).

2. ('22) 65 Ind Cas 661 (664) (Lah).

**Note 8**

1. ('86) 9 Mad 256 (257).

('11) 12 Ind Cas 506 (507) (Lah).

**4. Who can inspect under this rule.**

**5. Copies of documents produced, if can be taken.**

2. ('11) 9 Ind Cas 672 (672) (Mad).  
( '07) 80 Mad 280 (290).

3. ('24) AIR 1924 Mad 846 (846) : 47 Mad 934.

4. ('89) AIR 1989 Mad 52 (53).

5. ('88) AIR 1988 Rang 276 (277): 1988 Rang L R 248. (Order for obtaining and producing copies of income-tax returns—Order is without jurisdiction.)

6. ('09) 4 Ind Cas 864 (867) (Cal).

*Other Topics (miscellaneous)*

Order not revisable. See Notes 1 and 2.

Right to seal a portion. See Note 8.

**O. 11 R. 18**  
**Note 1**

**1. Scope of the Rule.** — Rules 15 to 18 deal with inspection of documents. Documents may, for the purposes of inspection, be divided into two classes —

- (1) Documents *referred to in the pleadings or affidavits* of the parties.
- (2) Other documents in the possession or power of the party but *not so referred to*.

As regards the *first* class of documents a party may, without the intervention of the Court, give notice to the party in whose pleadings they are referred to, to produce such documents for his inspection (Rule 15). The party to whom such notice is given should, within ten days from the receipt of such notice, give notice to the party claiming such inspection stating the time and place at which the documents may be inspected and stating his objections, if any, to the production of any of the documents (Rule 17). If he fails to do so in the manner required by Rule 17, the other party may apply to the Court for an *order* for such inspection [Rule 18, sub-rule (1)], and the Court should grant such inspection unless the documents are privileged in law or relate exclusively to the case of the party producing them and contain nothing supporting or tending to support the opponent's case.<sup>1</sup>

As regards the *second* class of documents the party desiring the inspection can only proceed by way of an *application to the Court* along with an *affidavit showing the relevancy* of the documents.<sup>2</sup>

A Court has no jurisdiction to order inspection of documents except as provided in Rules 15 to 18.<sup>3</sup> The privilege of inspection by a party of his adversary's documents is not a matter of routine but is to be permitted or refused only on *judicial considerations* and so as to result in as little harm as possible to the parties who are entitled to have the protection of the Court in carrying on their lawful pursuits.<sup>4</sup> The object of the rule is to give the opposite party the same advantage as if the documents had been fully set out in the pleadings.<sup>5</sup>

By referring to a document in his pleadings, a party does not lose the privilege that he might have claimed in respect of the document. The only result of such reference is that, if the party referring to it fails to produce it for inspection to the other side on notice, he cannot use it in evidence at the trial. Even in such a case, the Court may, if sufficient cause is shown by the defaulting party, allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.<sup>6</sup> Where documents are objected to on the ground of immateriality the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality.<sup>7</sup> A party who fails to comply with a notice under this rule is not absolved from the penalty prescribed thereby merely because the party giving the notice has not proceeded to apply to the Court for an *order* for inspection under Rule 18 *infra*.<sup>8</sup>

**Order 11 Rule 15—Note 1**

1. ('07) 30 Mad 230 (230). (Order refusing inspection not revisable.)

See Note 1 to Rule 18.

2. ('98) AIR 1938 Nag 239 (240).

[See ('08) 32 Bom 152 (154).]

3. ('02) 4 Bom L R 342 (350).

4. ('24) AIR 1924 Mad 846 (847) · 47 Mad 934.

5. ('84) 10 Cal 808 (813, 814).

- (1862) 1 Bom H C R 114 (117). (Case of next

of kin entitled to succeed but for the will.)

- 1 Ind Jur (NS) 323.

('35) AIR 1935 Mad 234 (236) (Object of the rule is that a party is not to have accounts sprung on him at the time of trial, the contents of which he had no opportunity to acquaint himself with beforehand.)

6. ('98) 17 Bom 581 (584).

7. ('01) 28 Cal 424 (426).

8. ('35) AIR 1935 Mad 234 (235).



**O. 11 R. 16**  
**Notes 1-3**

The fact that the accounts referred to by the plaintiff in his plaint would be required by him every day is no reason for not giving inspection of the same to the defendant.<sup>9</sup> Such a case is clearly provided for in Rule 17 *infra*.

**2. "At any time."** — Where a document is referred to in the pleadings or affidavits of a party, the opposite party is entitled as of right to claim inspection thereof<sup>1</sup> even before the filing of the written statement.<sup>2</sup> But no inspection will, as a *general* rule, be ordered of documents other than those referred to in the pleadings or affidavits, till after the written statement is filed.<sup>3</sup>

Whether the defendant desires to inspect the documents referred to in the pleadings or he desires to inspect *other* documents, he should proceed promptly, and delay on his part to take the necessary steps for such inspection may itself be a good ground for refusing to allow him time to file the written statement.<sup>4</sup>

**3. Documents referred to in the pleadings or affidavits.** — Pleadings include particulars<sup>1</sup> and affidavits will include an affidavit of documents,<sup>2</sup> affidavits of answers to interrogatories<sup>3</sup> and exhibits forming part of the affidavit<sup>4</sup> as also an affidavit intended to be filed but not filed and of which a copy has been given to the other side.<sup>5</sup>

The documents need not have been identified or particularly described in such pleadings or affidavits; it is enough if they have been referred to generally.<sup>6</sup> But a party is not entitled to inspect the documents incidentally referred to in the pleadings of the opposite party if they are *not material* for the case of either party.<sup>7</sup> There is a difference of opinion as to whether a document referred to in the plaint in the list attached thereto under the provisions of O. 7 R. 14, sub-rule (2) is one that can be said to be *referred to* in the pleadings. It has been held by the High Courts of Bombay<sup>8</sup> and Madras<sup>9</sup> following the English case of *Quilter v. Heatley*<sup>10</sup> that such a document *is* one referred to in the pleadings. The High Courts of Calcutta<sup>11</sup> and Nagpur<sup>12</sup> have, on the other hand, held that the list annexed to the plaint is not part of the plaint itself and consequently documents referred to in such list cannot be said to be referred to in the pleadings.

Where entries in a book are referred to in the pleadings, inspection will be limited to those entries.<sup>13</sup> The rule does not apply to *copies* of documents referred to though they may be in the possession of the party.<sup>14</sup> Where the plaintiff has made an affidavit of documents at the instance of one defendant and another defendant desires to inspect them, he is entitled to do this, subject to the right of the plaintiff to seal up such portions of the documents as do not relate to the matters in issue or to the case of the

9. ('85) AIR 1985 Mad 234 (235).

**Note 2**

1. ('11) 12 Ind Cas 506 (507) (Lah). (Document put in sealed cover—Order for inspection not reversible.)

[See ('20) AIR 1920 Cal 416 (417). (Where the point is implied.)]

2. ('94) 18 Bom 368 (369).

('38) AIR 1938 Nag 239 (240).

('37) AIR 1937 Sind 97 (98).

3. ('07) 32 Bom 152 (153).

[See ('38) AIR 1938 Nag 239 (240). (In exceptional cases the Court may order such inspection to be allowed but in such cases the procedure under Rule 18, sub-rule (2) should be followed.)]

4. ('38) AIR 1938 Nag 239 (241).

**Note 3**

1. (1884) 1884 W N 18, *Cass v. Fitzgerald*.

(1900) 1 Ch 876 (883, 884), *Milbank v Milbank*.  
(*Vide* Rule 18 (2).)

2. (1903) 1 Ch 191 (195), *Parady's Mozambique Syndicate v. Alexander*.

[See also ('11) 12 Ind Cas 12 (12, 13): 38 Cal 428.]

3. (1891) 2 Q B 707 (708), *Moore v. Peachey*.

4. (1895) 1 Ch 117 (120), *Re Hinchcliffe*.

(1891) 28 L R Ir 489, *Hunder v. Dublin etc., Ry. Co.*

5. (1897) 1 Q B D 667 (669), *Re Fenner & Lord*.

6. (1883) 48 L T 869, *Smith v. Harrie*.

7. ('28) AIR 1928 Bom 73 (74): 46 Bom 866.

8. ('94) 18 Bom 368 (369).

('08) 32 Bom 152 (153).

9. ('31) AIR 1931 Mad 825 (826): 55 Mad 421.

10. (1883) 23 Ch D 42 (48).

11. ('20) AIR 1920 Cal 416 (417).

12. ('38) AIR 1938 Nag 239 (240).

13. (1888) 23 Ch D 42 (49), *Quilter v. Heatley*.

14. (1888) 23 Ch D 42 (49), *Quilter v. Heatley*.



defendant applying.<sup>15</sup> Under the Original Side Rules of the Madras High Court a defendant is entitled to be furnished with a copy of the document sued on and which is deposited with the plaint.<sup>16</sup> **O. 11 R. 16**  
**Notes 3-5**

**4. Who can inspect under this Rule.** — The party, his authorised agent, and his pleader, can inspect the documents under this rule.<sup>1</sup> But a former employee of a party in charge of his books cannot be engaged by opposite party for such purpose. The Court will not ordinarily allow such persons to inspect.<sup>2</sup> The term "agent" does not include a professional accountant appointed for the purpose<sup>3</sup> though, in proper cases, the Court will allow inspection by an accountant or other expert.<sup>4</sup> Inspection by a witness is not usually allowed.<sup>5</sup> The costs of inspection are to be paid by the party inspecting though under exceptional circumstances such costs may be made costs in the cause.<sup>6</sup>

**5. Copies of documents produced, if can be taken.** — The right to inspection includes a right to take copies of documents produced,<sup>1</sup> unless they relate exclusively to the case of the party producing them and contain nothing to support his adversary's case.<sup>2</sup> The right to take copies is confined to all relevant and unprivileged documents.<sup>3</sup> In a proper case, the Court will order photographs to be taken.<sup>4</sup>

**R. 16.** [New.] Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require. **O. 11 R. 16**  
**Notice to produce.**

[R. S. C., O. 31 R. 16. See R. 15.]

**1. Notice to produce.** — Form No. 7 in Appendix C is identical with Form No. 9 of Appendix B of the English Rules of the Supreme Court. It has been held under these rules that the Form must be followed as closely as possible, but that it is not necessary to use the very words thereof.<sup>1</sup> The same observation applies to Form No. 6 also.<sup>2</sup>

15. (1908) 1 Ch 191 (195), Parady's Mozambique Syndicate v. Alexander.

16. ('98) 21 Mad 490 (491).

**Note 4**

1. (1857) 23 Beav 388 (389), Williams v. Prince of Wales Life Insurance Co.

(1875) 44 L J Ch 402 (408), Costa Rica Republic v. Erlanger.

2. ('98) 25 Cal 294 (297).

('24) AIR 1924 Mad 846 (847) : 47 Mad 934.

3. (1861) 30 L J Ch 286 (288), Draper v. Manchester etc., Ry. Co.

4. (1866) 2 Fq 274 (275), Swansea Vale Railway Co. v. Budd.

5. (1868) 8 Ch App 818 (820), Boyd v. Petue.

6. ('09) 2 Ind Cas 422 (428) (Bom).

(1872) 7 O P 352 (354), Peru v. Wegurlin.

**Note 5**

1. (1905) 1 Ch 505 (512), Ormerod v. St. George's Iron Works, Ltd.

(1882) 47 L T 249, Pratt v. Pratt.

(1901) 2 Ch D 59 (74), Bevan v. Webb.

('09) 4 Ind Cas 364 (367) (Cal).

('07) 80 Mad 230 (231).

2. ('07) 30 Mad 230 (231).

3. (1916) 140 L T 874, Siddely Deasy Motor Car Co. v. Thompson.

4. (1898) 2 Q B 191 (192), Lewis v. The Earle of Londonborough.

**Order 11 Rule 16 — Note 1**

1. (1879) 11 Ch D 256 (260), Re Credit Co.

2. ('22) AIR 1922 All 285 (287) : 44 All 565.

O. 11 R. 17

**R. 17.** [S. 132.] The party to whom such notice is givenTime for inspection  
when notice given.

shall, within ten days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

[R. S. C., O. 31 R. 17.]

*Synopsis*

1. **Scope of the Rule.**
2. **"Usual place of custody."**
3. **Bankers' books.** See Order 7 Rule 17 and Rule 18 of this Order.

**1. Scope of the Rule.** — This rule only comes into operation after a notice under Rule 15 has been given. It applies to all documents mentioned in Rule 15.<sup>1</sup> In *Dhapi v. Ram Pershad*<sup>2</sup> it has been held by the High Court of Calcutta that the correct rule of procedure is that if a party does not desire to produce documents he should refrain from delivering the notice under the rule but wait to see if the plaintiff applies under Rule 18. It has also been held that, when the notice was served at a time when the suit was stayed, the ten days' time begins to run only from the date the suit is revived.

**2. "Usual place of custody."** — This rule clearly specifies the place of inspection with regard to bankers' books and business books. The words in the old Code "some other convenient place" gave room for discussion and controversy which has now been removed. Where, in a suit instituted in Bombay for breach of a contract to gin cotton in the defendant's mill at Broach, the plaintiff applied for inspection of the defendant's account books in Bombay but the defendant offered to give inspection in Broach, it was held that the latter place was the place where the books were kept and was the proper place for inspection.<sup>1</sup> The Court is not a proper place to offer the inspection of account books.<sup>2</sup>

**3. Bankers' books.** — See Order 7 Rule 17 and Rule 18 of this Order.

O. 11 R. 18

**R. 18.** [Ss. 133, 134.] (1) Where the party served with

Order for inspection.

notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the

**Order 11 Rule 17 — Note 1****Note 2**

1. (1897) 1 QB 667 (669, 670), Re Funner and Lord.
2. ('87) 14 Cal 768 (777).

1. ('81) 5 Bom 467 (469).
2. ('85) AIR 1935 Mad 284 (285).

Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

**O. 11 R. 18**  
**Note 1**

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[1877, Ss. 133, 134; R. S. C., O. 31 R. 18.]

### Synopsis

- |                                     |                                 |
|-------------------------------------|---------------------------------|
| 1. Scope of the Rule.               | 4. Appeal.                      |
| 2. Discretion of Court.             | 5. Bankers' Books Evidence Act. |
| 3. Convenient place for inspection. |                                 |

### Other Topics (miscellaneous)

Denial of possession or power conclusive. See Note 1.

Notice prior to order under sub-rule (2). See Note 1.

**1. Scope of the Rule.** — Sub-rule 1 of this rule deals with inspection of documents referred to in the pleadings or affidavits of the parties. Sub-rule 2 deals with inspection of documents *other* than those mentioned in sub-rule 1. The difference between the two cases is that, in the case of documents not mentioned in the pleadings or the affidavits, *an affidavit has to be filed* by the applicant satisfying the Judge that the document is relevant to the case.<sup>1</sup> In the case of documents so mentioned, the relevancy is *admitted* while in the other case, the relevancy has to be proved.<sup>2</sup> The filing of the affidavit under sub-rule 2 is, however, not always necessary, when the Judge is satisfied as to the relevancy of the document; at any rate, the want of an affidavit cannot invalidate an order passed under this rule.<sup>3</sup> On the other hand, the filing of an affidavit does not entitle a party *immediately* to an order for inspection.<sup>4</sup> The Court should give the opposite party an opportunity of replying by an affidavit the application for inspection, and if the opposite party swears an affidavit that the documents are not in his possession or power, the Court will regard this as final and conclusive.<sup>5</sup> This is in consonance with the general rule that the Courts will not go

#### Order 11 Rule 18 — Note 1

1. ('31) AIR 1931 All 221 (222) : 58 All 442.  
(196) 23 Cal 117 (125).

[See also ('05) 1905 All W N 62 (62).]

2. ('31) AIR 1931 All 221 (222) : 58 All 442.

3. ('31) AIR 1931 All 221 (222) : 58 All (442).

[See however ('22) AIR 1922 All 235 (237) : 44 All 565. (Court cannot order inspection under sub-rule 2 without affidavit.)]

4. ('20) AIR 1920 Pat 131 (135) : 5 Pat L Jour 550.

5. ('96) 23 Cal 117 (127).

('20) AIR 1920 Pat 131 (135) : 5 Pat L Jour 550.

**O. 11 R. 18**  
**Notes 1-5**

behind the oath of the party against whom inspection is sought.<sup>6</sup>

An order under sub-rule 1 cannot be made unless notice has been given under the provisions of R. 15<sup>7</sup> and no party is entitled to an inspection of documents not referred to in the pleadings or affidavits without an *order* under sub-rule 2.<sup>8</sup> Nor is he entitled to a roving commission into papers belonging to the other side; the inspection must be restricted to such *specific* documents as the applicant names and which are relevant to his case.<sup>9</sup> A party who fails to comply with a notice under Rule 15 above incurs the penalty prescribed thereby. The fact that the party giving the notice has not proceeded to apply to the Court under sub-rule 1 of this rule for an *order* for inspection does not negative the liability for the penalty laid down by Rule 15.<sup>10</sup>

Where parties require the inspection or production of telegraphic messages, it is for them and not the Court to obtain the necessary sanction from Government.<sup>11</sup>

**2. Discretion of Court.** — Under sub-rule 1, the Court has a discretion limited to the terms of the proviso, in making an order for inspection and the *onus* rests on the party resisting an order, to show that it should not be made in the special circumstances of the case; but it would not be a proper exercise of discretion to refuse inspection on the general ground that it was sought before the written statement was filed; nor can the mere number of the documents afford any guide to the exercise of discretion.<sup>1</sup>

**3. Convenient place for inspection.** — In deciding a question as to the place where the inspection of documents is to be given, the Court should be guided by the balance of convenience.<sup>1</sup> See also Order 11 Rule 17 and Notes thereto.

**4. Appeal.** — No appeal lies under the Code from an order for inspection under this rule; nor does it lie under Clause 15 of the Letters Patent, as an order directing inspection to be given is not a "judgment."<sup>1</sup>

**5. Bankers' Books Evidence Act.** — The main object of this Act is to enable evidence to be procured and given<sup>1</sup> and to relieve bankers from attendance in Court with their books.<sup>2</sup> The party whose account is sought to be inspected may oppose the application on any ground on which inspection of ordinary documents could be resisted.<sup>3</sup>

(<sup>24</sup>) AIR 1924 All 510 (511) : 46 All 417.

(<sup>11</sup>) 12 Ind Cas 12 (18) : 38 Cal 428. (But he cannot merely rely on his previous affidavit of documents in answer to an application under this sub-rule.)

[See also (<sup>98</sup>) 2 Cal W N 17 (18). (Falsity of denial of possession can be elicited at trial and then inspection ordered.)

6. (1890) 24 QBD 537 (541), Wiedeman v. Walpole.

7. (<sup>26</sup>) AIR 1926 Sind 272 (272) : 20 Sind L R 309.

(<sup>87</sup>) 14 Cal 768 (776, 777).

(<sup>84</sup>) 10 Cal 56 (58).

8. (<sup>12</sup>) 14 Ind Cas 51 (52) (All).

9. (<sup>28</sup>) AIR 1928 Mad 1098 (1094).

(<sup>17</sup>) 14 Ind Cas 371 (372) (Lah). (Exposure of trade secrets.)

10. (<sup>35</sup>) AIR 1935 Mad 234 (235). (There is absolutely nothing in Rule 18 to suggest that it is a pre-requisite to Rule 15.)

11. (<sup>70</sup>) 2 N W P H O R 210 (214).

**Note 2**

1. (<sup>31</sup>) AIR 1931 Mad 825 (828) : 55 Mad 421.

[See also (<sup>82</sup>) AIR 1932 Mad 284 (285, 286, 287) : 55 Mad 704. (Inability to particularise instances of fraud or error under O. 6 R. 4 is no ground for refusing inspection of accounts of opposite side—Nor lateness of application which can be met by order for costs if there is no prejudice.)]

**Note 3**

1. (<sup>35</sup>) 39 C W N 667 (668) : 164 Ind Cas 791.

**Note 4**

1. (<sup>72</sup>) 9 Bom H O R 398 (408, 412).

(<sup>09</sup>) 2 Ind Cas 167 (167) (Bom).

**Note 5**

1. (1892) 62 L J Q B 77 (79), Emmott v. Star Newspaper Co.

(1918) 29 T L R 635, R. v. Bona.

2. (1892) 1892 P 137 (139), Parwell v. Wood. (Cited in 5 Bom L R 865.)

(1924) 2 K B 759 (763), Waterhouse v. Barker.

3. (1924) 2 K B 759 (764), Waterhouse v. Barker.

**R. 19.** [New.] (1) Where inspection of any business books is applied for, the Court may, if it thinks

O. 11 R. 19.

Verified copies.

fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

[R. S. C., O. 31 R. 19A.]

*Synopsis*

1. Scope of the Rule.
2. Inspection by the Judge — Sub-rule (2).
3. Specific documents — Sub-rule (3).

1. **Scope of the Rule.** — Sub-rule (1) applies particularly to bankers' books.<sup>1</sup>

2. **Inspection by the Judge — Sub-rule (2).** — This rule gives the Court power to inspect any document for which privilege is claimed so as to decide whether the claim is justified,<sup>1</sup> the object being that such claims ought to be decided at once in

**Order 11 Rule 19—Note 1****Note 2**

1. *Vide* Halsbury's Laws of England, Vol. 11, page 91.

1. (1918) 8 K B 850 (856), Birmingham etc., Motor Omnibus Co. v. L. & N. W. Ry. Co.

**O. 11 R. 19**  
**Notes 2-3**

proper cases.<sup>3</sup> The power exists even in respect of state documents and official communications and notwithstanding a certificate from a Minister of State claiming protection, provided of course that such power be exercised so as not to destroy the protection of the privilege in any case in which it may be found to exist.<sup>3</sup> The word "document" includes also a sealed-up portion of a document.<sup>4</sup>

**3. Specific documents — Sub-rule (3).**—The rule enlarges the power to order discovery.<sup>1</sup> In order to justify an application under this sub-rule, the affidavit must name and specify the documents in such a manner as to identify them; an affidavit in a general form containing an argument that the document must be in the possession or power of the opposite party is not sufficient.<sup>2</sup> A *prima facie* case of relevancy and possession of the specific document is, however, sufficient to entitle the applicant to the order.<sup>3</sup>

**O. 11 R. 20**

**R. 20.** [S. 135.] Where the party from whom discovery

Premature discovery.

of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

[1877, S. 135; R. S. C., O. 31 R. 20.]

**1. Scope of the Rule.** — The general principle of discovery is that discovery should not be granted beyond the exigency of the question in issue. It is also desirable to obviate the necessity of a troublesome inspection and discovery which would very much increase the costs of the suit. This rule empowers the Court to determine an issue for the exclusive purpose of deciding the right to discovery of documents which is to be used at the trial.<sup>1</sup> The Court has also a discretion to postpone discovery or inspection until some issue in the suit is determined.<sup>2</sup> The rule, however, does not apply where discovery is wanted for the determination of the issue in the suit.<sup>3</sup> An order under this rule is not a 'judgment' and no appeal lies therefrom.<sup>4</sup>

2. (1896) 2 Ch 826 (829), *Ehrmann v. Ehrmann*.  
3. ('91) AIR 1981 P C 254 (259) (PC).

4. (1896) 2 Ch 826 (829), *Ehrmann v. Ehrmann*.

**Note 3**

1. (1910) 1 K B 904 (915), *Kent Coal Concessions v. Duguid*.

2. (1901) 2 K B 241 (245), *White v. Spaffora & Co.*  
(1901) 18 T L R 115, *Graves v. Heinemann and Armstrong*.

(1911) 1911 W N 34 (34), *Huntly v. Backworth Collieries*.

3. (1907) 95 L T 694, *Ormerod v. St. George's Iron Works*. (A case of a letter produced referring to another letter.)

**Order 11 Rule 20—Note 1**

1. ('82) 6 Bom 572 (578).

(1881) 18 Ch D 477 (488), *Parkar v. Wells*.

2. ('10) 8 Ind Cas 107 (118): 88 Cal 280.

(1879) 27 W R (Eng) 677, *Tasmanian Main Line Co. v. Clark*.

(1884) 26 Ch D 717 (721), *Whyte v. Ahren*.

3. (1886) 81 Ch D 874 (877), *Leitch v. Abbott*.

('82) AIR 1982 Mad 284 (286): 55 Mad 704. (Suit on basis of settlement of accounts — Defendant seeking to re-open the accounts on ground of fraud—Accounts exclusively in plaintiff's possession — Defendant may be allowed inspection although he is not able to give particulars as to misconduct.)

('85) AIR 1985 Mad 288 (289). (O. 11 R. 20 does not operate as a bar to discovery, when for determining the very issue of a settled account, the discovery or production of documents is essential.)

4. ('02) 4 Bom L R 842 (847).

**R. 21. [S. 136.]** Where any party fails to comply with **O. 11 R. 21**

Non-compliance with  
order for discovery.

any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

[1877, S. 136; R. S. C., O. 31 R. 21. See Rr. 11, 12 and 18.]

### Synopsis

1. Scope of the Rule.
2. Committal for contempt.
3. Appeal.

4. Review.
5. Order, if can be set aside under O. 9 R. 9 or Rule 13.

### Other Topics (miscellaneous)

Conditions needed for order under this rule. See Note 1.

Leave under R. 2 not an "order to answer." See Note 1.

Non-applicability of the rule to production of documents. See Note 1.

**1. Scope of the Rule.**—There are only three grounds upon which a trial Court is justified, under this rule, in striking off the defence of the defendant or dismissing the suit of a plaintiff, namely—

- (1) the refusal to answer interrogatories under R. 11 ;
- (2) the refusal to make discovery of documents under R. 12 ; and
- (3) refusal to permit inspection of documents under R. 18.

In the absence, therefore, of an order under Rules 11, 12 or 18 and the disobedience thereof by the party against whom the order is made, the Court cannot act under this rule.<sup>1</sup> An order for *production* of documents under Rule 14 is not one of the orders mentioned in this rule, the word "production" which occurred after the word "discovery" in Section 136 of the old Code having been omitted in the present rule. There is, however, a difference of opinion as to whether a disobedience of an order for *production* under Rule 14 would empower the Court to take action under this rule. The High Court of Allahabad,<sup>2</sup> Madras<sup>3</sup> and Lahore<sup>4</sup> have held that the Court has no such

### Order 11 Rule 21 — Note 1

1. ('22) AIR 1922 All 235 (237) : 44 All 565.
- ('28) 112 Ind Cas 285 (285) (All).
- ('24) AIR 1924 Cal 806 (807).
- ('11) 12 Ind Cas 719 (719) (Mad).
- ('08) 7 Cal L Jour 295 (298).
- (1875) 1875 W N 201, Twycroft v. Grant.
- (1875) 1875 W N 229, Twycroft v. Grant.
- (1876) 1876 W N 193, Hartley v. Owen. (Failure to answer an interrogatory.)
- ('26) AIR 1926 All 558 (558).
- ('05) 8 Oudh Cas 172 (173). (Acting under this rule without an order for discovery, etc., is wrong.)
- ('15) AIR 1915 All 350 (351) : 33 All 5. (Do.)
- ('25) AIR 1925 Bom 886 (886, 887). (Do.)
- ('26) AIR 1926 Sind 272 (272) : 20 Sind L R 309 (Do.)

- ('18) AIR 1918 All 308 (304) (Do.)
- ('87) 14 Cal 768 (776, 777). (Do.—A strict compliance of the term of R. 18 (2) is necessary.)
- ('91) 18 Cal 420 (421) (FB). (Do.—Leave granted under Rule 2 is not an order to answer.)
- ('15) AIR 1915 All 196 (196). (Suit can be dismissed for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleading or affidavits.)
2. ('22) AIR 1922 All 235 (237) : 44 All 565.
- ('28) 112 Ind Cas 285 (285) (All).
- ('29) AIR 1929 All 83 (83).
3. ('24) AIR 1924 Mad 582 (583).
- ('33) AIR 1933 Mad 870 (870).
4. ('33) AIR 1933 Lah 248 (249).

O. 11 R. 21  
Note 1

power, while an opinion in the nature of *obiter dictum* has been expressed by the High Court of Lahore in the undermentioned case<sup>6</sup> that the Court has such power. The Court cannot strike out the defendant's defence for his failure to file a *written statement* as directed by the Court<sup>6</sup> or to *appear for examination as a witness* for the opposite side.<sup>7</sup> Nor can it be struck off for failure of the legal representative of a deceased defendant to comply with an order against the said defendant.<sup>8</sup>

The Court cannot, under this rule, act of *its own motion*, but can only do so on the application of the parties.<sup>9</sup> And even where the parties apply for an order under this rule the Court should not impose the penalty except in extreme cases and as a last resort.<sup>10</sup> It should be ordered only where the Court is satisfied that the party is avoiding a fair discovery<sup>11</sup> or is guilty of wilful default.<sup>12</sup> The word "wilfully" means that the act is done deliberately and intentionally and not by accident or inadvertence.<sup>13</sup> Thus, where the time allowed by law to answer interrogatories (ten days) has not expired and the defendant asks for further time, an order striking off the defence is improper.<sup>14</sup> Similarly, the failure to produce one out of many books ordered to be produced,<sup>15</sup> or the non-production of account books by a minor defendant,<sup>16</sup> or the failure to produce documents by a *pardanashin* lady,<sup>17</sup> or where the plaintiff is not in a position to make an affidavit of documents as ordered, the Court should not inflict the penalty under this rule.<sup>18</sup> An order for giving inspection "forthwith" must be complied with within a reasonable time after the order.<sup>19</sup>

Order 11 Rule 14 contemplates an order for the production of documents which are in the possession or power of the party ordered to produce them. Where the documents have been filed in Court, they cannot be said to be in the possession or power of the party. Hence, in respect of such documents, the Court has no power to take action under Rule 14 and this rule.<sup>20</sup>

On an application made for taking action under this rule, the Court should give an opportunity to the other side to put in his reply; an order dismissing the suit or striking off the defence without giving such opportunity is improper.<sup>21</sup>

The terms of the rule contemplate *two* orders; *first* an order under Rr. 11, 12 or 18, and *secondly*, upon the failure to comply therewith, a *further* order dismissing the suit or the striking off the defence.<sup>22</sup> But a conditional order for dismissal of the suit or for striking off the defence, on failure to comply with the orders for interrogatories, discovery or inspection cannot be said to be without jurisdiction.<sup>23</sup> Where

5. ('22) 65 Ind Cas 661 (664) (Lah).

6. ('92) 1892 Pun Re No. 59, page 216.

7. ('11) 12 Ind Cas 719 (719) (Mad).

8. ('25) AIR 1925 Bom 386 (387).

9. ('89) 1889 Pun Re No. 80 page 300.

('92) 1892 Pun Re No. 59, page 216.

('10) 8 Ind Cas 245 (245) (Lah).

10. ('88) 9 Cal 923 (925).

('98) 1898 Pun Re No. 60, page 164.

('22) 65 Ind Cas 661 (664) (Lah).

('20) AIR 1920 Pat 181 (185) : 5 Pat L Jour 550.

('80) 5 Cal 707 (710).

('29) AIR 1929 Lah 750 (751) : 11 Lah 209.

('97) 1897 All W N 140 (141).

('85) AIR 1935 Rang 810 (813).

11. ('25) AIR 1925 Cal 166 (168).

12. ('08) 7 Cal L Jour 295 (298).

(1885) 31 Ch D 478 (482), Haigh v. Haigh.

(1889) 23 Q B D 124 (129), Farden v. Richter.

(1889) 61 L T 108, Jennay v. Mackintosh.

('25) AIR 1925 Bom 386 (387).

('29) AIR 1929 Lah 750 (753) : 11 Lah 209.

('85) AIR 1935 Rang 810 (813).

13. ('29) AIR 1929 Lah 750 (753) : 11 Lah 209.

14. ('05) 8 Oudh Cas 172 (173).

15. ('22) 65 Ind Cas 661 (663, 664) (Lah).

[See also ('05) 1905 All W N 62 (68).]

16. ('96) 1896 All W N 156 (157).

17. ('86) 8 All 265 (267).

18. (1881) 7 Q B D 558 (561), Wilson v. Raffalovitch.

19. ('88) AIR 1938 Cal 853 (856) : I L R (1938) 2 Cal 14.

20. ('86) AIR 1936 Nag 180 (181) : I L R (1936) Nag 142.

21. ('24) AIR 1924 All 510 (511) : 46 All 417.

('25) AIR 1925 Bom 386 (387).

('24) AIR 1924 Cal 806 (808).

22. ('25) AIR 1925 Cal 166 (168).

23. ('88) 9 Cal 923 (925).



the defendant fails to comply with an order for discovery, an order allowing him to defend the suit but shutting out all his evidence is not a proper order; the case should be dealt with under this rule and the defence struck out.<sup>24</sup> The infliction of the penalty imposed by this rule after the *whole trial is closed* is improper;<sup>25</sup> nor can a Court of appeal punish a party under this rule where the Court of first instance has not taken any action thereunder.<sup>26</sup> Where a suit has been referred to arbitration and the arbitrators call upon a party to produce certain documents, the proper remedy of the party seeking discovery is to apply to the Court to have the proceedings stayed or the suit dismissed or the defence struck out; the arbitrators are not bound, of their own initiative, to refuse to proceed until the order is complied with.<sup>27</sup>

The last paragraph of Section 136 of the old Code which made the defaulting party liable to a prosecution under Section 188 of the Penal Code<sup>28</sup> has now been omitted. A disobedience of an order for production or inspection can now be dealt with only in the manner prescribed by this rule and is not punishable under the Penal Code.<sup>29</sup>

A Registrar of the High Court has no power under the High Court Rules to dismiss a suit under this rule.<sup>30</sup>

**2. Committal for contempt.** — The Chartered High Courts have, under powers conferred on them by the Letters Patent, power to commit a party to a suit filed in such High Court who has failed to obey an order for discovery or inspection, for contempt of Court.<sup>1</sup> According to the High Court of Bombay an appeal lies from an order of committal for contempt.<sup>2</sup> According to the High Court of Allahabad no such appeal lies.<sup>3</sup>

**3. Appeal.** — Under the old Code, an order under this rule was appealable as a *decree*.<sup>1</sup> Under O. 43 R. 1 (f) of the present Code such an order is appealable only as an *order*.<sup>2</sup> An order under this rule includes an order dismissing a suit or striking off a defence as well as an order *refusing* to dismiss the suit or to strike off the defence; in either case it is open to appeal.<sup>3</sup> But where the Court acts without *jurisdiction* in passing an order under this rule, as where it dismisses a suit for failure to comply with an order to *produce documents* under Rule 14, the order cannot be said to be one passed under this rule; the dismissal in such a case will be a decree and will be appealable as such.<sup>4</sup> Again, where an order, though purporting to be passed under this rule, is really and in substance one under O. 6 R. 5, no appeal lies therefrom.<sup>5</sup>

(1875) 1875 W N 201 (201), Twycroft v. Grant.

(1938) AIR 1938 Cal 353 (355) : 1 L R (1938) 2 Cal 14. (Order that plaintiff should file affidavit within prescribed time and that inspection be given forthwith and that in default suit be dismissed — On default suit is automatically dismissed without further order of dismissal.)

24. (1931) AIR 1931 Pat 114 (122).

25. (1918) AIR 1918 Nag 77 (79).

26. (1900) 1900 Pun Re No. 86, page 184.

27. (1918) AIR 1918 Pat 88 (89); 4 Pat L Jour 394.

28. (1899) 1899 Pun Re No. 80, page 300.

29. (1910) 6 Ind Cas 623 (624) (Lah).

30. (1907) 6 Cal L Jour 374 (378).

#### Note 2

1. (1929) AIR 1929 Cal 117 (118) : 55 Cal 1110.

(1897) 7 Bom 1 (3, 4).

(1897) 7 Bom 5 (18).

2. (188) 7 Bom 5 (12, 15).

3. (1905) 27 All 380 (381).

#### Note 3

1. (198) 1898 Pun Re No. 43, page 151.

(195) 19 Bom 307 (308).

(185) 7 All 159 (160).

2. (1925) AIR 1925 Rang 218 (218) : 3 Rang 63.

(192) AIR 1932 Mad 316 (316, 317). (Appeal against the order under Order 43 will lie notwithstanding that it has resulted in the dismissal of the suit.)

3. (1930) AIR 1930 Cal 426 (427).

4. (1929) AIR 1929 All 83 (83, 84).

5. (1932) AIR 1932 Mad 316 (318). (Mere use of word "interrogatory" will not make an application one under this rule if really it falls under Order 6 Rule 5.)

**O. 11 R. 31**  
**Notes 3-6**

Where a party appeals from an order under this rule in ignorance of the fact that a decree has been passed in the suit itself, the proper procedure is to treat the appeal as one from the decree itself.<sup>6</sup>

**4. Review.** — Where a suit is dismissed for want of prosecution under this rule, the remedy of the aggrieved party is by appeal or by review under the provisions of Order 47.<sup>1</sup> Where, however, the provisions of Order 47 do not apply to the particular order in question, the Court cannot review it under its inherent powers under Section 151 of the Code.<sup>2</sup>

**5. Order, if can be set aside under O. 9 R. 9 or R. 13.** — An order under this rule cannot be set aside under the provisions of Order 9,<sup>1</sup> General.

**O. 11 R. 22****R. 22. [New.]** Any party may, at the trial of a suit, use

Using answers to interrogatories at trial.

in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last mentioned-answers ought not to be used without them, it may direct them to be put in.

[R. S. C., O. 31 R. 24.]

**1. Using interrogatories at the trial.** — The answers to interrogatories are only affidavits and are not by themselves evidence.<sup>1</sup> The party wishing to use them must put them in evidence in the ordinary way.<sup>2</sup> They are, when so put, evidence against the party answering them, though great caution should be exercised in using them as such.<sup>3</sup>

**O. 11 R. 23****R. 23. [New.]** This Order shall apply to minor plaintiffs

Order to apply to minors.

and defendants, and to the next friends and guardians for the suit of persons under disability.

[R. S. C., O. 31 R. 29.]

**1. Application of Order to minors and lunatics.** — This rule is new. Under the old Code, there was a conflict of decisions as to whether the Sections corresponding

6. ('12) 14 Ind Cas 637 (638, 639) (Low Bur.).

**Note 4**

1. ('25) AIR 1925 Rang 218 (218) : 3 Rang 68.  
[See also ('32) AIR 1932 Bom 271 (272). (Court can also set aside under S. 151 of the Code.)]

2. ('27) AIR 1927 Cal 158 (158, 159).

**Note 5**

1. ('25) AIR 1925 Rang 218 (218) : 3 Rang 68.

('98) 2 Cal W N 676 (679).

[See also ('32) AIR 1932 Bom 271 (272). (Court can act under S. 151 of the Code.)]

**Order 11 Rule 22 — Note 1**

1. ('79) 4 Cal 836 (837).

2. ('86) 10 Bom 167 (171).

3. ('18) AIR 1918 Mad 1108 (1107).

(1911) 2 Oh 71 (77), Nash v. Layton.

to this Order applied to minors and lunatics.<sup>1</sup> This rule has now made it clear that the Order does apply to them also. Hence, where the guardian of a minor defendant fails to comply with an order for discovery, the Court is competent to pass an order under Rule 21 *ante* against the minor defendant by virtue of this rule.<sup>2</sup>

**O. 14 R. 23**  
**Note 1**

## ORDER XII.

### ADMISSIONS

**R. 1.** [New.] Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

**O. 12 R. 1**

Notice of admission of case.

[R. S. C., O. 32 R. 1.]

### Synopsis

- |                         |                                 |
|-------------------------|---------------------------------|
| 1. Scope of the Rule.   | 4. Withdrawal of admissions.    |
| 2. Kinds of admissions. | See Rule 2.                     |
| 3. Admission by minor.  | 5. Costs. See Rules 2, 4 and 9. |

**1. Scope of the Rule.** — Under Section 58 of the Evidence Act, facts admitted need not be proved. The adoption of the procedure provided in this Order would result in saving the costs of such proof and in cheapening and shortening litigation.<sup>1</sup> Further, admissions are the strongest evidence possible and even a wrong construction of a document will be assumed to be correct in view of the admission.<sup>2</sup>

Admissions must be taken *as a whole* or not at all.<sup>3</sup> If made subject to a condition, they must be accepted with that condition.<sup>4</sup> But where one portion of a claim is admitted and the other portion denied, the plaintiff is entitled to ask for a judgment on the admitted portion and proceed to trial on the other; there is no rule that he should accept *both* the admission and the denial or must ignore the admission and proceed to trial.<sup>5</sup> The value of an admission is, however, limited by its relevancy under the Evidence Act, and a judgment based upon irrelevant material will not be upheld.<sup>6</sup> Where the lower Court in its judgment makes a statement that certain admissions were made, the Appellate Court will not lightly doubt the statement.<sup>7</sup> The question whether there is a *cause of action* does not depend upon the admission of the defendant, but when the plaint discloses a cause of action, the plaintiff is entitled to get a decree on the admissions of the defence.<sup>8</sup>

#### Order 11 Rule 23 — Note 1

1. ('95) 19 Bom 350 (352). (Yes).
- (86) 10 Bom 167 (171, 172). (No).
- (95) 22 Cal 891 (896, 897). (No).
2. ('35) 39 Cal W N 1029 (1030).

#### Order 12 Rule 1 — Note 1

1. See Statement of Objects and Reasons.
2. ('14) AIR 1914 P O 220 (223) (P O).
3. ('28) 71 Ind Cas 270 (271) (Mad).
- (32) AIR 1932 Cal 39 (40).
- (24) AIR 1924 Nag 129 (131) : 20 Nag L R 68.
- (37) AIR 1937 Pat 418 (421).
- (35) AIR 1935 Pat 24 (28).

(97) AIR 1937 Nag 184 (185) : I L R (1938) Nag 167.

(95) 61 Cal L Jour 80 (82).

(95) AIR 1935 All 946 (948) : 58 All 261 (F B).

4. ('15) AIR 1915 P C 2 (4) : 39 Bom 399 : 42 Ind App 103 (P C).

5. ('18) AIR 1918 Cal 467 (468) : 45 Cal 188.

(26) AIR 1926 Sind 119 (120) : 20 Sind L R 216.

6. ('14) AIR 1914 P O 164 (165) (P C). (Admission by parent in previous suit is not binding on son.)

(26) AIR 1926 Mad 232 (233).

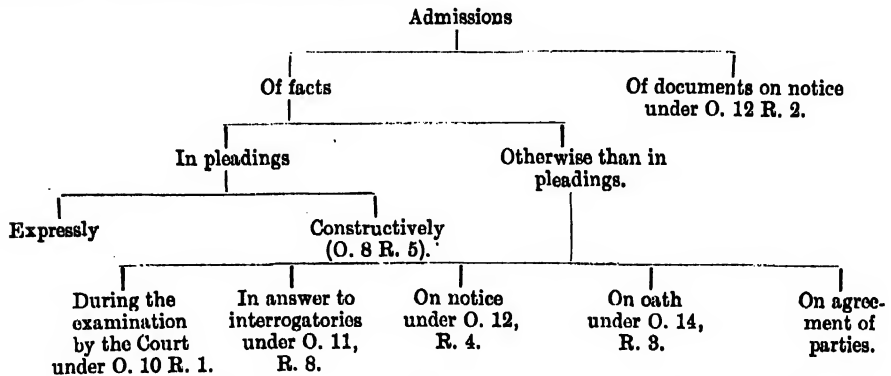
7. ('21) AIR 1921 Cal 584 (591).

8. ('21) AIR 1921 Pat 280 (280).

**O. 12 R. 1**  
**Notes 1-5**

Section 97 of the Estates Partition Act (Bengal Act V of 1897) renders provisions of the Code as to compelling production of documents applicable to enquiries under the said Act.

**2. Kinds of admissions.** — The following tabular statement shows the various kinds of admissions *after* suit that may be made. As to admissions *before* suit, see Sections 17 to 31 of the Evidence Act.



**3. Admission by minor.** — A minor defendant cannot make a valid admission where a guardian *ad litem* has been appointed for him in the suit.<sup>1</sup> In the undermentioned case<sup>2</sup> in which a minor and his father were made co-defendants to a suit and an admission was made by the father on a matter on which the father was best qualified to speak and the minor who was represented by a pleader did not deny the admission, it was held that the minor was bound by the admission. See also Order 8, Rule 5, Note 3.

**4. Withdrawal of admissions.** — See Rule 2, *infra*.

**5. Costs.** — See Rules 2, 4 and 9.

**O. 12 R. 2**

**R. 2.** [S. 128.] Either party may call upon the other party to admit any document, saying all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

[R. S. C., O. 32 R. 2.]

*Synopsis*

1. Object of the Rule.
2. Form of notice. See Rule 8.
3. Notice to admit facts. See Rule 4.

4. Admissions between co-defendants.
5. Withdrawal of admission.

**Note 3**

1. ('16) 82 Ind Cas 868 (868). (U P B R)
2. ('86) AIR 1986 Pat 428 (429).

**1. Object of the Rule.** — The object of the rule is to save the expense of producing, at the trial, evidence as to the documents which are admitted.

**O. 12 R. 2**  
**Notes 1-5**

**2. Form of notice.** — See Rule 3 below.

**3. Notice to admit facts.** — See Rule 4 below.

**4. Admissions between co-defendants.** — Admissions between co-defendants to which the plaintiff is not a party cannot be used as evidence against the plaintiff, or be included in an order for taxation of the general costs of the action.<sup>1</sup>

**5. Withdrawal of admission.** — Leave may be given to withdraw or amend any admissions made by a party, on such terms as may appear just to the Court. Thus, an admission made under a mistake may be allowed to be withdrawn and the plaint amended.<sup>1</sup> But, except under special circumstances, an admission forming the foundation of a judgment should not be allowed to be withdrawn in appeal.<sup>2</sup> An admission on a mixed question of law and fact cannot be allowed to be withdrawn in second appeal.<sup>3</sup>

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**R. 3.** [New.] A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

**O. 12 R. 3**

Form of notice.

[R. S. C., O. 32 R. 3.]

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**R. 4.** [New.] Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

**O. 12 R. 4**

Notice to admit facts.

[R. S. C., O. 32 R. 4]

**Order 12 Rule 2 — Note 4**

Burton.

1. ('84) 25 Ch D 617 (619), *Dodde v. Take*.

2. ('25) AIR 1925 P C 150 (154) (P C).

**Note 5**

1. ('92) 3 Ch 226 (226, 227), *Hollis v.*

3. ('85) AIR 1935 Oudh 163 (164).

O. 12 R. 4  
Notes 1-2

### Synopsis

#### 1. Scope of the Rule. | 2. "Any other party."

**1. Scope of the Rule.** — This rule provides for notice to admit *facts*, as the two previous rules provide for notice to admit *documents*. The penalty for refusing to admit facts pursuant to a notice given under this rule is that the party receiving the notice may be ordered to pay the costs occasioned by proving the facts which ought to have been admitted. A notice to admit facts may be given even before the defence is filed.<sup>1</sup>

**2. "Any other party."** — "It is obvious that only opposite parties can be meant."<sup>1</sup> For the meaning of "opposite party," see Note 11 to Order 11 Rule 1.

O. 12 R. 5

**R. 5.** [New.] A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

Form of admissions.

[R. S. C., O. 32 R. 5.]

O. 12 R. 6

**R. 6.** [New.] Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties : and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Judgment on admissions.

[R. S. C., O. 32 R. 6.]

### Local Amendments

#### MADRAS

1. *Re-number* the existing Rule 6 as sub-rule 6 (1) and *insert* the following as sub-rules (2) and (3) :

"(2) The Court may also of its own motion make such order or give such judgment as it may consider just, having due regard to the admissions made by the parties,

(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced."

#### Order 12 Rule 4 — Note 1

1. (1888) 1888 W N 198 (198), Crawford v. Chorley.

#### Note 2

1. (1885) 16 Q B D 125 (128), Brown v. Watkins. (Per Mathew, J.)

**PATNA**

*Substitute* the following for Rule 6 in Order 12 :

"6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just."

**RANGOON**

*Substitute* "judgment, decree or order" for the words "judgment or order" and "and the Court may, either upon such application or upon its own motion, give such judgment or make such decree or order as the Court may think just" for "and the Court may . . . . . just."

*Add* the following as sub-rule (2) :

"(2) A decree or order passed under this rule may be executed at any time, notwithstanding that other questions between the parties still remain to be decided in the case."

*Synopsis*

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| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "At any stage."</li> <li>3. Admissions on pleadings.</li> <li>4. Court may make such order as it may think just.</li> <li>5. Orders that may be passed under this Rule.</li> </ol> | <ol style="list-style-type: none"> <li>6. Admissions made otherwise than on pleadings.</li> <li>7. English practice.</li> <li>8. Co-plaintiffs.</li> <li>9. Judgment, if should be followed by a decree.</li> <li>10. Appeal.</li> </ol> |
|---|--|

**1. Scope of the Rule.** — A party can, under this rule, move for a judgment upon the admissions made by the opposite party and thus get rid of the portion of the action in which there is no dispute.<sup>1</sup> The object is to enable a party to obtain speedy judgment, at least to the extent of the relief, which, according to the admissions of the opposite party, he is entitled to.<sup>2</sup> But he is not bound to avail himself of this rule and is not precluded by not so applying, from relying on such admissions at the trial.<sup>3</sup> Nor, on the other hand, is the Court bound in every case to pass a judgment on the application of a party under this rule; the matter is entirely in the discretion of the Court. See Note 6 below.

In moving for a judgment under this rule, the party applying need not relinquish the rest of his claim.<sup>4</sup> But the admission on which a judgment can be claimed must be a clear and unequivocal one.<sup>5</sup> Further, an admission of a defendant will not necessarily entitle the plaintiff to a judgment, where the right asserted by the plaintiff has, in fact, no existence in law,<sup>6</sup> or where he has no cause of action at all.<sup>7</sup>

The rule refers only to admissions on points of *fact* and not on points of *law*.<sup>8</sup>

**Order 12 Rule 6 — Note 1**

1. (1876) 3 Ch D 637 (640), *Throp v. Holdiworth*.  
(25) AIR 1925 Oudh 486 (487).

2. ('26) AIR 1926 Sind 119 (120) : 20 Sind L R 216.

[See also (1876) 2 Ch D 686 (687), *Gilbert v. Smith*.]

3. (1878) 7 Ch D 403(407,408), *Tildesly v. Harper*.

4. ('26) AIR 1926 Sind 119 (120) : 20 Sind L R

216.

5. ('20) AIR 1920 Cal 163 (165).

- (38) AIR 1933 Lah 403 (403).

- (27) AIR 1927 Sind 25 (26, 27).

6. (1878) 7 Ch D 735(743), *Chilton v. Corporation of London*. (Cited in 14 Bom 213.)

7. [See ('21) AIR 1921 Pat 280 (280).]

8. ('29) AIR 1929 Lah 569 (572).

- (72) 18 Suth W R 359 (367) (P C).

- (1900) 27 Cal 156 (168) : 26 Ind App 216 (P C).

**O. 12 R. 6**  
**Notes 2-6**

**2. "At any stage."** — A plaintiff may move for judgment upon admissions on the defence, although he has joined issue on the defence.<sup>1</sup> Similarly, a defendant may apply to have the suit dismissed after he has delivered a rejoinder.<sup>2</sup>

**3. Admissions on pleadings.** — As has been seen in Note 2 to Rule 1 *ante*, an admission of facts in a pleading may be made either *expressly* or *constructively*. Under O. 8 R. 5 every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted. This is a *constructive* admission in a pleading. A defendant denying a plaint allegation *evasively* will be deemed not to have denied it at all, and will therefore be deemed to have admitted such allegation (see O. 8 R. 4). Thus, in *Harris v. Gamble*<sup>1</sup> the defendant in his defence merely "put the plaintiffs to proof of their several allegations in their statement of claim." Defendant failed to appear at the trial, and judgment was given for the plaintiffs without calling evidence, on the ground that such a defence was an admission of facts alleged in the statement of claim.

**4. Court may make such order as it may think just.** — The provisions of this rule are *discretionary* and not mandatory; it is not, therefore, incumbent on the Courts in all cases to pass a judgment upon admission.<sup>1</sup> If a case involves questions which cannot conveniently be disposed of on an application under this rule, or if the case is such that it is not safe to pass a judgment on admissions, the Court may, in the exercise of its discretion, refuse the motion.<sup>2</sup> Thus, in divorce cases a Court will not ordinarily pass a decree for dissolution of marriage on the mere admissions of the parties in view of possible collusion between the parties.<sup>3</sup> Where, however, the defendant admits the claim, but the plaintiff is absent at the trial, the suit should not be dismissed; a decree should be passed on the strength of the defendant's admission.<sup>4</sup> Where an application is made under this rule on the basis of a *constructive admission*, the Court may refuse to pass a decree if, in the circumstances of the case, it is of opinion that the defendant must not be held to have admitted facts not specifically denied in the written statement.<sup>5</sup>

**5. Orders that may be passed under this Rule.** — As a general rule, a judgment on admissions can be passed in all cases in which under the Code a preliminary decree can be passed. See Order 20 Rules 13, 15, 16 and 18.

**6. Admissions made otherwise than on pleadings.** — The use of the words "or otherwise" without the words "in writing" which are used in Rule 1 shows that a judgment may be given even upon *verbal* admission,<sup>1</sup> though caution is required in acting upon such admissions.<sup>2</sup> The rule is wide enough to afford relief not only in

**Note 2**

1. (1882) 21 Ch D 716 (717), *Brown v. Pearson*.

2. (1881) 50 L J Ch 337(338), *Pascoe v. Richards*.

**Note 3**

1. (1878) 7 Ch D 877 (877), *Harris v. Gamble*.

[See also (1879) 12 Ch D 758 (759), *Rutter v. Tregent*.]

**Note 4**

1. ('18) AIR 1918 Cal 467 (470) : 45 Cal 138.

(1877) 5 Ch D 842 (844), *Mellor v. Sidebottom*.

('24) AIR 1924 Rang 144 (144) : 1 Rang 530.

('81) AIR 1931 Oudh 321 (322).

('29) AIR 1929 Lah 569 (572).

('24) AIR 1924 Cal 190 (192).

('11) 10 Ind Cas 351 (352) (Mad). (Admission in

evidence by one of the defendants specifically denied by the other defendant in his pleading — First Appellate Court not justified in decreeing on such admission.)

('27) AIR 1927 All 175 (176).

2. ('18) AIR 1918 Cal 467 (470, 471) : 45 Cal 138.

3. ('93) 17 Bom 624 (625) (FB).

4. ('29) AIR 1929 Lah 830 (831).

5. ('85) 11 Cal 111 (118) : 11 Ind App 186 (PC).

See also *Proviso to O. 8 R. 5*.

**Note 6**

1. (1894) 1 Ch 499 (502), *In re Boeney*.

('18) AIR 1918 Cal 467 (468) : 45 Cal 138. (Remarks of Fletcher, J., quoted in the judgment.)

2. ('84) 6 All 406 (415, 416).



cases of admissions made in the pleadings, but also in the case of admissions *de hors the pleadings*.<sup>3</sup> Thus, admissions contained in letters written before action is brought<sup>4</sup> or in a letter written after action,<sup>5</sup> are sufficient for the purpose of this rule. **O. 12 R. 6 Notes 6-10**

**7. English practice.** — See Daniel's Chancery, Form 270 and Seton on Decrees, Vol. I, page 399, Form No. 5. See also Chitty's Forms, 15th Edition, page 310.

**8. Co-plaintiffs.** — An application under this rule for an order against a defendant should, where there are several plaintiffs, be made by *all* of them.<sup>1</sup>

**9. Judgment, if should be followed by a decree.** — According to the Calcutta High Court,<sup>1</sup> there is nothing objectionable to a decree being drawn up on a judgment under this rule and later on to another decree being drawn up after investigation of the claim not admitted. But according to the Sind Judicial Commissioner's Court,<sup>2</sup> it is not necessary to have a decree drawn up on a judgment passed under this rule, it being open to the plaintiff to enforce payment of the amount awarded as an order in execution proceedings by virtue of Section 36.

**10. Appeal.** — An order rejecting an application for a judgment on admissions is a "judgment" within Clause 15 of the Letters Patent and is appealable under the Letters Patent.<sup>1</sup>

**R. 7. [New.]** An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required. **O. 12 R. 7**

**Affidavit of signature.**

[R. S. C., O. 32 R. 7.]

**R. 8. [New.]** Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served. **O. 12 R. 8**

**Notice to produce documents.**

[R. S. C., O. 32 R. 8.]

3. ('26) AIR 1926 Sind 119 (120) 20 Sind L R 216.

4. (1884) 27 Ch D 251 (257), Hampden v. Wallis.

5. (1914) 1 Ch 904 (908, 909), Ellis v. Allen.

**Note 8**

1. (1895) 2 Ch 747 (749), Re Wright.

**Note 9**

1. ('18) AIR 1918 Cal 467 (470) : 45 Cal 188.

2. ('26) AIR 1926 Sind 119 (120): 20 Sind L R 216.

**Note 10**

1. ('20) AIR 1920 Cal 168 (164).

O. 12 R. 9

**R. 9.** [New.] If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.  
[R. S. C., O. 32 R. 9.]

Costs.

## ORDER XIII.

### PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS

O. 13 R. 1

**R. 1.** [Ss. 138, 140.] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

Documentary evidence  
to be produced at first  
hearing.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

[1877, Ss. 138, 140; 1859, Ss. 128, 129.]

#### Local Amendments

N.-W.F.P.

*Substitute* the following :

"All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Orders 7 and 8: provided that after the settlement of issues, the Court may fix a date, not being more than 30 days after such settlement, within which the parties may present supplementary lists of documents on which they rely."

OUDH

*Substitute* the following :

"1. (1) The parties or their pleaders shall produce or cause to be produced, on the date fixed by the Court, under Order 7 Rule 14, and Order 8 Rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court.

(3) The Court shall receive the documents so produced, provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct.

*Explanation.* — A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than

the plaintiff or defendant it will not be deemed to be "in the power" of the plaintiff or defendant."

**O. 13 R. 1**  
**Notes 1-2**

**PATNA**

*After* the words "at the first hearing of the suit" *add* the words :

"or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit."

**RANGOON**

*Add* the following as sub-rule (3) :

"(3). The High Court of Judicature at Rangoon directs that such lists shall  
Judicial  
be prepared in form \_\_\_\_\_ which will be given free of charge to parties wishing to  
General 23  
tender documents in evidence."

*Synopsis*

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| <p>1. <b>Scope and object of the Rule.</b></p> <p>2. <b>"Shall produce at the first hearing."</b></p> <p>3. <b>"First hearing."</b> See O. 8 R 1.</p> | <p>4. <b>Admission of documents after first hearing.</b> See Rule 2.</p> <p>5. <b>"In such form as the High Court directs."</b><br/>See Appendix II, Form No. 5.</p> |
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**1. Scope and object of the Rule.** — A Court must secure a fair trial of cases, and to that end obviate the chances for the parties to adduce forged or manufactured evidence. This rule, accordingly, enjoins on the parties to lay their documents before the Court at the earliest possible opportunity.<sup>1</sup> Where the documents are not in the possession or power of the party, they cannot and therefore need not be produced at the first hearing.<sup>2</sup>

The rule is *peremptory* that the documents on which a party intends to rely must be produced at the first hearing.<sup>3</sup> But as the object of the rule is not to penalise the parties, the Court is given discretion, under Rule 2, to receive any documents at later stages of the suit if there is no suspicion about their genuineness.<sup>4</sup>

The provisions of this Order relating to the production of documents are made applicable to proceedings under the undermentioned local Acts.<sup>5</sup>

**2. "Shall produce at the first hearing."** — The procedure under the Code relating to the production of documents by the parties is briefly as follows —

*The plaintiff* shall produce and deliver into Court with the plaint the document *on which he sues*, if it is in his possession or power (O. 7 R. 14 sub-rule 1). Other documents, whether in his possession or power or not, *on which he relies* in support of his claim need not, however, be produced with the plaint, but a *list* thereof shall be filed at the time of the plaint (O. 7 R. 14 sub-rule 2). In that list the plaintiff need mention only those documents on which he relies for his claim. He need not *anticipate the defence case* and mention in the list such documents as may form an answer to

**Order 13 Rule 1 — Note 1**

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| <p>1. ('98) 22 Bom 173 (175).<br/>(07) 6 Cal L Jour 621 (634).<br/>(08) 8 Cal L Jour 147 (151).<br/>(28) AIR 1928 Pat 537 (538).<br/>(31) AIR 1931 Pat 275 (281) : 10 Pat 388.<br/>2. ('75) 28 Suth W R 29 (30).<br/>(30) 1980 Mad W N 511 (513). (Rule not applicable to documents which are produced by witness on summons.)<br/>3. ('31) AIR 1931 Mad 512 (519).</p> | <p>4. ('18) AIR 1918 P O 11 (14) : 45 Cal 878 : 45 Ind App 73 (PC).<br/>(26) AIR 1926 Cal 1 (19).<br/>(28) AIR 1928 Pat 209 (212).<br/>(28) AIR 1928 Pat 555 (556) : 7 Pat 589.<br/>(68) 9 Suth W R 294 (295).<br/>[See ('83) AIR 1933 Lah 892 (893).]<br/>5. The Chota Nagpur Tenancy Act, (VI of 1908) S. 265 (3); The Bengal Embankment Act (VII of 1866), S. 8; The Estates Partition Act (Bengal Act V of 1897), S. 97.</p> |
|---|--|

**O. 13 R. 1**  
**Note 2**

such a defence. Nor need he mention in the list documents to be produced for the cross-examination of the defendant's witnesses or for refreshing the memory of a witness (Order 7 Rule 18, sub-rule 2).

Where the document referred to in O. 7 R. 14 is not in his possession or power, the plaintiff shall, if possible, state in whose possession or power it is (O. 7 R. 15). After the suit is instituted, a summons with a copy of the plaint is served on the defendant to appear and answer the plaintiff's claim (O. 5 R. 1). The summons will also order the defendant to *produce* all documents in his possession or power on which he intends to rely in support of his case (O. 5 R. 7). On the day on which the defendant is to appear and answer according to the summons, both parties must be present and the Court may *hear* the parties (O. 9 R. 1). On that day, both the parties shall, under this rule, bring in all the documents on which they rely, and the Court is bound to receive them, if they duly put them in (sub-rule 2).<sup>1</sup>

The language of this rule may be contrasted with the language used in O. 7, R. 14 with reference to the production of the document on which the plaintiff sues, *viz.*, "he shall produce it *in Court* and shall at the same time deliver the document . . . to be filed with the plaint." Production as such of documents under *this* rule amounts only to bringing in the documents with the object of leaving them in Court. The non-production of the documents by a party as per the terms of this rule is done at his own peril, the consequence of such non-production being that the Court *will not receive* them at a later stage except on satisfactory grounds. Accordingly, the plaintiff, if he desires to avoid the risk of his documents being rejected subsequently and to ensure their being received by the Court, must produce, under this rule, at the first hearing, all the documents mentioned in his list filed under O. 7 R. 14 and also such documents as may be ordered by the Court to be produced under O. 11 R. 14. But documents of the kind specified in O. 7 R. 18, sub-rule 2 or documents which are not in the possession or power of the plaintiff do not come under this rule.<sup>2</sup> The defendant is bound by the same procedure so far as it may be applicable to him.

Is the Court bound to pass an order fixing a date for the production of documents? Under the corresponding provision of the Code of 1882, the parties were required only to keep their documents in *readiness* at the first hearing to be produced *when called for by the Court*.<sup>3</sup> The present rule requires the parties not only to get ready but also to *produce*, *i. e.*, to deposit in Court their documents *at the first hearing*. The terms of the present rule are clear, and an order fixing a date for production of documents by the parties is not a condition precedent for their production. But the rule does not preclude a Court from calling on the parties, for valid reasons, to produce their documents or a list thereof by a specified date.<sup>4</sup> Thus, where the Court does not want the production of documents till a particular stage in the suit is reached, it may pass an order requiring parties to produce their documents within a specified time.<sup>5</sup> The view, however, that the Court is bound to receive documents at any stage of the suit, if there is no order of the Court for production within a fixed time,<sup>6</sup> does not appear to

**Note 2**

1. ('71) 15 Suth W R 928 (324). (Though by the inadvertence of Court officer, they were not kept in Court-record in due time.)

2. ('22) AIR 1922 Pat 569 (571). (Documents falling under O. 7 R. 18.)

('25) AIR 1925 Cal 1149 (1150, 1151). (Document in possession of witness.)

('29) AIR 1929 P C 99 (108) : 56 Ind App 119 : 56

Cal 1003 (PC). (Party and pleader ignorant of the existence of a document.)

3. ('98) 1898 Pun Re No. 58, p. 191.

('68) 10 Suth W R 179 (181).

[See also ('74) 21 Suth W R 42 (43).]

4. See Madras Rules of Practice, R. 62.

5. ('26) AIR 1926 Mad 347 (349).

6. ('28) AIR 1928 Mad 516 (517) : 51 Mad 472.

('25) AIR 1925 Mad 744 (745).

be sound or consistent with the terms of this rule.

3. "First hearing." — See Order 8 Rule 1.

4. Admission of documents after first hearing. — See Rule 2.

5. "In such form as the High Court directs." — See Appendix H, Form No. 5.

**O. 13 R. 1**  
**Notes 2-5**

**R. 2.** [S. 139.] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

**O. 13 R. 2**

**Effect of non-production of documents.**

[1877, Ss. 138, 139; 1859, S. 128.]

### *Synopsis*

1. Effect of non-production of documents.
2. "Unless good cause is shown."
3. Appeal.

**1. Effect of non-production of documents.** — The object of the previous rule is to prevent fraud by the late production of suspicious documents: see Note 1 to Rule 1. When, therefore, the genuineness of a document is beyond doubt, there can be no reasonable objection to its reception even at a later stage.<sup>1</sup> The rule makes the satisfactory explanation for non-production at the first hearing a condition precedent for the reception of documents produced out of time. But the rule must be liberally construed so as to advance the cause of justice.<sup>2</sup> No documents whether public<sup>3</sup> or

#### **Order 13 Rule 2 — Note 1**

1. ('18) AIR 1918 P C 11 : 45 Cal 878 : 45 Ind App 73 (PC). (Books filed in another Court previously.)
- ('29) AIR 1929 Pat 324 (325).
- ('24) AIR 1924 Cal 1059 (1063). (Decrees of Court.)
- ('28) AIR 1928 Mad 516 (517) : 51 Mad 472. (Public documents or certified copies or other genuine documents.)
- ('27) AIR 1927 Nag 269 (270). (But the other side must be given a fair opportunity to meet.)
- ('27) AIR 1927 Pat 117 (119). (Registered document.)
- ('28) AIR 1928 Rang 196 (196) : 6 Rang 337.
- ('28) AIR 1928 Cal 416 (416). (Document produced at re-hearing on review—Received though not tendered at the first trial.)
- ('13) 21 Ind Cas 28 (24) : 37 Bom 682. (But time to produce documents after close of whole case should not be granted.)

('37) AIR 1937 Cal 537 (540) : 1 L R (1937) 2 Cal 661.

[See also ('30) 1930 Mad W N 511 (513). (Court has no discretion to refuse reception of documents produced by witness on the ground of late production—O. 13 Rr. 1 and 2 apply only to documents produced by parties.)]

[See however ('19) AIR 1919 Cal 800 (801). (The Court has a discretion to refer in proper cases.)]

2. ('98) 22 Bom 173 (176).

('26) AIR 1926 Mad 347 (349).

('24) AIR 1924 Pat 208 (208).

[See also ('06) 33 Cal 1845 (1848). (Document filed with plaint—Tendered only at close of plaintiff's case—Rejection technically correct—But discretion not sound.)]

[But see ('24) AIR 1924 Pat 517 (518, 519).]

3. ('29) AIR 1929 PC 99 (103) : 56 Ind App 119 : 56 Cal 1003 (PC). (Official records of undoubted authority.)

**O. 13 R. 2**  
**Notes 1-3**

private<sup>4</sup> which are above suspicion should be excluded if they are necessary for the proper decision of the case.

The Court of the Judicial Commissioner of Oudh, while disagreeing with the view which gives a liberal construction to this rule has, however, arrived at the same result by granting the application under its inherent powers under Section 151 of the Code.<sup>5</sup>

Once a document is received under this rule, no adverse inference can be drawn against the party on the ground of late production.<sup>6</sup>

The discretion to reject a document under this rule must be exercised at the earliest possible opportunity after production, for, documents not promptly rejected<sup>7</sup> or ordered merely to be kept on the file<sup>8</sup> will be deemed to have been received.

The rule applies only to documents which are in the possession or power of a party. Hence, when the documents are in the custody of another Court and are produced after the first hearing, they cannot be rejected under this rule.<sup>9</sup>

**2. "Unless good cause is shown."** — Vexatious and dilatory applications for the reception of documents cannot be granted.<sup>1</sup> It is not a good cause for non-production that on the day fixed for the production of documents the hearing only resulted in an adjournment.<sup>2</sup> The Court must record its reasons for receiving documents beyond time. Admission of papers after long delay without recording any reasons is wrong.<sup>3</sup> The fact that the documents were in the custody of another Court and that the delay in their production was not due to any fault of the party is sufficient reason for receiving the documents after the first hearing under this rule.<sup>4</sup>

**3. Appeal.** — The admission or rejection of documents under this rule is entirely in the discretion of the trial Court<sup>1</sup> and an Appellate Court will not interfere with it,<sup>2</sup> unless such discretion has been exercised capriciously or improperly.<sup>3</sup> In a case where the trial Court in its discretion received documents produced at a late stage, the Privy Council said: "If the sanction of the Court can purge the original defect, it has

('24) AIR 1924 Pat 517 (518).

4. ('26) AIR 1926 Mad 847 (348). (Unregistered documents.)

('30) AIR 1930 Pat 608 (604). (Private documents.)

(1864) 1864 Suth W R Gap No. 271 (272). (Document on unstamped plain paper genuine—Received.)

[See ('32) AIR 1932 Pat 332 (333). (A receipt filed after long delay involving a new case — Not received.)]

5. ('28) AIR 1928 Oudh 59 (60): 25 Oudh Cas 286.

6. ('28) AIR 1928 Pat 294 (299).

7. ('28) AIR 1928 Pat 537 (538).

8. ('29) AIR 1929 Pat 254 (257): 8 Pat 766.

[See ('34) AIR 1934 Pat 526 (530).]

9. ('36) AIR 1936 Pat 681 (684).

**Note 2**

1. ('28) AIR 1928 Nag 223 (225).

2. ('19) AIR 1919 Cal 800 (801).

3. ('81) AIR 1981 Pat 275 (281): 10 Pat 388.

('89) AIR 1939 Rang 98 (105): 1939 Rang LR 18.

4. ('36) AIR 1936 Pat 681 (638).

**Note 3**

1. ('28) AIR 1928 Pat 555 (556): 7 Pat 589.

('38) AIR 1938 Lah 892 (893).

2. ('28) AIR 1928 Pat 555 (556): 7 Pat 589. (Admission by trial Court.)

('33) AIR 1933 Lah 892 (893).

('33) AIR 1933 Rang 174 (175). (Document produced at late stage refused to be admitted by trial Court—Lower Appellate Court not interfering with discretion of trial Court—High Court will not interfere.)

(1864) 1 Suth W R 198 (198). (Do.)

('85) 8 Mad 373 (375).

('69) 3 Agra 148 (148).

('26) AIR 1926 Cal 106 (106). (Discretion refusing to admit a document.)

('31) AIR 1931 Mad 512 (518). (Rejection for want of satisfactory explanation for late production.)

('27) AIR 1927 Oudh 612 (618). (Do.)

('38) 67 Cal L Jour 133 (134). (Discretion in allowing late production.)

3. ('26) AIR 1926 Mad 847 (849). (Discretion in allowing late production.)

('33) AIR 1933 Lah 892 (893).

('26) AIR 1926 Cal 1 (19).

('19) AIR 1919 Cal 800 (801).

('25) AIR 1925 Mad 744 (745). (No judicial exercise of discretion.)

('08) 8 Cal L Jour 147 (150, 151).

('28) AIR 1928 Lah 704 (705). (Non-compliance of rule by trial Court — No objection by party in trial Court — Party cannot raise point in second appeal.)

been so purged," and held that the late production could not be a ground of appeal from the decision in the suit.<sup>4</sup>

**O. 13 R. 2**  
**Note 3**

**R. 3. [S. 140.]** The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

**O. 13 R. 3**

Rejection of irrelevant  
or inadmissible docu-  
ments.

[1877, S. 140; 1859, S. 129.]

### Synopsis

1. Scope of the Rule.
2. Objection to admissibility.
3. Appeal.

**1. Scope of the Rule.**—Under Rule 1 the Court receives, as it is bound to do, all documents of every description produced by the parties at the first hearing, however numerous they might be. Under Rule 2, again, the Court, at its discretion, receives documents subsequently produced, or rejects them for *late production*. Out of the documents received as aforesaid, the Court, under this rule, is expected and empowered to exercise discrimination and reject, even *in limine*, documents considered *irrelevant or otherwise inadmissible*,<sup>1</sup> and retain on the file only such of the documents as may, if properly proved, be used as evidence at the trial.<sup>2</sup> Rejection under this rule may be at any stage.<sup>3</sup> For the procedure on rejection, see Rule 6 below.

**2. Objection to admissibility.**—There is a distinction in this matter between a point of relevancy and a point of admissibility. Whether an objection is raised or not, every Court is bound to reject irrelevant documents.<sup>1</sup> But objections to the admissibility of documents for want of proof or any necessary formality must be taken at the trial<sup>2</sup> and should be decided as they arise and not reserved until judgment is given.<sup>3</sup> In case of doubt on a question of admissibility, the safer course for the Court, in appealable cases, is to admit the document.<sup>4</sup>

No objection will be allowed to be taken in appeal to the admissibility of

(‘39) AIR 1939 Rang 98 (105); 1939 Rang LR 18.  
(Documents admitted without recording reasons.)

4. (‘69) 12 Suth W R 82 (32) (PC).

#### Order 13 Rule 3 — Note 1

1. (‘67) Marsh 127 : W R F B 41 (44, 45) (FB).

(‘33) AIR 1933 Lah 271 (273).

(‘28) AIR 1928 Pat 537 (538).

[See (‘69) 11 Suth W R 576 (576).]

2. (‘74) 21 Suth W R 76 (77, 78).

3. (‘69) 11 Suth W R 350 (352). (Want of time for Court to inspect and consider—Order to file the documents—No presumption that documents were held admissible.)

#### Note 2

1. (‘21) AIR 1921 Pat 61 (63).

[See (‘97) 19 All 76 (92); 23 Ind App 106 (P C). (The decision of their Lordships turned on the admissibility of the oral evidence.)]

[See also (‘86) AIR 1986 Pat 684 (685). (Formal proof of document can be waived—Acquies-

cence in admission of evidence which the law forbids to be received is no bar to raising objection in appeal.)]

2. (‘28) AIR 1928 Lah 428 (429).

(‘05) 9 Cal W N 111 (113).

(‘78) 6 Cal L Rep 109 (111). (Evidence before Commissioner—Objection to document must be before him.)

(‘86) AIR 1936 Pat 684 (685).

(‘36) AIR 1936 Pat 600 (601). (Objection as to the formality of comparing copies with the originals.)

(‘35) AIR 1935 All 293 (294).

[See also (‘89) 9 Cal 939 (940, 941). (Some grounds of objection before Commissioner—Others at the trial—Allowed.)]

3. [See (‘90) 17 Cal 173 (186, 187, 195).

(‘98) 25 Cal 401 (403).]

4. (‘90) 12 All 1 (26) (FB).

[See also (‘91) 18 Cal 201 (203); 17 Ind App 159 (P C).]

**O. 13 R. 3**  
**Notes 2-3**

a document which was admitted in evidence without objection at the trial.<sup>5</sup> The reason is, that if the objection had been taken at the trial, the party tendering the document would have taken steps to duly prove it.<sup>6</sup> But this principle does not apply to a document which the law forbids to be received in evidence. Thus, where a document which is compulsorily registrable under Section 17 of the Registration Act is not registered, Section 49 of that Act forbids such document to be received as evidence of any transaction affecting the immovable property comprised therein. In the case of such a document, the failure to object to the admission of the document in the trial Court is no bar to raising the objection before a superior Court.<sup>7</sup> As to objections on the score of insufficient stamp duty, see Sections 35 and 36 of the Stamp Act (II of 1899), and the undermentioned cases.<sup>8</sup>

**3. Appeal.**— There is no appeal from an order rejecting a document under this rule, though the order may be challenged in an appeal from the decree in the suit.<sup>1</sup>

**O. 13 R. 4****R. 4. [S. 141.]** (1) Subject to the provisions of the next

**Endorsements on documents admitted in evidence.**

following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

[1877, S. 141; 1859, S. 132.]

5. ('07) 34 Cal 1059 (1074); 34 Ind App 194 (PO). (Trial Court held a document genuine and admitted—High Court in appeal held it forgery—Privy Council upheld trial Court on the ground also of want of objection at trial.)

('04) 31 Cal 155 (157).

('87) 11 Bom 320 (324).

('85) AIR 1935 All 293 (294).

[See also ('16) AIR 1916 Mad 147 (149).]

6. ('01) 23 Cal 142 (144, 145).

('07) 6 Cal L Jour 22 (25).

('86) AIR 1936 Pat 634 (635).

7. ('86) AIR 1936 Pat 634 (635).

8. ('89) 13 Bom 498 (496).

('32) AIR 1932 Mad 693 (696). (Document admitted in evidence—Question that it is insufficiently stamped cannot be raised thereafter.)

('86) 12 Cal 64 (67).

('82) 4 Mad 137 (140).

('82) 5 Mad 220 (221).

('02) 12 Mad L Jour 351 (359).

('80) 2 All 554 (559, 560).

('85) AIR 1935 Rang 160 (160); 13 Rang 322. (Admissibility cannot be questioned in second appeal.)

('87) AIR 1937 Mad 431 (432). (Order 18 R. 8 is to be read subject to Section 36 of the Stamp Act.)

('89) AIR 1939 Nag 220 (221).

**Note 3**

1. ('72) 18 Suth W R 511 (511).

[See (1858) 7 Moo Ind App 148 (168) (PO). (The Privy Council scarcely interferes in question of admissibility.)]



### Local Amendments

#### OUDH

In sub-rule (1) (d), *add* "in the Judge's own handwriting" *after* the word "statement."

#### RANGOON

*Add* the following as sub-rules (3), (4) and (5):

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus, *A, B, C*, etc., and the documents admitted on behalf of the defendant with figures 1, 2, 3, etc.

(4) When a number of documents of the same nature are admitted, as, for example, a series of receipts for rent, the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series.

(5) Every document on admission shall be entered in a list in Form Judicial  
General 25.  
prepared by the Bench Clerk and signed by the Judge."

### Synopsis

#### 1. Legislative changes.

#### 2. Endorsements on admitted documentary evidence.

**1. Legislative changes.** — The words "or initialled" in this rule are new.

**2. Endorsements on admitted documentary evidence.** — There are two stages relating to documents filed in Court — One is the stage when all the documents are filed by the parties in Court; the next stage is where the documents are formally *proved and tendered in evidence*. It is at this stage that the Court has to decide whether they are to be admitted or rejected.<sup>1</sup> If the documents are admitted and proved, then the endorsement containing the particulars referred to in the rule is to be made on them. The endorsement is intended to be a record of the fact that the document *has been admitted* in evidence after the necessary legal formalities have been complied with.<sup>2</sup> An endorsement, therefore, made *before* the documents are proved,<sup>3</sup> or the practice of putting a seal on the documents immediately on their production,<sup>4</sup> is not proper.

The rule as to the endorsement of the documents must be strictly followed.<sup>5</sup> In *Sadik Husain Khan v. Hashim Ali Khan*,<sup>6</sup> their Lordships of the Privy Council deprecated strongly the practice of not complying with the provisions of this rule and went on to observe as follows:

" Their Lordships, with a view of insisting on the observance of the wholesome provisions of these statutes will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required."

#### Order 13 Rule 4 — Note 2

1. ('81) AIR 1981 Lah 546 (550): 18 Lah 126.

('87) 1887 Bom P J 884 (885).

('27) AIR 1927 Lah 115 (117): 8 Lah 1.

[See (1879) 11 Ch D 150 (158), *Watson v. Rodwell*. (No document is evidence unless it is formally put in at the trial.)]

2. ('88) 1888 All W N 22 (28).

3. ('28) AIR 1928 Lah 432 (434): 9 Lah 224.

4. ('81) AIR 1981 Lah 546 (550): 18 Lah 126.

5. ('16) AIR 1916 P C 27 (41): 38 All 627: 43 Ind App 212 (P C).

('66) 6 Suth W R 2 (6).

('18) AIR 1918 All 244 (245).

('12) 16 Ind Cas 834 (834, 835) (Lah).

6. ('16) AIR 1916 P C 27 (41): 43 Ind App 212: 38 All 627 (P C).

O. 13 R. 4  
Notes 2

'In *Secretary of State v. Sarla Devi*,<sup>7</sup> in which the provisions of this rule had been completely ignored, it was held that the documentary evidence in the case could not be regarded as having been legally brought on the record and as being legally before the Court. In *Imam-ud-Din v. Sri Ram Perbhu Dial*<sup>8</sup> there was a controversy whether the documents had been admitted in evidence and as it was impossible, owing to the absence of the endorsements under this rule, to say whether the documents had, in fact, been admitted in evidence or not, the High Court in appeal found it necessary to remand the case to the lower Court for retrial. But in *Mukhi Ram v. Firm Kamta Prasad*<sup>9</sup> the Patna High Court has distinguished the above Privy Council case on the ground that in it there was a controversy as to whether the documents had been admitted in evidence by the trial Court and it was held that where there was no doubt as to the documents having been admitted, as a fact, by the trial Court, the mere absence of the endorsements under this rule did not make the documents inadmissible in evidence. A similar view was also taken by the Sind Judicial Commissioner's Court in the undermentioned case.<sup>10</sup> The marking of documents for mere *identification*<sup>11</sup> or a mechanical endorsement without the Judge applying his mind to a consideration as to the admissibility of the document,<sup>12</sup> does not amount to an admission in evidence. Similarly, where a document tendered in evidence is marked as an exhibit for purposes of reference, but the endorsement prescribed by this rule is not made, it cannot be said that the document has been admitted in evidence.<sup>13</sup> To such cases, the provisions of Section 36 of the Stamp Act will not, therefore, apply. But where no objection is taken to the admissibility of a document at the time it is let in evidence and the formalities prescribed by this rule are complied with, the admissibility of the document on the ground that it is insufficiently stamped cannot be raised at any subsequent stage by virtue of Section 36 of the Stamp Act.<sup>14</sup>

Documents shown to have been regularly admitted in evidence by a commissioner cannot be objected to on the ground of the want of endorsement by the Court under this rule.<sup>15</sup>

O. 13 R. 5

**R. 5. [S. 141A.]** (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on

Endorsements on copies of admitted entries in books, accounts and records.

7. ('24) AIR 1924 Lah 548 (549) : 5 Lah 227.
8. ('28) AIR 1928 Lah 142 (142, 143) : 9 Lah 4.
9. ('87) AIR 1987 Pat 222 (222).
10. ('88) AIR 1988 Sind 379 (380) : 27 Sind LR 422. (Documents produced by party, referred to in arguments and made use of in judgment—Fact that they are not marked as exhibits is mere irregularity.)
11. ('12) 16 Ind Cas 884 (884, 885) (Lah).  
[See ('67) 8 Suth W R 91 (91). (Documents on production under Rule 1 or Rule 2 were called exhibits in S. 128 of the Code of 1859.)]  
[See also ('14) AIR 1914 Mad 478 (474) : 14 Ind Cas 894 (896) : 37 Mad 455.]

12. ('29) AIR 1929 Mad 522 (522) : 53 Mad 137. (Endorsement mechanically stamped by clerk—Judge's initials also in rubber stamp.)
13. ('19) AIR 1919 Nag 141 (148). (Tentatively marked.)
14. ('27) AIR 1927 Lah 679 (679). (Court induced to endorse behind back of party.)
15. ('27) AIR 1927 Lah 45 (45).
16. ('38) AIR 1938 Lah 271 (273).
17. ('38) AIR 1938 All 821 (821, 822) : 56 All 181.
18. ('32) AIR 1932 Mad 693 (696).
19. ('29) AIR 1929 Mad 622 (623).
20. ('29) AIR 1929 Rang 211 (218) : 7 Rang 164.
21. ('80) 8 Cal L Rep 109 (111, 112).

whose behalf the book or account is produced may furnish a copy of the entry.

**O. 13 R. 5**  
**Notes 1-3**

(2) Where such a document is an entry in a public record produced from a public office, or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished —

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

[1877, S. 141; 1859, S. 132.]

### Local Amendment

#### RANGOON

Add the following to sub-rule (3):

“A note of the return should be made in the list in Form \_\_\_\_\_”  
Judicial  
General 25.

### Synopsis

- |  |   |
|--|---|
| 1. Stamps, if necessary on copies furnished under this Rule. | 3. Admission of unregistered documents. |
| 2. Admission of unstamped documents.                         | 4. Admission of altered documents.      |

1. **Stamps, if necessary on copies furnished under this Rule.** — Copies furnished under this rule need not bear any stamp.<sup>1</sup>

2. **Admission of unstamped documents.** — See Section 35 of the Stamp Act (II of 1889) and the undermentioned cases.<sup>1</sup>

3. **Admission of unregistered documents.** — See Section 49 of the Registration Act (XVI of 1908) and the undermentioned cases.<sup>1</sup>

#### Order 13 Rule 5—Note 1

1. ('08) 27 Bom 150 (154).  
(‘02) 26 Bom 522 (526).  
(‘87) 11 Bom 526 (528).  
[See also ('91) 15 Bom 687 (690).]

#### Note 2

1. ('96) 18 All 295 (298).  
(‘18) 19 Ind Cas 445 (446) (All).

- (‘78) 20 Suth W R 68 (69).  
(‘88) 4 Mad H O R 812 (814).  
(‘84) 7 Mad 440 (441).  
(‘94) 17 Mad 478 (476).  
(1900) 28 Mad 49 (54).  
(1865) 8 Bom H C R A C 92 (98).

#### Note 3

1. ('96) 18 All 888 (840).  
(‘81) 5 Bom 143 (151, 152).

O. 13 R. 5  
Note 4

4. Admission of altered documents. — See the undermentioned cases.<sup>1</sup>

O. 13 R. 6

**R. 6.** [S. 142.] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence.

[1877, S. 142; 1859, S. 134.]

1. Legislative changes. — The words "or initialled" are new.

O. 13 R. 7

**R. 7.** [S. 142 A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

[1877, S. 142; 1859, S. 134.]

#### Local Amendments

##### MADRAS

Add the following proviso to sub-rule (2):

"Provided that no document shall be returned which by force of the decree has become wholly void or useless."

##### NAGPUR

The following shall be *added* as sub-rule (3):

"(3) Every document produced in evidence, which is not written in the Court language or in English, shall be accompanied by a correct translation into English;

('88) 7 Bom 310 (312).  
(94) 18 Bom 13 (17, 18).  
(94) 18 Bom 396 (400).  
(96) 20 Bom 553 (556, 557).  
(96) 20 Bom 704 (715).  
(1900) 24 Bom 609 (614).  
(69) 12 Suth W R 435 (436).  
(83) 9 Cal 520 (525).  
(84) 10 Cal 315 (323).  
(90) 17 Cal 291 (297) : 16 Ind App 238 (PC).  
(97) 24 Cal 20 (25).  
(99) 26 Cal 334 (336).  
(91) 14 Mad 55 (57).  
(92) 15 Mad 253 (254).  
(96) 19 Mad 288 (290).

('99) 22 Mad 217 (220).

##### Note 4

1. (1863) 9 Moo Ind App 1 (17) (P O).  
(77) 1 Bom 320 (329, 330).  
(82) 6 Bom 371 (374).  
(83) 7 Bom 418 (419).  
(86) 10 Bom 487 (492).  
(91) 15 Bom 44 (45).  
(81) 7 Cal 616 (619).  
(86) 12 Cal 313 (315, 316).  
(86) 9 Mad 399 (405) (FB).  
(92) 15 Mad 70 (71, 72).  
(89) 12 Mad 289 (241).  
(1900) 23 Mad 187 (144).  
(99) 12 O P L R 33 (35).

and every document which is written in the Court language but in a script other than Devanagiri shall be accompanied by a correct transliteration into Devanagiri script. If the document is admitted in evidence the opposite party shall either admit the correctness of the translation or transliteration or submit his own translation or transliteration of the document."

**O. 13 R. 7**  
**Notes 1-2**

### RANGOON

Add the following to sub-rule (2):

"who shall give a receipt for them in Col. 6 of the list in Form Judicial  
General 23."

### Synopsis

#### 1. Scope of the Rule. | 2. "Shall be returned."

**1. Scope of the Rule.** — Documents admitted in evidence are the only documents that can legally be on record.<sup>1</sup> Other documents cannot be on the record of the suit. Where after a document has been admitted in evidence the Court considers that it is a forged document or that its genuineness has not been satisfactorily established, the document should not be "rejected" but must still form part of the record although the Judge may make an endorsement on the document "genuineness not established" or words to that effect.<sup>2</sup>

**2. "Shall be returned."** — Documents which do not form part of the record as aforesaid should not be used in the case.<sup>1</sup> They should be removed from the records and returned to the persons producing them.<sup>2</sup>

**R. 8.** [S. 143.] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

**O. 13 R. 8**

Court may order any document to be impounded.

**R. 9.** [S. 144.] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same, —

**O. 13 R. 9**

Return of admitted documents.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

#### Order 13 Rule 7 — Note 1

1. ('92) 14 All 856 (857, 858). ('69) 12 Suth W R 267 (268). (Party relying on document must prove unless admitted by the other side.)
2. ('86) AIR 1983 Oudh 296(301, 302); 12 Luck 568.

#### Note 2

1. ('80) 5 Cal 317 (320).
2. ('72) 1872 Bom P J 275 (275). ('79) 5 Cal 817 (320). ('81) AIR 1981 Lah 546 (550) : 13 Lah 126.

O. 13 R. 9

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

[1877, S. 144; 1859, Ss. 135, 136, 137.]

#### Local Amendments

##### BOMBAY

Between the first and second proviso to sub-rule (1) the following proviso shall be *inserted*, namely:

"Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order 41 Rule 1, may be returned after the appeal has been disposed of by the Court."

##### LAHORE

To sub-rule (1), the following further proviso was *added* :

"Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced."

##### MADRAS

Add the following as sub-rules (3), (4) and (5):

"(3) Every application for return of a document under the first proviso to sub-rule (1) shall be made by a verified petition and shall set forth facts justifying the immediate return of the original.

(4) The Court may make such order as it thinks fit for the costs of any or all the parties to any application under sub-rule (1). The Court may further direct that any costs incurred in complying with or paid on application under sub-rule (1) or incurred in complying with the provisions of Rule 5 of this Order, shall be included as costs in the cause.

(5) Subject to the provisions of Rule 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of the document as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded by it in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay a certified copy for the original, and shall thereupon cause the original document to be returned to the applicant and may further make such order as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time

fixed by the Court, the original document shall be returned to the applicant without further delay."

**O. 13 R. 9**  
**Notes 1-3**

#### **NAGPUR**

*Insert* the following as sub-rule (2) and *re-number* the present sub-rule (2) as sub-rule (3) :

"Where the document has been produced by a person who is not a party to the suit, the Court may, and at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the costs of preparing the certified copy."

#### **PATNA**

*Add* the following as sub-rule (1a) :

"(1a) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided."

### *Synopsis*

#### **1. Legislative changes.**

#### **2. Scope of the Rule.**

#### **3. Stamp duty on copies furnished under this Rule.**

#### **1. Legislative changes.** — The effect of the principal changes in the rule is —

(1) In appealable cases the Court under the present Code should not only see that the time for preferring an appeal has expired but also be satisfied that no appeal has been preferred.

(2) In the case of return of documents before the time fixed by this rule, the Court under the present Code must also take an undertaking for the production of the original if and when required. The words "and undertakes to produce the original if required to do so" are new.

**2. Scope of the Rule.** — This rule provides for the return of documents *placed on the record*, whereas Rule 7 provides for return of documents *not placed on the record*. The return under this rule is made subject to conditions intended to secure the preservation of records for use by the Appellate Court if necessary.

The act of returning documents under this rule is merely ministerial and no evidence on oath is required, if there is a proper application for return.<sup>1</sup> Under the second proviso to sub-rule 1, no document shall be returned which, by force of the decree, has become wholly void or useless. But where a suit has been allowed to be withdrawn, the document on which the plaintiff sued does not become void or useless and must be returned.<sup>2</sup>

**3. Stamp duty on copies furnished under this Rule.** — There is a distinction between a copy substituted under Rule 5 and that substituted under this rule. The latter is liable to stamp duty if required by law.<sup>1</sup>

#### **Order 13 Rule 9 — Note 2**

1. ('21) AIR 1921 Cal 498 (498). (Return of documents not judicial proceeding—No action under S. 476, Criminal Procedure Code lies for a forged return application.)

2. ('93) 1893 Bom P J 128 (128).

#### **Note 3**

1. ('02) 26 Bom 522 (525). (The copy under R. 5 is not, when furnished, certified.)

O. 13 R. 10

**R. 10.** [S. 137.] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

[1877, S. 137; 1859, S. 138.]

#### Local Amendment

#### RANGOON

Sub-rule (3) shall be re-numbered as (5) and the following shall be *inserted* as sub-rules (3) and (4) :

"(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any record-keeper, chief clerk, or official of any Court.

(4) Whenever a Judge sends for the record of another suit or case, or other official papers, and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct at the expense of which party such copy shall be made."

#### Synopsis

- |                                  |   |
|----------------------------------|---|
| 1. Scope and object of the Rule. | 3. "From any other Court."                  |
| 2. Discretion of Court.          | 4. Affidavit in support of the application. |

#### Other Topics (miscellaneous)

Criminal case record. See Note 3.

Records from Collector's office. See Note 2.

Revision. See Note 2.

**1. Scope and object of the Rule.** — The power given under this rule may be exercised also by an Appellate Court.<sup>1</sup> A Court is not bound to send for the whole of the records but only such documents will be sent for as are specifically mentioned in the application.<sup>2</sup>

#### Order 13 Rule 10 — Note 1

1. ('71) 15 Suth W R 178 (174). (But not where party omitted to use document sent for in the

lower Court.)

('94) 1894 All W N 8 (8) : 16 All 126.

2. (1864) 1864 Suth W R 272 (278).



Documents do not become evidence in the case by the mere fact of being received into the Court under this rule. They must be admitted in evidence by the Court like any other document.<sup>3</sup> See sub-rule 3. **O. 13 R. 10**  
**Notes 1-4**

**2. Discretion of Court.** — The Court has a *discretion* to grant or refuse an application under this rule.<sup>1</sup> It should not, however, refuse to send for necessary documents on a proper application,<sup>2</sup> nor, having *ordered* them to be sent for, omit to *actually* send for them to be used by the party as evidence.<sup>3</sup> But a Court is not bound to send for a document when the party neglects or fails to make an application<sup>4</sup> or where he could but would not employ other means of production of the documents under the Code.<sup>5</sup>

An omission to exercise the discretion in favour of a party in a proper case is a good ground in an appeal or revision provided the party has been prejudiced thereby.<sup>6</sup>

**3. "From any other Court."** — The Court from which a document is sent for need not necessarily be a *Civil Court*.<sup>1</sup> But it must be a *Court*.<sup>2</sup> A Court from which records are sent for under this rule has no discretion to refuse to send them.<sup>3</sup>

**4. Affidavit in support of the application.** — The rule as to the contents of an affidavit under this rule must be strictly complied with. An application without setting forth the necessary grounds satisfactorily in the affidavit will be rejected.<sup>1</sup>

### Local Amendment

#### RANGOON

The following shall be *inserted* as Rules 10A and 10B :

"10A. Exhibits, with their accompanying lists, shall not be filed with the record until after the termination of the trial. **O. 13 R. 10A**  
**(Rangoon)**

10B. If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or not." **O. 13 R. 10B**  
**(Rangoon)**

3. ('27) AIR 1927 Lah 69 (70).  
( '29) AIR 1929 Lah 78 (79).  
( '31) AIR 1931 Lah 119 (120).  
( '66) 2 Bom H C R 341 (342).  
( '13) 18 Ind Cas 857 (858) : 9 Nag L R 11.  
( '30) 81 Pun L R 250 (257).  
[See also (1864) 1 Suth W R 63 (64).]

#### Note 2

1. (1864) 1864 Suth W R 177 (178, 180) (FB).  
( '67) 7 Suth W R 109 (109).
2. ('72) 18 Suth W R 127 (128).  
( '66) 6 Suth W R 79 (79).  
( '82) 7 Cal 560 (565). (Though the documents cannot be produced before the termination of the trial.)
3. ('08) 8 Cal L Jour 48 (46, 47).  
( '82) 1882 Bom P J 162 (162). (Collector's office not a Court.)
4. ('88) 9 Cal 260 (264, 265) (P C).  
( '72) 18 Suth W R 18 (14).
5. ('71) 15 Suth W R 150 (151). (Taking out sum-

- mons for production.)  
( '70) 14 Suth W R 302 (308). (Do.)  
6. ('09) 2 Ind Cas 958 (958) (Cal).  
( '72) 18 Suth W R 127 (128).  
( '66) 6 Suth W R 79 (79).  
( '18) AIR 1918 All 375 (376).  
( '07) 11 Cal W N 112 (114, 116).

#### Note 3

1. ('74) 1874 Pun ReNo. 32, p. 147. (Record of a criminal case.)
2. ('71) 15 Suth W R 150 (151). (A Court of Wards is no Court—*Note*: The power to send for documents from 'Public Offices' under S. 138 of the Code of 1859 has been taken away from the corresponding provisions of the later Codes.)  
[See ('71) 15 Suth W R 173 (174). (Record of a *cazoe* cannot be sent for.)
3. ('79) 4 Cal L Rep 86 (37).

#### Note 4

1. ('31) AIR 1931 Lah 119 (120).  
( '94) 1894 All W N 3 (3) : 16 All 126.

O. 13 R. 11

**R. 11.** [S. 145.] The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Provisions as to documents  
applied to material objects.

### Local Amendment

#### ALLAHABAD

Add the following to the end of Order 13 :

O. 13 R. 12  
(Allahabad)

"12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint, or (b) at the first hearing, or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document.

O. 13 R. 13  
(Allahabad)

13. When a document included in the list, prescribed by Rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in Rule 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A-1, A-2, A-3, etc., and those of the second party B-1, B-2 B-3, etc. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series."

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## ORDER XIV.

### SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT

#### ON ISSUES OF LAW OR ON ISSUES AGREED UPON

O. 14 R. 1

**R. 1.** [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

Framing of issues.

(2) Material propositions are those propositions of law or

fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

O. 14 R. 1  
Notes 1-2

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

[1877, S. 146; 1859, S. 139. R. S. C., O. 33 R. 1.]

### Synopsis

- |                                  |  |
|----------------------------------|--|
| 1. Legislative changes.          | 7. Abandonment of issue.   |
| 2. Scope and object of the Rule. | 8. Delay in raising issue.   |
| 3. Issues between co-defendants. | 9. Issue not raised in pleadings but in evidence.                      |
| 4. Omission to frame issues.     | 10. Variance between pleadings and proof. Vide Note 9 under O. 6 R. 2. |
| 5. Wrong issues.                 |  |
| 6. Issues by consent.            |  |

### Other Topics (miscellaneous)

- |   |   |
|---|---|
| Court not to frame inconsistent issues. See Note 5.                           | Proper issues in suits for damages. See Note 5.                       |
| Issue—Abandonment of, by pleader. See Note 7.                                 | Proper issues in suits for malicious prosecution. See Note 5.         |
| Issues must be decided. See Note 2.   | Proper issues in suits for possession. See Notes 2, 4, 5 and 9.       |
| One party. See Note 3.  | Proper issues in suits on easement. See Note 2.                       |
| Power of appellate Court to frame issues and remand for findings. See Note 4. | Proper issues in suits to recover lands granted in trust. See Note 5. |
| Proper issues in account suits. See Note 5.                                   | Suits for rent. See Notes 2 and 5.                                    |
| Proper issues in injunction suits. See Note 5.                                |   |
| Proper issues in lease suits. See Note 4.                                     |   |

**1. Legislative changes.** — In sub-rule (2), the words "or a defendant must allege in order to constitute his defence" are new.

**2. Scope and object of the Rule.** — The plaint and the written statement constitute the pleadings in a case and mark the *first stage* at which the differences between the parties are placed before the Court. The Court itself may also at the *first hearing* examine the parties in order to ascertain with precision, the propositions of law

**O. 14 R. 1**  
**Note 2**

or fact on which the parties are at variance;<sup>1</sup> and on such questions issues have to be framed and recorded.<sup>2</sup>

The framing of issues has a very important bearing on the trial and decision of a case. In the *first place*, it is the *issues fixed* and not the pleadings that guide the parties in the matter of adducing evidence.<sup>3</sup> Thus, when a point has been the subject of an issue, the parties will not be heard to say that the point was not disputed and so required no proof.<sup>4</sup> *Secondly*, the Court *cannot refuse to decide a point* on which an issue has been framed and evidence given by the parties,<sup>5</sup> even if the point involved is not mentioned in the pleadings.<sup>6</sup> Conversely, the Court should not decide a suit on a matter on which no issue has been raised.<sup>7</sup> *Finally*, if the case goes in appeal it must be dealt with by the Appellate Court *on the issues settled for trial*<sup>8</sup> and not on a point on which there is no issue.<sup>9</sup> It is therefore essential to the right decision of a case that appropriate issues should be framed and tried.<sup>10</sup>

Sub-rule (1) declares that an issue arises when a *material proposition* of law or fact is affirmed by one party and denied by the other,<sup>11</sup> and sub-rule (2) defines what material propositions are.

The issues should be confined to points necessary for the proper trial and disposal of the case and should not be framed with respect to points *not so necessary*.<sup>12</sup> No issue need be framed on a point of law which is perfectly clear,<sup>13</sup> nor is the Court bound to grant an issue on a point not arising on the pleadings.<sup>14</sup> But when the pleadings raise points with sufficient clearness, issues should be framed on them though they may not have been put in the pleadings in any particular form.<sup>15</sup> Sub-rule (3) declares what each issue should contain. The issues should be so framed as to embrace the *whole dispute* in the suit<sup>16</sup> but to cover only the points in *dispute* and to cover each point *once only*.<sup>17</sup>

It is primarily the *duty* of the Judge to frame the proper issues in a case<sup>18</sup> and

**Order 14 Rule 1 — Note 2**

1. ('70) 14 Suth W R 181 (182).
2. ('90) 17 Cal 840 (848).
3. ('71) 16 Suth W R 218 (219). (Plaint disclosed no cause of action—Pleadings were examined and issues fixed.)
4. ('25) AIR 1925 Cal 1157 (1160).
5. ('25) AIR 1925 Mad 427 (429).
6. ('85) 11 Cal 407 (410).
7. ('88) 15 Cal 533 (537) : 15 Ind App 119 (PC).
8. ('25) AIR 1925 Mad 169 (169).
9. ('71) 15 Suth W R 286 (287). (Indistinctness of plaint no ground for setting aside decree.)
10. ('66) 5 Suth W R Act X 72 (73).
11. ('95) 22 Cal 324 (331); 22 Ind App 4 (PC). (Object in pleading issue is to allow appropriate evidence to be put forward.)
12. ('21) 60 Ind Cas 751 (752) (Lah).
13. ('36) AIR 1936 Mad 526 (527). (The purpose of setting out points for decision before trial is to enable parties to know what evidence they have to produce before the Court.)
14. ('89) 11 All 396 (398) (PC).
15. ('92) 16 Bom 545 (547).
16. ('74) 21 Suth W R 407 (408).
17. ('12) 15 Ind Cas 185 (186) (Mad).
18. ('26) AIR 1925 Lah 571 (572). (Issue not arising on pleadings.)
19. ('85) 7 All 1 (11) : 11 Ind App 149 (PC).
20. ('69) 12 Suth W R 229 (230).

21. ('86) 12 Cal 239 (245, 246); 12 Ind App 166 (PC).
22. ('06) 30 Bom 178 (188).
23. ('21) AIR 1921 Lah 360 (361).
24. ('36) AIR 1936 Nag 177 (179). (Such affirmation or denial must be contained in the pleadings as defined in O. 6 R. 1.)
25. ('71) 8 N W P H C R 303 (307).
26. ('72) 8 Beng L R 180 (192, 193).
27. ('11) 10 Ind Cas 805 (805) : 35 Bom 425.
28. (1864) 2 Bom H C R 258 (266).
29. ('02) 25 Mad 837 (878) : 29 Ind App 76 (PC).
30. ('21) AIR 1921 Lah 360 (361).
31. ('19) AIR 1919 Pat 196 (198). (In fact the Court is not justified in framing an issue on a question about which no dispute arises in the pleadings.)
32. ('28) AIR 1928 All 167 (167). (Do.)
33. ('15) AIR 1915 Mad 519 (526).
34. ('66) 8 Mad H C R 25 (26).
35. ('24) AIR 1924 Nag 156 (157).
36. ('31) AIR 1931 All 625 (628).
37. ('02) 26 Bom 360 (362).
38. ('07) 9 Bom L R 1114 (1115). (Where minors are concerned.)
39. ('01) 3 Bom L R 535 (537).
40. ('35) AIR 1935 Lah 251 (259) : 16 Lah 782. (It is also the duty of counsel to get the proper issues framed.)
41. ('38) AIR 1938 Mad 829 (829). (But parties should also draw Court's attention to omission in framing issues.)

the Judge must apply his mind and understand the facts before framing them.<sup>19</sup> Where issues have already been framed in a suit, the fact that the Judge who framed the issues has been transferred will not make it obligatory on the incoming Judge to frame issues again.<sup>20</sup> Where after the filing of a written statement, the Court passes a consent decree on the agreement of the parties, there is no obligation on the Court to frame issues before passing the decree.<sup>21</sup>

Sub-rule (6) relates to cases where the defendant makes no defence. The Court is not bound to frame and record issues when the defendant is *ex parte* and no written statement has been put in.<sup>22</sup> But even in *ex parte* cases, if there is any room for doubt about any matter, the Court has been held, under certain circumstances, to be bound to inform the plaintiff specifically what points he has to prove.<sup>23</sup>

As to particular issues arising in certain kinds of suits, see the undermentioned cases.<sup>24</sup>

A point alleged by the plaintiff and *admitted* by the defendant cannot be said to be in issue and a decision can be given on the basis of such admission without an issue.<sup>25</sup> Averments contained in the plaint which are not traversed in the written statement and as to which no issue has been asked for will be deemed to be admitted.<sup>26</sup>

**3. Issues between co-defendants.** — It is contrary to practice to frame and try issues between co-defendants.<sup>1</sup> Where, however, such an issue is necessary for giving appropriate relief to the plaintiff, it should be framed and tried.<sup>2</sup>

**4. Omission to frame issues.** — A Court commits a grave irregularity in proceeding to the final hearing of a case without settling issues therein.<sup>1</sup> But the mere omission to frame issues is not necessarily *fatal* to the trial of the suit.<sup>2</sup> It is an

19. ('30) AIR 1930 Mad 78 (79).

20. ('87) 1887 All W N 247 (248).

21. ('93) AIR 1933 Sind 304 (304).

22. ('71) 15 Suth W R 145 (146).

('07) 11 Cal W N 871 (872).

[See also ('36) AIR 1936 Nag 177 (179). (Where there is no written statement the only issues would be those arising out of the plaint which allegations are put in issue when not admitted.)]

23. ('28) AIR 1928 Nag 83 (84).

24. ('95) 18 Mad 142 (149). (The legality of an order granting permission to institute a suit under Cl. 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted.)

('33) AIR 1933 Sind 184 (184). (Suit for dissolution of marriage—Issues as to damages should be framed.)

('82) 8 Cal 288 (241, 242, 243). (Rent suits in which defendant sets up title of a third party.)

('75) 24 Suth W R 101 (104). (Rent suit.)

('92) 16 Bom 588 (585). (Suit for removal of obstruction to easement.)

('81) 6 Cal 812 (814). (Suit to establish an easement by prescription when limitation is pleaded.)

('96) 20 Bom 753 (755). (Suits for possession of land on a sale deed by a person who is not defendant.)

('08) 32 Bom 255 (258). (Suits based on fraud.)

('72) 17 Suth W R 482 (489, 489). (Suit by a Hindu widow for declaration of her right to maintenance out of her husband's estate which has been mortgaged to defendant by the husband's heir.)

('92) 15 Mad 15 (17). (In a suit for declaration that the defendant had no right either to the office of sheik or to the properties in question, and for an injunction restraining him from interfering with the properties, and for further and other relief, it was alleged by the defendant that he was in possession and hence the plaintiff could not maintain a suit for declaration without asking for possession—An issue was framed if the defendant was in possession.)

('38) AIR 1938 Sind 124 (125) : 1 L R (1939) Kar 50. (Defendant alleging that plaintiff has inflated claim to file suit in higher Court—Specific issue on point and not preliminary issue about jurisdiction should be framed.)

25. ('98) 11 Mad 367 (370).

26. ('70) 12 Suth W R 469 (469).

('72) 18 Suth W R 287 (287).

('75) 23 Suth W R 158 (159).

('02) 26 Bom 735 (737).

### Note 3

1. (1865) 2 Suth W R 45 (46).

('67) 8 Suth W R 356 (357, 358).

('69) 11 Suth W R 462 (463, 464).

2. (See (1900) 22 All 386 (390). (Decision on the point of *res judicata*.)

### Note 4

1. ('83) 12 Cal L Rep 169 (174) : 6 Mad 1 : 9 Ind App 128 (P C).

('66) 11 Moo Ind App 25 (27) (P C).

('70) 2 N W P H C R 183 (184).

2. ('03) 1908 Pun Ro No. 77, p. 321. (Subsidiary issue.)

**O. 14 R. 1**  
**Note 4**

irregularity which may or may not be a *material* one. If such omission has affected the disposal of the case on the merits it will be a ground for remanding the case for a new trial. But if, on the other hand, parties have not been prejudiced by the omission<sup>3</sup> and *substantial justice* has been done in the case notwithstanding the omission to frame issues,<sup>4</sup> the decision will not be set aside or remanded for a new trial. Thus, a decision will not be interfered with in the following cases on the ground of issue not having been framed —

- (1) Where the issue omitted relates to a point not necessary for the right determination of the case;<sup>5</sup>
- (2) Where, in spite of the omission of an issue, the parties are alive to the point, have adduced evidence on it, and have discussed it in the trial Court.<sup>6</sup> Thus, in a case where no specific issue was raised on a point but it was treated as if it arose in the suit and it had been put in issue in another suit between the same parties, it was held that evidence in that suit could be considered to determine the question where no surprise would be caused thereby;<sup>7</sup>
- (3) Where, in spite of the omission, the party affected had *notice* of the point and had *opportunity* to adduce evidence to meet it;<sup>8</sup> or
- (4) Where the omission was due to the *deliberate* conduct of the party affected.<sup>9</sup>

On the other hand, where there has been no trial at all or only an imperfect trial on the point as a consequence of the omission of an issue on it, the decision will be set aside.<sup>10</sup> In such cases the Appellate Court should frame the proper issues and remand the case for re-trial on them.<sup>11</sup> Where an issue already framed, though in terms covering the main question in the case, does not sufficiently direct the attention of the parties to it, and may thereby have prevented a party from adducing evidence on it, the proper course is to frame fresh issues and to remand the case for re-trial on them.<sup>12</sup>

3. ('25) AIR 1925 Oudh 383 (384).

('03) 1903 Pun Re No. 77, p. 321.

4. ('70) 13 Moo Ind App 573 (582, 583 and 584).

(It is submitted that the contrary view taken in A I R 1939 Pesh 44 is not good law in view of this decision of the Privy Council.)

5. ('15) AIR 1915 Cal 648 (648).

[See also ('35) AIR 1935 Pat 351 (352). (In cases of alienation by a widow, the issue as to legal necessity and that relating to bona fide inquiry are separate; and if the parties or their pleaders press only one of the issues, the Court is not bound to decide the other also.)]

6. ('07) 29 All 184 (190, 191, 192 and 195) : 34 Ind App 27 (P C).

('95) 22 Cal 324 (331) : 22 Ind App 4 (P C).

('03) 25 All 498 (506) (F B).

('06) 29 Mad 72 (74).

('11) 10 Ind Cas 291 (291) (Mad).

('12) 15 Ind Cas 757 (759) : 5 Sind LR 192.

('15) AIR 1915 Cal 444 (446, 447).

('26) AIR 1926 Bom 384 (385).

('74) 22 Suth W R 448 (449).

('69) 12 Moo Ind App 495 (503) (P C).

('85) 11 Cal 379 (384, 385) (P C). (No settlement of issues — But where judgment has laid points for determination they may be looked upon as

issues unless party is prejudiced.)

7. ('21) AIR 1921 P O 84 (86, 87) : 44 Mad 288 : 48 Ind App 1 (P C).

8. ('87) 14 Cal 592 (597).

('97) 24 Cal 306 (309).

('71) 15 Suth W R 145 (146).

9. ('80) 5 Cal 283 (286).

('88) AIR 1988 Mad 329 (329, 330). (Person alleging that he is not necessary party but not pressing issue to that effect when issues were being framed — That issue must be held to have been waived by him.)

10. ('69) 11 Suth W R 366 (367). (Suit on lease.)

('74) 21 Suth W R 59 (60).

('79) 3 Bom 210 (211, 213).

('87) 9 All 147 (153).

11. ('78) 20 Suth W R 401 (402). (Suit for possession.)

('11) 12 Ind Cas 53 (54) (Lah).

('96) 18 All 322 (324, 325). (Suit for damages for deficiency in area sold — Proper issues to be framed and tried — Issues accordingly framed by Appellate Court and remanded.)

12. ('78) 21 Suth W R 353 (353, 360) : 1 Ind App 268 (PC).

('75) 23 Suth W R 172 (173).

**5. Wrong issues.** — Where wrong issues have been framed in a suit and the suit has been disposed of on the findings on those issues, the decision will be set aside in appeal and the suit remanded for re-trial after framing proper issues.<sup>1</sup> This, however, will not be done where, in spite of the wrong issues, the points have been correctly understood by all the parties<sup>2</sup> or where all the available evidence has been adduced on the necessary points and duly discussed.<sup>3</sup>

**6. Issues by consent.** — Where the issues raised in a suit have been *consented* to by a party, then the decision cannot be objected to by him on the ground that the issues are wrong or defective or unnecessary.<sup>1</sup> Similarly, where the parties affected by the wrong issue have waived their objections thereto, the decision will not be interfered with.<sup>2</sup>

**7. Abandonment of issue.** — It is open to the parties to abandon issues, thereby waiving the points raised therein. Such abandonment may be express or implied. It has been held by the High Court of Madras that Courts are not bound to raise issues *suo motu* on *questions of fact* where parties do not ask for them, that the omission to raise such issues implies an abandonment of such questions by the party interested, but that, where the question is one of *law*, it is incumbent on the Court to frame proper issues on such questions.<sup>1</sup> The High Court of Bombay has, on the other hand, broadly held that it would be unsafe to presume, from the failure of the Court to raise the necessary issues, an intention on the part of the party to admit the fact which the other party was bound to prove.<sup>2</sup>

Even on points *raised in the pleadings*, the conduct of a party may, in certain circumstances, amount to abandonment.<sup>3</sup> A pleader duly appointed to conduct a case on behalf of his client has full authority to abandon an issue raised on behalf of his client and the latter will be bound by such abandonment.<sup>4</sup>

**8. Delay in raising issue.** — Rule 5 gives the Court power to raise issues or amend or strike out issues at any time. The mere fact that a particular issue was raised at a late stage of the suit will be immaterial if the parties had sufficient opportunity to

#### Note 5

1. ('11) 12 Ind Cas 137 (138) (Mad).
- ('69) 12 Suth W R 198 (199). (Suit for damages).
- ('66) 6 Suth W R 57 (57, 58) (PC).
- ('69) 12 Suth W R 132 (133). (Suit to recover land granted in trust.)
- ('69) 12 Suth W R 460 (461). (Suit for possession.)
- ('70) 14 Suth W R 149 (149, 150). (Rent suit — But in this case the Appellate Court decided on the merits as there was evidence on record.)
- ('70) 14 Suth W R 466 (466, 467).
- ('72) 17 Suth W R 101 (101). (Suit for malicious prosecution.)
- ('72) 17 Suth W R 149 (150). (Suit for accounts.)
- ('72) 17 Suth W R 359 (360). (Suit for injunction.)
- ('72) 17 Suth W R 504 (505). (Suit for rent.)
- ('72) 18 Suth W R 297 (297).
- ('88) 15 Cal 684 (692) : 15 Ind App 81 (PC).
- ('90) 18 Mad 549 (551). (Inconsistent issues.)
- ('90) 1890 Pun Re No. 108, page 816.
- ('21) AIR 1921 Mad 701 (702, 708).
- ('69) 11 Suth W R 61 (61). (Wrong issue amended in appeal — Party should ask for opportunity to meet it—Otherwise barred.)

2. ('08) 32 Bom 356 (361).
- ('21) AIR 1921 Sind 159 (164) : 16 Sind L R 207.
3. ('75) 24 Suth W R 275 (276).
- ('97) 21 Bom 325 (327).

#### Note 6

1. ('69) 11 Suth W R 277 (278).
- ('68) 10 Suth W R 389 (389).
- ('69) 11 Suth W R 20 (21).
- ('70) 13 Suth W R 205 (205).
- ('70) 14 Suth W R 466 (466).
- ('73) 20 Suth W R 377 (379) : Ind App Sup Vol 212 (PC).
- ('26) AIR 1926 Nag 164 (167).
- Marsh 519.
2. ('01) 3 Bom L R 535 (537, 538).

#### Note 7

1. ('19) AIR 1919 Mad 698 (699).
- ('02) 26 Mad 363 (363).
2. ('02) 26 Bom 360 (362).
3. ('25) AIR 1925 Mad 427 (429).
4. ('02) 25 Mad 867 (877) : 29 Ind App 76 (PC).
- ('16) AIR 1916 Oudh 195 (197).
- ('35) AIR 1935 Lah 71 (74) : 16 Lah 828.

**O. 14 R. 1** adduce evidence and the Court was in a position to pronounce judgment on it.<sup>1</sup> See also  
**Notes 8-10** the undermentioned decision.<sup>2</sup>

**9. Issue not raised in the pleadings but in evidence.** — A relief not founded on the pleadings should not ordinarily be granted. But as has already been pointed out, there is nothing irregular in a Court granting relief on matters not set forth in the pleadings where they are comprised in the issues and have been put into evidence.<sup>1</sup>

Where a material point has not been raised in the pleadings and is not comprised in the issues originally framed, but appears for the first time in evidence, the Court may frame an issue on it and decide it<sup>2</sup> after giving the party affected an opportunity to meet it.<sup>3</sup>

**10. Variance between pleadings and proof.** — *Vide* Note 9 under O. 6 R. 2.

**O. 14 R. 2**

**R. 2.** [S. 146, cl. 6.] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

[1877, S. 146, cl. 6; 1859, S. 139. *Cf.* R. S. C., O. 25 R. 2.]

### *Synopsis*

1. Legislative changes.
2. Scope and applicability of the Rule.
3. Revision.

#### *Other Topics (miscellaneous)*

Court, whether bound to decide questions of fact where it can dispose of on issues of law only. See Note 2.

Disposal on issues of law. See Note 2.

**1. Legislative changes.** — The words "or any part thereof" are new.

**2. Scope and applicability of the Rule.** — Ordinarily, a Court is not under any obligation as to the order in which it is to try the issues raised before it, and has the right to dispose of the issues in any way which it considers most likely to be conducive to the ascertainment of truth.<sup>1</sup> There are however two reservations. The first is that in appealable cases, the Court should as far as possible decide on all the issues joined, inasmuch as a piecemeal trial might lead to protracted litigation and

#### **Note 8**

1. ('95) 22 Cal 824 (831) : 22 Ind App 4 (PC).
2. ('88) AIR 1938 Cal 200 (298). (Issue on question of *locus standi* of objector must be framed before trial and tried and determined as preliminary proceeding.)

#### **Note 9**

1. ('99) 21 All 58 (69) : 25 Ind App 195 (PC).
- ('90) 12 All 556 (558).
2. ('71) 16 Suth W R 44 (45).

(1865) 2 Mad H C R 428 (426).

('78) 19 Suth W R 388 (884, 885). (Suit for possession.)

('92) 16 Bom 588 (585).

3. ('96) 20 Bom 569 (570).

#### **Order 14 Rule 2 — Note 2**

1. ('75) 28 Suth W R 54 (55).

('83) AIR 1988 All 749 (751). (High Court will not interfere in revision to make a direction as to this.)



repeated appeals in the same suit.<sup>2</sup> The *second* is that contained in this rule, which prescribes that where issues of law going to the root of the case and capable of being decided without evidence arise, the Court is bound to try those issues first<sup>3</sup> and may in its discretion postpone the settlement of the issues of fact until after the issues of law have been determined.<sup>4</sup> The rule casts on the Court the duty of determining whether circumstances exist in each particular case for the exercise of the power conferred therein.<sup>5</sup> Where a party suggests that the suit can be disposed of on the hearing of a preliminary issue, the proper procedure is to set down the case for settlement of issues and on that day decide which, if any, of the issues can be decided in the above manner.<sup>6</sup>

The present rule, no doubt, contemplates the procedure to be followed at the issue stage. But O. 15 R. 3 empowers the Judge to proceed to determine issues of law at any subsequent stage also,<sup>7</sup> so that even if issues of fact have been settled, a Judge commits no irregularity if he proceeds to determine issues of law postponing the trial of the issues of fact.<sup>8</sup>

At the hearing of a case on a preliminary issue, the party by whom it is raised has the right to begin.<sup>9</sup>

The trial of issues of fact will not be stayed pending appeal on the decision on law except upon very strong grounds.<sup>10</sup>

An issue *requiring evidence* is not a preliminary issue which can be dealt with under this rule.<sup>11</sup> Where all the issues are issues of fact, the Court has no power to try only some of them and postpone the trial of the others, save on the ground of embarrassment.<sup>12</sup>

The decision on a preliminary issue cannot be re-opened in the trial Court.<sup>13</sup>

**3. Revision.** — Where the trial Court fails to consider whether a case or a part thereof may be disposed of on issues of law only, but merely says that it is not desirable that the case be decided piecemeal, the order is open to revision by the High Court.<sup>1</sup>

2. ('21) AIR 1921 Pat 323 (323).

(32) AIR 1932 Bom 1 (3). (Court dismissing on preliminary issue—Desirability—Decision on all issues desirable unless records are heavy and issue of law is clear.)

3. ('86) AIR 1936 Pat 250 (253).

4. ('09) 8 Ind Cas 304 (306) (Cal). (Issue of limitation.)

(33) AIR 1933 All 753 (754).

5. ('21) AIR 1921 Pat 467 (467).

(31) AIR 1933 All 753 (753).

(36) AIR 1936 Pat 250 (252). (In exercising the discretion the Court has to reconcile two objects, viz., the object of avoiding a piecemeal trial of the suit and that of avoiding an unnecessary trial on facts.)

(39) AIR 1939 Lah 158 (158). (Preliminary issue as to absence of cause of action should be tried first.)

(34) 162 Ind Cas 819 (819) (Nag). (Issues regarding plaintiff's title to bring suit should be decided before dealing with other issues.)

(35) AIR 1936 Lah 982 (983) : 17 Lah 391. (Issue of limitation — Facts not in dispute — Issue of limitation may be decided first.)

6. ('23) AIR 1923 Bom 249 (251) : 47 Bom 503.

7. ('21) AIR 1921 Pat 467 (467).

[See ('33) AIR 1933 Cal 559 (559). (O. 15 R. 3 applies to stage of first hearing—See also notes to O. 15 R. 3.)]

8. ('16) AIR 1916 Cal 164 (165).

(22) AIR 1922 Mad 321 (322).

9. ('88) 12 Bom 454 (459).

10. (1883) 22 Ch D 88 (89, 90), *Re Palmer's Application*.

11. ('23) AIR 1923 Pat 344 (345).

(15) AIR 1915 Cal 87 (90).

(32) AIR 1932 Bom 128 (129) : 56 Bom 224. (There is no power to frame a preliminary issue of fact.)

[See ('32) 1932 Mad W N 331 (332). (Such an issue not to be tried before framing all necessary issues.)]

12. ('25) AIR 1925 Pat 674 (676).

[See also ('12) 16 Ind Cas 705 (707) (Cal).

(32) AIR 1932 Bom 128 (129) : 56 Bom 224.]

13. ('38) AIR 1938 All 113 (114) : 11 L R (1938) All 198.

#### Note 3

1. ('36) AIR 1936 Pat 250 (253).

**O. 14 R. 3**

Materials from which  
issues may be framed.

**R. 3. [S. 147.]** The Court may frame the issues from all or any of the following materials:—

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders or such parties;
  - (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
  - (c) the contents of documents produced by either party.
- [1877, S. 147, 1859, S. 139.]

### *Synopsis*

1. Legislative changes.
2. Scope and applicability of the Rule.
3. Issue not to be inconsistent with the pleadings.
4. Appeal.

**1. Legislative changes.** — The word “pleadings” in clause (b) has been substituted for the words “in the plaint or in the written statement (if any) tendered in the suit” which occurred in the corresponding portion of the old Section.

**2. Scope and applicability of the Rule.** — In *Eshenchunder v. Shamcharan*,<sup>1</sup> their Lordships of the Privy Council observed that “the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made.” In order to provide against failure of justice upon technical rules of pleadings and to enable the Court to frame issues on correct points of dispute, this rule prescribes that the Courts are to base the issues not on the pleadings only but on the other materials referred to in the rule as well.<sup>2</sup> Owing to the infelicitous mode of drawing up pleadings prevalent in this country, the real points in dispute are often missed or obscured and therefore even if the pleadings are bad, it is the duty of the Judge to ascertain these points clearly and frame issues accordingly.<sup>3</sup> The proper “materials” that may be taken into consideration under this rule are —

- (1) Allegations made on oath by the parties or any persons present on their behalf and statements made by pleaders appearing for the parties<sup>4</sup> [clause (a)] ;
- (2) Allegations made in pleadings or in answer to interrogatories [clause (b)] ;  
and,
- (3) Documents filed by parties [clause (c)].

#### Order 14 Rule 3 — Note 2

1. ('66) 11 Moo Ind App 7 (20, 28) (P O).
2. ('87) 10 Mad 375 (502).
3. ('79) 8 Bom 210 (213).
- ('74) 8 Mad H O R 114 (125, 182).
- [See also ('71) 15 Suth W R 286 (287).]
4. ('81) 5 Bom 809 (614).
- (1868) 2 Ind Jour (N S) 388.
- ('67) 8 Suth W R 162 (162).

- ('71) 16 Suth W R 218 (219).
- ('79) 8 Bom 210 (213).
- ('84) 12 Ind App 52 (56) ; 11 Cal 818 (P O).
- ('85) 11 Cal 407 (410).
- ('97) 24 Cal 808 (909).
- ('19) AIR 1919 Cal 186 (187).
- ('25) AIR 1925 Mad 169 (169).
- [See ('88) 15 Cal 533 (537) ; 15 Ind App 119 (P O).]
- [See also ('87) 15 Ind App 159 (162, 168) ; 16 Cal 108 (P O).]

Under Rule 4 the Judge can summon witnesses and documents and examine them before framing issues. In Rule 5 provision is made for amendment, addition and striking out of issues in the course of the trial.

**O. 15 R. 3**  
**Notes 2-4**

These "materials" mentioned in the rule are only intended to enable the Court to ascertain the contentions of the parties with precision,<sup>5</sup> *i. e.*, to elucidate points which are *ambiguous or obscure*.<sup>6</sup> They cannot *enlarge* the scope of the pleadings so as to enable the Court to raise an issue on a point not at all raised in the pleadings.<sup>7</sup> But the Court cannot refuse to enquire into a plea raised by plaintiff's vakil in reply to question put to him by the Court even though such a plea has not been advanced in the original plaint.<sup>8</sup> Also, where a plaint has not set out the true facts, a plea raised by a defendant in his examination cannot be refused on the ground that it is not found in the written statement.<sup>9</sup>

The result of the exhaustive provisions contained in this rule is that if a point or plea has not been raised or agitated in the trial Court, it will not ordinarily be allowed to be raised for the first time in second appeal.<sup>10</sup>

The provisions of this rule do not apply where the defendant is *ex parte*.<sup>11</sup>

**3. Issue not to be inconsistent with the pleadings.** — The issue raised by the Court should not be *inconsistent* with the allegations contained in the pleadings.<sup>1</sup> Thus, on a plea of forgery of a document, no issue can be raised as to whether it was executed under coercion or undue influence.<sup>2</sup> But an issue as to undue influence is not *inconsistent* with a plea of fraud.<sup>3</sup>

**4. Appeal.** — An order refusing to frame an issue asked for by a party is not appealable either under the Code<sup>1</sup> or under Clause 15 of the Letters Patent as a "judgment."<sup>2</sup>

## **R. 4. [S. 148.]** Where the Court is of opinion that the

**O. 14 R. 4**

Court may examine witnesses or documents before framing issues.

issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

[1877, S. 148; 1859, S. 140.]

5. ('90) 17 Cal 840 (848).

6. ('02) 1902 All W N 35 (38).

7. ('02) 1902 All W N 35 (38).

('19) AIR 1919 Mad 698 (699).

('11) 12 Ind Cas 137 (138) (Mad). (In fact a Court is not justified in framing an issue on a point not alleged in the plaint.)

8. ('67) 8 Suth W R 354 (355).

9. ('75) 23 Suth W R 172 (173).

('74) 21 Suth W R 407 (408).

10. (1857-1860) 8 Moo Ind App 170 (187) (PC).

('72) 17 Suth W R 407 (408).

('74) 22 Suth W R 469 (471).

('75) 23 Suth W R 208 (211) : 2 Ind App 87 (PC).

[See ('88) 10 All 627 (630).]

11. ('71) 15 Suth W R 145 (146).

### **Note 3**

1. ('88) 15 Cal 684 (692) : 15 Ind App 81 (PC). (Suit to set aside a gift deed on the allegation of forgery—Issue of undue influence, not allowed.)

('90) 13 Mad 549 (551).

('09) 4 Ind Cas 37 (37) (Mad). (Suit for possession.)

[See also ('66) 11 Moo Ind App 7 (20, 21) (PC).]

2. ('88) 15 Cal 684 (692) : 15 Ind App 81 (PC).

3. ('17) AIR 1917 Lah 168 (169) : 1917 Pun Re. No. 90.

### **Note 4**

1. ('79) 4 Cal 581 (585).

2. ('10) 8 Ind Cas 340 (343, 349) : 35 Mad 1 (FB).

O. 14 R. 4  
Notes 1-2

### Synopsis

1. Legislative changes. | 2. Scope and applicability of the Rule.

**1. Legislative changes. —**

1. The words "to be fixed by the Court" which occurred in the old Section have been omitted.
2. The words "subject to the rules contained in the Indian Evidence Act" which occurred in the old Section have been substituted by the words "subject to any law for the time being in force."
3. The words "in whose hands it may be" which occurred in the old Section have been changed into "in whose possession or power it is."

**2. Scope and applicability of the Rule. —** Section 163 of the Evidence Act does not apply to a document produced under this rule by one party at the instance of the other party.<sup>1</sup>

O. 14 R. 5

**R. 5. [S. 149.]** (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

Power to amend, and strike out, issues.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

[1877, S. 149; 1859, S. 141.]

### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and object of the Rule.</li> <li>3. Where an amendment of issues and the framing of new issues is obligatory.</li> <li>4. Where an amendment of issues and the framing of additional issues is discretionary.</li> </ol> | <ol style="list-style-type: none"> <li>5. "At any time before passing a decree."</li> <li>6. Power of the appellate Court to amend the issues or frame additional issues.</li> <li>7. Sub-rule (2).</li> </ol> |
|---|--|

**1. Legislative changes. —** The word "controversy" which occurred in the old Section has been changed into "matters in controversy."

**2. Scope and object of the Rule. —** This rule provides for amending issues, framing additional issues and striking out issues in the course of the trial of a suit. A Court trying a civil action has inherent jurisdiction to take cognizance of questions going to the root of the subject-matter in controversy between the parties at any stage of the trial.<sup>1</sup> But before doing so, the Court should frame and record issues on such questions.<sup>2</sup>

**Order 14 Rule 4 — Note 2**

1. ('26) AIR 1926 Nag 60 (61).

**Order 14 Rule 5 — Note 2**

1. ('12) 16 Ind Cas 250 (252) : 35 Mad 607 : 39 Ind App 218 (PC).

('22) AIR 1922 Pat 514 (524) : 2 Pat 52.

('16) AIR 1916 Mad 479 (479). (Invalidity of mortgage for want of proper attestation—Raised only at trial—Distinct issues to be raised and opportunity for evidence to be given.)

2. ('19) AIR 1919 Mad 471 (471).

This rule does not enable the re-opening of issues already closed; in other words, a permission to raise an additional issue will not empower the party to let in additional evidence on issues already closed.<sup>3</sup>

A Judge who transfers a case to his own file can amend the issues already framed and frame additional issues.<sup>4</sup>

**3. Where an amendment of issues and the framing of new issues is obligatory.** — Where an amendment of an issue or an additional issue is *necessary* for determining the matter in controversy between the parties, it is obligatory on the Court under the second portion of sub-rule (1) to make such amendments of issues or to frame such additional issues. The principle underlying this provision is that Courts are bound to take into consideration all the rights of parties whether legal or equitable.<sup>1</sup> Thus, where the pleadings and proof necessarily lead to one or more particular issues, it is the duty of the Court, if they do not come by surprise to the other side, to raise such issues and give relief thereon.<sup>2</sup> Similarly, where a matter is fairly within the scope of the pleadings and important for the decision of the substantial dispute between the parties, it is equally the duty of the Court to frame issue on it and decide it.<sup>3</sup> For illustrations of this principle, see the cases noted below.<sup>4</sup> If the issues already framed do not clearly bring out the points in controversy between the parties,<sup>5</sup> or if by inadvertence or other causes the recorded issues do not enable the Court to try the whole case on the merits,<sup>6</sup> the issues should be amended or new issues framed in order to be able to give a decision on the *real points* in dispute. Where a suit has been adjusted by a valid compromise and it is brought to the notice of the Court, it is bound to raise an issue in respect of the compromise and proceed to determine it.<sup>7</sup>

(‘34) AIR 1934 All 273 (278): 56 All 428.

3. (‘15) AIR 1915 Mad 1196 (1198): 39 Mad 456.

4. (1865) 3 Suth W R 147 (150).

#### Note 3

1. (1863) 1 Mad H C R 471 (477).

(‘80) 5 Cal 64 (70, 71).

(‘78) 1 Cal L Rep 415 (417).

(‘14) AIR 1914 Oudh 255 (257).

[See also (‘84) 1884 Pun Re No. 63.]

2. (1862) 2 Hyde 263 (265).

3. (‘66) 1 Agr 46 (48) (FB).

4. (‘70) 14 Suth W R O C 11 (13, 14). (Suit by several plaintiffs as partners — Some of them found to be not partners at the time of cause of action — Court should frame issue whether plaintiffs are or are not partners and give relief to those who are partners.)

(‘71) 15 Suth W R 69 (70). (Suit brought against two persons—An issue whether one of them is solely liable, can be framed.)

(‘92) 15 Mad 15 (16, 17). (In a declaratory suit it appeared on the evidence for the defendant that he had been in possession of a part of the property, but no issue had been framed as to the maintainability of the suit under S. 42 of the Specific Relief Act—*Held*, that the Court should take evidence and try an issue on this point.)

(‘90) 12 All 556 (558). (Where a plaintiff claims exclusive possession and proves a right to joint possession only, he is entitled to a decree for joint possession.)

(‘91) 11 All W N 45 (46). (Do.)

(‘96) 20 Bom 569 (570). (Do.—Provided a specific

issue is raised on it, and the defendant is given an opportunity of meeting it.)

(‘71) 16 Suth W R 44 (45). (In a suit for possession defendant pleaded limitation, and it was unexpectedly disclosed in the course of the trial that he was a mortgagee. It was the duty of the Judge to frame an issue on this subject.)

(‘75) 23 Suth W R 172 (173). (In a suit for possession of land, the plaintiff described himself as the son of a certain man. The defendant denied that the land belonged to that person but stood in the name of an idol, the possession being with a different person under whom the defendant held it under a lease and mortgage deed. On the day of the final disposal of the suit the plaintiff petitioned that he was the son of that person, the lessor of the defendant. *Held*, upon the new allegations the Court should have allowed the defendant to make his defence, framed issues and given the defendant an opportunity to produce his evidence.)

(‘05) 27 All 266 (270, 271).

(‘73) 20 Suth W R 208 (208). (In a case in which, after the evidence of both parties had been taken, the principal defendant asked for permission to file an amended written statement which would in effect raise a new question as part of the defence; *held*, though the application was informal it was the duty of the Munsif, if it appeared that this was the real question between the parties to amend the issues.)

5. (‘95) 19 Bom 374 (396).

6. (1854-1857) 6 Moo Ind App 393 (410, 411) (PC).

7. (‘37) AIR 1937 Mad 200 (207, 208).

**O. 14 R. 5**  
**Notes 4-6**

**4. Where an amendment of issues and the framing of additional issues is discretionary.** — The first portion of sub-rule (1) leaves it to the discretion of the Court to amend issues or frame additional issues in certain cases not falling within the obligatory provision. Where no injustice would be done to either party, the Court, in the exercise of its discretion, under special circumstances, may allow issues to be raised upon matters which do not come within the proper scope of the pleadings.<sup>1</sup> The same discretion applies in the matter of amendment of issues also.<sup>2</sup> This discretion is, however, subject to several restrictions. Thus a party, having set up one case and *failed* in it, will not be allowed to ask for issues to be raised to suit the proof.<sup>3</sup> Nor should a Judge take the case altogether out of the hands of the parties and make for them a case which they had no intention of making for themselves.<sup>4</sup> Similarly, no amendment should be made and no new issues raised on points which are inconsistent with the original pleas,<sup>5</sup> or are wholly different from them,<sup>6</sup> or which will change the nature of the suit;<sup>7</sup> nor should a new issue be framed which would re-open the whole case.<sup>8</sup>

Where a Judge at the settlement of issues had decided not to raise a certain issue, the question cannot be re-opened at the trial.<sup>9</sup>

The exercise of the power under this part of the sub-rule being discretionary, it is doubtful whether a revision would lie from an order declining to amend issues or frame additional issues.<sup>10</sup> In any view, the exercise of the discretion will not be interfered with unless the discretion is shown to have been *abused* or perversely exercised.<sup>11</sup>

**5. "At any time before passing a decree."** — The Court may amend issues or frame additional issues at any time before passing a decree.<sup>1</sup> Thus, the power can be exercised even after the close of the arguments<sup>2</sup> unless the exercise of the power at such a late stage is likely to prejudice the fair trial of the case.<sup>3</sup>

A Court acts irregularly in simply recording a proceeding declaring its intention to frame additional issues and postponing the actual framing of such issues till judgment.<sup>4</sup>

**6. Power of the Appellate Court to amend the issues or frame additional issues.** — Where, by inadvertence or other causes the issues recorded do not enable the Appellate Court to try the whole case on the merits, it should make the necessary

**Note 4**

1. ('80) 5 Cal 64 (70).
- ('81) 5 Bom 609 (614).
- ('96) 19 Mad 419 (421). (The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties subsequent to the institution of the suit.)
- ('02) 25 Mad 867 (878) : 29 Ind App 76 (PC). (Discretion not exercised.)
2. ('25) AIR 1925 Cal 1157 (1160).
- ('30) AIR 1930 Bom 70 (77).
3. (1862) 2 Hyde 268 (265).
4. ('74) 11 Bom 160n (164n).
- ('71) 15 Suth W R 368 (364).
- ('26) AIR 1926 Bom 38 (87).
- ('70) 18 Suth W R 464 (465).
5. (1851) 5 Moo Ind App 271 (290) (PC).
- ('83) 5 All 456 (459).
- ('83) 7 Bom 155 (160, 161).
- ('92) 14 All 866 (871) (PC). (New issue—Not inconsistent—Allowed.)
6. 2 Ind Jur (N S) 118.

('05) 27 All 1 (10) : 31 Ind App 235 : 7 Oudh Cas 287 (PC).

7. ('89) 13 Bom 664 (668).

[See also ('70) 14 Suth W R 11 (14).

('16) AIR 1916 Pat 50 (52) : 2 Pat L Jour 69.]

8. ('08) 27 Bom 485 (491) : 30 Ind App 127 (PC).

[See also ('32) AIR 1932 Mad 588 (587).]

9. ('78) 4 Cal 572 (573, 574).

10. ('14) AIR 1914 Low Bur 207 (208) : 8 Low Bur Rul 77. (Revision disallowed.)

11. ('11) 9 Ind Cas 267 (267) (Lah).

**Note 5**

1. ('81) 5 Bom 609 (614).

('30) AIR 1930 Nag 225 (228) : 27 Nag L R 75.

('28) 113 Ind Cas 313 (313) (Mad).

2. ('12) 16 Ind Cas 250 (252) : 35 Mad 607 : 39 Ind App 218 (PC).

[See also ('22) AIR 1922 Pat 514 (524) : 2 Pat 52. (Issue raised in appeal—Disallowed.)

3. ('11) 10 Ind Cas 280 (231) (All).

('19) AIR 1919 Cal 805 (806).

('68) 10 Suth W R 169 (170).

4. ('71) 15 Suth W R 151 (152).

amendments or frame additional issues.<sup>1</sup> But a point not suggested in the pleadings and not raised in the first Court should not be put in issue for the first time by the Appellate Court.<sup>2</sup> Where new issues are raised by the Appellate Court the parties should have an opportunity of producing evidence on them<sup>3</sup> and the proper course in such cases is to frame the issues and refer them for trial by the Court of first instance.<sup>4</sup>

As to the High Court's power in revision to frame an additional issue, see the undermentioned case.<sup>5</sup>

**7. Sub-rule (2).**—Sub-rule (2) empowers the Court at any time before passing the decree, to strike out any issue that appears to have been wrongly framed or introduced. But if the issues have been framed by consent of both the parties, they should not be struck out without the consent of both.<sup>1</sup> Where the lower Appellate Court framed a wrong issue, but it appeared from its judgment that there was a finding on the point which would have been raised if the correct issue had been framed, the High Court refused to remand the case for a new finding on the point.<sup>2</sup>

**O. 14 R. 5**  
**Notes 6-7**

**R. 6. [S. 150.]** Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

**O. 14 R. 6**

Questions of fact or law  
may by agreement be stated  
in form of issues.

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

[1877, S. 150; 1859, S. 142. *Cf.* O. 36 R. 1.]

**Note 6**

1. ('72) 18 Suth W R 297 (297). (First Court framed wrong issue—Appellate Court framed right issue but was wrong in deciding without giving parties opportunity of adducing fresh evidence.)
- ('82) 1882 All W N 98 (98).
2. ('72) 17 Suth W R 407 (408).
- ('74) 22 Suth W R 299 (300).
- ('74) 28 Suth W R 169 (170).
- ('75) 2 Ind App 87 (107) (PC).
- ('75) 28 Suth W R 382 (383).
- ('75) 28 Suth W R 404 (406). (Under special circumstances new issue can be allowed.)
- ('76) 25 Suth W R 145 (145).
- ('88) 10 All 627 (629).

(1859-1861) 8 Moo Ind App 170 (187) (PC).

3. ('69) 11 Suth W R 61 (61).
- ('72) 17 Suth W R 361 (362).
- ('72) 20 Suth W R 401 (402).
4. ('96) 19 Mad 157 (159).

5. ('86) AIR 1936 Pesh 157 (158). (Wherein revision, the petitioner urged that a new issue which was already covered by the issues under consideration, should be framed: *Held* that he could not be granted a further opportunity to do that which with common care and attention he must have known he had to do from the start.)

**Note 7**

1. ('28) AIR 1928 Mad 764 (770, 771).
2. ('97) 21 Bom 325 (327).

O. 14 R. 6  
Notes 1-2

### Synopsis

#### 1. Scope and applicability of the Rule. | 2. Appeal.

**1. Scope and applicability of the Rule.** — This rule may be compared with Order 36 which deals with the statement of a special case for the opinion of the Court, without bringing a suit. This rule and Rule 7 deal with stating by consent, of *special issues in a suit*, and provide for what may be called an adjustment or compromise of a suit, not absolutely as under O. 23 R. 3 but contingently on the opinion of the Court on certain issues of fact or law submitted to it. Upon the finding on those issues being given, the adjustment or compromise becomes absolute.<sup>1</sup> As to the form of agreement for issues to be tried, see Appendix H, Form No. 1.

**2. Appeal.** — A decree passed under the terms of Rules 6 and 7 is appealable.<sup>1</sup> But where the parties agreed to refer issues of fact to a commissioner and to abide by his findings, it was held that no appeal would lie against a decree passed on the report of the commissioner.<sup>2</sup>

O. 14 R. 7

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

**R. 7. [S. 151.]** Where the Court is satisfied, after making such inquiry as it deems proper, —

- (a) that the agreement was duly executed by the parties,
- (b) that they have a substantial interest in the decision of such question as aforesaid, and
- (c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

[1877, S. 151; 1859, S. 143.]

### Synopsis

#### 1. Legislative changes. | 2. Scope of the Rule.

**1. Legislative changes.** — The word “may” which occurred in the two paragraphs of clause (c) of the old Section has been substituted by the word “shall” in the present rule.

**2. Scope of the Rule.** — As has been seen in Note 1 to Rule 6 *ante*, that rule provides for the adjustment of a suit *contingent* upon the opinion of the Court on certain issues of fact or law, submitted to it by the parties. Upon the findings on issues so submitted being given, the adjustment becomes absolute and the Court is bound to

Order 14 Rule 6 — Note 1

upon by parties.)

1. ('92) 16 Bom 202 (216).

2. ('02) 29 Cal 806 (809, 810).

Note 2

1. ('86) 1886 All W N 233 (233). (Issue agreed

[See also ('82) 8 Cal 455 (459).]



pronounce judgment according to the terms of the agreement.<sup>1</sup>

As to appeals under this rule, *vide* Note 2 under Rule 6, *supra*.

**O. 14 R. 7**  
**Note 2**

## ORDER XV.

### DISPOSAL OF THE SUIT AT THE FIRST HEARING

**R. 1. [S. 152.]** Where at the first hearing of a suit it **O. 15 R. 1**

**Parties not at issue.** appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

[1877, S. 152; 1859, S. 144.]

### *Synopsis*

**1. First hearing, meaning of.** See O. 8 R. 1. | **2. Disposal at first hearing.**

**1. First hearing, meaning of.** — See Order 8 Rule 1.

**2. Disposal at first hearing.** — Where the parties are not at issue upon any point of fact or law, the Court may, under this rule, at once pronounce judgment. It has been seen in O. 5 R. 1 that no summons need be sent to a defendant who has appeared at the presentation of the plaint and admitted the plaintiff's claim. In such a case and in cases where the defendant appears after summons at the first hearing and *confesses judgment*, the Court may proceed to give judgment.<sup>1</sup> But the Court must be satisfied that the proper persons are before the Court and that the confession of judgment is *unconditional*. Where the confession is conditional the Court must dispose of the suit on the merits.<sup>2</sup>

A Court is not justified in disposing of a case two days before the date fixed for hearing and the decree so passed will be set aside.<sup>3</sup>

**R. 2. [S. 153.]** Where there are more defendants than **O. 15 R. 2**

**One of several defendants not at issue.** one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

[1877, S. 153.]

#### Order 14 Rule 7 — Note 2

1. ('92) 16 Bom 202 (216).

#### Order 15 Rule 1 — Note 2

1. ('69) 12 Suth W R 432 (434).

2. ('67) 2 Agra 77 (77, 78).

3. ('24) AIR 1924 Lah 459 (460).

O. 15 R. 2  
Note 1

MADRAS

### Local Amendment

*Re-number* Rule 2 as sub-rule (2) (1) and *insert* the following as sub-rule (2) :

"(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced."

**1. Confession of judgment by one of several defendants.** — Where one of several defendants appears and confesses judgment, and judgment is pronounced against him, it does not bar further prosecution of the suit as against the other defendants.<sup>1</sup>

O. 15 R. 3

**R. 3.** [S. 154.] (1) Where the parties are at issue on some

*Parties at issue.* question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if

the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

[1877, S. 154; 1859, S. 145.]

### *Synopsis*

1. Application of the Rule.
2. Summons for settlement of issues only — Effect of.
3. "And shall fix a day" — Sub-rule (2).

**1. Application of the Rule.** — This rule and O. 14 R. 2, give power to the Court to try issues of law first. The power under O. 14 R. 2 can be exercised at the issue stage.<sup>1</sup> As to whether this rule gives power to the Courts to proceed to determine issues of law at a *stage subsequent* to the issue stage, there is a difference of opinion.

**Order 15 Rule 2 — Note 1**

1. ('01) 25 Bom 378 (386).

**Order 15 Rule 3 — Note 1.**

1. ('21) AIR 1921 Pat 467 (467).

The High Courts of Madras<sup>3</sup> and Patna<sup>3</sup> have held that it does, while the High Court of Calcutta<sup>4</sup> has held that it does not.

**O. 15 R. 3**  
**Notes 1-3**

But though this rule empowers a Court to dispose of a suit on preliminary issues, it should not ordinarily do so but should pronounce its opinion on all important issues.<sup>5</sup> The reason is that piecemeal trial of a case leads to serious inconvenience and protracts litigation. In *Tara Kant Banerjee v. Puddo Monee Dossee*,<sup>6</sup> Lord Justice Turner, in delivering the judgment of the Privy Council, observed as follows :

"The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinion on *all* the important points.

Where the suit is sought to be disposed of on a preliminary point of law, it must be done only on the assumption that the facts pleaded can be and are proved.<sup>7</sup>

**2. Summons for settlement of issues only—Effect of.** — Where the summons has been issued for the settlement of issues only, the Court may proceed to hear and dispose of the case if the parties are ready and willing to proceed.<sup>1</sup> If, however, one of the parties *objects* to the adoption of such a procedure, the Court has no jurisdiction to proceed to dispose of the case.<sup>2</sup>

**3. "And shall fix a day"—Sub-rule (2).** — The object of the Code in requiring a day to be fixed for the hearing of the case and all the evidence to be adduced on that day is that parties may thus be confronted with each other and the whole evidence on either side be at one and the same time before the Court.<sup>1</sup>

**R. 4. [S. 155.]** Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

**O. 15 R. 4**

[1877, S. 155; 1859, S. 145.]

2. ('22) AIR 1922 Mad 321 (322).

3. ('21) AIR 1921 Pat 467 (467).

4. ('15) AIR 1915 Cal 87 (90).

('33) AIR 1933 Cal 559 (559, 560). (Court has however such power irrespective of the provisions of the Code.)

5. ('22) AIR 1922 PC 405 (408) : 50 Cal 243 : 50 Ind App 247 (PC).

('90) AIR 1980 Cal 787 (796) : 58 Cal 474.

('26) AIR 1926 Lah 125 (127, 128) : 7 Lah 42.

6. ('66) 10 Moo Ind App 476 (488) (PC).

7. ('66) 10 Moo Ind App 540 (558) (PC).

**Note 2**

1. 1 Ind Jour (OS) 14: 1 Hyde 145

2. ('15) AIR 1915 Mad 319 (319).

('92) 16 Mad 198 (200).

('74) 22 Suth W R 426 (427).

('69) 1 N W P H C R 147 (148).

**Note 3**

1. ('71) 15 Suth W R 150 (151).

**O. 15 R. 4**  
**Notes 1-3***Synopsis*

1. "The Court may pronounce judgment."
2. "Sufficient cause."
3. Appeal.

*Other Topics (miscellaneous)*

Court can determine preliminary issues first. See Note 1.  
 Proviso to the Rule. See Note 2.

1. "The Court may pronounce judgment." — Even in a case in which the summons may have been issued for final disposal, the Court has a discretion to adjourn the case for the production of such evidence as may be necessary. Thus, if, after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable, in the interests of justice, that the discretion given to the Court by this rule should be so exercised as to ensure a fair trial and not to deny, in effect, the trial to the parties.<sup>1</sup>

Where a party fails, without sufficient cause, to produce his evidence on the date fixed for final disposal, and an adjournment is refused, the Court can at once pronounce judgment. But it cannot *dismiss the suit for non-prosecution*.<sup>2</sup>

2. "Sufficient cause." — Where the plaintiff and the defendants were endeavouring to settle their differences by arbitration, and the plaintiff was told by one of the defendants that he would inform the Court of what was going on, in consequence of which plaintiff did not appear with his evidence on the day fixed, it was held that there was sufficient cause for the plaintiff not to be ready with his evidence.<sup>1</sup>

3. Appeal. — A pronouncement of judgment under this rule is a decree and is appealable as such.<sup>1</sup>

**ORDER XVI.****SUMMONING AND ATTENDANCE OF WITNESSES****O. 16 R. 1**

**R. 1.** [S. 159.] At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

Summons to attend  
to give evidence or  
produce documents.

[1877, S. 159; 1859, S. 149.]

**Local Amendments****ALLAHABAD**

The following proviso shall be *added* :

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not

**Order 15 Rule 4 — Note 1**

1. ('14) AIR 1914 Bom 46 (47): 38 Bom 377.  
( '87 ) 7 Suth W R 84 (84).
2. ('29) AIR 1929 All 548 (548).

**Note 2**

1. ('87) 1887 All W N 105 (105).

**Note 3**

1. ('04) 31 Cal 150 (154).  
( '88 ) 1888 All W N 171 (171). (Dismissal of suit for failure to produce evidence must be taken to be one under this rule.)

previously issued, or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor."

O. 16 R. 1

**LAHORE**

*Add the following proviso :*

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the Court made in writing and stating the reasons therefor."

*Note.* — All the witnesses need not be named in the lists originally filed. A party can file his list up till the moment when he actually commences to lead evidence.<sup>1</sup>

**N.-W.F.P.**

*Substitute the following for Rule 1 :*

"1. (1) On such date as the Court may appoint and not later than 30 days after the settlement of issues, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

(2) They shall not be permitted to call witnesses other than those contained in the said list, except with the permission of the Court and after showing good cause for the omission of the said witnesses from the list; the Court granting such permission shall record reasons for so doing.

(3) On application to the Court or such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in Court."

**OU DH**

*Substitute for Rule 1, the following :*

"1. (1) The Court may, in any suit or class of suits, require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce; and may, if necessary, direct that such list be kept in a sealed envelope for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness, any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-rule (1) the parties may, after the suit is instituted, obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents."

*Synopsis*

1. Legislative changes.

2. Scope of the Rule.

3. When witness summons may be applied for.

4. Summoning of a party as a witness.

5. Refusal of summons.

6. Remedy when summons is refused.

7. Form of witness summons. See Form No. 13, Schedule I, Appendix B.

8. Second appeal. See Note 6.

9. Revision.

*Other Topics (miscellaneous)*

Application—Time of. See Notes 3 and 5.

May obtain. See Note 2.

**Order 16 Rule 1 (Lahore).**

1. ('35) AIR 1935 Lah 488 (489).

**O. 16 R. 1**  
**Notes 1-4**

**1. Legislative changes. —**

The words "at any time after the suit is instituted" have been substituted for the words "after the summons has been delivered or sent for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit . . . . . before the day fixed for such settlement or disposal."

For the effect of the change, see Note 3.

**2. Scope of the Rule. —** This Order contains the necessary rules in the matter of enforcing the attendance of persons either to give evidence or to produce documents provided for in Sections 30 and 32, *ante*. Though the Court is bound to help the parties in this behalf,<sup>1</sup> it is ordinarily for the parties to move the Court to take the necessary steps,<sup>2</sup> unless the Court chooses to act of its own motion under Rule 14, *infra*.

The powers exercisable by Civil Courts under this Order have been conferred on the tribunals appointed under the undermentioned Acts.<sup>3</sup>

**3. When witness summons may be applied for. —** Section 159 of the Code of 1882 was differently worded as is shown in Note 1, *supra*. It was, however, held under that Code that an application under that Section could be made at any time before the party closed his case and not necessarily before the date of the first hearing.<sup>1</sup> The present Code has clearly provided that an application under this rule can be made *at any time after the institution* of the suit.

**4. Summoning of a party as a witness. —** The Code of 1859 had a special provision (Section 162) for summoning the opposite party as a witness in the case.

**Note 2**

1. ('10) 5 Ind Cas 184 (185) (Cal).  
(26) AIR 1926 Pat 545 (547). (Court may instead of summons, send a Court peon with an order to Collector for production of documents.)

2. ('75) 23 Suth W R 83 (84).

(27) AIR 1927 Lah 845 (846).

[See ('38) AIR 1933 Mad 821 (822). (Party desiring the presence of the opposite party for giving evidence should take steps under this order and apply under O. 8 R. 1.)]

3. The Administrator General's Act (III of 1913), S. 46; The Bengal Agricultural and Sanitary Improvement Act (VI of 1920), S. 33; The Bengal Drainage Act (VI of 1880), S. 49; The Bengal Embankment Act (II of 1882), S. 82; The Bengal Estates Partition Act (V of 1897), S. 97; The Bengal Irrigation Act (III of 1876), S. 92; The Bengal Land Registration Act (VII of 1876), S. 58; The Bengal Sanitary Drainage Act (VIII of 1895), S. 29; The Bengal Survey Act (V of 1875), S. 50; The Bengal Tenancy Act (VIII of 1885), S. 58 (8); The Bihar and Orissa Municipal Survey Act (I of 1920), S. 7; The Bombay Land Revenue Code (V of 1879), S. 192; The Bombay Local Boards Act (VI of 1923), S. 128 (2); The Bundelkhand Encumbered Estates Act (I of 1903), S. 34; The Burma Boundaries Act (V of 1880), S. 15; The Burma Canal Act (II of 1905), S. 74; The Burma Forest Act (IV of 1903), S. 9 (b); The Calcutta Improvement Act (V of 1911), S. 70 (c); The Calcutta Survey Act (I of 1887), S. 9; The Charitable and Religious Trusts Act (XIV

of 1920), S. 11; The Chota Nagpur Tenancy Act (VI of 1908), Ss. 263 and 265 (3); The Central Provinces Land Revenue Act (II of 1917), S. 20; The Co-operative Societies Act (II of 1912), S. 42 (3); The Incumbered Estates Act—Breach and Kaira (Act XXI of 1881), S. 35; The Incumbered Estates Act—Sind (Act XX of 1896), S. 77; The Indian Income Tax Act (XI of 1922), S. 37; The Indian Mines Act (IV of 1923), S. 21; The Indian Naturalization Act (VII of 1926), S. 11; The Indian Registration Act (XVI of 1908), S. 75; The Madras, Ganjam and Vizagapatam Act (XXIV of 1898), R. 16; The Madras Survey and Boundaries Act (VIII of 1928), S. 28; The Northern Indian Canal and Drainage Act (VIII of 1873), S. 69; The Official Trustees Act (II of 1913), S. 20; The Orissa Tenancy Act (II of 1913), S. 67 (10); The Provident Insurance Societies Act (V of 1912), S. 19 (3); The Punjab Sikh Gurdwara and Shrines Act (VI of 1922), S. 24 (4); The United Provinces Canal Drainage Act (VIII of 1873), S. 69; The United Provinces Land Revenue Act (III of 1901), S. 199; The United Provinces Minor Irrigation Act (I of 1920), S. 44; The United Provinces Town Improvement Act (VIII of 1919), S. 58 (c); The Workmen's Compensation Act (VIII of 1923), S. 23.

**Note 3**

1. ('68) 9 Suth W R 530 (532).

(90) 1890 Bom P J 338 (338).

(88) 1898 Bom P J 419 (420).

(91) 15 Bom 86 (86).

[See also ('81) 5 Bom 184 (186). (Defendant's side not closed.)]

The Court had a *discretion* in the matter of such summons and had to be satisfied that such evidence was material.<sup>1</sup> There is nothing in this rule to prevent a party from examining his opponent as his witness in the case.<sup>2</sup> See also Rule 21, *infra*.

**O. 16 R. 1**  
**Notes 4-5**

**5. Refusal of summons.** — The Court is bound to issue summons where application is made at *any time* after the institution of the suit and before its final disposal<sup>1</sup> provided the application made therefor is a proper one.<sup>2</sup> It cannot be refused on the ground that such an application is *too late*, though it is within the discretion of the Court to refuse an *adjournment of the hearing* on the ground of want of diligence of the party.<sup>3</sup> The reason is that it is possible that the hearing may for some reason be adjourned or the party may have his own facilities for the expeditious service of summons.<sup>4</sup> Rule 9, *infra*, which provides that summons must be served on the witness in sufficient time, is only a rule in favour of the *witness* and intended to induce due diligence in the party; but it does not empower the Court to refuse to issue a witness summons on the ground of late application.<sup>5</sup> Nor can summons be refused on the ground that the evidence of a witness *may not be beneficial to the party*,<sup>6</sup> or that the witness had not been summoned before,<sup>7</sup> or that the party had undertaken to bring his witnesses,<sup>8</sup> or that steps were not taken by the party within a time fixed by the Court for that purpose.<sup>9</sup>

This rule does not, however, take away the *inherent* power of the Court to refuse witness summons in order to prevent an *abuse of the process* of the Court.<sup>10</sup>

#### Note 4

1. ('66) 6 Suth W R 65 (66).  
(1864) 1 Suth W R 297 (298).  
(1865) 2 Suth W R 4 (4).  
(72) 17 Suth W R 507 (508).  
(74) 21 Suth W R 44 (44).  
(67) 7 Suth W R 147 (147).
2. ('18) 20 Ind Cas 450 (451) : 16 Oudh Cas 145.  
(69) 12 Suth W R 317 (318).  
(75) 24 Suth W R 72 (73). (Ordinarily the Court must secure the evidence of the party, if required, before deciding the suit.)  
[See also ('83) AIR 1933 Mad 821 (822). (The procedure to examine a party is to take steps under this Order and not to apply under O. 3, Rule 1.)]

#### Note 5

1. ('24) AIR 1924 Cal 971 (972).  
(33) AIR 1933 Lah 538 (539). (Court refusing to summon proper witness acts with illegality.)  
(25) AIR 1925 Bom 368 (368).  
(33) AIR 1933 Nag 336 (337). (Resummoning for adjourned hearing.)  
(66) 5 Suth W R 111 (111).  
(1900) 13 C P L R 152 (153).  
(22) AIR 1922 Pat 276 (278) : 1 Pat 644.  
(74) 22 Suth W R 296 (296). (Defendant's side not yet closed—Application a day before the hearing.)  
(37) 167 Ind Cas 169 (169) (Lah). (The word "may" in O. 16 R. 1 means "it shall be lawful.")  
[See ('69) 11 Suth W R 418 (419).]
2. ('10) 8 Ind Cas 418 (420) (Oudh). (Witness list must contain proper particulars.)  
[See also ('37) 167 Ind Cas 169 (169, 170) (Lah). (Unless the application on the face of it is

frivolous and vexatious, the Court has a discretion but to summon the witnesses.)]

3. ('29) AIR 1929 All 449 (451) : 51 All 341.  
(33) AIR 1933 Nag 336 (337).  
(29) AIR 1929 Cal 459 (461).  
(26) AIR 1926 Cal 364 (364).  
(25) AIR 1925 Lah 67 (67).  
(21) 60 Ind Cas 656 (656) (Lah).  
(75) 24 Suth W R 290 (291).  
(94) 16 All 218 (219).  
(16) AIR 1916 Pat 93 (93) : 1 Pat L Jour 173.  
(29) AIR 1929 Pat 622 (623).  
(10) 8 Ind Cas 418 (418) (Oudh).  
(79) 3 Cal L Rep 569 (571).  
(76) 25 Suth W R 71 (71).  
(81) 7 Cal 730 (731, 732).  
(21) 63 Ind Cas 736 (736) (Lah).  
(29) 114 Ind Cas 439 (440) (Lah).  
(37) 167 Ind Cas 169 (170) (Lah).  
[See also ('81) 7 Cal 560 (565).  
(68) 9 Suth W R 489 (489, 490).  
(96) 1896 All W N 120 (120).]
4. ('23) AIR 1923 Nag 58 (59).  
(68) 9 Suth W R 580 (582).  
(09) 4 Ind Cas 797 (799) : 5 Nag L R 181.  
5. ('85) 9 Bom 308 (310).  
(25) AIR 1925 Lah 572 (572).  
(71) 15 Suth W R 447 (448).  
[See ('04) 6 Beng L R App 10 (10).]
7. ('27) AIR 1927 Lah 281 (281).  
(10) 5 Ind Cas 184 (186) (Cal).  
(23) AIR 1923 Nag 58 (59).  
8. ('82) 6 Bom 742 (743).  
9. ('31) AIR 1931 Lah 135 (136).  
10. ('70) 14 Suth W R 66 (67, 68).  
(05) 28 Mad 28 (33, 34, 36).  
(24) AIR 1924 Lah 647 (649).  
[See also ('26) AIR 1926 Cal 1 (36).]

**O. 16 R. 1**  
**Notes 4-9**

**6. Remedy when summons is refused.** — An order refusing an application for witness summons is not open to appeal; but its correctness can be questioned in an appeal from the decree in the suit and subject to the limitations prescribed in Sections 99 and 105 of the Code.<sup>1</sup> The High Court may, in a proper case, interfere even in a second appeal<sup>2</sup> provided the appellant had insisted on his right in both the lower Courts.<sup>3</sup>

**7. Form of witness summons.** — See Form No. 13 in Appendix B of the First Schedule.

**8. Second appeal.** — See Note 6 above.

**9. Revision.** — An order wrongly refusing an application may be a material irregularity in the exercise of jurisdiction and in that case will be open to revision.<sup>1</sup>

**Local Amendments****BOMBAY**

The following shall be *added* as Rule 1A:

**O. 16 R. 1A**  
**(Bombay)**

"1A. — (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party.

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court."

**SIND**

*Add* the following as Rule 1A, *after* Rule 1:

**O. 16 R. 1A**  
**(Sind)**

"1A. — The Court may, on the application of any party for a summons for the attendance of any person as a witness, permit that service of such summons shall be effected by such party."

**O. 16 R. 2**

**R. 2.** [S. 160.] (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

**Expenses of witness to be paid into Court on applying for summons.**

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing

**Experts.**

**Note 6**

1. ('94) 16 All 218 (220).
- ('96) 1896 All W N 120 (120, 121). (Refusal to summon some of the witnesses — Appeal from decree in suit—Order refusing to summon witness questioned.)

2. ('74) 22 Suth W R 296 (296).

3. ('69) 11 Suth W R 418 (419).

**Note 9**

1. ('85) 9 Bom 308 (310).

- ('21) 60 Ind Cas 656 (656) (Lah).

[See also ('87) 167 Ind Cas 169 (170) (Lah).]



any work of an expert character necessary for the case.

O. 16 R. 2

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

[1877, S. 160; 1859, S. 151.]

### Local Amendments

#### ALLAHABAD

To Rule 2, *add* :

"(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 *per mensem* and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters."

#### BOMBAY

*Insert* as proviso to sub-rule (1):

"Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness."

#### CALCUTTA

*Cancel* clauses (1) and (2) and *substitute* the following :

"(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the persons summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

#### LAHORE

*Add* the following exception to Rule 2 (1):

"*Exception.* — When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1)."

#### NAGPUR

*Add* the following as an exception to Rule 2 (1):

"*Exception.* — When applying for a summons for any of its own officers, Government will be exempt from the operation of sub-rule (1)."

#### PATNA

*Add* the following proviso to Rule 2 (1):

"Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, in his public capacity."

**9. 16 R. 2 RANGOON**

(1). *Add* the following to Rule 2 (1) :

"Provided that in cases to which Government or a local authority is a party :

(a) No payment into Court will be required for the travelling and other expenses of a servant of Government or of local authority who may be required to be summoned at the instance of Government or the local authority prospectively to give evidence in the official capacity ;

(b) The amount to be paid into Court for the travelling and other expenses of a servant of a Government or of a local authority whose salary exceeds Rs. 10 and who may be required to be summoned at the instance of a party other than the Government or the local authority respectively to give evidence in his official capacity in a Court situated at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the rules applicable to him in his official capacity."

(2). *For* sub-rule (3) *substitute* the following :

"(3) Subject to provisions of sub-rule (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale :

(1) *Ordinary labouring classes.* — The actual fare to and from the Court by the lowest class for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12); or where the journey could not have been performed by public conveyance, actual travelling expenses reasonably incurred not exceeding Re. 1-4-0 a day by boat and annas *two* a mile by road; and an allowance for each day's absence from home of annas *six* to those who are residents of places other than the place where the Court is held, and of annas *four* to those who are residents of the place where the Court is held.

(2) *Petty village officers.* — The same rates as above for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12), or actual travelling expenses reasonably incurred not exceeding Re. 1-4-0 a day by boat and annas *two* a mile by road ; and an allowance of annas *eight* for each day's absence from home.

(3) *Persons of higher ranks of life, such as Clerks, Tradespeople, Village Headmen, Headmen of Circles and Members of Circle Boards.* — Third class fare to and from the Court for journeys which were or could have been performed by public conveyance as defined in Burma Travelling Allowance Rule 6 (12); or where the journey could not have been performed by public conveyance, actual travelling expenses reasonably incurred not exceeding Rs. 2-8-0 a day by boat and annas *two* a mile by road; and an allowance not to exceed, except in special cases, Re. 1 for each day's absence from home :

Provided that the second class fare by public conveyance may be paid in any case in which the Court is satisfied that the witness is a person who ordinarily travels by second class and did actually travel by that class. The Court should certify that it is so satisfied in all cases in which second class fare is paid.

(4) *Members of District Councils, persons paying income-tax on Rs. 3000 per annum or more, and other persons of equal or superior status.* — The actual travelling expenses reasonably incurred to and from the Court with an allowance according to circumstances, not to exceed, except in very special cases, Rs. 2 for each day's absence from home.

(5) *Witnesses following any profession such as medicine or law.* — A special allowance according to circumstances, which is not to exceed Rs. 3, unless the witness is called to give expert evidence. In determining the amount payable under this rule the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(6) *Lodging allowance.* — In addition to the above, a lodging allowance not exceeding, except in special cases, annas *thirteen* for persons in class (3) and Re. 1-10-0 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness had to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent and the Court must be satisfied that such expenditure was necessary.

Provided that —

(i) a servant of Government or of a *local authority* whose salary exceeds Rs. 10 per mensem giving evidence in his official capacity in a suit to which Government or *the local authority* respectively is a party —

(a) when giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance ;

(b) when giving evidence at a place not more than five miles from his headquarters, shall, in cases where the Court considers it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances.

(ii) a servant of Government or of a *local authority* whose salary does not exceed Rs. 10 per mensem, giving evidence in his official capacity, shall receive his expenses from the Court.

[*Note.* — When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey.]

Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, shall be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares."

SIND

*Insert the following as proviso to sub-rule (1) :*

" Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness."

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Applicability of the Rule to Chartered High Courts.</li> <li>3. Expenses of witnesses.</li> <li>4. Remedy where the expenses are not paid.</li> </ol> | <ol style="list-style-type: none"> <li>5. Effect of non-service of summons owing to the default of process server.</li> <li>6. Government servants summoned as witnesses, if entitled to salary during absence on summons.</li> </ol> |
|--|---|

**O. 16 R. 2**  
**Notes 1-6**

*Other Topics (miscellaneous)*

Considerations in fixing the scale of expenses. Party making due payment not responsible for service. See Note 8.

**1. Legislative changes.** — Sub-rule (2) is new.

**2. Applicability of the Rule to Chartered High Courts.** — This rule does not apply to Chartered High Courts. See Order 49 Rule 3.

**3. Expenses of witnesses.** — A witness is entitled to be paid his travelling and other expenses for his attendance in Court. But except as provided for in sub-rule (2), no witness is entitled to any compensation for *loss of time*<sup>1</sup> or to any special amount on the ground of *status*,<sup>2</sup> though the expenses may be claimed suitable to the rank or status of the witness.<sup>3</sup> The right to claim expenses is not lost by the fact of the witness having attended and given evidence before making the claim,<sup>4</sup> or of his having been called by one party and examined by the opposite party.<sup>5</sup> The Court must give the party a reasonable time for payment of the amount of expenses into Court.<sup>6</sup>

**4. Remedy where the expenses are not paid.** — The remedy of the witness whose expenses are not paid is by an *application* to the Court and not by a separate suit.<sup>1</sup> See also Rule 4.

**5. Effect of non-service of summons owing to the default of the process-server.** — If the party duly pays the necessary fees into Court, he is not answerable for the non-service of the summons owing to the default of the process-server.<sup>1</sup> A dismissal of the plaintiff's suit by reason of the plaintiff's witnesses not appearing owing to the default of the process-server in serving the summons on them, is illegal.<sup>2</sup> It is otherwise if the fees are not duly paid.<sup>3</sup>

**6. Government servants summoned as witnesses, if entitled to salary during absence on summons.** — Government servants summoned as witnesses are not entitled to the payment of any salary as part of the expenses inasmuch as the Government does not deduct any salary for such absence.<sup>1</sup>

**O. 16 R. 3**

**R. 3. [S. 161.]** The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.

[1877, S. 161; 1859, S. 151.]

**Order 16 Rule 2—Note 3**

1. (1865) 2 Hyde 236 (236).
- (11) 12 Ind Cas 190 (190). (Chief officer of municipality—Summons to produce documents—Not entitled to search fee.)
2. ('22) AIR 1922 Bom 116 (117): 46 Bom 89. (Pleader as witness of facts — No expert — No claim on account of status.)
3. ('78) 19 Suth W R 78 (78).
4. ('80) 4 Bom 619 (621). ('04) 28 Bom 647 (648).
5. ('04) 28 Bom 647 (649, 650).
6. ('24) AIR 1924 Nag 271 (275): 20 Nag LR 181.

[See ('68) 9 Suth W R 127 (128).]

**Note 4**

1. ('66) 5 Suth W R S C O Ref 6 (7). [See however ('07) 17 Mad L Jour 149 (149, 144). (But a suit lies to recover money paid to a witness for expenses if he does not attend.)]

**Note 5**

1. ('71) 15 Suth W R 88 (89).
2. ('25) AIR 1925 Lah 296 (296).
3. ('25) AIR 1925 Lah 457 (458). ('72) 18 Suth W R 16 (18, 19).

**Note 6**

1. ('28) 38 Cal L Jour 149 (149, 150).

## Local Amendments

O. 16 R. 3

## BOMBAY

*Insert the proviso :*

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him."

## CALCUTTA

*Substitute the following for Rule 3 :*

"3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally."

## LAHORE

*For Rule 3, substitute :*

"3. (1) The sum paid into a Court shall, except in the case of a Government witness, be tendered to the person summoned, at the time of serving the summons if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

*Exception.*—(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them.

*Exception.*—(2) A Government servant, whose salary does not exceed Rs. 10 *per mensem*, may receive his expenses from the Court."

## NAGPUR

*For Rule 3, substitute the following :*

"3. (1) The sum so paid into Court shall, except in case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

*Exception.*—(1) In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, the actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them.

*Exception.*—(2) A Government servant whose salary does not exceed Rs. 10 *per mensem* may receive his expenses from the Court."

## PATNA

*Add the following as proviso :*

"Provided that when the person summoned is an officer of Government, who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge, or of matters which he has had to deal, in his public capacity, then—

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by Rule 2 and recover the amount from the Treasury ;

(ii) if the officer's salary exceeds Rs. 10 a month, and the Court is situated not

**O. 16 R. 3**  
**Note 1**

more than 5 miles from his headquarters, the Court may, at its discretion on his appearance, pay him the actual travelling expenses incurred ;

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than 5 miles from his headquarters, no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government."

**RANGOON**

*Add the following :*

"This rule does not apply, where the person summoned is a servant of Government or of a local authority summoned to give evidence in his official capacity in a case to which the Government or the local authority respectively is a party."

**SIND**

*Insert the following as proviso :*

"Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice, or of facts with which he has had to deal in his official capacity, or to produce a document from the public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him."

**1. Witness's right to claim expenses.** — See Rule 2 Note 3.

**O. 16 R. 4****R. 4. [S. 162.] (1)** Where it appears to the Court or to

**Procedure where insufficient sum paid in.**

such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

**(2)** Where it is necessary to detain the person summoned

**Expenses of witnesses detained more than one day.**

for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

[1877, S. 162; 1859, S. 151.]

**Local Amendments****CALCUTTA**

*Cancel* clause (1) and *substitute* therefor the following :

"(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid."

**LAHORE**

*After* the word "summoned" where it first occurs in Rule 4 (1), *insert* :

"or, when such person is a Government servant, to be paid into Court,"

**NAGPUR**

*After* the word "summoned" where it first occurs in Rule 4 (1), *insert* :

"or, when such person is a Government servant, to be paid into Court,"

**Synopsis**

- |  |  |   |
|--|--|---|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. Expenses of witnesses detained more than one day — Sub-rule (2).</li> </ol> |  | <ol style="list-style-type: none"> <li>3. Direction to witness to appear on the adjourned date.</li> <li>4. Realization of expenses ordered.</li> </ol> |
|--|--|---|

**1. Scope of the Rule.** — This rule lays down the procedure for the recovery of the expenses or the remuneration of a witness where an insufficient sum has been paid in or where he is detained for more than *one day*.<sup>1</sup> On default of payment, provision is made also for the discharge of the witness without requiring him to give evidence.

**2. Expenses of witnesses detained more than one day—Sub-rule (2).** — If the attendance of a witness is required for a longer period than one day, the Court may order payment of the sum required from time to time; and, if such payment is not made, the witness may be discharged.<sup>1</sup>

**3. Direction to witness to appear on the adjourned date.** — If on the day a witness attends Court in pursuance of summons, the case is not reached, the Court *may* require him to attend on the date of the adjourned hearing.<sup>1</sup>

**4. Realization of expenses ordered.** — The realization of the expenses due to a witness should be by way of execution of the order against the party liable to pay<sup>1</sup> or, his legal representative<sup>3</sup> and in the manner provided for by this rule. The *immovable property* of the party cannot be proceeded against.<sup>3</sup>

**Order 16 Rule 4—Note 1**

1. ('07) 17 Mad L Jour 485 (486).

**Note 2**

1. ('66) 5 Suth W R S C C Ref 6 (7).

**Note 3**

1. ('01) 24 Mad 200 (201). (And a fresh summons is not necessary.)  
(12) 15 Ind Cas 867 (868) (Mad). (But the Court is not bound to.)

[See also ('12) 16 Ind Cas 986 (986) (Mad).]

[See contra ('69) 5 Mad H C R 132 (134). (Now obsolete.)]

**Note 4**

1. ('10) 5 Ind Cas 742 (743) (Mad). (Order under this rule executable.)  
(66) 5 Suth W R S C C Ref 6 (7).  
2. [See ('12) 17 Ind Cas 298 (294) (Mad).]  
3. ('21) AIR 1921 Cal 430 (431). (S. 36 is excluded by the specific provision in this rule.)

**O. 16 R. 4A**  
(Madras)

**MADRAS**

**Local Amendment**

*Insert the following as Rule 4A:*

"4A —(1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council, no payment in accordance with Rule 2 or Rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters; and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under Rule 4 according to the same scale; and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance."

**O. 16 R. 5**

**R. 5. [S. 163.]** Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

[1877, S. 163; 1859, S. 152.]

*Synopsis*

1. Contents of summons.

2. Failure to specify the place of appearance.

3. Where the hearing is postponed. See Note 3 to Rule 4 and Rule 16.

**1. Contents of summons.** — A summons should contain the necessary particulars of time and place of attendance<sup>1</sup> and of the documents to be produced.<sup>2</sup> In fixing the time for the attendance of public officers as witnesses, sufficient consideration must be given to the exigencies of public duties.<sup>3</sup>

**2. Failure to specify the place of appearance.** — A witness cannot be held liable for non-compliance with the summons where it is defective in particulars of time or place.<sup>1</sup> See Rule 15, *infra*.

**Order 16 Rule 5 — Note 1**

1. ('88) 5 All 7 (8).

2. (1864) 1864 Suth W R Gap No. 164 (165).

[See also ('18) 12 Ind Cas 190 (190): 5 Sind L R 44.

(Documents specified only need be produced.)]

3. ('70-71) 6 Mad H O R App Side Ruling VI.

**Note 2**

1. ('88) 5 All 7 (8).



**3. Where the hearing is postponed.** — See Note 3 to Rule 4, *supra* and Rule 16, *infra*.

**O. 16 R. 6  
Note 3**

**R. 6.** [S. 164.] Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

**O. 16 R. 6**

[1877, S. 164; 1859, S. 153; R. S. C., O. 37 R. 7.]

**1. Scope.** — It is open to a witness to produce documents at the hearing though he has not been summoned to produce them.<sup>1</sup>

Where anything has to be done before a document can be produced under this rule, it must be done by the party and not the Court.<sup>2</sup>

**R. 7.** [S. 165.] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

**O. 16 R. 7**

**Power to require persons present in Court to give evidence or produce document.**

[1877, S. 165.]

**1. Scope.** — This rule is subject to Sections 130 and 131 of the Evidence Act under which persons who are not parties to the suit cannot be compelled to produce particular documents.<sup>1</sup> It is left to the discretion of the Court to act under this rule.<sup>2</sup>

### Local Amendment

#### CALCUTTA

*Insert the following as Rule 7A:*

"7A. (i) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

**O. 16 R. 7A  
(Calcutta)**

(ii) Rules 16 and 18 of Order 5 shall apply to summons personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant."

#### Order 16 Rule 6 — Note 1

1. ('25) AIR 1925 Cal 1149 (1151).
2. ('70) 2 N W P H O R 210 (218). (Sanction of Government (which is necessary) to an officer in the Telegraph Department for producing a copy

of a message that passed through his office.)

#### Order 16 Rule 7 — Note 1

1. ('11) 11 Ind Cas 794 (795) (Cal).
2. ('08) 4 Nag L R 129 (138).

O. 16 R. 8

**R. 8.** [S. 166.] Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

[1877, S. 167; 1859, S. 154.]

#### Local Amendments

##### ALLAHABAD

*After* "this Order" and *before* "shall be served", *add* "may by leave of the Court be served by the party or his agent, applying for the same, by personal service and failing such service."

##### CALCUTTA

*Cancel* Rule 8 and *substitute* therefor the following :

"8. (1) Every summons under this Order not being a summons made over to a party for service under Rule 7A (i) of this Order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order 5 as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under Rule 2 of this Order."

##### N.-W.F.P.

*Add* the following :

"Provided that such summons shall ordinarily be made over for service to the party calling the witnesses, and his affidavit shall be considered sufficient proof of service; provided further that he shall, for sufficient reasons, be entitled to apply to the Court to have the summonses served through its agency."

##### ODDH

*Add* the following provisos :

"Provided that any party may, with the sanction of the Court, himself or by his agent effect service on his own witness, as if he were an officer of the Court, but in this case no diet money paid to a witness by a party or by his agent shall be included in the costs of the suit unless the witness verifies such payment before an officer of the Court :

Provided also that the special procedure for the service of summons upon defendant under Order 5 Rule 20A (1), shall not apply to service of summons under this Order."

##### PATNA

*Add* the following :

"Provided that a summons under this Order may by leave of the Court be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served by the Court in the usual manner."

##### RANGOON

*Add* the following proviso :

"Provided that, at the request of a party or his pleader, summons for the

service on a witness or witnesses, whose attendance is required by such party, may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and the rules in Order 5 as to service and proof of service shall apply in such case as if the person employed by such party or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons."

**O. 16 R. 8**

**R. 9.** [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

**O. 16 R. 9**

**Time for serving summons.**

#### **Local Amendment**

#### **RANGOON**

*Add the following :*

"Where the person summoned is a public officer or servant of a Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post."

**R. 10.** [S. 168.] (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

**O. 16 R. 10**

**Procedure where witness fails to comply with summons.**

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a

**O. 16 R. 10  
Note 1**

warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

[1877, S. 168; 1859, S. 159; R. S. C., O. 37 R. 8.]

**Local Amendment****ALLAHABAD**

In sub-rule (1) *substitute* a colon for the full stop after the word "summons" and *add* the proviso:

"Provided that the Court need not examine the serving officer if the person has been summoned only to produce a document and has attended and admitted receipt of the summons but has failed to produce the document."

In sub-rule (2):

(a) between the word "proclamation" and the word "requiring," *insert* the words, "or, if he is present, an order in writing to be signed by him";

(b) for the words "and a copy of such proclamation" *substitute* the words, "and a copy of the proclamation if issued."

In sub-rule (3) between the word "proclamation" and the words "or at any time afterwards" *insert* the words, "or an order in writing."

**Synopsis**

1. Scope and applicability of the Rule.

2. "Without lawful excuse."

3. Issue of proclamation — Sub-rule (2).

4. Issue of warrant of arrest — Sub-rule (3).

4a. Order for attachment of property — Sub-rule (3).

5. Appeal.

**Other Topics (miscellaneous)**

Clause (1). See Note 1.

Duty of Settlement Courts. See Note 1.

May issue. See Note 1.

**1. Scope and applicability of the Rule.** — This rule is intended to enable the Court to help the parties by *compelling* the obedience of recalcitrant witnesses.<sup>1</sup> The rule becomes applicable only where the Court *finds* that the summonses have been *duly served*<sup>2</sup> as is indicated in sub-rule (1). It has no application where there has been no summons<sup>3</sup> or where the summons has not been returned<sup>4</sup> or where the witness attends or produces the document on the required date though he had refused the summons.<sup>5</sup> The rule being of a highly penal nature, the procedure laid down in sub-rule (1) must be strictly followed before a Court finds whether the summons was served or not.<sup>6</sup> The Nazir's report is not legal evidence on this point.<sup>7</sup>

**Order 16 Rule 10 — Note 1**

1. ('66) 6 Suth W R 14 (15).

[See ('66) 5 Suth W R Act X, 49 (50).]

[See also ('67) 7 Suth W R 519 (520) (FB). (Court can even send them for trial before Magistrate.)]

('87) AIR 1987 Mad 811 (818). (Purpose is to vindicate authority of Court.)]

2. ('87) 7 Suth W R Cri Rul 60 (60).

3. ('16) AIR 1916 Cal 421 (422). (Duty of Settle-

ment Courts.)

4. ('69) 11 Suth W R 99 (99).

5. ('38) AIR 1928 Lah 469 (469).

6. ('99) 8 Cal W N 807 (810).

('17) AIR 1917 Lah 281 (281). (Issue of a warrant without an affidavit or examination on oath of the serving officer illegal).

[See however ('06) 27 All 491 (498). (A case of criminal revision.)]

7. ('86) 6 Suth W R Act X, 92 (98).

As a general rule, it is for the party to move the Court to issue one or more of the coercive processes under this rule<sup>9</sup> though the Court is not precluded from taking action *suo motu*.<sup>9</sup> In either case, both the conditions precedent laid down in sub-rule (2) must be satisfied before any coercive action is taken.<sup>10</sup> If the conditions are not satisfied, the party is entitled only to a fresh summons.<sup>11</sup> Even where both the conditions are satisfied, it is left to the discretion of the Court to take coercive measures or not;<sup>12</sup> but the discretion must not be *arbitrarily* exercised.<sup>13</sup>

**O. 16 R. 10**  
**Notes 1-4**

**2. "Without lawful excuse."** — The question of lawful excuse depends on the circumstances of each case.<sup>1</sup> It is not necessary for the Court to institute a formal investigation and come to a decision on the evidence adduced in order to believe in the want of lawful excuse. If the Court believes that the witness has knowledge of the summons and thinks that his evidence is material and if there is no one in Court to account for the witness's absence, there is sufficient reason to act under this rule.<sup>2</sup> Non-payment or non-tender of expenses to the witness is a lawful excuse for non-attendance.<sup>3</sup> Where the summons is returned unserved, the party must be given reasonable time to make out the grounds for the coercive process.<sup>4</sup>

**3. Issue of proclamation — Sub-rule (2).** — Delay caused by the office owing to the late payment of process fees for proclamation cannot be set up by the party as a ground for non-production of witnesses.<sup>1</sup>

**4. Issue of warrant of arrest — Sub-rule (3).** — In requiring parties to take out warrants of arrest against recalcitrant witnesses, the Court must have due regard to the practical difficulties felt by litigants in procuring the evidence of an important

(‘68) 10 Suth W R 3 (4).

(‘72) 18 Suth W R 197 (197).

(1864) 1864 Suth W R Gap No. Misc 9 (9).

(‘81) 7 Cal 34 (38).

(1865) 3 Suth W R Misc App 11 (12, 15).

[See (1865) 4 Suth W R Misc 4 (5).]

8. (‘69) 11 Suth W R 99 (99).

(‘70) 13 Suth W R 324 (324).

(‘20) AIR 1920 Nag 62 (62).

[See (‘70) 14 Suth W R 336 (337).

(‘76) 25 Suth W R 154 (154, 155).]

9. (‘11) 10 Ind Cas 903 (904) : 33 All 690.

10. (‘29) AIR 1929 All 850 (853, 854).

(‘70) 13 Suth W R 416 (416).

(‘66) 6 Suth W R 235 (235).

(‘71) 15 Suth W R 176 (178). (That evidence is material is by itself no ground.)

[See (‘70) 13 Suth W R 324 (324).]

11. (‘10) 8 Ind Cas 418 (419) (Oudh).

(‘24) AIR 1924 Pat 86 (86).

[See (‘75) 15 Beng L R App 12 (13).]

[See also (‘26) AIR 1926 Lah 26 (27).]

12. (‘70) 13 Suth W R 416 (416).

(‘70) 14 Suth W R 336 (337).

(1864) 1 Suth W R 25 (26). (Connivance or otherwise inequitable conduct of parties—Good ground for refusal.)

(‘10) 5 Ind Cas 184 (186) (Cal).

[See (‘66) 5 Suth W R 222 (228).]

13. (‘67) 8 Suth W R 505 (505).

(‘66) 5 Suth W R Act X, 6 (6).

(‘04) 1904 Pun Be No. 61, p. 75. (Witness a leading man of District—No good ground for refusal.)

(‘12) 13 Ind Cas 332 (334) (Cal). (Witness refus-

ing to appear — Warrant must issue, though applied for late.)

(1865) 3 Suth W R 97 (97). (Warrant returned "not found" a day before hearing — Application for attachment on date of hearing — Not to be refused.)

(1865) 3 Suth W R 21 (23). (Case clearly falling within the rule—Refusal of coercive process illegal.)

(‘20) AIR 1920 Mad 1014 (1017) : 61 Ind Cas 967 (969). (Witness appearing and stating documents not to be in his possession — Issue of warrant arbitrary.)

#### Note 2

1. (‘72) 18 Suth W R 63 (64).

[See (‘35) AIR 1935 Mad 659 (660). (Absence of witness due to alleged illness—Certificate given by medical practitioner by itself is not evidence — Examination of doctor on oath or at least affidavit by him should be insisted on.)]

[See also (‘72) 18 Suth W R 45 (47).

(‘89) AIR 1939 Pat 235 (237). (Witness—Non-appearance on day of hearing—Order-sheet not clear as to direction to witness to appear—Witness held not guilty of wilful absence in defiance of order.)]

2. (‘69) 5 Mad H O R 104 (105).

3. (‘95) 17 All 277 (279).

(‘72) 13 Suth W R 16 (18, 19).

4. (‘66) 6 Suth W R 126 (126).

#### Note 3

1. (‘81) 7 Cal 730 (731, 732).

**O. 16 R. 10**  
**Notes 4-8**

witness by means of his arrest.<sup>1</sup> The issue of a proclamation *subsequent* to the issue of a warrant of arrest is a contravention of the terms of sub-rule (3).<sup>2</sup>

A *panchayatdar* is not exempt from the coercive provisions of this rule.<sup>3</sup>

**4a. Order for attachment of property—Sub-rule (3).** — A Court can order the attachment of the property of a witness under sub-rule (3) of this rule. In applying for attachment under this sub-rule, a party is not in the same position as a decree-holder seeking to attach the property of his judgment-debtor. The reason is that proceedings to enforce the attendance of a witness are the acts of the *Court* and the object of such proceedings is to vindicate the authority of the Court. Hence, where the properties of a person other than the witness are attached by mistake, the party applying for attachment is not liable for damages.<sup>1</sup>

**5. Appeal.** — An order for attachment under this rule is appealable under O. 43, Rule 1, clause (g) of the Code.

**O. 16 R. 11**

If witness appears,  
attachment may be  
withdrawn.

**R. 11.** [S. 169.] Where, at any time after the attachment of his property, such person appears and satisfies the Court, —

- (a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,
- (b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

[1877, S. 169; 1859, S. 160.]

**1. Scope.** — This rule provides for a case where the person in default satisfies the Court that he had not intentionally failed to carry out the order of the Court.<sup>1</sup>

**O. 16 R. 12**

Procedure if witness  
fails to appear.

**R. 12.** [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition

**Note 4**

- 1. ('26) AIR 1926 All 108 (107).  
[See also ('27) AIR 1927 Lah 424 (424).]
- 2. ('20) AIR 1920 Mad 1014 (1017) : 61 Ind Cas 967 (969).

- 3. ('28) AIR 1928 Mad 299 (305) : 51 Mad 1.

**Note 4a**

- 1. ('37) AIR 1937 Mad 811 (813).  
**Order 16 Rule 11 — Note 1**
- 1. ('20) AIR 1920 Cal 46 (47).

in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:

**O. 16 R. 12**  
**Notes 1-2**

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

[1877, Ss. 170, 174; 1859, S. 160.]

### *Synopsis*

1. Scope of the Rule.
2. When fine can be imposed.
3. Appeal.

**1. Scope of the Rule.** — Rule 11 deals with the case when the person served appears and shows proper cause for his failure to appear; the present rule applies to a witness who does not appear or on appearance, fails to show proper cause.<sup>1</sup>

This rule does not affect the special jurisdiction of a Chartered High Court to proceed for contempt against a defaulting witness.<sup>2</sup>

**2. When fine can be imposed.** — There is a conflict of opinion on the point as to when fine can be imposed and three different views have been expressed —

- (1) The first view is that no fine can be imposed under this rule until the procedure laid down in Rule 10, sub-rule (2) or sub-rule (3) has been followed, *i. e.*, either a proclamation or a warrant of arrest or an attachment has been issued.<sup>1</sup> A person to whom a summons has been issued and who fails to obey it cannot straightway be fined under this rule.
- (2) The second view is that the words "such person" in this rule refer to the "person to whom a summons has been issued" in sub-rule (1) of Rule 10 and that the issue of a proclamation or an order for arrest or attachment are not *conditions precedent* to the imposition of fine, and that this rule deals with *all* cases of disobedience not covered by Rule 11.<sup>2</sup>
- (3) Where a party is *present in Court* and is directed to produce a document, the Court can, on his failure to comply with the order, impose a fine upon him without going through the procedure in sub-rules (2) and (3).<sup>3</sup>

#### **Order 16 Rule 12 — Note 1**

1. ('20) AIR 1920 Cal 46 (47).  
[See also ('19) AIR 1919 Cal 474 (475). (Legal Practitioners Act — Non-production of documents by pleader—District Judge can apply this rule—See S. 141, C. P. C.)]
2. ('26) AIR 1926 Rang 188 (189, 190): 4 Rang 257.

#### **Note 2**

1. ('16) AIR 1916 Cal 421 (422).  
('20) AIR 1920 Cal 46 (47).

- (20) AIR 1920 Cal 655 (655).  
(29) AIR 1929 All 850 (853).  
(28) AIR 1928 Lah 478 (474).  
[See also ('99) 3 Cal W N 307 (310). (Can only be fined after he has been arrested and brought before the Court.)]
2. ('25) AIR 1925 Mad 1247 (1247, 1248): 48 Mad 94.  
(28) AIR 1928 Lah 469 (469).  
(28) AIR 1928 Lah 979 (980). (*Obiter.*)
3. ('29) AIR 1929 All 99 (100).

**O. 16 R. 12**  
**Notes 2-8**

It is submitted that the second of the above views is correct. This rule, Rule 11 and sub-rules (2) and (3) of Rule 10 all refer to "such person" and must, therefore, necessarily refer to some person referred to before, *i. e.*, "a person to whom a summons has been issued" in sub-rule (1) of Rule 10.

What is lawful excuse depends upon the circumstances of each case.<sup>4</sup>

**3. Appeal.** — An appeal lies from an order imposing a fine under this rule: *vide* Section 104 (1) (h) of this Code. But there is no second appeal: see S. 104 (2).

As regards orders of attachment and sale under this rule, no appeal lay under the Code of 1882.<sup>1</sup> Rule 13 of the present Code makes applicable to such attachment and sale, all the provisions in the Code regarding attachment and sale in execution of a decree.

**O. 16 R. 13****R. 13.** [New.] The provisions with regard to the attach-

*Mode of attachment.*

ment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

**O. 16 R. 14****R. 14.** [S. 171.] Subject to the provisions of this Code as

*Court may of its own accord summon as witnesses strangers to suit.*

to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

[1877, S. 171.]

*Synopsis*

1. Scope of the Rule.
2. Cross-examination of a witness summoned by Court of its own accord.

**1. Scope of the Rule.** — Ordinarily, it is for the party to summon the witnesses necessary for his case. This rule is only intended to enable the Court to secure *suo motu* the attendance of a witness whose evidence appears to the Court to be

4. ('28) AIR 1928 Lah 979 (980). (Missing the train and intimating to Court by telegram—Lawful excuse.)

('10) 5 Ind Cas 184 (186) (Cal). (Latitude to be given to busy professional men.)

('88) 12 Bom 68 (64). (Summons to produce docu-

ments—Witness attends but pleads non-possession of documents — Not liable to fine — Jurisdiction can be exercised only after arrest.)

**Note 3.**

1. ('10) 7 Ind Cas 100 (100) : 88 All 68.



necessary.<sup>1</sup> But the Court cannot compel a party to summon such a witness or penalise him for his refusal to summon him.<sup>2</sup>

**O. 16 R. 14.**  
**Notes 1-2**

The general powers under this rule are, in the case of Appellate Courts, circumscribed by the specific provisions of O. 41 R. 27.<sup>3</sup>

**2. Cross-examination of a witness summoned by Court of its own accord.** — The parties cannot be refused the right to cross-examine a witness examined by the Court under this rule.<sup>1</sup>

**R. 15.** [S. 172.] Subject as last aforesaid, whoever is

**O. 16 R. 15.**

**Duty of persons summoned to give evidence or produce document.**

summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

[1877, S. 172; 1852, S. 167.]

**R. 16.** [S. 173.] (1) A person so summoned and attending

**O. 16 R. 16.**

**When they may depart.**

shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

### Local Amendment

#### LAHORE

Add the following sub-rule (3) :

"(3) In the absence of the presiding officer the powers conferred by sub-rule (2) may be exercised by the Senior Subordinate Judge of the first class exercising jurisdiction at the headquarters of the district, or by any Judge or court-official nominated by him for the purpose."

**1. Direction to witness to appear on the adjourned date.** — See Rule 4, Note 3.

#### Order 16 Rule 14 — Note. 1

1. ('98-1900) 1898-1900 Low Bur Rul 658.  
(09) 2 Ind Cas 847 (848) : 5 Low Bur Rul 1.  
(Boundary dispute — Identity of land doubtful — This rule freely used.)

[See also ('88) AIR 1988 Pat 806 (824, 825) : 12 Pat 859. (Lawyer present all through — He should not be examined as court witness.)]

2. ('11) 10 Ind Cas 85 (86) (Lah).

3. ('95) 18 Mad 94 (98). (Per Shephard J.)  
[See ('88) AIR 1988 Pat 806 (825) : 12 Pat 859.  
(Party having plenty of opportunities — Court would refuse to examine witness at appellate stage.)]

#### Note 2

1. ('69) 11 Suth W R 110 (111). (Cross-examination refused—The evidence is no legal evidence.)  
(('69) 11 Suth W R 468 (472). (Refusal—A serious mistake.)

**O. 16 R. 17**

**R. 17.** [Ss. 174, 175.] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16.

Application of  
rules 10 to 13.

[1877, Ss. 174, 175; 1859, Ss. 168, 169.]

1. Jurisdiction of Court to punish. — See Rule 11, Note 2.

2. "Without lawful excuse." — See Rule 10, Note 2.

**O. 16 R. 18**

**R. 18.** [S. 174.] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

Procedure where witness apprehended cannot give evidence or produce document.

[1877, S. 174; 1859, S. 169.]

1. **Non-attendance, when an offence.** — Section 174 of the Indian Penal Code deals with the offence of non-attendance in obedience to an order passed by a public servant. No such offence is committed unless —

(a) there is summons to attend,<sup>1</sup>

(b) such summons is specific as to the time and place of attendance,<sup>2</sup> and,

(c) the non-attendance is legally found<sup>3</sup> to be "intentional."<sup>4</sup>

**O. 16 R. 19**

No witness to be ordered to attend in person unless resident within certain limits.

**R. 19.** [S. 176.] No one shall be ordered to attend in person to give evidence unless he resides —

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of

Order 16 Rule 18 — Note 1

1. ('68) 10 Suth W R Cri Rul 88 (84).

2. ('88) 5 All 7 (8).

('72) 17 Suth W R Cri Rul 88 (88).

3. ('70) 14 Suth W R Cri Rul 20 (20).

4. ('68) 10 Suth W R Cri Rul 88 (84). (Superior officer refusing permission to attend — No intention to disobey.)

the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

O. 16 R. 19  
Notes 1-2

### Synopsis

#### 1. Scope of the Rule. | 2. Revision.

**1. Scope of the Rule.** — When a party desires to examine himself on commission, in his own favour, the provisions of O. 26 R. 4 apply.<sup>1</sup> This rule provides an exemption from personal attendance of a witness who resides outside the limits prescribed in the rule.<sup>2</sup>

**2. Revision.** — The High Court of Lahore has held that an order in contravention of this rule is not open to revision.<sup>1</sup>

## R. 20. [S. 177] Where any party to a suit present in Court refuses, without lawful excuse, when

O. 16 R. 20

Consequence of refusal  
of party to give evidence  
when called on by Court.

required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

[1877, S. 177; 1859, S. 170.]

### Synopsis

1. Scope and applicability.
2. "May pronounce."
3. Appeal.

**1. Scope and applicability.** — This rule applies to miscellaneous proceedings also.<sup>1</sup> The provisions of this rule being highly penal in character, the rule must be strictly construed.<sup>2</sup> Thus, a party is bound only to *produce* the document required and is not bound to *exhibit* it as evidence in the case.<sup>3</sup> Again, the rule applies only when the party is *present* in Court and refuses to comply with the order.<sup>4</sup> The failure in one suit to obey a requisition to produce or give evidence will not entitle the Court to give a judgment against the defaulter under this rule, in any *other suit*.<sup>5</sup> Nor can the rule be applied when the default has been once condoned<sup>6</sup> nor against all parties when only *one* of them was affected by an obligation under this rule.<sup>7</sup>

#### Order 16 Rule 19 — Note 1

1. ('22) AIR 1922 Cal 42 (48).  
[See ('28) AIR 1928 Mad 821 (822): 46 Mad 574.]
2. ('23) AIR 1923 Cal 427 (428).  
('32) AIR 1932 Nag 185 (186): 28 Nag L R 146.  
(Plaintiff outside prescribed limits — Cannot be summoned as defendant's witness.)

#### Note 2

1. ('28) AIR 1928 Lah 801 (801).

#### Order 16 Rule 20 — Note 1

1. ('78) 19 Suth W R 188 (184). (Interlocutory application.)  
('67) 8 Suth W R 64 (64). (Execution proceedings.)

[See also (1865) 4 Suth W R Act X 18 (19). (Suits under the Bengal Rent Act.)

(1865) 4 Suth W R Act X 50 (50). (Do.)]

2. ('74) 22 Suth W R 270 (271).
3. ('18) AIR 1918 Cal 145 (145).
4. ('11) 12 Ind Cas 719 (719) (Mad). (He is therefore, not bound to be present on the adjourned date.)
5. ('69) 5 Mad H C R 269 (272).
6. ('68) 4 Mad H C R 231 (238). (Default overlooked — Case adjourned — Rule cannot be enforced on adjourned date.)
7. (1864) 1 Suth W R 168 (169, 170).  
(1864) 1 Suth W R 25 (25).

**O. 16 R. 20**  
**Notes 1-3**

A party who is not guilty of *wilful* default is not liable to be visited with the consequences of this rule.<sup>9</sup>

**2. "May pronounce."** — The rule is permissive and not mandatory and it is, therefore, within the *discretion* of the Court to pronounce judgment against the defaulter,<sup>1</sup> though such discretion must be exercised with caution and forbearance.<sup>2</sup> It would be a wrong exercise of discretion if the Court penalises the party and prevents him from proving his case<sup>3</sup> merely by reason of the default. Where, for example, there is sufficient evidence on his side<sup>4</sup> or where the opposite party has failed to give any evidence in support of his own case,<sup>5</sup> or the claim of the opposite party is *prima facie* unsustainable,<sup>6</sup> the Court need not act under this rule. But the Court will be justified in acting under this rule against the defaulting party<sup>7</sup> where, for example, his evidence or his production of any document is material<sup>8</sup> or where there is evidence for the opposite party<sup>9</sup> or where the opposite party is unable to make out his case without compliance of the order, by the defaulting party.<sup>10</sup>

**3. Appeal.** — A decision pronouncing judgment against a party under this rule is an appealable *order* and an appeal lies therefrom.<sup>1</sup> See Order 43 Rule 1 (h).

**O. 16 R. 21**

Rules as to witnesses to  
apply to parties sum-  
moned.

**R. 21.** [S. 178.] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

[1877, S. 177; *cf.* 1859, S. 126.]

**Local Amendments**

**CALCUTTA**

*Cancel* Rule 21 and *substitute* therefor the following:

"21. (1) When any party to a suit is required by any other party thereto to

8. ('66) 6 *Suth W R* 247 (248).

('69) 11 *Suth W R* 110 (112).

('71) 15 *Suth W R* 253 (254).

('71) 15 *Suth W R* 269 (269).

('73) 20 *Suth W R* 165 (166).

[*See* ('69) 12 *Suth W R* 359 (360).]

[*See also* ('66) 2 *Bom H C R* 340 (341). (Refusal to answer — Not of any material question — Judgment not to be against party).]

**Note 2**

1. ('66) 5 *Suth W R* 89 (89).

('66) 6 *Suth W R Act X* 36 (36).

('68) 10 *Suth W R* 174 (174).

('69) 11 *Suth W R* 5 (5).

(1864) 1864 *Suth W R* 138 (134).

('68) 1 *Beng L R (S N)* 10 (10, 11).

[*See* ('66) 3 *Mad H C R* 299 (300, 301).

2. ('68) 4 *Mad H C R* 231 (233).

('66) 6 *Suth W R* 247 (248).

('72) 17 *Suth W R* 563 (564).

3. ('70) 2 *N W P H C R* 67 (68).

('75) 24 *Suth W R* 314 (314, 315).

4. ('72) 18 *Suth W R* 16 (18).

*Marsh* 467.

5. ('69) 12 *Suth W R* 242 (242).

('71) 15 *Suth W R* 253 (254).

('72) 17 *Suth W R* 563 (563).

('84) 9 *Bom* 241 (244). (Rule will not justify the judge in dispensing with proof of the execution of a will in probate cases.)

6. ('67) 7 *Suth W R* 46 (47). (A claim barred by limitation on the very face of it.)

7. ('76) 2 *Cal* 222 (225).

('71) 16 *Suth W R* 196 (197).

8. ('68) 4 *Mad H C R* 142 (144). (Non-production of a material document.)

[*See* (1865) 2 *Suth W R Act X* 43 (48).]

[*See also* ('71) 16 *Suth W R* 196 (197).]

9. ('69) 12 *Suth W R* 369 (369).

10. ('68) 10 *Suth W R* 158 (159).

('72) 17 *Suth W R* 550 (551). (The corresponding provision of the Code of 1859, i. e., S. 170 does not contain the words "present in Court" and "then and there." But the principles decided in the cases under the said Code quoted above are, nevertheless, applicable under the present Code.) [*See also* (1864) 1864 *Suth W R* 24 (25).]

**Note 3**

1. ('66) 5 *Suth W R* 270 (270).

*Marsh* 568.

[*See also* ('72) 18 *Suth W R* 16 (19).]

give evidence, or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

**O. 16 R. 21**  
**Note 1**

(2) When any party to a suit gives evidence on his own behalf the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing."

#### **MADRAS**

*Substitute the following for Rule 21 :*

"21. (1) When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing."

**1. Opposite party as a witness.** — This rule applies only to the case where a party to a suit has been called to give evidence by the other party. The Court has, therefore, no power under this Code to order the travelling expenses of a party who has given evidence in support of his own case.<sup>1</sup> See the amendment to this rule made by the Calcutta High Court.

The practice of a party not examining himself as his witness and forcing the opposite party to summon him, thereby hoping to obtain an opportunity of being cross-examined by his own counsel,<sup>2</sup> has been severely condemned by their Lordships of the Privy Council. The High Courts of Bombay and Lahore have also held that the practice of summoning the opposite party as a witness is equally objectionable.<sup>3</sup>

As regards the weight of the evidence of the opposite party summoned as a witness, see the undermentioned case.<sup>4</sup>

It is the duty of a party who has certain facts within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to these facts and submit himself to cross-examination by the other side.<sup>5</sup>

#### **Local Amendment**

##### **ALLAHABAD**

To Order 16, *add* the following rules :

"22. (1) Save as provided in this rule and in Rule 2, the Court shall allow travelling and other expenses on the following scale :—

(a) in the case of witnesses of the class of cultivators, labourers, and menials, six annas a day ;

(b) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct ; and

(c) in the case of witnesses of superior rank, including officers of Government in receipt of a salary of not less than Rs. 200 a month, from three to five rupees a day.

#### **Order 16 Rule 21 — Note 1**

9 (P C).

1. ('35) AIR 1935 Mad 244 (244).

3. ('09) 8 Ind Cas 45 (45) (Bom).

2. ('10) 5 Ind Cas 549 (550) : 82 All 104 : 87 Ind App 1 (P C).

('29) AIR 1929 Lah 868 (871).

4. ('98) 2 Cal W N (S N) 99 (99).

('00) 1 Ind Cas 128 (129) : 81 All 116 : 86 Ind App

5. ('88) AIR 1988 Lah 248 (244).

**O. 16 R. 22**  
**(Allahabad)**

**O. 16 R. 22**  
(Allahabad)

(2) If a witness demands any sum in excess of what has been paid to him, such sum shall be allowed if he satisfy the Court that he has actually and necessarily incurred the additional expense.

*Illustration*

A post office or railway employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which, he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip which the witness will present to the Court from which the summons issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule as may seem to the Court to be reasonable and proper :

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

**O. 16 R. 23**  
(Allahabad)

23. In cases to which Government is a party, Government servants whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their head-quarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses."

## ORDER XVII.

### ADJOURNMENTS

**O. 17 R. 1**

**R. 1.** [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

[1877, S. 156; 1859, S. 146.]

### Local Amendments

#### ALLAHABAD

Add the following further proviso :

" Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order 16 Rule 1."

## LAHORE

Add the following as sub-rule (3) :

"(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1), the Court shall proceed with the suit forthwith."

O. 17 R. 1  
Notes 1-2

*Synopsis*

- |  |                           |
|--|---------------------------|
| 1. Scope of the Rule.                        | 6. Costs in pauper suits. |
| 2. "May adjourn"—Discretion of Court.        | 7. Proviso.               |
| 3. Sufficient cause must be shown.           | 8. Appeal.                |
| 4. "The Court shall fix a day"—Sub-rule (2). | 9. Review.                |
| 5. Costs of adjournment—Sub-rule (2).        | 10. Revision.             |

*Other Topics (miscellaneous)*

Adjournments not at the instance of parties —  
Applicability of rule. See Note 1.

Hearing of the suit and hearing of the evidence—  
Distinction. See Note 1.

Costs of adjournment as condition precedent. See  
Note 5.

Proviso—Trial Court itself to exercise discretion  
and not to ask for orders of superior Court.  
See Note 7.

**1. Scope of the Rule.** — The rule vests in Courts a discretion to grant time to a party *at any stage* of the suit.<sup>1</sup> But the application of the rule is limited to adjournments granted at the instance of *parties* and does not extend to those necessitated by rules of the Court.<sup>2</sup> Thus, an order made on the settlement of issues fixing a day for the final hearing is not an order under this rule.<sup>3</sup> Similarly, orders for adjournment necessitated by delay on the part of Court's officers in the performance of Court's duty are not governed by this rule.<sup>4</sup> But the High Court of Allahabad has held in the undermentioned case<sup>5</sup> that this rule applies both to adjournments made at the instance of a party and to adjournments by the Court of its own motion.

The rule speaks of the "hearing of the suit." There is a distinction between the hearing of the *suit* and the hearing of *evidence*. Thus, the Court may adjourn the hearing of the suit and yet may, under O. 13 R. 2, refuse to accept documentary evidence which ought to have been but was not produced at the first hearing of the suit, though such hearing resulted only in an adjournment.<sup>6</sup>

Neither this rule nor any other rule of this Order applies to execution proceedings.<sup>7</sup> *Vide also* Notes under Rules 2 and 3.

**2. "May adjourn" — Discretion of Court.** — The granting of an adjournment to a party to a suit is, under this rule, left to the *discretion* of the Court.<sup>1</sup> The discretion is not subject to any definite rules, but should be exercised in a judicial and

**Order 17 Rule 1 — Note 1**

1. ('16) AIR 1916 Lah 175 (176). (Such time may be granted even at the stage of arguments.) ('35) AIR 1935 All 476 (477).
2. ('98) 2 Cal W N 490 (491).
3. ('91) 14 Mad 88 (98).
4. ('29) AIR 1929 Lah 620 (621). (It is the duty of Court to see that service of summons to witnesses is effected — Adjournment caused by non-service of such summons on the part of the process department is not an adjournment under Rule 1.)
5. ('85) AIR 1935 All 210 (211).
6. ('19) AIR 1919 Cal 800 (801).
7. ('98) 15 All 84 (94) (F B).

('38) AIR 1938 Mad 418 (422) : 56 Mad 490 (F B).  
**Note 2**

1. ('14) AIR 1914 Sind 105 (106) : 8 Sind LR 275. ('16) AIR 1916 Lah 175 (176).
2. ('22) AIR 1922 Nag 81 (81). (This is a matter in the discretion of the first Court, not in that of appellate Courts.)
3. ('21) AIR 1921 Pat 76 (78) : 5 Pat L Jour 390. (Apart from an express provision of law, the Court is not bound to grant an adjournment.)
4. ('11) 10 Ind Cas 748 (748) (Bom). (Parties to a suit cannot by consent obtain an adjournment of the case as a matter of course.)
5. [See ('36) AIR 1936 Pat 472 (472, 478) : 15 Pat 561 (S B). (Non-appearance of defendant living at a great distance in another province—Adjournment for a month is proper.)]

**O. 17 R. 1**  
**Notes 2-3**

reasonable manner,<sup>3</sup> and upon proper materials.<sup>3</sup> It should be exercised after considering the party's conduct in the case,<sup>4</sup> and the opportunity he has had of getting ready, and the truth and sufficiency of the reason alleged by him for not being ready.<sup>5</sup> Where the adjournment is refused, reasons should be given for such refusal.<sup>6</sup>

The main object of vesting the discretion in the Court is to enable it to prevent a party from improperly *delaying* proceedings and abusing the process of the Court.<sup>7</sup> The Court should not, therefore, be too technical in such matters,<sup>8</sup> and unless there is a pressing necessity for proceeding with the case, or the application for adjournment is obviously frivolous, the adjournment asked for should not be refused.<sup>9</sup> But adjournment is improper when it is granted on the intervention of a third party without hearing the plaintiff or his pleader.<sup>10</sup>

**3. Sufficient cause must be shown.** — On the one hand, an adjournment should not be refused where sufficient cause for the adjournment is shown;<sup>1</sup> and on the other, it should not be granted even on condition of payment of costs, where no sufficient cause exists.<sup>2</sup>

What is sufficient cause will depend upon the circumstances of each case.<sup>3</sup> Speaking generally, where the necessity for the adjournment is not due to anything for which the party applying for it is responsible,<sup>4</sup> or where there has been little or no negligence on his part,<sup>5</sup> an adjournment should not be refused. But where the party has been wanting in due diligence,<sup>6</sup> or is guilty of negligence,<sup>7</sup> an adjournment can be refused.

The following are some of the circumstances which have been held to constitute sufficient cause for adjournment —

2. ('14) AIR 1914 Sind 105 (106) : 8 Sind L.R. 275.
3. ('16) AIR 1916 All 188 (189).
- (36) AIR 1936 Pat 472 (474) : 15 Pat 561 (S B).
4. ('16) AIR 1916 Pat 88 (89) : 1 Pat L.Jour 173.
5. ('27) AIR 1927 Lah 879 (879).
- (28) AIR 1928 Cal 102 (102).
6. ('16) AIR 1916 All 188 (189).
7. ('14) AIR 1914 Sind 105 (107) : 8 Sind L.R. 275.
8. ('26) AIR 1926 Mad 859 (860).
- (28) AIR 1928 Nag 165 (165). (Adjournment—Refusal to postpone the hearing for an hour or two to give time for a party to appear can be hardly called proper.)
- (29) AIR 1929 Rang 215 (216). (On the day fixed for hearing, case not called until 2 p. m.—Six witnesses for plaintiff examined and forty witnesses for defendant present—Defendant's advocate appearing in other Court and defendant applying for adjournment but Court refusing—Though defendant has not shown sufficient cause for not being ready with his case, Court could use its discretion in allowing adjournment.)
9. ('82) 1882 All W N 127 (127).
10. ('36) AIR 1936 Pat 472 (473, 474) : 15 Pat 561 (S B). (Judge adjourning case for long period as result of a letter from Criminal Investigation Department—Adjournment is improper and unsound.)

**Note 3**

1. ('91) 1891 All W N 112 (113, 114).
- (35) AIR 1935 All 476 (477).
- [See ('25) AIR 1925 Lah 572 (572, 578).]
2. ('24) AIR 1924 Cal 774 (776) : 51 Cal 70.
3. (1865) 3 Bom H O R (O C) 55 (58).

- (26) AIR 1926 Mad 944 (944).
- (29) AIR 1929 Rang 215 (216).
- (35) AIR 1935 All 476 (477).
4. ('16) AIR 1916 All 188 (189).
- (72) 18 Suth W R 141 (142). (Where a defendant has not been served with the summons in time so as to enable him to produce his evidence, he should be given time if he asks for it.)
- (29) AIR 1929 Pat 609 (612) : 9 Pat 408. (Where a suit was adjourned to a particular date and defendant was ready with his witnesses on that date but it happened to be a holiday and therefore the case was not taken up and the witnesses returned to their places, there was sufficient cause for adjournment.)
- (72) 18 Suth W R 825 (825, 826). (Court not sitting on date of hearing—No date fixed—Court taking it on a future date—Party not knowing the usual practice in such cases—Adjournment ought to be given.)
- (33) AIR 1933 Nag 336 (337). (Witnesses served but absent as wrong date given in processes—It is good ground for adjournment.)
5. ('26) AIR 1926 Mad 859 (860).
6. ('28) AIR 1928 Lah 548 (550) : 4 Lah 258.
- (75) 24 Suth W R 202 (202).
- (26) AIR 1926 Oudh 75 (76).
- (71) 15 Suth W R 447 (448). (Witnesses not served owing to process fee being paid late.)
- (16) AIR 1916 Pat 83 (88) : 1 Pat L.Jour 173. (Do.)
- (13) 15 Ind Cas 584 (585) (Mad). (Do.)
7. ('11) 10 Ind Cas 554 (555) : 5 Sind L.R. 40.
- (32) AIR 1932 Lah 591 (592) : 13 Lah 458. (Do.)



(1) Where a party is not ready for the hearing by reason of his having been taken by *surprise*.<sup>8</sup>

(2) Where he could not reasonably know of the date of hearing in sufficient time to get ready for the same.<sup>9</sup>

(3) Where his witnesses fail to appear for the hearing owing to non-service of summonses on them when such non-service is not due to the fault of the party.<sup>10</sup> In such cases an adjournment should be granted to enable the party to take steps again for their attendance.<sup>11</sup> The mere fact that the process fees were paid late is no ground for refusing adjournment, if the witnesses are absent though served in sufficient time to attend.<sup>12</sup> Where the absence of witnesses is due to a *bona fide* mistake on the part of the party, there is sufficient cause for adjournment.<sup>13</sup>

(4) Where a party is not ready owing to his lawyer having withdrawn his appearance in the case under circumstances which do not give the party sufficient time to engage another lawyer and enable him to get ready.<sup>14</sup>

For cases which have been held *not* to constitute sufficient cause for adjournment, see the undermentioned decisions.<sup>15</sup>

Applications for adjournment should not be belated but should be sufficiently early so that no inconvenience may be caused to the Judge or the opposite party.<sup>16</sup>

**4. "The Court shall fix a day" — Sub-rule (2).** — Where a suit is adjourned, the date to which it is adjourned should be fixed by order of Court.<sup>1</sup> The date so fixed

defendants aware of intended departure of witnesses — No steps taken to get them examined before they leave—Court can refuse to wait till their return.)

(26) AIR 1926 Nag 486 (487).

8. ('67) 7 Suth W R 84 (84).

(25) AIR 1925 Pat 534 (534, 535).

9. ('29) AIR 1929 Pat 609 (612) : 9 Pat 408.

10. ('20) AIR 1920 Oudh 254 (255).

(33) AIR 1933 Lah 176 (177). (Defendant taking steps to summon necessary and important witnesses—Witnesses not appearing for no fault of defendant — Adjournment should be given for production of such witnesses.)

(25) AIR 1925 Oudh 304 (304).

(33) AIR 1933 Mad 612 (613).

(96) 1896 Bom P J 220). (But not where the summonses could not be served owing to the party's dilatoriness.)

(82) 1882 All W N 127 (127). (Where adjournment is asked for, for the attendance of witnesses, then unless there is pressing necessity for proceeding with the case, or application is obviously frivolous, or party was grossly negligent, adjournment "ought to be granted".)

11. ('01) 4 Oudh Cas 379 (386).

(28) AIR 1923 All 218 (219) : 45 All 407.

(28) AIR 1928 Lah 641 (642). (But not if the party has undertaken to produce them.)

(89) 1889 Bom P J 269. (Non-attendance of witnesses through illness is sufficient ground.)

(26) AIR 1926 Lah 501 (501). (Do.).

[But see ('08) 2 Low Bur Rul 91 (93).]

12. ('20) AIR 1920 Nag 221 (222); 16 Nag L R 1.

[See also ('88) AIR 1988 Lah 448 (451). (Process for witness paid late — Witness important — Summons returned with report that witness could not be found—Adjournment should not

be refused.)]

13. (1900) 28 Cal 37 (52, 53).

(25) AIR 1925 Bom 105 (108). (But when notice for the discovery and inspection of documents has been posted to the hearing of the suit but on the day so fixed, no judgment is given on the notice, adjournment of hearing of the suit may be refused.)

14. ('08) 35 Cal 799 (802, 806). (Two pleaders engaged — Senior ill on the hearing date — Another senior engaged not allowed to argue on ground of want of vakalatnama — Junior not ready to argue—Adjournment must be granted.)

(11) 10 Ind Cas 214 (214) (All). (But where pleader could not attend hearing and time is granted to engage another and the second pleader engaged asks again for adjournment, adjournment can be refused.)

15. ('27) AIR 1927 Rang 258 (258). (Absence of advocate owing to his attendance in another case is not sufficient ground for adjournment.)

(28) AIR 1928 Mad 401 (401). (The fact that compromise was suggested is no sufficient cause for adjournment especially where the suit is an old one.)

(21) AIR 1921 Pat 76 (78) : 5 Pat L Jour 390. (Non-compliance with a provision of law by party asking for adjournment is not sufficient cause for adjournment.)

[See also ('87) 1887 All W N 282 (282). (Illness of pleader—No ground in appeal for adjournment.)]

16. ('25) AIR 1925 Nag 236 (237).

#### Note 4

1. ('82) 1882 All W N 171 (171). (A mere note by a clerk does not amount to a proper appointment of adjourned date for the hearing of a case.)

**O. 17 R. 1**  
**Notes 4-6**

should be communicated to the parties or their pleaders or to such of them as are present or represented in Court when the adjournment takes place.<sup>3</sup> It is not, however, necessary to communicate it to an absent party,<sup>3</sup> for, it is the duty of the pleaders to get acquainted with the date of adjournment.<sup>4</sup> See also the undermentioned decision.<sup>5</sup>

**5. Costs of adjournment — Sub-rule (2).** — In granting an adjournment under this rule, the Court may, if it thinks fit, direct the party asking for adjournment to pay costs to the other party.<sup>1</sup> The sum so awarded should not, however, be in the nature of a penalty or punishment but should be commensurate with the costs which, in the opinion of the Court, the party who is ready will have to incur;<sup>2</sup> and sufficient opportunity should be given to the party to obey the order.<sup>3</sup> The rule gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment and not the costs of the suit generally.<sup>4</sup>

An order directing payment of costs can be executed under Section 36.

The payment of costs may be made a condition precedent to the adjournment.<sup>5</sup> Such a condition need not, however, be express if it is sufficiently obvious from the context.<sup>6</sup> If the costs are not so paid a further adjournment may be refused.<sup>7</sup> If a suit or appeal is adjourned on condition that it will *stand dismissed* if the costs of the adjournment are not paid within a certain date, then, on failure of payment of costs within such a date, the suit or appeal will stand dismissed.<sup>8</sup> Similarly, if the suit is adjourned on condition that if the defendant does not pay the costs ordered before the adjourned date, the defence will be struck off and the suit proceeded with *ex parte*, the Court can in case of default strike off the defence.<sup>9</sup> But the Court has no jurisdiction to pass such a conditional order of adjournment as to enable it, on default, to pass a decree without evidence, *when such evidence is necessary*.<sup>10</sup>

No costs can be awarded against a party not at fault, in the matter of the adjournment.<sup>11</sup>

**6. Costs in pauper suits.** — The High Court of Rangoon has held that even a plaintiff suing in *forma pauperis* may be ordered to pay costs as a condition precedent to his being granted an adjournment.<sup>1</sup>

2. ('23) AIR 1923 All 79 (80).

('25) AIR 1925 Pat 807 (809) : 4 Pat 440. (Signature of the pleaders of both the parties should be on order-sheet.)

3. ('80) AIR 1930 Mad 118 (114, 117) (SB).

4. ('99) 27 Cal 529 (531).

5. ('38) AIR 1938 Cal 789 (790). (Before fixing per-emptory date for hearing of suit, Court should hear parties to enable them to inform it what time would be necessary for enabling them to be ready with their evidence.)

**Note 5**

1. ('81) 7 Cal 177 (177).

('28) AIR 1928 Rang 306 (307) : 6 Rang 561. (Costs of adjournment can be awarded even against a plaintiff suing in *forma pauperis*.)

2. ('80) AIR 1930 Oudh 171 (172, 173) : 4 Luck 529.

3. ('09) 1 Ind Cas 366 (368) : 36 Cal 566.

('25) AIR 1925 Cal 570 (571).

('26) AIR 1926 Cal 1221 (1222).

4. ('38) AIR 1938 Mad 711 (711). (Rule does not entitle the Court to demand payment of the entire costs of the suit incurred up to the date on which the adjournment is asked for. What can be allowed is only the costs of the day including a reasonable fee to the legal practitioner engaged

by the opposite party.)

5. ('28) AIR 1928 Rang 306 (307) : 6 Rang 561.

6. ('28) AIR 1928 Mad 786 (788).

('16) AIR 1916 Lah 162 (163).

('19) AIR 1919 Cal 111 (112).

7. ('08) 6 Oudh Cas 41 (43).

8. ('25) AIR 1925 Oudh 102 (103) : 27 Oudh Cas 225.

('22) AIR 1922 Cal 820 (821). 48 Cal 902.

9. ('25) AIR 1925 All 280 (281, 282) : 47 All 588.

('08) 21 Mad 403 (404). (But it is not open to the Court to strike off the defence unless payment of costs is made a condition precedent to the hearing of defendant's evidence.)

10. ('08) 18 Mad L Jour 541 (542).

11. ('15) AIR 1915 Lah 476 (477).

[See also ('86) 1886 All W N 220 (220). (Where adjournment is occasioned by the Court's convenience, it was held, the payment of process for issue of summons is not obligatory on the party in view of the rule prevailing in Allahabad.)

('86) AIR 1936 Lah 705 (706). (Pleader asked to admit genuineness of document is entitled to consult client—Pleader demanding short adjournment should not be burdened with costs.)]

**Note 6**

1. ('28) AIR 1928 Rang 306 (307) : 6 Rang 561.

**7. Proviso.** — Where the trial of the suit has once begun, it should ordinarily go on from day to day. The Court has, however, a discretion to adjourn the trial of a part-heard case to a day beyond the following day, but in such a case the Court should record its reason therefor.<sup>1</sup> In exercising such a discretion the Court should act of itself and not ask for orders of the superior Court in the matter.<sup>2</sup>

**O. 17 R. f  
Notes 7-10**

**8. Appeal.** — No appeal lies from an order refusing adjournment under this rule;<sup>1</sup> but such a refusal is liable to correction by an Appellate Court in an appeal from the decree in the suit.<sup>2</sup> The refusal may be made a ground of attack in appeal, at whatever stage of the hearing of the suit the order of refusal may have been made.<sup>3</sup> The exercise of discretion under this rule is not liable to be interfered with in second appeal.<sup>4</sup> (*Vide* also Notes under Sections 100 & 101).

**9. Review.** — An order of adjournment once made cannot be rescinded in review unless for good and sufficient reasons and in the presence of the other side.<sup>1</sup>

**10. Revision.** — An order of adjournment is not liable to revision.<sup>1</sup> But where an adjournment is refused and the suit is either dismissed for default or decreed *ex parte*, a revision will lie from an order passed in appeal against an order refusing to set aside the dismissal for default or the *ex parte* decree as the case may be.<sup>2</sup> Even in such a case the matter will not be interfered with except for strong reasons.<sup>3</sup>

**R. 2.** [S. 157.] Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

**O. 17 R. 2**

Procedure if parties fail to appear on day fixed.

[1877, S. 157; 1859, S. 147.]

### Local Amendments

#### ALLAHABAD

Add the following:

"Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on the merits.

**Explanation.** — No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application."

#### Note 7

1. ('10) 8 Ind Cas 990 (991) (Low Bur).
2. ('15) AIR 1915 Mad 78 (78).

#### Note 8

1. ('17) AIR 1917 Nag 48 (49).
2. ('20) AIR 1920 Nag 221 (222) : 16 Nag L R 1.  
[See also ('85) AIR 1985 All 476 (477).]
3. ('22) AIR 1922 Bom 267 (269) : 46 Bom 184.
4. ('14) AIR 1914 All 280 (282).

('85) AIR 1935 All 476 (477).

#### Note 9

1. ('73) 20 Suth W R 2 (8).

#### Note 10

1. ('24) AIR 1924 Nag 417 (418).
2. ('14) AIR 1914 All 176 (176).
2. ('22) AIR 1922 All 72 (73) : 44 All 325.
3. ('24) AIR 1924 Nag 298 (299).
3. ('14) AIR 1914 Sind 105 (106) : 8 Sind L R 275.

O. 17 R. 2  
Note 1

## OUDH

Add the following as sub-rule (2), and read the existing Rule 2 as sub-rule (1):

"(2) Where before any such day, the evidence or a substantial portion of the evidence of any party has been recorded, and such party fails to appear on such day, the Court may, in its discretion, proceed with the case as if such party were present and may dispose of it on the merits.

*Explanation.* — No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader though engaged only for the purpose of making an application."

*Synopsis*

1. Scope and applicability of the Rule.
2. Execution proceedings.
3. Distinction between Rules 2 and 3.  
See Rule 3.
4. "Any day to which the hearing of the suit is adjourned."

5. "Appearance."
6. "Hearing."
7. One of the modes directed by Order 9.
8. "Or make such other order as it thinks fit."
9. Appeal and revision.

*Other Topics (miscellaneous)*

Default of appearance on the date fixed for judgment. See Note 8.  
Difference between Order 9 and Order 17. See Notes 1 and 7.  
Dismissal for default *not res judicata*. See Note 7.  
No day fixed for hearing, rule inapplicable. See Note 4.

Powers of Court at different stages of the suit. See Note 8.

Remedies against orders passed under this rule. See Note 7.

Suit not to be dismissed for default, where plaintiff lets in all evidence. See Note 8.

**1. Scope and applicability of the Rule.** — This rule should be read along with the provisions of Order 9. That Order deals with the failure of parties to appear at the *first hearing* of the suit, while this rule deals with their failure to appear at the *adjourned* hearing of the suit. The provisions of Order 9 by themselves do not apply to a case in which a plaintiff or defendant has already appeared but has failed to appear at the adjourned hearing of the case. For such a case the procedure is laid down in this Order.<sup>1</sup>

If, at the hearing of a suit after settlement of issues, the parties or either of them fail to appear, the suit need not be decided on the *merits*. Nor need it necessarily be dismissed under Order 9; the Court has a *discretion* either to proceed under Order 9 or pass such *other orders* as the Court thinks fit.<sup>2</sup> It has been held by the Allahabad High Court in the undermentioned case<sup>3</sup> that where a Court after the framing of issues, fixes a date for the hearing of the suit, such date is one fixed for the "first" hearing of the suit and not one to which the hearing has been "adjourned." It is submitted with respect that the decision is not sound in view of the provisions of O. 15 R. 3, sub-rule (2) which expressly refers to such hearing as the "further" hearing of the suit. Where a suit has been disposed of under circumstances which make this rule applicable, such disposal will be referred to the provisions of this rule.<sup>4</sup>

**Order 17 Rule 2 — Note 1**

1. ('35) AIR 1935 All 210 (211).
- ('14) AIR 1914 Cal 860 (861) : 41 Cal 956.
- ('87) AIR 1937 Mad 674 (674).
2. ('10) 8 Ind Cas 156 (157) (Mad).
- ('17) AIR 1917 Low Bur 77 (78).
- ('89) AIR 1939 Nag 213 (214) : IL R (1939) Nag 574.
3. ('37) AIR 1937 All 847 (848).
4. ('09) 4 Ind Cas 1167 (1167) (Mad).

('10) 6 Ind Cas 681 (681) (Mad).

('87) AIR 1937 Rang 437 (438). (Plaintiff absent at adjourned hearing — Failure to comply with Court's order to file list of witnesses — Dismissal is under O. 17 R. 2 read with O. 9 R. 8.)

('87) 169 Ind Cas 226 (227) (Oudh). (Right course for Court to proceed under R. 2 — Judgment mentioning R. 8 — Still Judge must be held to have intended to act under R. 2.)

This rule will not, however, apply if the parties are *present* though they may have defaulted in respect of some other act.<sup>5</sup> Nor will it apply if the person absent is not validly a party in the suit as where a minor party has no guardian *ad litem* appointed for him.<sup>6</sup>

The rule does not apply to proceedings *after* decree.<sup>7</sup>

**2. Execution proceedings.**—This rule does not apply to execution proceedings.<sup>1</sup> (*Vide also* Notes under Rules 1 and 3.)

**3. Distinction between Rules 2 and 3.** — See Rule 3.

**4. "Any day to which the hearing of the suit is adjourned."** — This rule does not apply unless the day to which a suit has been adjourned is a day fixed for the *hearing* or trial of the case.<sup>1</sup> Thus, it has been held not to apply in the following cases —

- (1) Where the day was fixed for consideration of an application for amendment of issues.<sup>2</sup>
- (2) Where it was fixed for the hearing of an application for the appointment of a guardian *ad litem* of a minor defendant.<sup>3</sup>
- (3) Where on the defendant asking for a stay of the suit, it was adjourned to another date for the production of the copy of a certain order.<sup>4</sup>

Where a suit was postponed to a fixed day for finding out the whereabouts of an unserved defendant and no other separate day was specifically fixed for hearing, it was held that the date fixed was the date of the hearing of the suit.<sup>5</sup>

Where the hearing of a case is proceeding from day to day and the case is adjourned to the next day because the cross-examination of a witness is unfinished, the adjournment is under this rule, and the disposal of the suit *ex parte* on the next day on the non-appearance of the defendant on that day is under this rule.<sup>6</sup>

**5. "Appearance."**—By virtue of an explanation added to this rule by the High Court of Allahabad<sup>1</sup> and the Chief Court of Oudh,<sup>2</sup> no party shall be deemed to have

(22) AIR 1922 Mad 416 (416). (Dismissal of suit for default of appearance of plaintiffs after issues—*Held* that the dismissal was under O. 9, R. 8 and that the remedy was under O. 9 R. 13—This, it is submitted, is a discrepancy. The remedy is under O. 9 R. 9 and not under R. 13.)  
 5. ('29) AIR 1929 All 548 (548).  
 6. ('20) AIR 1920 Bom 54 (54) : 44 Bom 767.  
 7. ('24) AIR 1924 PC 198 (200) : 4 Pat 61 : 51 Ind App 821 (PC).

#### Note 2

1. ('92) 1892 All W N 222 (224) : 15 All 55.  
 ('33) AIR 1933 Mad 418 (422) : 56 Mad 490 (FB).  
 ('93) 15 All 84 (94) (FB).  
 ('95) 18 Mad 181 (183).

#### Note 4

1. [*See also* ('09) 1 Ind Cas 86 (88) (Cal).  
 ('72) 18 Suth W R 825 (825). (Court not sitting—No date fixed for adjourned hearing—This rule does not apply—Court not justified in refusing adjournment and disposing of the suit.)]  
 2. ('21) AIR 1921 Pat 96 (97) : 6 Pat L Jour 831.  
 3. ('11) 10 Ind Cas 818 (814) : 88 All 560.  
 ('22) AIR 1922 Pat 252 (254, 255) : 6 Pat L Jour 650.  
 ('24) AIR 1924 Pat 714 (715).

4. ('16) AIR 1916 Lah 132 (133).

5. ('19) AIR 1919 Sind 89 (90) : 13 Sind L R 149.

6. ('14) AIR 1914 Cal 360 (361) : 41 Cal 956.

#### Note 5

1. ('81) AIR 1931 All 703 (704). (Defendant absent—Pleader applying for adjournment—On refusal withdrawing—*Held* no failure to appear—Decree is one on merits.)  
 ('33) AIR 1933 All 41 (41). (Plaintiff absent and defendant present—Plaintiff's pleader's application for adjournment refused—Pleader reporting no instructions—Decree passed is on the merits.)  
 ('84) AIR 1984 All 107 (108).  
 ('85) AIR 1985 All 210 (211).  
 ('85) AIR 1985 All 398 (401). (Suit adjourned for final hearing—Application by plaintiff's counsel for further postponement rejected—Counsel reporting no instructions—Suit dismissed—Dismissal is on merits.)  
 ('36) AIR 1936 All 619 (620, 621).  
 ('85) AIR 1985 All 565 (566). (Adjournment asked by pleader refused—Pleader saying no instruction—No failure to appear.)  
 ('86) AIR 1986 All 670 (670). (Do.)  
 ('86) AIR 1986 All 659 (660). (Do.)  
 2. ('84) AIR 1984 Oudh 171 (174) : 9 Luck 586.

**O. 17 R. 2**  
**Notes 5-7**

failed to appear if he is represented by an agent or a pleader though engaged only for making an application. (See also O. 3 R. 1 and Notes thereto). But, the mere fact that before the case is called on for hearing a pleader files a list of witnesses, does not amount to the party being "represented" at the hearing.<sup>3</sup> But, where, however, on the day of the adjourned hearing the pleader reports that he has no instructions and the party is absent and a decree is passed in the suit, the Explanation (added by the Allahabad High Court) does not apply and the decree is an *ex parte* decree.<sup>4</sup>

**6. "Hearing."** — The word "hearing" means the taking of evidence or the hearing of arguments or the consideration of questions relating to the suit which would enable the Judge to finally come to an adjudication upon it, and not the consideration of merely interlocutory matters.<sup>1</sup> It refers, so far as this rule is concerned, to the commencement of the hearing on *each day* of the hearing, and cannot be considered to mean that the suit is in a continuous state of being called on for hearing so long as it is being heard.<sup>2</sup>

The reader of a Court, when the presiding Judge is on leave, is not competent to pass an order, e. g., giving a further date which can bind the parties. The non-appearance of the plaintiff on a date so fixed should not entail the dismissal of the suit for default.<sup>3</sup>

See also Notes to Order 9 Rule 9.

**7. One of the modes directed by Order 9.** — As has been seen in Note 1, Order 9 refers to cases of default of appearance of parties at the *first hearing* of a case. This rule makes the provisions of Order 9 applicable to cases of such default at *adjourned* hearings.

In an old Calcutta case<sup>1</sup> it was held that there was a distinction between Order 9 and this rule and that the provisions of Order 9 relating to the restoration of suits and the setting aside of *ex parte* decrees did not apply to orders passed under this rule. This view has, however, been overruled and it has been repeatedly held that the said provisions of Order 9 will apply to orders passed under this rule on default of appearance of parties at adjourned hearings. Thus —

(i) if the *plaintiff* fails to appear at an adjourned hearing, the Court may make an order dismissing the suit for default under this rule and Rule 8 of Order 9, and the plaintiff may thereupon apply for restoration of the suit under Order 9 Rule 9,<sup>2</sup>

3. ('86) AIR 1986 All 619 (620, 621). (Appearance is appearance at hearing and not before.)

[See also ('35) AIR 1935 Mad 210 (211): 58 Mad 817. (Pleader filing additional written statement and applying for fresh issue after suit is called on for hearing—Party is represented at "hearing.")]

4. ('38) AIR 1938 All 652 (654).

**Note 6**

1. ('20) AIR 1920 Pat 595 (597).  
( '22) AIR 1922 Pat 485 (487, 488) : 1 Pat 188.  
( '86) AIR 1986 Lah 280 (281). (Date fixed for return of Commissioner's report is not date of hearing.)

2. ('27) AIR 1927 Mad 799 (800).

3. ('82) 83 Pun L R 804 (805).

[See also ('86) AIR 1986 Lah 1000 (1001). (If suit is dismissed, it must be restored — 83 Pun L R 804, Foll.)]

**Note 7**

1. ('94) 21 Cal 269 (278, 274). (Overruled by Full Bench decision in 28 Cal 788.)

2. ('07) 84 Cal 408 (417) (FB).  
( '34) AIR 1934 Mad 199 (199). (Vakil pleading no instructions and party not prepared to go on — Rule 2 applies.)

( '77) 1 Mad 287 (288).

( '84) 7 Mad 41 (42).

( '07) 84 Cal 285 (240).

( '09) 1 Ind Cas 741 (741, 742) : 86 Cal 189.

( '22) AIR 1922 All 68 (69).

( '88) AIR 1988 Cal 789 (790).

- (ii) if the *defendant* fails to appear at an adjourned hearing, the Court may pass an *ex parte* decree under this rule and Rule 6 of Order 9; and the defendant may thereupon apply under O. 9 R. 13 to set aside the *ex parte* decree;<sup>3</sup>
- (iii) if neither party appears at such hearing, the Court may dismiss the suit under this rule and Rule 3 of Order 9; and the plaintiff may thereupon either file a fresh suit or apply to have the dismissal set aside.<sup>4</sup>

But the provisions of this rule will not apply to proceedings after decree.<sup>5</sup>

**8. "Or make such other order as it thinks fit."** — In the interpretation of these words, three questions arise for consideration, *viz.* —

- (i) What is the meaning of the expression "such other order as it thinks fit?"
- (ii) Does the expression include the power to decide the case on the merits? And if so,
- (iii) When is the Court to proceed under Order 9 and when to proceed to decide the case on the merits?

On the first two questions, the High Court of Allahabad<sup>1</sup> had held that the expression "such other order as it thinks fit" only empowers the Court to grant an *adjournment* and not to decide the case on the *merits*. The High Court of Lahore<sup>2</sup> has also taken the same view. An earlier decision of the High Court of Madras<sup>3</sup> was also to the same effect. But in a later decision of the same High Court, the power of the Court to give a decision on the *merits* in certain circumstances has been recognized.<sup>4</sup> The High Court of Calcutta<sup>5</sup> also recognizes the power of the Court to give a decision on the merits. The Allahabad High Court and the Chief Court of Oudh have recognized this power by adding a new clause to this rule.

On the third question, where the evidence has *not yet begun*, it has been held that the Court should either proceed under Order 9 or adjourn the case.<sup>6</sup> Where, however, the case is *part heard*, it would seem that the rule vests in the Court a discretion either to proceed under Order 9 or to give a decision on the merits.<sup>7</sup> In cases

(‘37) AIR 1937 Rang 437 (438).

(‘36) 163 Ind Cas 556 (557) (Cal).

[See also (‘32) AIR 1932 Mad 414 (414). (Party to appear in person—Default.)]

3. (‘96) 28 Cal 738 (753, 756, 758, 760, 764, 765) (FB).

(‘33) AIR 1933 All 907 (908).

(‘34) AIR 1934 Cal 116 (117) : 60 Cal 1381. (An application for review is not the proper remedy.)

(‘94) 20 Bom 380 (382).

(‘38) AIR 1938 Nag 370 (373) : 30 Nag L R 94.

(‘97) 19 All 855 (857).

(‘98) 2 Cal W N 693 (694, 695).

(‘14) AIR 1914 Cal 360 (361) : 41 Cal 956.

(‘37) AIR 1937 Mad 674 (674). (Defendant being absent, Judge declaring him to be *ex parte* and reserving judgment—Defendant immediately appearing and wrongly believing that *ex parte* decree was made applying for setting it aside—Judgment subsequently delivered but no fresh application made by defendant after decree—His previous application may be treated as application to set aside *ex parte* decree.)

(‘35) AIR 1935 Mad 210 (211) : 58 Mad 817.

[See (‘33) AIR 1933 Lah 248 (249).]

4. (‘87) 10 Mad 270 (271).

(‘33) AIR 1933 Nag 234 (235, 236) : 29 Nag L R 148.

5. (‘24) AIR 1924 P C 198 (200) : 4 Pat 61 : 51 Ind App 321 (PC).

(‘32) AIR 1932 Mad 519 (522). (Preliminary decree passed in partition suit—Court cannot subsequently dismiss suit—Decree can be varied only in appeal.)

#### Note 8

1. (‘15) AIR 1915 All 139 (140) : 37 All 460.

(‘23) AIR 1923 All 551 (552) : 45 All 618.

(‘25) AIR 1925 All 182 (182, 183) : 47 All 181.

(‘25) AIR 1925 All 267 (271) : 47 All 140.

2. (‘32) AIR 1932 Lah 477 (478).

3. (‘08) 18 Mad L Jour 51 (54).

4. (‘16) AIR 1916 Mad 897 (897).

[See (‘34) AIR 1934 Mad 199 (199). (But Court is not bound to proceed on the merits.)]

5. (‘07) 84 Cal 235 (237).

(‘08) 35 Cal 1023 (1026, 1027).

6. (‘33) AIR 1933 Nag 370 (372); 30 Nag L R 94.

7. (‘25) AIR 1925 Oudh 433 (434).

(‘33) AIR 1933 Nag 234 (236) : 29 Nag L R 326. (Court may adjourn suit in its discretion only when there is good reason for default.)

(‘25) 26 Pun L R 190 (191).

**O. 17 R. 2**  
**Notes 8-9**

where the plaintiff has adduced *all his evidence* or has made out a *prima facie case*, but is absent at the adjourned hearing, the Court should proceed to give a decision on the merits and *not* dismiss the suit for default.<sup>8</sup> Where the case *has been closed* but has been adjourned for the Court to refer to a document<sup>9</sup> or to pronounce judgment, and either of the parties fails to appear at the adjourned hearing, the Court should *not* proceed under Order 9 but give a decision on the merits.

**9. Appeal and revision.** — No appeal lies from an order dismissing a suit<sup>1</sup> or appeal<sup>2</sup> for default under this rule. It may, however, be open to revision.<sup>3</sup>

No appeal lies from an order restoring a suit dismissed for default under this rule.<sup>4</sup> Where a Court wrongly held that no application under O. 9 R. 13 lay against an order under this rule, it was held that it amounted to a refusal to exercise jurisdiction vested in it and hence liable to revision.<sup>5</sup>

**O. 17 R. 3**

**R. 3.** [S. 158.] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence, etc.

[1877, S. 158; 1859, S. 148.]

**Local Amendments****ALLAHABAD****Amend Rule 3 :**

"3. Where any party to a suit, to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits."

**OUDH****Substitute the following :**

"3. Where any party to a suit to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the

8. ('05) 7 Bom L R 261 (262).

('84) AIR 1984 Lah 56 (57).

('16) AIR 1916 Mad 897 (897).

('29) AIR 1929 Pat 248 (248, 249).

('26) 7 L R All (Rev) 186 (187).

('09) 3 Ind Cas 683 (684) : 5 Low Bur Rul 75.

9. ('71) Select Cases Part X, No. 10.

('11) 11 Ind Cas 842 (842) (Lah). (Pronounce judgment.)

**Note 9**

1. ('14) 12 Mad L Jour 478 (474).

('84) AIR 1984 Mad 199 (199).

('02) 5 Oudh Cas 294 (296).

('16) AIR 1916 Cal 233 (233).

('25) AIR 1925 Pat 433 (434).

('39) AIR 1939 Nag 213 (213) : ILR (1939) Nag 574.

2. ('96) 28 Cal 827 (828).

3. ('25) AIR 1925 Pat 433 (434).

('38) AIR 1938 Nag 234 (236) : 29 Nag L R 826. (Conditions of S. 115 not satisfied.)

4. ('87) 10 Mad 270 (271).

('97) 19 All 355 (357). (No appeal was held to lie from an order, under the Section corresponding to this rule read with Section 108 of the last Code, setting aside a decree passed *ex parte*.)

5. ('25) AIR 1925 All 267 (269, 270) : 47 All 140.



further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, and whether such party is present or not, proceed to decide the suit on the merits."

**O. 17 R. 3:  
Note 1**

### Synopsis

1. Scope and applicability of the Rule.
2. Execution proceedings.
3. Distinction between Rules 2 and 3.
4. "To whom time has been granted."

5. When is party deemed to fail to do the act for which time has been granted.
6. "Any other act necessary to the further progress of the suit."
7. Remedy of a person aggrieved by an order under this rule.

### Other Topics (miscellaneous)

Applicability only to cases of default by party given time for acts specified. See Notes 1 and 4.

Applicability where time granted owing to non-service of summonses. See Note 5.

Decision under this rule is *res judicata*. See Note 7.

Default by non-production of heirship-certificate. See Notes 8 and 7.

Default contemplated by this rule. See Note 1 and Notes 8 to 6.

Default in payment of costs ordered as condition precedent. See Note 7.

Disposal to be not for default but on merits. See Note 1.

Inapplicability to default in filing amended plaint ordered. See Note 1.

Inapplicability to default in payment of court-fee ordered. See Notes 1 and 7.

Inapplicability to default in supplying several stamps for partition-decree as per award. See Note 1.

No revision. See Note 7.

**1. Scope and applicability of the Rule.** — This rule does not apply unless time had been granted to a party at *his instance*,<sup>1</sup> to do one or other of the three things mentioned in the rule, *viz.*, to produce evidence, or to cause the attendance of witnesses, or to perform any other act *necessary for the progress of the suit*,<sup>2</sup> and unless default had been committed by such *party in doing the act for which the time was granted*.<sup>3</sup>

#### Order 17 Rule 3 — Note 1

1. ('84) 1884 Pun Re No. 189, p. 367.

('33) AIR 1933 Nag 284 (235) : 29 Nag L R 326.

('78) 19 Suth W R 34 (35).

('76) 1 Mad 287 (288). (In a suit, issues having been settled, the final hearing of the suit was adjourned to a fixed date for final disposal — On that date plaintiff did not appear, and the suit was dismissed under S. 148 of Act VIII of 1859. *Held*, that as this was not a case which had been adjourned in favour of either party to enable him to produce his proofs or cause the attendance of his witnesses, the order was not one which could properly be made.)

('06) 1906 Pun Re No. 80, p. 112.

('13) 19 Ind Cas 472 (473) (Lah).

('14) AIR 1914 Cal 860 (861) : 41 Cal 956.

('15) AIR 1915 Lah 489 (489) : 1915 Pun Re No. 51.

('17) AIR 1917 Mad 196 (197).

('38) 40 Pun L R 1014 (1015). (Hearing adjourned in ordinary course for defendants to file list of witnesses—Failure of defendants to appear and file list on day fixed — Court cannot pass *ex parte* decree under this rule.)

2. ('91) 1891 All W N 112 (118, 114).

('38) AIR 1938 All 907 (908).

('75) 1875 Pun Re No. 82, p. 96. (When the adjournment was not granted for a party to do anything—Here adjournment was for "inspection

by Court" of spot.)

('76) 1876 Bom P J 250 (251). (Where it did not appear from the endorsement on the application that time was granted to the plaintiff to produce evidence, it was held that S. 148 of the Code of 1859, corresponding to this rule did not apply.)

('07) 84 Cal 235 (240).

('13) 19 Ind Cas 472 (473) (Lah). (A plaint was rejected on the ground that the plaintiff had no right to bring a suit without filing an agreement to arbitrate under Para. 20 of the Second Schedule of the C. P. Code.)

('15) AIR 1915 Lah 489 (440) : 1915 Pun Re No. 51.

('17) AIR 1917 Mad 196 (197).

('21) AIR 1921 Bom 458 (458) : 45 Bom 1181.

('26) 27 Pun L R 714 (715).

('26) 27 Pun L R 592 (593).

('27) AIR 1927 Lah 484 (485).

('27) AIR 1927 Rang 148 (148, 149) : 5 Rang 888.

3. ('68) 4 Mad H O R 56 (59).

('08) 85 Cal 1023 (1027).

('15) AIR 1915 Mad 864 (865).

('15) AIR 1915 Lah 489 (489) : 1915 Pun Re No. 51.

('21) AIR 1921 Bom 458 (458) : 45 Bom 1181.

('22) AIR 1922 Pat 485 (488) : 1 Pat 188.

('28) AIR 1928 Rang 191 (192) : 6 Rang 828.

**O. 17 R. 3**  
**Notes 1-2**

The rule is *permissive* and not mandatory as is shown by the words "the Court may" proceed to decide the suit forthwith.<sup>4</sup> The stringent provisions thereof should not be applied unless the facts do not admit of the application of any other provision of the Code.<sup>5</sup> Where, for instance, there are no sufficient materials on record to give a proper decision, the Court should grant a further adjournment of the case.<sup>6</sup> Similarly, if the facts of the case make the provisions of Rule 2 applicable, the Court should act under that rule even though such facts come within the operation of this rule as well.<sup>7</sup>

A decision "forthwith" should nevertheless be a decision on the merits, *i. e.*, on a consideration of such materials as may be necessary and available,<sup>8</sup> and does not mean a *summary* decision.<sup>9</sup> If, in the case of the plaintiff, such materials fail to substantiate the claim, the suit will be dismissed on *that ground* and *not for the default* committed by him.<sup>10</sup> Similarly, a decree passed against the defendant under this rule will not be an *ex parte* decree which can be set aside under O. 9 R. 13.<sup>11</sup>

In a case where the defendant's prayer for adjournment was refused but some time was nevertheless given to him for his evidence, and after plaintiff's evidence was over the Court passed a decree without waiting for the time fixed for the defendant's evidence, the decree was held to be illegal.<sup>12</sup>

The rule applies only *after the suit* has been instituted,<sup>13</sup> but not to proceedings *after the decree*.<sup>14</sup>

**2. Execution proceedings.** — The provisions of this rule do not apply to execution proceedings.<sup>1</sup>

- 4. ('93) 1893 All W N 84 (84).
- ('34) AIR 1934 Lah 560 (560).
- ('35) AIR 1935 All 210 (212).
- ('19) AIR 1919 Lah 344 (345) : 1919 Pun Re No. 150.
- ('89) AIR 1939 All 524 (526). (Rule 3 confers discretion on Court — Discretion if not properly exercised High Court can interfere.)
- ('39) AIR 1939 All 642 (643) : 1939 All L Jour 627 (628).
- 5. ('04) 1904 Pun L R No. 74.
- ('08) 1908 Pun Re No. 9, p. 68.
- ('99) 1899 Pun Re No. 80, p. 300.
- ('89) 11 All 91 (92). (A failure to supply the deficient court-fee does not justify an order under Sec. 158 of the Old Code, since Sec. 54 (O. 7, R. 11) contains clear directions as to the procedure in such cases.)
- 6. ('70) 1870 Pun Re No. 20, p. 85.
- ('33) AIR 1933 Nag 234 (235) : 29 Nag L R 326.
- 7. ('93) 1893 All W N 84 (84).
- ('95) 1895 Pun Re No. 82, p. 391.
- ('75) 1875 Pun Re No. 32, p. 96.
- ('19) AIR 1919 Low Bur 189 (140) : 9 Low Bur Rul 366.
- 8. ('16) AIR 1916 Mad 708 (708).
- ('09) 1 Ind Cas 741 (741) : 36 Cal 189.
- ('89) AIR 1939 All 642 (643) : 1939 All L Jour 627 (628, 629). (Appearance on behalf of the defendant would be assumed whether he was in fact present or not.)
- ('88) AIR 1938 Sind 142 (144). (Dismissal of suit without reference to materials on record is against the provisions of the rule.)
- 9. ('01) 28 All 462 (464).
- ('10) 8 Ind Cas 850 (850) (Mad).

- ('20) AIR 1920 Pat 600 (601) : 4 Pat L Jour 277.
- ('19) AIR 1919 Lah 844 (345) : 1919 Pun Re No. 150.
- '24) AIR 1924 Lah 404 (404).
- '27) AIR 1927 Lah 888 (888).
- '19) AIR 1919 All 252 (253) : 41 All 663.
- ('07) 17 Mad L Jour 81 (82). (A Court has no power to restore an *ex parte* decree once set aside — Where the Court is acting under S. 158, the proper course for it is to decide the suit as it stood then before it if the Judge could do so, and not to "restore" the *ex parte* decree once set aside by it.)
- 10. ('27) AIR 1927 Mad 109 (110).
- 11. ('39) AIR 1939 All 642 (643) : 1939 All L Jour 627 (629).
- 12. ('30) AIR 1930 Cal 251 (251).
- 13. ('25) AIR 1925 Mad 1045 (1046). (Where a plaint is rejected on the ground that the plaintiff has not filed an amended plaint, as he was asked to do, O. 17 R. 8 does not apply.)
- 14. ('19) AIR 1919 All 269 (270). (Where an order has been made for preparation of a partition decree in terms of an award and the plaintiff fails to comply with an order of the Court to pay the stamp duty as distinct from court-fees, his omission to pay is no ground for dismissal of the suit.)

**Note 2**

- 1. ('94) 18 Bom 429 (432).
- ('38) AIR 1938 Mad 418 (422) : 56 Mad 490 (FB). (Still Court has inherent power to dismiss execution application for default in payment of debts.)
- ('98) 1898 All W N 28 (28). (Collector to whom proceedings are sent for execution has no power to act under this rule.)

**3. Distinction between Rules 2 and 3.** — Rules 2 and 3 provide for distinct and different sets of circumstances —

**O. 17 R. 3  
Note 3**

- (1) Rule 2 applies where an adjournment has been generally granted and not for *any special purpose*. This rule applies where the adjournment has been given for one of the *purposes mentioned in the rule*.<sup>1</sup>
- (2) Rule 2 does not apply unless the party has *failed to appear* at the hearing. Rule 3 will apply where the party is present and has committed the default referred to in the rule.<sup>2</sup> A party appearing by pleader and asking for adjournment must, in the absence of an effective withdrawal of appearance by the pleader, be deemed to have appeared.<sup>3</sup> And even if the pleader reports "no instructions" after refusal of the adjournment, it may not, under certain circumstances, constitute a failure to appear.<sup>4</sup>

There might be cases where a default under this rule is coupled with a default under Rule 2 as well. Thus, a party to whom time has been granted, at his instance, for doing one or other of the acts mentioned in this rule, may not only commit default in the doing of the act but may not appear in person or by pleader. In such a case, what has the Court to do? On this question the authorities are not uniform. It was held by the High Court of Allahabad in the undermentioned cases<sup>5</sup> that, in such cases, the procedure to be followed is under Rule 2. The decisions of the Oudh Court were

(‘93) 1893 All W N 12 (13). (Difficulty of applying the provisions to execution proceedings pointed out. In this case it was assumed that the order was passed under S. 158 for argument's sake. Relief asked for in the prior application being different from that in the second application, the second application not barred.)

(‘93) 15 All 84 (94) (FB).

[But see (‘93) 15 All 49 (54).]

#### NOTE 3

1. (‘28) AIR 1928 Cal 341 (342).
- (‘17) AIR 1917 Mad 196 (197).
- (‘08) 18 Mad L Jour 51 (53).
- (‘14) AIR 1914 Sind 92 (93) : 8 Sind L R 241.
- (‘17) AIR 1917 Lah 281 (282).
- (‘23) AIR 1923 Pat 530 (531).
- (‘27) AIR 1927 Rang 46 (47) : 4 Rang 408.
- (‘28) AIR 1928 Rang 191 (193) : 6 Rang 323.
- (‘29) AIR 1929 Rang 73 (74) : 6 Rang 766.
- (‘29) 116 Ind Cas 752 (752) (All).
- (‘29) 117 Ind Cas 73 (74) (Lah).
2. (‘30) AIR 1930 Nag 152 (152).
- (‘34) AIR 1934 Mad 199 (199). (Rules 2 and 3 are mutually exclusive—Pleader reporting 'no instructions' and party not prepared to go on with the case—This rule does not apply and R. 2 applies.)
- (‘39) AIR 1938 Nag 370 (371) : 30 Nag L R 94.
- (‘24) AIR 1924 Nag 26 (27).
- (‘19) AIR 1919 Cal 1052 (1053).
- (‘25) AIR 1925 Nag 286 (288). (A pleader's unpreparedness to argue affords no ground for the Court to ignore his presence and proceed to dismiss the appeal as if there was no appearance—He is bound to proceed to decide on merits.)
- (‘26) 95 Ind Cas 798 (798) (All).
- (‘27) AIR 1927 All 507 (507).
- (‘32) AIR 1922 Pat 485 (487, 488) : 1 Pat 188. (Defendant present—His vakil asks for time—Refused—Not conducting further—Decree passed

is under O. 17 R. 2 and liable to be set aside under Order 9).

(‘36) AIR 1936 Mad 625 (625).

3. (‘24) AIR 1924 Mad 43 (44).

(‘18) AIR 1918 Mad 787 (788).

4. (‘25) AIR 1925 Mad 316 (316, 317).

(‘11) 10 Ind Cas 770 (771) (Low Bur).

(‘35) AIR 1935 Mad 210 (211) : 58 Mad 817. (Acts of pleader in filing additional written statement and in applying to Court for framing of fresh issue are acts done by him in the conduct of suit and towards progress of suit and these acts constitute appearance.)

[See (‘39) AIR 1939 Mad 974 (975) : 50 Mad L W 430 (431, 432). (Adjournment refused and pleader not taking any further part in the proceedings—Plaintiff present in Court but not giving evidence—Suit dismissed—Dismissal must be held to be under R. 2 and not under this rule—Mere physical presence of the plaintiff is not sufficient to constitute appearance under R. 3.) (‘36) AIR 1936 Mad 625 (625, 626). (Case adjourned—Neither defendants nor their vakil present on adjourned date—Vakil appearing on their behalf having no instructions beyond applying for adjournment—Decree passed is *ex parte*.)]

[See also (‘35) AIR 1935 All 398 (401). (Plaintiff appearing in person and by counsel—Adjournment refused—Both, plaintiff and his counsel, then absenting themselves—Dismissal of suit is dismissal on merits and not for non-appearance.)]

[But see (‘30) 124 Ind Cas 402 (403) (All).

(‘26) AIR 1926 Mad 971 (973). (Plaintiff present—His pleader reports "no instructions"—Dismissal—O. 17 R. 2 applies.)

(‘33) AIR 1933 Nag 370 (373) : 30 Nag L R 94.]

5. (‘22) AIR 1922 All 68 (68, 69).

(‘28) AIR 1928 All 158 (155, 156, 157).

(‘25) AIR 1925 All 182 (182) : 47 All 181.

**O. 17 R. 3**  
**Note 3**

conflicting.<sup>6</sup> The rule has since been amended by the Allahabad High Court and the Chief Court of Oudh<sup>7</sup> giving a discretion to the Court to proceed to decide the suit on the merits. The Bombay<sup>8</sup> and the Madras<sup>9</sup> High Courts are agreed that in such cases the Court should proceed only under Rule 2. The Rangoon High Court has also taken a similar view.<sup>10</sup> On the other hand, the Calcutta,<sup>11</sup> Lahore<sup>12</sup> and Patna<sup>13</sup> High Courts take the view that the Court can proceed under this rule if there are materials on record to enable the Court to come to a decision on the merits and that otherwise the Court should proceed under Rule 2. Even according to the Patna High Court, this rule will apply only after the hearing of the case *has commenced*.<sup>14</sup> For the views held by the other High Courts, see the undermentioned cases.<sup>15</sup>

Where the entire evidence is over and the case is posted to a day for the clearing up of a point or for the Court satisfying itself on a particular point before delivering judgment and the parties defaulted on that day and failed even to appear, the Bombay

(25) AIR 1925 All 267 (269, 270) : 47 All 140.

(16) AIR 1915 All 139 (140) : 37 All 460.

[But see (08) 25 All 194 (195).]

(26) AIR 1926 All 729 (730). (On the ground of costs directed not having been paid R. 3 was held to apply—Difficulty of avoiding Rr. 2 and 3—Recommended to Rule Committee for amendment.)]

6. ('23) AIR 1923 Oudh 18 (19). (Where the defendant absents himself on the date fixed for evidence in a case, the proper procedure for a Court is to proceed under O. 17 R. 3 and not under O. 9 R. 6, C. P. C.)

(25) AIR 1925 Oudh 278 (280). (Rule 3 applies where two elements exist, viz., (1) the adjournment must have been at the instance of the party; (2) there must be materials on record to proceed to decide the suit.)

(25) AIR 1925 Oudh 397 (346) : 28 Oudh Cas 8. (Where a plaintiff realising the weakness of his case absented himself on the date fixed for hearing and let the suit be dismissed for default, the decision is one under O. 9 R. 3 even though the Court purported to act under O. 17 R. 3 and the decision does not bar a fresh suit.)

(25) AIR 1925 Oudh 860 (860). (When one of the parties fails to appear on the date to which the case is adjourned, the case falls under O. 17 R. 2.)

7. ('38) AIR 1938 All 41 (41).

(35) AIR 1935 All 210 (212).

(34) AIR 1934 Oudh 171 (174) : 9 Luck 586.

8. ('25) AIR 1925 Bom 328 (329).

(96) 20 Bom 736 (743, 744).

(23) AIR 1923 Bom 27 (28, 29) : 46 Bom 1026.

[But see (05) 7 Bom L R 261 (262). (If there is evidence on record sufficient to a decision on the merits, R. 3 should be applied.)]

9. ('02) 12 Mad L Jour 473 (474).

(10) 5 Ind Cas 23 (24, 25) : 33 Mad 241.

(18) AIR 1918 Mad 143 (146) : 41 Mad 286 (F B). (Overruling 34 Mad 97.)

(28) 108 Ind Cas 897 (897) (Mad).

10. ('37) AIR 1937 Rang 487 (488). (Plaintiff absent at adjourned hearing—Failure to comply with Court's order to file list of witnesses—Suit dismissed for want of prosecution—Nevertheless dismissal is one under R. 2 and can be set aside

for sufficient cause.)

11. ('07) 34 Cal 235 (237, 238).

(38) AIR 1938 Cal 412 (414). (Applicability of Rr. 2 and 3 pointed out—Court can proceed under R. 3 if adjournment is given at the instance of party and if there are materials on record both conditions must exist for the applicability of this rule.)

(08) 35 Cal 1023 (1027).

(18) AIR 1918 Cal 330 (331).

(14) AIR 1914 Cal 360 (361) : 41 Cal 956.

(33) AIR 1933 Cal 73 (74). (Plaintiff part-heard—Plaintiff absent—Dismissal—O. 17 R. 2 and not R. 3 applicable.)

12. ('24) AIR 1924 Lah 545 (546) : 5 Lah 218.

(32) AIR 1932 Lah 477 (478).

(19) AIR 1919 Lah 419 (420) : 1919 Pun Re No. 48. (Where default takes place within the meaning of both Rr. 2 and 3 and there is not enough material on record to enable the Court to proceed to judgment, the Court should proceed under Rule 2.)

(32) AIR 1932 Lah 477 (478). (Party absent—Decree—*Ex parte* decree and not an order under O. 17 R. 3.)

[See however (80) 1880 Pun Re No. 41, p. 88.]

13. ('22) AIR 1922 Pat 2 (9) : 6 Pat L Jour 318.

(18) AIR 1918 Pat 256 (257) : 3 Pat L Jour 481. (Rule 3 contemplates material for decision prior to default.)

(20) AIR 1920 Pat 589 (590) : 4 Pat L Jour 712.

14. ('28) AIR 1928 Pat 167 (167) : 7 Pat 236.

15. ('10) 6 Ind Cas 851 (852) : 3 Sind L R 208. (Where at any adjourned hearing there is no appearance of the plaintiff and there are no materials on record, the appropriate procedure is laid down by S. 157, i. e., O. 17 R. 2.)

(38) AIR 1938 Nag 370 (372, 373) : 30 Nag L R 94. (Nagpur follows the Bombay and Madras view mentioned above.)

(38) AIR 1938 Nag 234 (235) : 29 Nag L R 326 (Do.)

(19) AIR 1919 Sind 89 (90) : 13 Sind L R 149. (When both the conditions laid down in O. 17 Rr. 2 and 3 coincide, O. 17 R. 2 should have preference, for the consequences of non-appearance have a natural precedent over the merits.)

and Madras High Courts have held that the Court should proceed under Rule 3 and not under Rule 2.<sup>16</sup>

**O. 17 R. 3**  
**Notes 3-5**

**4. "To whom time has been granted."** — Where a party is ordered to be present at an adjourned hearing it does not amount to a granting of time to the party to do any *act* within the meaning of this rule.<sup>1</sup> Nor is an adjournment on the joint application of *both the parties* within this rule.<sup>2</sup> The rule will not also apply where time was granted not to *the party in default* but to the opposite party.<sup>3</sup> Further, the time must have been granted for the doing of an act which it was not the *duty of the Court* to do.<sup>4</sup>

Where a party applied for adjournment of the case for getting a transfer thereof and the application was refused but the case was fixed for further evidence, it was held that this rule did not apply as no time can be said to have been granted to the party within the meaning of this rule.<sup>5</sup>

When a case comes within the meaning of the language of this rule, the mere fact that the date fixed is a holiday (when the date has been expressly agreed upon) will not prevent the Court from proceeding under this rule.<sup>6</sup>

**5. When is party deemed to fail to do the act for which time has been granted.** — At the adjourned hearing of a case, the witnesses on behalf of a party were absent though served and the party applied for warrants of arrest against them. The application was refused. Thereupon the pleader reported "no instructions" and the suit was dismissed. It was held that the dismissal was not one under this rule.<sup>1</sup> Where a party takes steps in time but the witnesses are not served owing to delay on the part of the Court's officers to serve them, the party cannot be said to have committed default.<sup>2</sup> Even if the steps are taken late but there is sufficient time to get the witnesses served, the party cannot be said to be in default.<sup>3</sup> He will be held to have committed a default if the steps are taken *too late* to get the witnesses served.<sup>4</sup>

When a commission has been issued, the non-return of the commission is no failure on the part of a party.<sup>5</sup>

16. ('81) AIR 1981 Bom 111 (119, 114).

('14) AIR 1914 Mad 381 (382).

[See also ('14) AIR 1914 Mad 116 (116, 117).

(Where all the evidence has been adduced and an adjournment was granted for the production of a succession certificate for a portion of the claim but the plaintiff failed to produce the same, suit ought not to be dismissed under O. 17 R. 2 but should be disposed of on the merits under Rule 3 in respect of that portion of the claim for which succession certificate was not necessary and in respect of that portion for which the certificate was necessary the suit should have been dismissed.)]

#### Note 4

1. ('06) 1906 Pun Re No. 80, p. 112.

('27) AIR 1927 Lah 388 (388).

2. ('87) 10 Mad 270 (271).

[See however ('89) AIR 1989 All 524 (525, 526).

(The decision distinguishes the Madras ruling in 10 Mad 270 on the ground that the Allahabad High Court has amended Rule 8.)]

3. ('84) 7 Mad 41 (42).

('06) 1906 Pun Re No. 80, page 112.

4. ('78) 19 Suth W R 84 (85). (Where adjournments are made by a Court in order to give

effect to its processes for compelling the attendance of the witnesses, being thus made as much on its own motion as at the instance of the defendant or as at the instance of the plaintiff the case cannot be said to come under Act VIII of 1859, S. 148 corresponding to O. 17, R. 3.)

('24) AIR 1924 Lah 404 (404). (Do.)

5. ('28) AIR 1928 Lah 281 (281).

6. ('06) 1906 Pun Re No. 111, page 426.

#### Note 5

1. ('10) 5 Ind Cas 499 (499) (Cal). (34 Cal 235, Referred.)

2. ('24) AIR 1924 Lah 272 (272).

('25) AIR 1925 Lah 296 (296).

('17) AIR 1917 Lah 281 (281, 282). (When once a party has given the address and other particulars of his witnesses and has also paid the expenses, the Court is quite incompetent to proceed against that party, if service of summons is not effected, nor proceed under Rule 3 for party refusing to pay warrant batta when such order was passed illegally.)

3. ('25) AIR 1925 Oudh 304 (304).

4. ('26) AIR 1926 Lah 27 (28).

5. ('27) AIR 1927 All 749 (750).

**O. 17 R. 3**  
**Notes 5-7**

When time is to be regarded as the essence of the default, the party should have distinct notice of the time within which the act should be done.<sup>6</sup>

**6. "Any other act necessary to the further progress of the suit."** — The act contemplated by this rule is one which must be necessary to the *further progress* of the suit.<sup>1</sup> An act which brings about a stay and thus *arrests* the further progress of the suit cannot be interpreted to be an act necessary to the further progress of the suit; a Court cannot therefore dismiss a suit for non-prosecution because the party failed to produce a stay order within the period allowed.<sup>2</sup> As to what are such acts, see the cases noted below:<sup>3</sup> and as to what are not such acts, see the undermentioned decisions.<sup>4</sup> When the act is one ordered without jurisdiction, a default in doing it will not attract the provisions of this rule.<sup>5</sup>

**7. Remedy of a person aggrieved by an order under this Rule.** — A decision under this rule is a decree. It will operate as *res judicata* and bar a second suit for the same relief.<sup>1</sup> But if the decision is not one properly within the rule, there is no bar against a second suit.<sup>2</sup>

The remedy of a party aggrieved by an order under this rule is by way of appeal<sup>3</sup> or review<sup>4</sup> and not revision.<sup>5</sup> It has, however, been held in a case before the Lahore High Court that a decree passed under this rule may nevertheless be an *ex parte* decree to which the provisions of Order 9 will apply.<sup>6</sup>

Where the order has been *expressly passed under this rule*, the remedy is by way of appeal only, even though the Court had no power to proceed thereunder and

**6.** ('90) 13 Mad 510 (511).

**Note 6**

1. ('91) 3 Mad 259 (260).
- ('98) 21 Mad 403 (404). (*Held* that costs ordered to be paid was not a condition precedent to the hearing.)
2. ('28) AIR 1928 Nag 24 (26).
3. ('12) 17 Ind Cas 294 (295) (All). (Summons to respondent returned unserved and time given to appellants to take further steps.)
- ('30) AIR 1930 Oudh 351 (352). (*Ex parte* order set aside on condition of payment of costs—Costs not paid.)
- ('19) AIR 1919 Low Bur 139 (140) : 9 Low Bur Rul 266. (Failure of appellant to take steps for preparation of Bench copies and translations of vernacular documents.)
- ('22) AIR 1922 Pat 252 (255) : 6 Pat L Jour 650. (Where a date is fixed for appointment of a guardian of a minor defendant and the plaintiff takes no steps to get the guardian appointed the Court cannot dismiss the suit without giving the plaintiff an opportunity to adduce evidence at least against the original defendants in the suit.)
4. ('26) AIR 1926 Lah 571 (571). (A dismissal of suit for failure to amend plaint and pay costs of adjournment cannot fall under O. 17 R. 3.)
- ('24) AIR 1924 Lah 608 (608). (Non-production of document which ought to be produced in Court by the plaintiff when plaint is presented does not attract operation of O. 17 R. 3.)
- ('25) AIR 1925 All 604 (605). (Parties agreeing to abide by oath affecting a third person to be taken in particular manner—Oath illegal under Oaths Act—Court fixing date for oath to be

taken — Oath not taken on that day — O. 17, R. 3 does not apply.)

5. ('25) AIR 1925 Pat 316 (317). (Dismissal of suit for failure to supply defendant with copies in a specific language.)

**Note 7**

1. ('12) 13 Ind Cas 172 (173) (Lah).
- ('87) 10 Mad 272 (279).
- ('36) AIR 1936 Lah 385 (386).
2. ('90) 13 Mad 510 (511). (The decision will not be *res judicata* if the dismissal was due to non-payment of court-fees when no date was fixed for its payment.)
- ('95) 18 Mad 466 (467, 468). (The dismissal of suit for non-production of a certificate of heirship is not a decision under this rule, so as to bar a second suit on the same cause of action as *res judicata* as the want of succession certificate prevents an adjudication on the merits.)
- [**But see** ('85) 1885 All W N 168 (168).]
3. (1900) 22 All 66 (78) (FB).
- ('12) 16 Ind Cas 159 (160) : 36 Bom 536.
- ('24) AIR 1924 Mad 43 (44).
- ('25) AIR 1925 Oudh 278 (280).
- ('27) AIR 1927 Rang 148 (149) : 5 Rang 386.
- ('85) AIR 1935 Mad 210 (211) : 58 Mad 317.
- ('33) AIR 1933 All 41 (42).
- [*See* ('35) AIR 1935 All 398 (402). (Same Court has no jurisdiction to restore the suit on the ground that there was no decision on merits.)]
4. ('18) AIR 1918 Mad 143 (145) : 41 Mad 286 (FB).
- ('70) 6 Mad H O R 262 (264).
- ('98) 11 C P L R 94 (94).
- ('38) AIR 1938 All 41 (42).
5. ('11) 12 Ind Cas 608 (604) : 34 All 123.
6. ('23) AIR 1923 Lah 281 (281).

acted erroneously in doing so,<sup>7</sup> and even though Rule 2 may have been mentioned by mistake instead of Rule 3.<sup>8</sup>

**O. 17 R. 3**  
**Note 7**

But, where the rule under which the order is passed is *not stated*, then the Court must go into the matter and decide whether the order is really one under Rule 2 or Rule 3.<sup>9</sup> The *substance* of the order will be examined for determining under which rule it falls. In such a case, the guiding principle has been laid down to be that unless the facts and circumstances of the case clearly indicate that the order was one under this rule, the order should be treated as one under Rule 2.<sup>10</sup> For cases in which the order was treated as one under this rule, see the cases noted below.<sup>11</sup> For cases where it was treated as one under Rule 2, see the undermentioned decisions.<sup>12</sup>

As to the power of an Appellate Court in such cases, see the cases cited below.<sup>13</sup>

As to the effect of an appellate order in such cases, see the undermentioned decisions.<sup>14</sup>

7. ('12) 14 Ind Cas 119 (120) (All).

('17) AIR 1917 Mad 659 (660).

('18) AIR 1918 Mad 143 (146) : 41 Mad 286 (F B).

('19) AIR 1919 All 252 (253) : 41 All 668.

('23) AIR 1923 Pat 223 (223).

('25) AIR 1925 All 252 (252).

('27) AIR 1927 Lah 562 (562).

('81) 3 All 519 (520).

[But see ('76) 1 Mad 287 (288).]

8. ('25) AIR 1925 Oudh 495 (495).

9. ('28) AIR 1928 Lah 427 (428).

10. ('20) AIR 1920 Pat 589 (590) : 4 Pat L Jour 712.

('33) AIR 1933 All 118 (120). (Order dismissing a suit for non-prosecution — Rule does not apply even though conditions of this rule may be present.)

('33) AIR 1933 Cal 73 (74). (Suit decided on evidence of plaintiff and defendant in absence of plaintiff—Judge should act under R. 2 — If suit is dismissed, decree is *ex parte* within O. 9.)

('25) AIR 1925 All 267 (269) : 47 All 140.

('95) 1895 All W N 140 (140).

11. ('12) 17 Ind Cas 836 (837) (All). (An Assistant Collector dismissed a suit for mesne profits recording the following order : — "As the plaintiff has failed to prove his claim and has failed to prosecute the case it is ordered that the plaintiff's claim be dismissed for default." *Held*, that the Assistant Collector did not take action under R. 2 of O. 17 but that he acted under R. 8 of that Order and therefore an appeal lay against that order and no revision.)

('26) AIR 1926 All 729 (730). (Date fixed for production of evidence — No evidence produced and costs ordered as condition precedent not paid — Pleader reported no instructions — Order 17 Rule 3.)

('29) AIR 1929 All 432 (432). (When a case was called for hearing, the plaintiff's pleader appeared and applied for adjournment — The application was rejected and the pleader declined to examine even the witnesses who were in attendance. The Judge dismissed the suit writing a judgment on

the merits. *Held*, that the dismissal was one on the merits and not one for default and the decree was appealable.)

('20) AIR 1920 Pat 600 (601, 602) : 4 Pat L Jour 277.

('38) AIR 1938 Sind 142 (144). (Dismissal of suit for failure to deposit commissioner's fees.)

('35) AIR 1935 Rang 123 (124). (Plaintiff present but witnesses not ready—Plaintiff also not giving evidence—Dismissal of suit is under R. 3.)

('35) AIR 1935 All 398 (401). (Plaintiff appearing in person and by counsel—Adjournment refused — Both plaintiff and his counsel then absenting themselves — Dismissal of suit is dismissal on merits and not for non-appearance.)

('39) AIR 1939 All 41 (41). (Plaintiff absent on adjourned hearing—Defendants present — Plaintiff's pleader applying for adjournment—Adjournment refused and suit dismissed — Order falls under this rule.)

12. ('15) AIR 1915 Mad 16 (17). (Dismissal suit—Default of plaintiff—Instructions to pleader to apply for adjournment only — Order of dismissal not one under the rule.)

('15) AIR 1915 All 196 (196).

('27) AIR 1927 All 464 (464). (Plaintiff failing to pay charge for service of summons as ordered by Court—Dismissal of suit—Effect.)

('30) AIR 1930 Rang 270 (271) : 8 Rang 168.

('39) AIR 1939 Mad 974 (975) : 50 Mad L W 430 (431, 432). (Suit adjourned for plaintiff's witnesses—Plaintiff's advocate absent on adjourned date—Application for adjournment by another advocate refused—Plaintiff not giving evidence — Dismissal of suit—Rule 2 applies.)

13. ('24) AIR 1924 Rang 177 (178) : 1 Rang 656. (Where in appeal against dismissal under O. 17, R. 3, the Appellate Court directs further evidence to be taken by the trial Court, without expressly setting aside the trial Court's decree, it acts with material irregularity.)

('22) AIR 1922 All 497 (499).

14. ('07) 10 Oudh Cas 245 (246).



## ORDER XVIII.

## HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

**R. 1.** [S. 179 Expln.] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Right to begin.

[1877, S. 179.]

## Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Right to begin.</li> <li>2. Allegations.</li> <li>3. Admissions.</li> </ol> | <ol style="list-style-type: none"> <li>4. Preliminary issue raised by defendant that the suit does not lie.</li> <li>5. Preliminary issue that the appeal does not lie.</li> <li>6. Applicability.</li> </ol> |
|---|---|

## Other Topics (miscellaneous)

Application for restitution of mesne profits. See Note 2.

"Facts." See Note 3.

Right to begin — Examples. See Notes 1 and 2.

Review application—Who is to begin. See Note 2.

Two sets of defendants — Counsel when to be heard. See Note 1.

"Unless the defendant admits the facts alleged by the plaintiff." See Note 3.

**1. Right to begin.** — The right to begin follows the *onus probandi* as provided by Sections 101 to 114 of the Evidence Act (I of 1872). As a general rule, the plaintiff has to prove his claim by positive proof, for the Court has to see whether there is proof of claim before it need enquire as to the truth or otherwise of the defence.<sup>1</sup> It is the duty of the parties to prove their case and the Judge "has nothing to do with the getting up of a case,"<sup>2</sup> but the Court has jurisdiction on a proper occasion, in the interest of justice, to examine *de bene esse*, witnesses upon an *ex parte* application.<sup>3</sup> It must be pointed out that evidence need not always be led by the party who has the right to begin and on whom lies the burden; it is open to him to sustain the *onus* by facts which he may elicit in cross-examination of the other party's witnesses.<sup>4</sup> The *onus* is not in all cases and necessarily a question of law. How much or what evidence will discharge the *onus* is a question which depends upon the weight attached to the evidence.<sup>5</sup> In the case of two sets of defendants whose interests are the same, both should address the Court before any evidence is taken,<sup>6</sup> but the defendant supporting the plaintiff must begin before the other defendants.<sup>7</sup> If on the issue or issues of fact, the burden of proof is on the defendant, he has the right to begin.<sup>8</sup>

**2. Allegations.** — Under Section 102 of the Evidence Act, the burden of proof rests on the party who would fail if no evidence at all were given on either side.<sup>1</sup> Thus,

## Order 18 Rule 1 — Note 1

1. ('28) AIR 1928 All 688 (688).
- ('28) AIR 1928 Lah 41 (42). (Suit to recover property alienated by father — Punjab Customary Law — Plaintiff must prove that his suit is within time.)
2. (1910) 1 K B 827 (882), *Enoch and Zaretz Key In re.* (Per Moulton, L. J.)

3. ('70) 5 Beng L R 252 (258).

4. ('24) AIR 1924 Nag 867 (871, 872).

5. ('11) 12 Ind Cas 691 (691, 692) (Bom).

6. ('02) 29 Cal 82 (82).

7. ('08) 32 Bom 599 (602).

8. ('86) 40 Cal W N 865 (868).

## Note 2

1. ('90) 18 Mad 60 (68).



in all claim petitions it is the claimant to the attached property that must begin.<sup>2</sup> Similarly, it is the defeated attaching creditor who challenges the order in the claim petition that must begin.<sup>3</sup> For other instances, see cases under Sections 101, 102 and 103 of the Evidence Act and the undermentioned decisions.<sup>4</sup>

**O. 18 R. 1**  
**Notes 2-4**

**3. Admissions.** — Where the defendant *admits* the facts alleged by the plaintiff but contends that he is not entitled to any part of the relief which he seeks, the defendant gets the right to begin. Thus, in suits on a settled account, signed by the defendant,<sup>1</sup> or on a bond the execution of which is admitted,<sup>2</sup> or in a suit for restitution of conjugal rights by the husband where the marriage is admitted by the wife,<sup>3</sup> the defendant has the right to begin. But he will not get this right to begin unless *all the material facts* are admitted and not only *some* of them.<sup>4</sup>

In a suit to recover possession of land from the tenant by the landlord, it is not for the plaintiff to explain the possession of the defendant tenant but for such defendant to show that it necessarily leads to an inference of perpetual tenancy.<sup>5</sup> Again, where the defendant held certain lands, admittedly some at least of which were rent paying, the defendant ought to lead some *prima facie* evidence of the fact that the lands were rent-free if he wants to plead such a fact.<sup>6</sup>

**4. Preliminary issue raised by the defendant that the suit does not lie.** — Where the defendant raises a preliminary objection that the suit does not lie as, for instance, where he pleads that the suit is barred by *res judicata*, he has the right to begin.<sup>1</sup> It must be remembered that for the purposes of the preliminary issue, the pleadings are taken as true.<sup>2</sup>

2. ('68) 11 Suth W R 8 (15) (FB).
- ('96) 18 All 369 (370).
- ('88) 16 Cal 473 (479).
- ('69) 11 Suth W R 422 (423).
3. (1900) 4 Cal W N 151 (152).
- ('93) 17 Bom 94 (99).
4. ('91) 18 Cal 201 (214) : 17 Ind App 159 (P C).  
(Suit on title—Plaintiff to begin.)
- ('82) AIR 1932 Cal 39 (40). (Suit for specific performance of contract—Plaintiff to prove the allegation first.)
- (1841-1846) 3 Moo Ind App 261 (273) (PC). (Suit on a contract—The party who alleges that the contract is governed by special law must prove it.)
- ('71) 14 Moo Ind App 152 (172) (PC).
- (1859) 7 Moo Ind App 441 (470) (PC). (Person alleging that his consent was obtained to an arbitration through undue influence must prove it.)
- ('68) 10 Suth W R 421 (422). (Suit against agent for advance paid.)
- ('71) 20 Suth W R 459 (463, 464) (PC). (Suit for resumption of mall lands.)
- ('82) 8 Cal 280 (237). (Do.)
- ('83) 9 Cal 818 (817). (Do.)
- ('67) 8 Suth W R 209 (210). (Do.)
- ('86) 12 Cal 182 (184). (Do.)
- ('87) 10 All 272 (289) : 15 Ind App 51 (PC).
- (1846) 4 Moo Ind App 466 (499) (PC).
- ('12) 13 Ind Cas 956 (956, 957) (All). (Plea of minority by defendant—Plaintiff must prove that he was not a minor.)
- ('87) 9 All 61 (63). (Application for review — Counsel for opposite party allowed to begin.)
- ('92) 15 Mad 95 (96). (Suit for ejectment—Plain-

- tiff must prove that he has superior title.)
- ('95) 19 Bom 803 (806, 807). (Do.)
  - ('25) AIR 1925 Mad 145 (147) : 47 Mad 800. (Applicant for mesne profits of property taken in execution of decrees reversed on appeal must begin.)
  - (1865) 3 Suth W R Misc 25 (25). (Do.)
  - ('82) 9 Cal L Rep 1 (3).
  - ('21) AIR 1921 Cal 40 (41) : 48 Cal 161. (Reference to High Court under the Income-tax Act.)
  - ('90) 14 Bom 458 (461, 462). (Plaintiff must prove that his claim is not barred.)
  - ('94) 18 Bom 513 (515). (Case under Art. 144, Limitation Act—Defendant to prove.)
  - ('69) 12 Suth W R 529 (531). (Suit for account—Plaintiff to show what sum is due on the account.)
  - ('85) AIR 1935 Cal 368 (372) : 62 Cal 346. (Admission by defendant shifts the burden.)
  - [But see ('81) 7 Cal 736 (739). (Suit to set aside registered deed.)]

#### Note 3

1. ('75) 24 Suth W R 202 (203).
2. ('84) 6 All 73 (74).
- ('72) 17 Suth W R 509 (510).
- ('71) 8 Bom H O R A O 139 (141).
3. ('14) AIR 1914 Low Bur 210 (212) : 7 Low Low Rul 847.
4. ('80) 7 Cal L Rep 274 (275).
5. ('88) 16 Cal 223 (232) : 16 Ind App 6 (P C).
6. ('81) 6 Cal 666 (668, 669).

#### Note 4

1. ('88) 12 Bom 454 (459).
2. ('18) 18 Ind Cas 949 (950) : 40 Cal 598 : 40 Ind App 56 (P O).

**O 18 R. 1**  
**Notes 5-6**

**5. Preliminary issue that the appeal does not lie.**—Where the respondent in an appeal objects that the appeal does not lie, the appellant must show that he has a right of appeal and has therefore the right to begin.<sup>1</sup>

**6. Applicability.**—The procedure in regard to trial of suits as laid down in this Order is to be followed in proceedings under the undermentioned local and special Acts.<sup>1</sup>

**O. 18 R. 2****R. 2. [Ss. 179, 180.] (1)** On the day fixed for the hearing

**Statement and production of evidence.**

of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

[1877, Ss. 179, 180.]

**Local Amendments****ALLAHABAD**

For the present Rule 2 *substitute* the following:

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the oral evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)."

**MADRAS**

At the end of Rule 2, *insert* the following "explanation":

"*Explanation.*—Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage."

**NAGPUR**

*Add* the following as sub-rule (4) to Rule 2:

"(4) Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit."

**Note 5**

1. ('84) 8 Bom 287 (289).

**Note 6**

1. The Madras Survey and Boundaries Act (VIII of 1928), S. 28; The U. P. Court of Wards Act

(IV of 1912), S. 57 (2); The Bengal Settled Estates Act (III of 1904), S. 8 (2); The Bengal Tenancy Act (VIII of 1885), S. 107; The Madras Railway Protection Act (IV of 1886), S. 15; The Calcutta Rent Act (III of 1920), S. 24; The Bengal Court of Wards Act (IX of 1879), S. 66.

**OUDH**

For the present Rule 2 *substitute* the following :

**O. 18 R. 2**  
**Note 1**

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him and the nature of the evidence which each of his witnesses is expected to give and shall then produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)."

**RANGOON**

Add the following as a proviso to sub-rule (2) of Rule 2 :

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub-rule before the evidence of the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided."

**Synopsis**

- |                       |                       |
|-----------------------|-----------------------|
| 1. Scope of the Rule. | 3. "The other party." |
| 2. Hearing.           | 4. Arguments.         |

**1. Scope of the Rule.** — On the day fixed for hearing the party having the right to begin must state his case, but this does not give him the right to introduce new pleas without the leave of Court. He has only the right to state his case, as has already been put forward.<sup>1</sup> It follows, as a consequence, that the Courts ought not to allow evidence to be given in regard to contentions not raised in the pleadings.<sup>2</sup>

It is not the duty of the Court to determine what witnesses shall be examined.<sup>3</sup> The parties must select their own witnesses and ask the Court to examine such of them as they tender.<sup>4</sup> It is, however, in the discretion of the Court to allow further evidence after the case has been closed.<sup>5</sup> But in such cases it behoves the Court of first instance to take care that a party whose case has been finished is not permitted, without good reason, to mend that case by fresh evidence after his adversary has succeeded in impeaching it.<sup>6</sup> But a document filed with the plaint when tendered after the close of the case, but before the other party began, can be admitted.<sup>7</sup>

Where the *onus* is on the plaintiff and he has failed to sustain it successfully, the Court will act rightly in dismissing the suit without insisting on the defendant to go into the witness-box;<sup>8</sup> but where the burden of proving *some issues* lies on the defendant, the plaintiff is entitled to reserve his case, and produce rebutting evidence after the defendant's evidence on those issues has been recorded.<sup>9</sup> Where a witness has been summoned and does not appear, the party calling him is entitled to call upon the Court to compel his attendance;<sup>10</sup> but it is not only illegal but improper and unfair to

**Order 18 Rule 2 — Note 1**

1. ('27) AIR 1927 Lah 615 (615).
2. ('23) AIR 1923 Lah 368 (365).
3. ('70) 18 Suth W R 185 (188).
4. ('66) 6 Suth W R 231 (232).
- (08) 4 Nag L R 129 (131).
- (04) 1904 Pun Re No. 61, p. 175.
- (09) 11 Suth W R 248 (248).
- (70) 18 Suth W R 185 (188).
- [See ('84) AIR 1984 Lah 817 (817).

- (69) 11 Suth W R 99 (99).]
5. ('69) 12 Suth W R 455 (456).
6. ('67) 8 Suth W R 461 (463).
- (70) 14 Suth W R 493 (495, 496).
7. ('06) 33 Cal 1345 (1348).
8. ('13) 21 Ind Cas 96 (102) (Mad).
- [But see ('66) 5 Suth W R 179 (179)].
9. ('11) 12 Ind Cas 862 (864) : 1911 Pun Re No. 66.
10. ('02) 6 Cal W N 548 (550).

**O. 18 R. 2**  
**Notes 1-4**

permit the defendant at the very outset of the case to be put into the witness-box nominally as a plaintiff's witness. It is certainly in accord with justice that a party who has to defend a suit should hear what his opponent has to say before he himself is called upon to answer.<sup>11</sup>

Reasonable time must be given for either party to produce his evidence and the Court will exercise sound discretion, if it allows the party to produce his evidence at any time before it proceeds to judgment.<sup>12</sup> Thus, when the defendant's request for time to produce his witnesses was refused but the defendant produced them on the day the case was posted for judgment, it was held that it was a wrong exercise of discretion not to examine the witnesses before proceeding to judgment.<sup>13</sup>

A pleader is bound to call the witnesses his party wishes to examine and any threat on the part of the Court to report to the High Court the conduct of the pleader in examining such witnesses is highly improper.<sup>14</sup> Where a counsel refrains from calling evidence in deference to some observations from the Bench, the Appellate Court ought not to reverse the decree of the first Court without allowing such evidence to be given which the first Court thought unnecessary.<sup>15</sup>

A Court is bound to allow the defendant to produce his evidence although it has already formed an opinion in favour of the defendant from the plaintiff's evidence itself. The Court is not entitled to dispose of the suit without calling on the defendant.<sup>16</sup>

**2. Hearing.** — See Notes to O. 8 R. 1 and also the undermentioned cases.<sup>1</sup>

**3. "The other party."** — "The other party" means the party other than the one who has the right to begin and has begun. Where there are two sets of defendants and their interests are practically the same, the rule is that after the plaintiff's case has been closed, both the defendants should address the Court before any evidence is given by either set of defendants.<sup>1</sup>

But where a defendant or a set of defendants support the plaintiff's case, wholly or in part, the former must immediately follow the plaintiff and call his or their witnesses, and then only can the other set of defendants who differ from the plaintiff be called upon to address the Court and produce their evidence.<sup>2</sup>

**4. Arguments.** — It is in the option of the parties to argue their case when the evidence has been closed and it is for them to decide whether they will exercise that privilege or not<sup>1</sup> and a Court delivering judgment without hearing arguments is not acting irregularly where the parties having had the opportunity did not choose to make use of it.<sup>2</sup> Where new cases are quoted in reply, the other party will be allowed to address the Court on such new cases and on the points not argued before the Court previously.<sup>3</sup>

A Judge, who has not heard any part of the evidence and before whom no part of the proceedings has taken place, is not justified in proceeding to judgment until

11. ('08) 1908 Pun Re No. 116, p. 528.  
 [See however ('02) 26 Bom 392 (395, 396).]

12. ('93) 20 Cal 740 (743, 745).

13. ('98) 20 Cal 740 (743, 745).

14. ('01) 8 Bom L R 562 (563).

[See ('88) AIR 1938 Bom 308 (304).]

15. ('83) AIR 1933 Bom 303 (304). (Judges ought not to stop the parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary.)

16. ('12) 17 Ind Cas 87 (87) : 40 Cal 119.

**Note 2**

1. ('25) AIR 1925 All 99 (99).  
 ('20) AIR 1920 All 207 (208) : 42 All 542.

**Note 3**

1. ('02) 29 Cal 32 (32).  
 2. ('08) 82 Bom 599 (600, 601, 602).

**Note 4**

1. ('20) AIR 1920 Lah 246 (247).  
 2. ('24) AIR 1924 Lah 107 (107, 108) : 4 Lah 364.  
 3. ('88) 9 Cal 14 (22).

he has given the parties an opportunity of appearing before him and stating their case; a judgment so pronounced is bad in law and must be set aside.<sup>4</sup>

**O. 18 R. 2  
Note 4**

The practice of submitting written arguments by pleaders is not proper and in any case, must first be submitted to the other side and then to the Court.<sup>5</sup>

A party must be represented by *one* pleader or set of pleaders and cannot be represented *severally* by different pleaders.<sup>6</sup>

### Local Amendment

#### CALCUTTA

*Insert* the following as Rule 2A :

"2A. Notwithstanding anything contained in clauses (1) and (2) of Rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit."

**O. 18 R. 2A  
(Calcutta)**

**R. 3.** [S. 180.] Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

**O. 18 R. 3**

**Evidence where  
several issues.**

[1877, S. 180.]

### Local Amendments

#### ALLAHABAD

*For* the present Rule 3, *substitute* the following :

"3. (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence.

(2) After both parties have produced their evidence, the party beginning may address the Court on the whole case; the other party may then address the Court on the whole case; and the party beginning may reply generally on the whole case, provided that in doing so he shall not, without the leave of the Court, raise questions which should have been raised in the opening address."

#### ODDH

Same as that of the Allahabad High Court, above, except that sub-rule (2) is numbered as (3) and the following is inserted as sub-rule (2) :

4. ('04) 1904 Pun Re No. 91, p. 845.

5. ('21) AIR 1921 Cal 426 (428).

('28) AIR 1928 Mad 1130 (1131).

6. ('71) 8 Bom H C R A C 241 (244).

**O. 18 R. 3  
Note 1**

"(2) The substance of the statement of the case provided for by Rules 2 and 3 (1) above shall be taken down by or under the personal direction and superintendence of the Judge and shall form part of the proceedings."

**1. Scope of the Rule.** — Where there are several issues the burden of proving some of which lies on the other party, the party beginning may at his option —

- (1) produce his evidence on those issues, or
- (2) reserve it by way of answer to the evidence produced by the other party.

In the "latter" case, the party beginning may, after the other party has produced his evidence, produce his rebutting evidence.<sup>1</sup> It is in the discretion of the Court to give adjournments for the purpose.<sup>2</sup> A party trying to prove a point not raised in his pleadings cannot object to the opposite party tendering rebutting evidence as to that point.<sup>3</sup>

**O. 18 R. 4**

**R. 4. [S. 181.]** The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

[1877, S. 181; 1859, S. 172.]

*Synopsis*

1. Examination of witnesses.
2. Open Court.
3. Power of the Appellate Court to examine witnesses.

*Other Topics (miscellaneous)*

Evidence of the witnesses in attendance. See Note 1.	Waiver of rules of procedure for examination. See Note 2.
Examination to be on oath. See Note 2.	
Pardanashin woman and exempted persons — Examination in open Court. See Note 2.	Witnesses not examined properly — Court should interfere. See Note 2.

**1. Examination of witnesses.** — A party has a right to have *all* the witnesses tendered by him examined by the Court.<sup>1</sup> The Court cannot ordinarily refuse to examine them<sup>2</sup> on the ground that their names do not find a place in the witness list,<sup>3</sup> or on the ground that they were not present at the previous hearing.<sup>4</sup> But if it clearly appears that the object of summoning them is merely to obstruct or

**Order 18 Rule 3 — Note 1**

1. ('26) AIR 1926 Pat 94 (98). (Defendant pleading that plaintiff was benamidar for him—Plaintiff to be permitted to adduce rebutting evidence.) ('26) 93 Ind Cas 273 (276) (Pat). (Do.)
2. ('26) AIR 1926 Nag 486 (487).
3. ('14) AIR 1914 Oudh 52 (65).

**Order 18 Rule 4 — Note 1**

1. ('67) 8 Suth W R 864 (865). ('71) 16 Suth W R 109 (110). ('78) 20 Suth W R 203 (204). ('75) 23 Suth W R 63 (64). ('88) 1888 Bom P J 210.

- (85) 9 Bom 146 (149, 150).
2. ('67) 8 Suth W R 505 (505). (1841) 2 Moo Ind App 424 (427) (P O). ('87) 9 All 889 (840). ('95) 17 All 29 (32). ('96) 19 Mad 375 (381). (Case under the Criminal Procedure Code.) ('69) 12 Suth W R 229 (229). ('26) AIR 1926 Lah 450 (450). ('84) AIR 1984 Lah 317 (317).
3. ('69) 12 Suth W R 455 (456).
4. ('97) 10 O P L R 92 (93). ('93-1900) 1893-1900 Low Bur Rul 398.

delay justice, the Court can refuse to examine them<sup>5</sup> and whenever it so refuses, it must record its reasons for such refusal.<sup>6</sup>

**O. 18 R. 5**  
**Notes 1-2**

Where the witness to be examined is an infant or a person of advanced age, the Court may hold an examination on the *voir dire* as to his competency to give evidence.<sup>7</sup> But this examination must be held before the actual examination commences.<sup>8</sup> Courts, of course, have always the power to examine any of the parties to the suit and compel their attendance.<sup>9</sup> It is also in the discretion of the Court to allow a party to call further evidence after he has closed his case.<sup>10</sup>

The examination of a witness is not complete without any opportunity being allowed for his cross-examination by the other side.<sup>11</sup> A court cannot fix any time limit for cross-examination<sup>12</sup> though it has full power to prevent any abuse of the rights of cross-examination.<sup>13</sup> A co-defendant who is represented by a separate *vakil* may cross-examine another defendant, in order to discredit the evidence given by him in plaintiff's favour.<sup>14</sup> Refusal by the trial Court to examine the witnesses tendered by a party before delivery of judgment may amount to a substantial error or defect of procedure which may have affected the decision of the case on the merits, and is a ground for second appeal under Section 100, clause (c).<sup>15</sup>

**2. Open Court.** — The parties have a right to have the evidence of witnesses taken in *open Court*, i.e., *publicly*.<sup>1</sup> All witnesses should, without distinction, give their evidence from the witness-box; it is not desirable that anyone should give his evidence on the *dais* by the side of the Judge.<sup>2</sup> The following may be deemed to be exceptions to the rule that the examination of witnesses should be in open Court —

(1) *Pardanishin* women and other persons who are exempted from personal appearance in Court should not be examined in open Court.<sup>3</sup> See also Sections 132 and 133, *ante*;

(2) Where witnesses are examined on commission.<sup>4</sup>

The Court should not, as a rule, interfere in the examination of the witnesses except where it is found that they are not properly examined through the incompetency of those who have the management of the case.<sup>5</sup>

The Oaths Act provides imperatively that no person shall testify except on *oath* or *affirmation*. As to the effect of the omission to take the oath or affirmation, see the Oaths Act and the undermentioned cases.<sup>6</sup>

5. ('72) 17 *Suth W R* 172 (173).

('71) 6 *Beng L R App* 10.

6. ('97-1900) 2 *Upp Bur Rul* 373.

7. ('14) *AIR* 1914 *Cal* 276 (278) : 41 *Cal* 406.

('89) 11 *All* 183 (185).

('07) 11 *Cal W N* 51 (53).

8. ('07) 11 *Cal W N* 51 (53).

[But see ('14) *AIR* 1914 *Cal* 276 (279) : 41 *Cal* 406.]

9. ('68) 10 *Suth W R* 280 (282).

10. ('67) 8 *Suth W R* 461 (468).

11. ('68) 9 *Suth W R* 587 (588). (Unless consented to.)

('06) 30 *Bom* 528 (535, 536).

('71) 16 *Suth W R* 257 (258).

12. ('10) 8 *Ind Cas* 418 (421) (*Oudh*).

13. ('22) *AIR* 1922 *Oudh* 124 (128).

14. (1868) 1 *Mad H C R* 456 (456).

15. ('93) 20 *Cal* 740 (743, 744).

#### Notes 2

1. ('28) *AIR* 1928 *Pat* 488 (489).

('74) 21 *Suth W R* 196 (198).

(1859) 6 *Moo Ind App* 232 (247) (P.C.). (Witnesses should not be examined in the absence of the parties.)

('25) *AIR* 1925 *Mad* 381 (381).

2. ('21) 63 *Ind Cas* 461 (462) (*Lah*).

3. ('83) 5 *All* 92 (94). (Case under the Criminal Procedure Code.)

('94) 21 *Cal* 588 (589, 590). (Do.)

4. See Order 26 below.

5. ('68) 1 *Beng L R* (S N) 20 (c).

[See ('36) *AIR* 1936 *Lah* 183 (185). (Court should intelligently control the conduct of the case and should not allow scandalous matters to be introduced into the record unless such matters are relevant for the proper decision of the case.)]

[See also ('36) *AIR* 1936 *Lah* 887 (890). (Judge can put questions to witnesses in order to get at truth.)]

6. ('88) 10 *All* 207 (221). (S. 6 of the Oaths Act

**O. 18 R. 4**  
**Notes 2-3**

The parties may agree to the evidence being given in a *particular manner* and such consent will bind them<sup>7</sup> except where the evidence amounts to nothing or is *manifestly untrue*<sup>8</sup> or where the evidence is *legally inadmissible*.<sup>9</sup>

**3. Power of the Appellate Court to examine witnesses.** — Where the Court of first instance refuses to examine the witnesses tendered by a party, they may be examined by the Appellate Court.<sup>1</sup> But the objection to the rejection of witnesses must be taken at the earliest possible opportunity, and, if not so taken, the High Court will refuse to interfere.<sup>3</sup> It has been held that the procedure of an Appellate Court calling for an expert witness to prove the handwriting of the attestors is illegal.<sup>3</sup> See also Order 41 Rules 27 and 33, *infra*.

**O. 18 R. 5**

**R. 5.** [S. 182.] In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

[1877, S. 182; 1859, S. 172.]

a. The provisions of Rules 5, 6, 7, 8, 9, 11, 13, 14, 15 and 16 of this Order, so far as they relate to the manner of taking evidence do not apply to the Chief Court of Oudh: *Vide* Oudh Chief Courts Act, (U. P. IV of 1925), S. 16 (2).

**Local Amendment**

**RANGOON**

The following shall be *substituted* for Rule 5 :

"5. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over

is imperative and not merely directory.)  
(78) 2 Cal L Rep 476 (477). (Refusal to make the oath or solemn affirmation in a particular manner — Presumption.)  
(92) 14 All 141 (145). (Do.)  
(98) 22 Bom 680 (688). (Do.)  
(74) 21 Suth W R Cr. 81 (82).  
(75) 14 Beng L R 294 (296, 297).  
(1864) 2 Mad H O R 246 (247). (Member of the Church of England is not exempted from taking an oath in a Court of justice in India.)  
(1862) 1 Mad H O R 99n. (Mahomedan witnesses though suffering from a disease which disqualifies him from taking an oath on the koran must be sworn in the regular way, or not at all.)  
(68) 10 Suth W R 284 (284).  
(98) 22 Bom 281 (288). (Offer to be bound by oath.)  
(1900) 27 Cal 229 (231).  
(96) 18 All 46 (49).  
(99) 22 Mad 284 (286, 287).

(08) 81 Mad 1 (8).  
7. (06) 30 Bom 109 (112).  
(15) AIR 1915 Mad 762 (768).  
(15) AIR 1915 Mad 793 (794, 795) : 38 Mad 160.  
[See however (70) 13 Suth W R 108 (109).]  
8. (69) 11 Suth W R 110 (111).  
9. (1865) 2 Suth W R 252 (253, 254).  
(66) 5 Suth W R 234 (234).

**Note 3**

1. (81) 6 Cal 608 (611).  
(98) 22 Bom 253 (255).  
2. (70) 2 All H O R 209 (210).  
(70) 2 N W P H O R 306 (206, 207).  
(82) 6 Bom 524 (527).  
(66) 6 Suth W R 218 (215).  
(66) 6 Suth W R 324 (324).  
(69) 11 Suth W R 289 (290).  
(69) 12 Suth W R 868 (864).  
(71) 15 Suth W R 87 (88).  
(70) 14 Suth W R 419 (420).  
3. (68) 9 Suth W R 88 (69).



or translated to the witness by such person as the Judge may direct, provided that the Judge may, if he thinks fit, require the evidence to be read over in his own presence.

Such person shall, after reading over the deposition to the witness, append a certificate at the foot of the deposition form as follows :

Read over \_\_\_\_\_ by me in Burmese or \_\_\_\_\_ (as the case may be) and acknowledged  
Interpreted \_\_\_\_\_  
correct.

(Signature).

Interpreter or Clerk.

The Judge shall, if necessary, correct the deposition and shall sign it."

### Synopsis

- |  |                          |
|--|--------------------------|
| 1. Scope and applicability of the Rule.                | 3. "Shall be read over." |
| 2. Effect of evidence taken in the absence of parties. | 4. Signature of witness. |
|  | 5. Signature of Judge.   |

**1. Scope and applicability of the Rule.** — This rule applies to all proceedings<sup>1</sup> except that it does not apply to Chartered High Courts<sup>2</sup> and to the Chief Court of Oudh<sup>3</sup> in the exercise of their original jurisdiction and to Courts constituted under the Provincial Small Cause Courts Act.<sup>4</sup> But it applies to proceedings conducted by commissioners for partition appointed by the original side of the High Court.<sup>5</sup> See Order 26 Rule 17.

An objection that the depositions of witnesses were not taken in the manner prescribed must be taken at the earliest possible opportunity and not in second appeal.<sup>6</sup>

The notes by a Munsif as to the *age* or *description* of the witness in the heading of the deposition do not form part of the evidence.<sup>7</sup>

**2. Effect of evidence taken in the absence of parties.** — The examination of a material witness in the absence of the other party is a material irregularity which will vitiate the procedure if objection to the same is taken at the proper time.<sup>1</sup> Where no opportunity was given to a party to examine his witness, or to rebut the evidence or cross-examine the witness of the opposite party, then that evidence is not admissible for or against him unless consented to.<sup>2</sup> Where the defendant fails to appear without lawful excuse, the Judge may at once enter judgment against the defendant, but where the Court takes the evidence of the plaintiff, the defendant who has appeared is entitled

#### Order 18 Rule 5 — Note 1

1. ('34) AIR 1934 Cal 737 (739) : 61 Cal 488. (Witness examined by a commissioner for partition appointed by the original side of High Court.)
- ('71) 15 Suth W R O C 16 (18). (Insolvency proceedings.)
- ('67) 5 Bom H C R O C 68 (64). (Witness examined by a commissioner for partition appointed by the original side of the High Court.)
- ('72) 9 Bom H C R 907 (809, 810) (Do.)
- ('91) 14 Mad 404 (405). (Do.)
- ('71) 17 Suth W R 221 (228). (Proceeding under the Land Acquisition Act.)
- ('75) 24 Suth W R 162 (162). (Probate proceedings.)
- ('23) AIR 1928 Oudh 119 (120). (Witness examined on commission.)

*Note.* The procedure of this rule is applicable to proceedings under the Bengal Land Registration Act II of 1906 (S. 53A) and the Madras, Gunjam and

Vizagapatam Act XXIV of 1839 (R. 16).

2. See Order 49 Rule 3.
3. See the U. P. (Oudh Courts) Act IV of 1925, S. 16 (2). So also Rules 6 to 9, 11, 13 to 16 of this Order are not applicable.
4. See O. 50 R. 1 (b).  
[See also ('25) AIR 1925 Nag 412 (413, 414).]
5. ('34) AIR 1934 Cal 737 (739) : 61 Cal 488.
6. ('72) 18 Suth W R 112 (113).
- Note.* For observations on the improper manner in which evidence is generally taken by the lower Courts, see ('82) 4 All 249 (250, 251).
7. ('19) AIR 1919 Cal 502 (503).
- ('04) 26 All 108 (118) : 31 Ind App 38 (P C).

#### Note 2

1. (1854-1857) 6 Moo Ind App 232 (247 to 250) (PC).  
[See also ('14) AIR 1914 Cal 575 (576).]
2. ('68) 9 Suth W R 587 (588).
- ('69) 11 Suth W R 110 (112).

**O. 18 R. 5**  
**Notes 2-5**

to cross-examine him.<sup>3</sup> The admission of a fact dispenses with the proof thereof and such portion of the statement as is an admission, can always be treated as evidence without the whole statement being treated as such.<sup>4</sup>

**3. "Shall be read over."** — There is a conflict of opinion as to whether a deposition *not read over* to the witness is admissible in evidence against him in a subsequent trial for perjury or forgery. The High Courts of Calcutta,<sup>1</sup> Lahore<sup>2</sup> and Madras<sup>3</sup> have held that it is not, while the Judicial Commissioner's Court of Nagpur has held that it is admissible.<sup>4</sup> But the fact that the deposition was read over by the *witness himself*,<sup>5</sup> or that the reading over of the deposition was not in the *presence* of the Judge,<sup>6</sup> or that a certificate as to the reading over to the witness was not appended by the Judge,<sup>7</sup> or the non-observance of some other formality,<sup>8</sup> will not render the evidence inadmissible in evidence.

**4. Signature of witness.** — There is no obligation upon witnesses to affix their signature or mark, after their evidence is read over to them. It is, however, generally the practice to have their signatures.<sup>1</sup> But see Rule 16 *infra* where such signature is obligatory.

**5. Signature of Judge.** — It is essential that the Judge should sign the deposition so read over to the witness. A prosecution for perjury on the basis of such deposition cannot otherwise be sustained.<sup>1</sup>

**O. 18 R. 6**

**R. 6. [S. 183.]** Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

[1877, S. 183; 1859, S. 172.]

*Synopsis*

1. **Applicability.** | 2. **"Shall be interpreted."** See Note 3 to Rule 5.

**1. Applicability.** — This rule does not apply to the Chartered High Courts (see O. 49 R. 3). Nor does it apply to cases governed by S. 19 of the Oudh Laws Act<sup>1</sup>; But it applies to proceedings conducted by commissioners for partition appointed by the Court on the original side of the High Court.<sup>2</sup>

3. ('69) 2 Beng L R App 12 (13).

4. ('71) 16 Suth W R 257 (258).

**Note 3**

1. ('24) AIR 1924 Cal 705 (707, 709) : 51 Cal 286. (Dissenting from the observations *obiter* in A I R 1918 Cal 289.)

('14) AIR 1914 Cal 789 (790) : 42 Cal 240.

('81) 6 Cal 762 (768).

('08) 12 Cal W N 845 (847).

2. ('17) AIR 1917 Lah 192 (198) : 1917 Pun Re Cr No. 12.

3. ('19) AIR 1919 Mad 45 (47) : 42 Mad 561.

('05) 28 Mad 308 (309, 310).

4. ('23) AIR 1923 Nag 39 (40) : 18 Nag L R 192.

5. ('19) AIR 1919 Cal 514 (515) : 46 Cal 895.

6. ('10) 7 Ind Cas 414 (415) : 84 Mad 141.

('18) AIR 1918 Mad 334 (334).

7. ('05) 2 Cal L Jour 496 (497).

[See ('70) 2 N W P H O R 241 (243).]

8. ('29) AIR 1929 Cal 78 (80) : 55 Cal 1084. (Dictation to typist.)

('19) AIR 1919 Lah 348 (349) : 1918 Pun Re Cr No. 28.

**Note 4**

1. ('12) 16 Ind Cas 521 (521, 522) : 1912 Pun Re Cr. No. 8.

**Note 5**

1. ('81) 6 Cal 762 (768).

**Order 18 Rule 6 — Note 1**

1. ('81) AIR 1981 Oudh 385 (385).

2. ('84) AIR 1984 Cal 737 (739) : 61 Cal 433.

2. "Shall be interpreted." — See Note 3 to Rule 5 above.

O. 18 R. 6  
Note 2

### Local Amendment

#### RANGOON

The following shall be *inserted* as Rule 6A :

"6A. Where there are no interpreters paid by Government, and it is found necessary to employ an interpreter in a civil case, he shall be paid such fee, ordinarily not exceeding Rs. 2 *per diem*, as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required, and shall be treated as costs in the case. All payments of interpreter's fees shall be made through the Court and duly entered in Bailiff's Register II."

O. 18 R. 6A  
(Rangoon)

**R. 7.** [S. 185A (3).] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

O. 18 R. 7

Evidence under  
Section 138.

**R. 8.** [S. 184.] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

O. 18 R. 8

Memorandum when  
evidence not taken  
down by Judge.

[1877, S. 184; 1859, S. 172.]

### Local Amendments

#### OUDH

Add the following proviso :

"Provided that such memorandum shall not be necessary in the case of a Judge who has obtained the previous sanction of the Chief Court to dictate evidence in open Court."

#### RANGOON

Rule 8 shall be deleted.

### Synopsis

1. Applicability.
2. Memorandum of evidence.
3. Effect of non-compliance.

**1. Applicability.** — This rule does not apply to Chartered High Courts: see Order 49 Rule 3. For a local repeal of this rule and Rules 9 and 13 of this Order, see the undermentioned Act.<sup>1</sup>

### Order 18 Rule 8 — Note 1

1. The O. P. Laws Act (II of 1879), Section 11.

**O. 18 R. 8**  
**Notes 2-3**

**2. Memorandum of evidence.** — Where a Judge does not take down the whole of the evidence himself, he is bound to make a memorandum of evidence and record every material answer made by the witness in the examination-in-chief, in the cross-examination and in reply to questions by the Court. It should be written down in consecutive sentences.<sup>1</sup> Where there is a conflict between the Judge's memorandum and the recorded deposition of a witness, the Court must be guided by the latter and not the former.<sup>2</sup> In cases governed by this rule, there must be either one or two records of evidence. If it is on record it must be in Judge's *own handwriting*; if otherwise, there must be a memorandum of evidence.<sup>3</sup>

**3. Effect of non-compliance.** — Failure to make a memorandum of evidence does not vitiate the proceedings if evidence is taken down *in the language* in which it is given.<sup>1</sup>

**O. 18 R. 9**

**R. 9.** [S. 185.] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

[1877, S. 185; 1859, S. 172.]

**1. Applicability.** — This rule, corresponding to Section 185 of the Code of 1877, does not apply to enquiries under the Central Provinces Laws Act.<sup>1</sup>

**O. 18 R. 10**

**R. 10.** [S. 186.] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

[1877, S. 186; 1859, S. 172.]

**1. Scope of the Rule.** — This rule does not apply to Chartered High Courts: see Order 49 Rule 3.

**Note 2**

1. ('66) 6 Suth W R 112 (113).  
( '82) 1882 All W N 184 (184).
2. ('71) 15 Suth W R 375 (377).
3. ('29) AIR 1929 Cal 78 (79, 80) : 55 Cal 1084.  
(Dictation to typist — Memorandum of evidence is necessary.)  
( '73) 9 Bom H O R 307 (309, 310).  
( '68) 5 Bom H O R O C 68 (64).

( '86) 1886 Pun Re No. 45, page 85.

**Note 3**

1. ('68) 9 Suth W R Or 69 (69).

**Order 18 Rule 9 — Note 1**

1. See The Central Provinces Laws Act (XX of 1875), Section 11, inserted by Central Provinces Laws (Amendment) Act (II of 1879).

**R. 11. [S. 187.]** Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon. **O. 18 R. 11**

Questions objected to  
and allowed by Court.

objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

[1877, S. 187 ; 1859, S. 172.]

### Synopsis

#### 1. Scope and applicability | 2. Objection, when to be taken.

**1. Scope and applicability.** — This rule does not apply to Chartered High Courts : see Order 49 Rule 3. When a question put to a witness is objected to, the proper course for the Court is to allow the question to be recorded and then give its ruling whether such question is allowed or disallowed. It is improper for the Court to allow the question to be put to the witness subject to objection.<sup>1</sup>

**2. Objection, when to be taken.** — Objection as to admissibility of evidence has to be taken in the Court of first instance and if not so done, the Appellate Court will not entertain any such objection<sup>1</sup> and where evidence of doubtful *admissibility* has been loosely received, the Privy Council will deal with the case as it appears to it just and will not allow any mere technical objection to prevail as to its admissibility.<sup>2</sup> But an erroneous omission to object to irrelevant evidence will not make it relevant and will therefore be disregarded.<sup>3</sup>

**R. 12. [S. 188.]** The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination. **O. 18 R. 12**

Remarks on demeanour  
of witnesses.

thinks material respecting the demeanour of any witness while under examination.

[1877, S. 188; 1859, S. 172.]

**1. Remarks on demeanour.** — Under this rule, the Court may record such remarks about the demeanour of a witness as it thinks fit and the same cannot be expunged under the cloak of an amendment.<sup>1</sup> But where a witness stated his age to be 24 but the Judge made a note in his deposition that his age "appeared to be 18 or 19" it was held that the note could not be considered to be evidence in the case.<sup>2</sup> The Court's belief that the evidence is biased, is not a valid ground for refusing to record it.<sup>3</sup> The evidence of a defendant called to give evidence on the plaintiff's side, cannot be judged under different principles, merely because he is a defendant.<sup>4</sup>

#### Order 18 Rule 11 — Note 1

1. ('36) AIR 1936 Lah 183 (185).

#### Note 2

1. ('68) 10 Suth W R 90 (31).  
(1846) 4 Moo Ind App 259 (284, 285, 286) (P C).  
(1854-57) 6 Moo Ind App 292 (247, 248) (P C).  
(‘87) 11 Bom 320 (324).  
(‘63) 12 Suth W R Cr 13 (14).  
(‘69) 12 Suth W R Cr 244 (245).  
(‘12) 14 Ind Cas 589 (540) (Lah).  
(‘75) 24 Suth W R 296 (296).  
(‘16) AIR 1916 Mad 585 (586).  
(‘07) 34 Cal 1059 (1074) : 34 Ind App 194 (P C).  
(‘95) 5 Mad L Jour 81 (82).  
(‘74) 22 Suth W R 216 (218).

(‘04) 31 Cal 155 (157, 158).

(‘01) 28 Cal 142 (144, 146).

(‘26) AIR 1926 Cal 752 (754). (Final decision on objection must be recorded before Court proceeds to judgment.)

2. (1863) 13 Moo Ind App 519 (529) (P C).

3. (‘97) 19 All 76 (92) : 28 Ind App 106 (P C).

(‘96) 23 Cal 395 (398).

(‘99) 26 Cal 53 (56, 72).

#### Order 18 Rule 12 — Note 1

1. (‘22) AIR 1922 All 107 (110) : 44 All 401.  
2. (‘19) AIR 1919 Cal 502 (503).  
3. (‘28) AIR 1928 Nag 58 (60).  
4. (‘97) 2 Cal W N 99n.

O. 18 R. 13

**R. 13.** [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

**Memorandum of evidence  
in unappealable cases.**

[1877, S. 189; 1859, S. 172.]

**1. Scope of the Rule.** — A Judge is bound under this rule, to make a memorandum of the substance of what each witness deposes.<sup>1</sup> A short abstract of the whole evidence<sup>2</sup> or a mere reference to the evidence in the judgment<sup>3</sup> is not sufficient compliance with the rule.

This rule does not apply to Chartered High Courts: see O. 49 R. 3. As to the applicability of this rule to enquiries under various local or special enactments, see the undermentioned Acts.<sup>4</sup>

O. 18 R. 14

**R. 14.** [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

**Judge unable to make  
such memorandum to  
record reasons of his  
inability.**

(2) Every memorandum so made shall form part of the record.

[1877, S. 190; 1859, S. 172.]

#### Local Amendments

##### ODDH

In sub-rule (1), between the words "is" and "unable", insert "not authorized by the Chief Court to dictate and is".

##### RANGOON

In sub-rule (1) for the words "this Order" the word and figures "Rule 13" shall be substituted.

**1. Applicability.** — This rule does not apply to Chartered High Courts: see Order 49 Rule 3 (4).

#### Order 18 Rule 13 — Note 1

1. ('96) 1 Cal W N 229n (229n, 230n).
- ('21) AIR 1921 Cal 558 (558).
- ('16) AIR 1916 Mad 547 (548).
- ('38) AIR 1938 Pesh 46 (47). (Small cause suit.)
2. ('05) 9 Cal W N 418 (419).

('05) 9 Cal W N 420 (421).

3. ('38) AIR 1938 Pesh 46 (47).

4. The Orissa Tenancy Act (II of 1913), Sec. 198 (h); The O. P. Laws Act (XX of 1875), Sec. 11; The North-West Frontier Province Law and Justice Regulation (VII of 1901), Sec. 46 (2).

**R. 15. [S. 191.] (1) Where a Judge is prevented by death, O. 18 R. 15**

Power to deal with evidence taken before another Judge.

transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

[1877, S. 191.]

### Synopsis

1. Applicability.
2. Scope of the Rule.
3. Sub-rule (2).

### Other Topics (miscellaneous)

New plaintiff substituted — De novo trial. See Successor, when bound to hear arguments de novo. See Note 2.

**1. Applicability.** — This rule does not apply to the Chartered High Courts : see O. 49 R. 3.

**2. Scope of the Rule.** — Under Section 191 of the Code of 1882, as it stood before 1888, it was held that the successor of the Judge who was removed was bound to fix a date for the *entire* hearing and trial of the case before himself and that such trial should proceed in the ordinary way except that the parties would be allowed to use the evidence already taken as evidence in the case.<sup>1</sup> This view, however, was dissented from by a Full Bench in *Jadu Rai v. Kanizak Hussain*<sup>2</sup> and it was held that Section 191 empowered the Judge to make use of the materials collected by the predecessor as evidence in the case without being bound to fix a day for commencing the trial *de novo*. In order to give effect to this latter view, the old Section 191 was replaced by a new Section by Act VII of 1888, empowering the Judge to *proceed with the suit from the stage at which the predecessor left it*. That Section has been substantially re-enacted in this rule.

### Order 18 Rule 15 — Note 2

1. ('85) 8 All 85 (87).

('85) 7 All 857 (859, 860).

2. ('86) 8 All 576 (581, 600, 611) (F B).

See also the following cases under the previous Codes :

('74) 21 Suth W R 196 (198).

('70) 13 Suth W R 184 (185).

('70) 13 Suth W R 76 (77, 78).

('71) 15 Suth W R 848 (849). (Where such an agreement has been entered into the witnesses should not be re-examined without some good reason.)

(1864) 1 Suth W R 809 (811). (Do).

('66) 4 Bom H C R A C 98 (100, 101).

('87) 1887 All W N 13 (13). (Trial by Munsif completed except delivery of judgment — Transfer of suit by District Judge — Judgment delivered by Munsif who did not take evidence — Judgment must be set aside.)

('69) 8 Beng L R A C 105 (106). (Judge dying after hearing and deciding a case — Only record of decision being entry in Court order book — Co-ordinate Court cannot take up and re-hear the case but High Court will on ground of want of record of reasons for the decision, reverse the order and remand the case for rehearing.)

**O. 18 R. 15**  
**Notes 2-3**

It is not competent for any *co-ordinate Court* to hear the case under this rule.<sup>3</sup> Thus, an Additional Munsif has no jurisdiction to deliver judgment in a case in which the evidence was taken by the Principal Munsif.<sup>4</sup>

An *opinion* reduced to writing by a Judge but not pronounced by him is not a judgment, but a mere memorandum<sup>5</sup> and the successor is bound to hear arguments or give the parties an opportunity of being heard before the judgment is given.<sup>6</sup>

Where a *new* plaintiff is added after the removal of the predecessor, this rule has no application and the successor is bound to grant a *de novo* trial.<sup>7</sup>

**3. Sub-rule (2).** — See the undermentioned cases.<sup>1</sup>

**O. 18 R. 16**

**R. 16.** [S. 192.] (1) Where a witness is about to leave the

Power to examine witness immediately.

jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

[ 1877, S. 192 ; 1859, S. 173.]

*Synopsis*

**1. Applicability of the Rule.**

**2. Scope of the Rule.**

**1. Applicability of the Rule.** — This rule does not apply to Chartered High Courts : see Order 49 Rule 3.

**2. Scope of the Rule.** — This rule provides for the *de bene esse* examination of a witness about to leave the jurisdiction of the Court.<sup>1</sup>

The evidence taken under this rule should be *signed* by the witness after being read over to him.

3. ('69) 8 Beng L R A O 105 (106).

4. ('87) 1887 All W N 13 (13).

5. ('68) 9 Suth W R 1 (5, 30).

('69) 12 Suth W R 254 (254).

6. ('86) 1886 Pun Re No. 110, p. 261.

('04) 1904 Pun Re No. 91, p. 345.

('07) 4 Low Bur Rul 256 (258, 260, 261).

('05) 1905 Pun Re No. 8, p. 19.

('24) AIR 1924 Lah 107 (108) : 4 Lah 864.

('17) AIR 1917 Lah 306 (307) : 1917 Pun Re No. 14.  
[But see ('12) 17 Ind Cas 278 (279) (Mad).]

7. ('11) 9 Ind Cas 254 (254) (Mad).

**Note 3**

1. ('06) 10 Cal W N 12 (13).

('02) 26 Mad 595 (596).

**Order 18 Rule 16 — Note 2**

1. ('70) 5 Beng L R O G 252 (253). (Such examination must be taken by Court and not under commission.)



# **R. 17. [S. 193.]** The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit. **O. 18 R. 17**

Court may recall and examine witness.

the Court thinks fit.

**1. Scope of the Rule.**— This rule provides for the recalling of witnesses after their examination has once been finished; but a witness examined by the plaintiff cannot be recalled as witness on the *defendant's* side without the leave of the Court.<sup>1</sup> Nor can a witness dispensed with by the plaintiff be recalled under this rule.<sup>2</sup>

# **R. 18. [New.]** The Court may at any stage of a suit inspect any property or thing concerning which any question may arise. **O. 18 R. 18**

Power of Court to inspect.

**1. Scope of the Rule.**— This rule enables the Court to inspect any property or thing though it may issue a commission for that purpose.<sup>1</sup> The object of this provision is to enable the tribunal to understand questions that are being raised and to follow and apply the evidence.<sup>2</sup> But a judgment should not be based solely on the basis of such personal local inspection.<sup>3</sup> So also, a Judge is not entitled to use the impression formed by him from the local inspection to contradict a witness<sup>4</sup> or to decide whether the plaintiff's evidence or the defendant's evidence is true.<sup>5</sup> A Judge is not entitled to substitute his own view formed as a result of local inspection, for the evidence in the case.<sup>6</sup> Though the Code nowhere lays down that it is obligatory on the Judge to record the result of the local enquiry,<sup>7</sup> yet it is desirable that the result of such inspection should be recorded in the proceedings and not left for notice till judgment.<sup>8</sup>

[See also ('92) AIR 1932 Bom 405 (405). (It should ordinarily be held in Court and preferably before the Judge who is ultimately to hear and decide suit.)]

## **Order 18 Rule 17 — Note 1**

1. (1863) 2 Ind Jur (N s) 160.
2. ('71) 15 Suth W R 348 (349).

## **Order 18 Rule 18 — Note 1**

1. ('21) AIR 1921 Mad 328 (323) : 44 Mad 640. ('97) 1 Cal W N 682 (685).
2. ('20) AIR 1920 Pat 788 (739). ('31) AIR 1931 Mad 531 (532). (1901) 1 Ch 135 (139), London G. O. Co. v. Lavell. ('19) AIR 1919 Pat 517 (518).
3. ('31) AIR 1931 Mad 531 (532). ('23) AIR 1923 Lah 546 (548). ('30) AIR 1930 Nag 40 (41). ('29) AIR 1929 All 116 (117). ('15) AIR 1915 Mad 1214 (1214) : 39 Mad 501. ('14) AIR 1914 All 4 (4). (Judgment solely relying on the inspection note of the predecessor.) ('30) AIR 1930 Lah 152 (152). ('19) AIR 1919 Pat 517 (519). ('39) 2 Mad L Jour 284 (286). (No notes of inspection made — Decision of Judge arrived at

without putting points observed by him to the parties and eliciting their answers cannot be upheld.)

- ('39) AIR 1939 Mad 61 (64). (Finding based mainly on local inspection not binding in second appeal.)
- ('37) AIR 1937 Pat 333 (334). ('38) AIR 1938 Pat 288 (289). ('35) AIR 1935 Rang 129 (129).
4. ('37) AIR 1937 Pat 333 (334).
  5. ('35) AIR 1935 Pat 457 (457).
  6. ('37) AIR 1937 Pat 333 (334).
  6. ('35) AIR 1935 Pat 457 (457).
  7. ('38) AIR 1938 Pat 288 (289).
  7. ('25) AIR 1925 Cal 170 (170, 171). ('11) 10 Ind Cas 914 (916) : 35 Bom 317. ('22) 65 Ind Cas 601 (602) (Cal).
  8. ('10) 8 Ind 939 (941) : 4 Sind L R 180. ('22) 65 Ind Cas 601 (602) (Cal).
  9. ('06) 33 Cal 133 (135).
  10. ('12) 14 Ind Cas 377 (378, 379) (Cal).
  11. ('14) 24 Ind Cas 618 (620) (Cal).
  12. ('82) 9 Cal 363 (365, 366).
  13. ('16) AIR 1916 Pat 334 (335).
- [See ('26) AIR 1926 Cal 660 (660).]  
[See also ('06) 30 Bom 109 (112). (Local inspection by consent of parties.)]

**O. 18 R. 18**  
**Note 1**

A Munsif is not bound to get the sanction of the District Judge before he makes an inspection. Sanction is, however, necessary for the levy of money for the expenses of such inspection.<sup>9</sup>

Where, at the instance of the plaintiff, a Munsif held a local inspection and, in the course thereof, at the instance of both the parties, he examined a person whose statements he used as confirming his impression formed independently of them, it was held that the parties could not turn round and say that the Munsif ought not to have used those statements.<sup>10</sup> But, it is not a justifiable procedure for a Judge at such local inspection to welcome the presence of crowds of anonymous villagers and indulge in informal inquiries amongst the people in those crowds for the purpose of guidance in deciding the rights of the parties.<sup>11</sup>

**Local Amendment**

**ALLAHABAD**

Add the following rule at the end of O. 18 :

**O. 18 R. 19**  
**(Allahabad)**

"19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings."

**ORDER XIX.**

**AFFIDAVITS**

**O. 19 R. 1**

**R. 1. [S. 194.]** Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

**Power to order any point to be proved by affidavit.**

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

[1877, S. 194; *Cf.* R. S. C., O. 37 R. 1. *See* O. 11.]

**Synopsis**

1. Affidavits, essentials of.
2. Stamp duty, if necessary.
3. Court-fee, if necessary.
4. Cross-examination of deponent of affidavit.

5. Agreement to take evidence by affidavit.
6. Necessity for affidavits on matters of record or questions of law.
7. Applicability.

9. ('14) AIR 1914 Mad 640 (640).

10. ('18) AIR 1918 Pat 688 (684).

[*See also* ('28) AIR 1928 All 497 (498, 499).]

11. ('39) AIR 1939 Mad 61 (64). (Judge not

to convert himself into an unofficial investigator and inquire of all and sundry regarding their views on the rights of the parties with the object of founding a judgment on what he has heard.)

**1. Affidavits, essentials of.** — An affidavit is a declaration as to facts, made in writing and sworn before a person having authority to administer an oath.<sup>1</sup> The officer authorized must be *on duty* at the time when the oath is administered.<sup>2</sup> But the want of the seal of the Magistrate before whom it is sworn does not make it bad.<sup>3</sup> The deponent may, instead of signing his name, affix a mark or a stamp bearing his name.<sup>4</sup>

Under the rules of the Supreme Court in England as also under the Rules of Practice framed by the High Courts in India, every affidavit should be drawn up in the first person and divided into paragraphs consecutively numbered, each paragraph dealing with a specific portion of the subject as nearly as may be.<sup>5</sup> It should also state correctly the description, and true place of the abode of the deponent.<sup>6</sup> Any person acquainted with the facts of the case may give the affidavit.<sup>7</sup> An affidavit should not contain any *inferences* but only *facts*.<sup>8</sup> The contents must be read over to the deponent in a language which he understands and vouched by him to be correct.<sup>9</sup>

**2. Stamp duty, if necessary.** — An affidavit for the immediate purpose of being used or filed in any Court or before the officer of any Court, is exempt from stamp duty.<sup>1</sup>

**3. Court-fee, if necessary.** — No court-fee is payable on an affidavit filed in Court. See also Court-fees Act, Section 19 (xiv). Under Chapter 12, Rule 3 of the Appellate Side Rules of the High Court of Calcutta, a court-fee of Rs. 2 is prescribed for an affidavit.<sup>1</sup>

**4. Cross-examination of deponent of affidavit.** — Where the adverse party *bona fide* desires the production of the deponent for cross-examination, the Court has no power, under this rule, to order that the affidavit may be read at the hearing on proof of certain facts.<sup>1</sup> The Court will refuse to act on an affidavit, when the deponent cannot be cross-examined.<sup>2</sup>

On principle, no cross-examination is allowed on affidavits in support of a petition for sanction under Section 195 of the Criminal Procedure Code, and sanction should be given when the affidavit discloses materials for a *prima facie* case.<sup>3</sup>

**5. Agreement to take evidence by affidavit.** — When parties agree to take evidence by affidavit, it does not preclude them from taking oral evidence for

**. Order 19 Rule 1 — Note 1**

1. ('10) 8 Ind Cas 897 (897, 898): 4 Sind L R 88. (A statement before a foreign Court authorized to administer oaths—Affidavit in this case was not sworn before the Sessions Judge when functioning as a Sessions Judge.)

See also S. 117, of the Presidency Towns Insolvency Act (III of 1909).

2. ('10) 8 Ind Cas 897 (898): 4 Sind L R 88.

3. ('27) AIR 1927 Lah 376 (377).

4. ('68) 9 Suth W R 357 (357).

('28) AIR 1928 Mad 175 (175, 176): 51 Mad 242.

5. See Madras Civil Rules of Practice, Rr. 37, 38.

6. See Madras Civil Rules of Practice, R. 38.

7. ('32) AIR 1932 Cal 160 (160): 58 Cal 1389.

('14) AIR 1914 All 197 (199): 36 All 13.

('18) AIR 1918 Cal 177 (178). (An affidavit as to what was argued in a case, sworn by a person who did not know the language in which the argument was made, is worthless.)

8. ('04) 6 Bom L R 704 (711).

9. ('14) AIR 1914 All 197 (199): 36 All 13.

**Note 2**

1. See Stamp Act (II of 1899), Sch 1, Art. 4. [See also ('88) 12 Bom 276 (277).]

**Note 3**

1. ('32) AIR 1932 Cal 160 (160): 58 Cal 1389.

**Note 4**

1. ('26) AIR 1926 All 161 (163). (Proof of documents by affidavit.)

('39) AIR 1939 Mad 927 (928): (1939) 2 Mad L Jour 399 (400).

[See also ('21) AIR 1921 Mad 381 (382). (Showing answers to interrogatories.)]

2. ('86) AIR 1986 All 671 (672). (Deponent not subjected to cross-examination — Affidavit is not evidence.)

[See ('10) 8 Ind Cas 897 (898): 4 Sind L R 88. (When the ruler of a Native State could not be compelled to appear for cross-examination his affidavit is worthless.)]

3. ('09) 4 Ind Cas 273 (274) (Bom).

**O. 19 R. 1**  
**Notes 6-7**

supplementing the same except where the agreement specifies that the evidence is upon affidavits *alone*.<sup>1</sup>

**6. Necessity for affidavits on matters of record or questions of law.**—An affidavit is of no weight when it is simply a party's "opinion" on a question of law.<sup>1</sup> It is superfluous when the facts deposed to therein are already a matter of record.<sup>2</sup>

**7. Applicability.**—This rule enables any Court to order that any fact may be proved by affidavit. Therefore, where on the day of the first hearing of a suit, the defendant does not appear though served, the execution of the document which is sued upon may be proved by an affidavit without calling a witness.<sup>1</sup> The power to take affidavits in proof of facts is extended to enquiries under the undermentioned local or special Acts.<sup>3</sup>

**O. 19 R. 2**

**R. 2. [S. 195.] (1)** Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance of deponent for cross-examination.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

[*Cf.* R. S. C., O. 38 R. 1. *See* Ss. 132, 133 and O. 11.]

### *Synopsis*

1. "May be given by affidavit."
2. Stay of execution.
3. Rule to show cause.

4. Application to declare a person a tout.
5. Affidavit of documents.

1. "**May be given by affidavit.**"—When evidence by affidavit is given, great care should be taken to see that they represent the real facts.<sup>1</sup> Thus, when contributories of a company in liquidation complain of misapplication of the funds by the liquidators, and apply to make an officer of the company liable for such misappropriation, they must definitely set out the sum misapplied and the grounds of the charge in the affidavit.<sup>2</sup> In motions to vary a commissioner's report affidavits should be filed only when the Court orders them or for advancing a special fact with the permission of the Court.<sup>3</sup> A party in a suit for dissolution of marriage is not entitled to give evidence by affidavit.<sup>4</sup>

Legal practitioners are officers of the Court and, when called upon to speak

#### **Note 5**

1. (1878) 47 L J Ch 536 (536), *Glossop v. Heston and Isleworth Local Board*.

#### **Note 6**

1. ('14) AIR 1914 Oudh 206 (207). (Whether a particular property is talukdari property.)
2. ('05) 32 Cal 146 (149).
- (‘08) 8 Cal L Jour 308 (312) : 31 Cal 146.

#### **Note 7**

1. ('83) AIR 1933 Mad 164 (165).
2. The Charitable and Religious Trusts Act (XIV of 1920), S. 11 (1).

(‘85) AIR 1935 Nag 125 (125). (C. P. Land Revenue Act.)

*See also* The Indian Elections Offences and Enquiries Act (XXXI to XL of 1920), S. 5; and the Presidency Towns Insolvency Act (III of 1909), S. 117.

#### **Order 19 Rule 2 — Note 1**

1. (1910) 129 L T 263, *Rammerns v. Cecil*. (*See* remarks of Eve, J.)
2. ('95) 19 Bom 88 (94).
3. ('75) 1 Bom 158 (160, 161).
4. ('91) 1891 Pun Re No. 18, p. 88.
- (‘85) 62 Cal 541 (545).

to facts relating to the case in which they are engaged, should not be asked to file affidavits. Their statements should be accepted.<sup>5</sup>

**O. 19 R. 2**  
**Notes 1-8**

**2. Stay of execution.** — An application for stay of execution should be supported by an affidavit.<sup>1</sup>

**3. Rule to show cause.** — An application for a rule to show cause must be supported by an affidavit.<sup>1</sup>

**4. Application to declare a person a tout.** — Though it is open to a Court in an application under the Legal Practitioners Act to act on an affidavit to declare a person a tout, it is desirable that Courts should hear oral evidence.<sup>1</sup>

**5. Affidavit of documents.** — The production of documents can be resisted by a party by claiming privilege and the grounds of privilege must be sufficiently disclosed in the affidavit of documents. If the affidavit of documents does not sufficiently set out the plea, a party may supplement the same by a separate affidavit.<sup>1</sup> Similarly, when a party claims to seal up a portion of a document on the ground that it is irrelevant to the issue, the affidavit of documents must clearly specify such portions and the grounds on which he claims to seal them.<sup>2</sup>

### R. 3. [S. 196.] (1) Affidavits shall be confined to such

**O. 19 R. 3**

**Matters to which affidavits shall be confined.**

facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

[1877, S. 196; R. S. C., O. 38 R. 3.]

### *Synopsis*

1. Statements as to belief must contain grounds thereof.
2. Scandalous and irrelevant matter.

**1. Statements as to belief must contain grounds thereof.** — The grounds of belief must be stated with sufficient clearness to enable a Court to judge whether it would be safe to act on the deponent's belief.<sup>1</sup> Thus, where in an interlocutory application for injunction to restrain the publication of a libel the affidavit in support

5. ('28) AIR 1928 Mad 690 (692).

#### **Note 2**

1. ('91) 15 Bom 536 (537).

#### **Note 3**

1. ('69) 12 Suth W R 419 (418).

('80) 5 Cal 605 (611).

#### **Note 4**

1. ('03) 26 Mad 596 (597).

#### **Note 5**

1. ('95) 22 Cal 105 (110).

2. ('93) 20 Cal 587 (589).

#### **Order 19 Rule 3 — Note 1**

1. (1900) 2 Ch 753 (754, 755), Re J. L. Young Manufacturing Co.

(1891) 2 Ch 269 (288), Bounard v. Perryman.

(1901) 1 K B 532 (535, 536), Lumley v. Osborne.

**O. 19 R. 3  
Notes 1-2**

of the application stated that the documents complained of were "to the best of his knowledge, information and belief, utterly untrue" but no grounds for his belief were shown, it was held insufficient.<sup>2</sup> An affidavit is defective if the deponent does not say which part is based on information and which on belief or if he does not state the grounds of his belief.<sup>3</sup> Though, ordinarily, evidence on information and belief is admissible in interlocutory applications intended to maintain things in *status quo* till the rights of the parties are decided, yet in England, if the application is only interlocutory in form but really aiming at finally disposing of the rights of the parties, it will be inadmissible.<sup>4</sup>

**2. Scandalous and irrelevant matter.** — If an affidavit contains scandalous and irrelevant allegations, it may be ordered to be taken off the file, or the particular passage may be expunged.<sup>1</sup>

**Local Amendments****ALLAHABAD**

Add the following Rules :

**O. 19 R. 4  
(Allahabad)**

"4. Affidavits shall be entitled, *In the Court of* . . . *at* . . . (naming such Court.) If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case, it shall be entitled *In the matter of the petition of*.

**O. 19 R. 5  
(Allahabad)**

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and as nearly as may be, shall be confined to a distinct portion of the subject.

**O. 19 R. 6  
(Allahabad)**

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly ; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

**O. 19 R. 7  
(Allahabad)**

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

**O. 19 R. 8  
(Allahabad)**

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say."

**O. 19 R. 9  
(Allahabad)**

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory

('07) 9 Bom L R 540 (542).

('10) 6 Ind Cas 666 (667) : 37 Cal 259.

('09) 4 Ind Cas 380 (382) (Cal).

('19) AIR 1919 Cal 970 (971).

('14) AIR 1914 Mad 366 (367).

('24) AIR 1924 Pat 312 (313).

('26) AIR 1926 Pat 54 (55).

[See also ('32) AIR 1932 Pat 217 (218). (Patna High Court Rules, Ch. 3, R. 12 — Affidavit by clerk of advocate for applicant for stay of execution — Swearing of facts on information received and believed to be true is good affidavit.)]

2. (1882) 20 Ch D 501 (508), In Quarty Hill Consolidated Gold mining, Co. v. Beall.

[See also ('32) AIR 1932 Cal 255 (256). (Affidavit

in contempt proceedings based on information — Source of information not given.)]

3. ('34) AIR 1934 Cal 694 (696) : 61 Cal 814.

4. (1878) 9 Ch D 259 (266, 269), Gilbert v. Endean.

**Note 2**

1. (1855) 3 W R (Eng) 688, Goddard v. Parr.

(1910) 1910 W N 128, In re Jessop. (A case in which the C. A. refused to strike out extracts from letters marked "without prejudice.")

(1878) 1878 W N 101 (101), Osmastan v. Association of Land Financiers.

(1881) 1881 W N 69 (69), Warner v. Mosses.

(1879) 11 Ch D 1 (12, 18), Cracknell v. Janson.

('09) 4 Ind Cas 380 (381) (Cal).

proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed," and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

**O. 19 R. 9**  
**(Allahabad)**

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

**O. 19 R. 10**  
**(Allahabad)**

11. Every person making an affidavit for use in a Civil Court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

**O. 19 R. 11**  
**(Allahabad)**

11A. Such identification may be made by a person :—

**O. 19 R. 11A**  
**(Allahabad)**

(a) personally acquainted with the person to be identified, or

(b) satisfied, from papers in that person's possession or otherwise, of his identity :

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified :—

#### FORM

I (name, address and description), declare that the person verifying this petition (or making this affidavit) and alleging himself to be *A. B.* has satisfied me (here state by what means, *e. g.*, from papers in his possession or otherwise) that he is *A. B.*

12. No verification of a petition and no affidavit purporting to have been made by a *pardnanshin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition, or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

**O. 19 R. 12**  
**(Allahabad)**

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

**O. 19 R. 13**  
**(Allahabad)**

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place

**O. 19 R. 14**  
**(Allahabad)**

**O. 19 R. 14** when and where it was made, and shall for the purpose of identification mark and  
**(Allahabad)** initial any exhibits referred to in the affidavit.

**O. 19 R. 15** 15. If it be found necessary to correct any clerical error in any affidavit, such  
**(Allahabad)** correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made."

# **RANGOON**

*Add the following Rules 4 to 12 :*

**O. 19 R. 4** "4. The officer administering the oath to the declarant of an affidavit should  
**(Rangoon)** Mode of taking oath or first make the declarant take the oath or affirmation. Then affirmation by declarant of he should make the declarant repeat the whole of the statement written in the affidavit as coming from him. Then the declarant should sign the affidavit. Lastly the officer administering the oath should sign and date it.

**O. 19 R. 5** 5. Every affidavit to be used in a Court of Justice should be entitled "In the  
**(Rangoon)** Form of affidavit. ——— Court of ——— at ———", naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled "In the case of ———." If there is no case in the Court, the affidavit should be entitled, "In the matter of the petition of."

**O. 19 R. 6** 6. Every affidavit containing any statement of facts shall be divided into para-  
**(Rangoon)** Mode of writing affidavits. graphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

**O. 19 R. 7** 7. Every person, other than a plaintiff or defendant in a suit in which the  
**(Rangoon)** Address of person making affidavit. application is made, making an affidavit, shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

**O. 19 R. 8** 8. When the declarant in any affidavit speaks to any fact within his own  
**(Rangoon)** Mode of speaking by declarant to fact within his own knowledge. knowledge, he must do so directly and positively, using the words "I affirm" (or 'make oath') 'and say'.

**O. 19 R. 9** 9. When the particular fact is not within the declarant's own knowledge, but  
**(Rangoon)** Mode of speaking by declarant to fact not within his own knowledge. is stated from information obtained from others, the declarant must use the expression "I am informed" (and, if such be the case, should add 'and verily believe it to be true') or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from *any* Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

**O. 19 R. 10** 10. Every person making an affidavit, if not personally known to the commis-  
**(Rangoon)** Identification of person making affidavit not personally known to commissioner. sioner, shall be identified to the commissioner by some person known to him, and the commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.



11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the commissioner to be illiterate or not fully to understand the contents of the affidavit, the commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained, and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the commissioner shall state in his certificate, the name of the interpreter, and the fact that he was sworn to interpret truly.

**O. 19 R. 11**  
(Rangoon).

12. In administering oaths and affirmations to declarants the commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

**O. 19 R. 12**  
(Rangoon)

## ORDER XX.

### JUDGMENT AND DECREE

**R. 1.** [S. 198.] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

**O. 20 R. 1**

[1877, S. 198 ; 1859, S. 183.]

a. The provisions of Rules 1, 3, 4 and 5 of this Order do not apply to the Chief Court of Oudh: *vide* the Oudh Chief Courts Act (U. P. IV of 1925), Section 16 (2).

### Local Amendment

#### MADRAS

The existing Rule 1 is re-numbered as sub-rule (1) and the following is added as sub-rule (2) :

"(2) The judgment may be pronounced by dictation to a shorthand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court."

### Synopsis

- |  |   |
|--|---|
| 1. Scope of the Order.                       | 6. When judgment may be pronounced.       |
| 2. Chartered High Courts.                    | 7. Holiday.                               |
| 3. "After the case has been heard."          | 8. "Or on some future day."               |
| 4. "Shall pronounce judgment in open Court." | 9. Notice to parties.                     |
| 5. "Judgment," meaning of.                   | 10. Non-compliance with Rules 1, 2 and 3. |

### Other Topics (miscellaneous)

Judgment on evidence taken before another Judge. See Note 3.  
"Pronounce," meaning. See Note 4.

**1. Scope of the Order.** — Rules 1 to 5 of this Order deal with judgments and Rules 6 to 19 with decrees. Rule 20 enacts that the parties shall be entitled to obtain certified copies of the judgment and decree on application made by them and at their

**O. 20 R. 1**  
**Notes 1-4**

expense. Rules 12 to 18 in particular deal with the classes of cases in which *preliminary decrees* may be passed. As to whether the list is exhaustive of the cases in which preliminary decrees can be passed, see Note 10 to Section 2, sub-section 2 and the undermentioned case.<sup>1</sup>

**2. Chartered High Courts.** — This rule does not apply to Chartered High Courts<sup>1</sup> or the Chief Court of Oudh<sup>2</sup> in the exercise of their ordinary or extraordinary original civil jurisdiction.

**3. "After the case has been heard."** — A judgment given without the Judge having heard the case fully, is a nullity.<sup>1</sup> Where, after arguments were partly heard, a party died and the Court, without bringing his legal representatives on the record pronounced judgment, it was held that the judgment was a nullity as the case had not been fully heard.<sup>2</sup> It is not legal for the Judge to appoint assessors to appraise the value of the evidence in the case and base his judgment on that opinion<sup>3</sup> or to base the judgment upon the unrecorded statements made at the Bar.<sup>4</sup> See also Section 33 *ante*.

As a general rule it is the Judge who heard the evidence that should give the judgment.<sup>5</sup> The following cases are, however, exceptions to the general rule —

- (1) Where the Judge is prevented by death, transfer, or other like cause from concluding the trial of the suit. In such cases the successor may deal with the evidence taken by the predecessor and proceed with the suit. See Order 18 Rule 15.
- (2) Under Rule 2, a Judge may *pronounce* a judgment written by his predecessor.
- (3) Where the evidence has been taken by a commissioner under the provisions of Order 26 Rules 1 and 4.

**4. "Shall pronounce judgment in open Court."** — Judgments should be pronounced in *open Court*.<sup>1</sup> The expression "open Court" refers to the *place* and *manner* of the pronouncement of the judgment.<sup>2</sup> The mere posting of a notice on the notice-board announcing the result of an appeal is not a sufficient compliance with the rule.<sup>3</sup> But it is not necessary that the whole of the judgment should be read out by the Judge in open Court.<sup>4</sup> Nor is a judgment of the Full Bench rendered invalid by its pronouncement at a time when one of the Judges of the Bench was absent on other duty.<sup>5</sup> Where a judgment was written and signed by the Judge who heard the case, but, at his request, was read out by his colleague, a Judge presiding in another Court, it was held that such a procedure is not invalid and will, in any case, be only an irregularity which is cured by Section 99 of the Code.<sup>6</sup>

**Order 20 Rule 1 — Note 1**

1. ('15) AIR 1915 Bom 42 (48) : 39 Bom 427.

**Note 2**

1. See Order 49 Rule 3.
- (29) AIR 1929 All 403 (403).
2. See the U P Act IV of 1925, S. 16 (2).

**Note 3**

1. [See ('33) AIR 1933 All 196 (196). (Common-law to write judgment before hearing evidence fully, held to be a gross irregularity and judgment was set aside in revision.)]
2. ('19) AIR 1919 Mad 685 (690).
3. ('18) 21 Ind Cas 427 (428) (All).
4. ('21) AIR 1921 Cal 558 (558).
5. ('86) 4 Bom H O R A C 98 (101, 102, 108).

('67) 7 Suth W R 441 (441, 445).<sup>1</sup>

**Note 4**

1. ('23) AIR 1923 Pat 129 (130) : 1 Pat 771.
- ('06) 30 Bom 455 (456, 457).
- [See also ('67) 9 Suth W R 1 (5).]
2. ('12) 13 Ind Cas 463 (464) (Mad).
3. ('21) AIR 1921 Mad 690 (690, 691).
4. ('26) 94 Ind Cas 121 (121) (Nag).
5. ('25) AIR 1925 Mad 58 (59).
- [See also ('11) 9 Ind Cas 596 (597) : 35 Mad 47. (Where to avoid the question of validity of a judgment a new Full Bench was constituted.)]
6. ('19) AIR 1919 Cal 799 (799).
- [See also ('19) AIR 1919 Cal 171 (172); ('17) AIR 1917 Cal 494 (495).]

That an order may be defied is no reason for refusing to make what in the circumstances is a just and proper order. If the execution of the order is likely to be attended with a breach of the peace, it is for the proper authorities to take such steps as they may deem necessary.<sup>7</sup>

**O. 20 R. 1**  
**Notes 4-9**

**5. "Judgment," meaning of.**— See Section 2, sub-section (9) and the case noted below.<sup>1</sup> As to what judgments should contain, see Rule 4, *infra*.

**6. When judgment may be pronounced.**— A judgment can be pronounced only after the case has been heard. Where a date has been fixed for the hearing of the suit or appeal, the Court cannot pronounce its judgment before such date.<sup>1</sup> The Court has, however, ample authority to direct successive trials of different issues, and to record *interlocutory judgments* thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case.<sup>2</sup> There is no objection to a Judge at the close of the hearing of a suit or appeal stating at once orally the judgment which he intends to record and deliver, and afterwards to pronounce in open Court his written judgment.<sup>3</sup> See also Notes 7, 8 and 9 below.

**7. Holiday.**— The delivery of a judgment or the doing of any judicial act on a holiday is not illegal,<sup>1</sup> though if a party is *injuriously affected* by such act he will be entitled to have the proceedings set aside on that ground.<sup>2</sup>

**8. "Or on some future day."**— The law pre-supposes a prompt and continuous trial and a judgment must be pronounced as quickly as possible.<sup>1</sup> A judgment delivered after an interval of seven months on an incomplete and imperfect record of evidence was held not to be a legal decision.<sup>2</sup>

**9. Notice to parties.**— Where a judgment is to be passed on a future day after the case has been heard, it is necessary that due notice thereof should be given to the parties or their pleaders.<sup>1</sup> It is not the duty of the parties to make enquiries as to when the judgment will be delivered; they are entitled to rely on the Court obeying the express provisions of law and giving notice to them or their pleaders of the date fixed for the delivery of judgment.<sup>2</sup> The object of the provision as to notice in this rule is to enable the parties to conform to the adjective law in respect of periods of limitation enacted or periods during which conditional payments are prescribed, as for instance, in matters of pre-emption or the making of final or preliminary decrees.<sup>3</sup> The posting of a notice on the notice-board<sup>4</sup> or the sending of a notice to the pleader of a party<sup>5</sup> or to the party<sup>6</sup> announcing the result of a case, is not a compliance with the rule. It has been held that where a judgment has been pronounced without previous notice to a party and, on a subsequent date, information as to the judgment is sent to the party or his pleader, the latter date must be taken to be the date of the delivery of the

7. ('85) AIR 1985 Mad 612 (615) : 59 Mad 36.

#### Note 5

1. ('12) 16 Ind Cas 45 (46) (Mad).

#### Note 6

1. ('04) 1904 Pun Re No. 61, page 175.
2. ('24) AIR 1924 Cal 467 (478).
3. ('69) 5 Mad H C R App 8 (8).

#### Note 7

1. ('12) 18 Ind Cas 468 (468) (Mad).
- ('07) 29 All 562 (568).
2. ('87) 9 All 366 (382).
- ('12) 18 Ind Cas 468 (465) (Mad).

#### Note 8

1. ('12) 15 Ind Cas 938 (939) : 8 Nag I, R 91.
- ('08) 35 Cal 756 (761) (FB). ('Ten months' delay strongly disapproved.)
2. ('12) 15 Ind Cas 938 (939) : 8 Nag I, R 91.

#### Note 9

1. ('17) AIR 1917 Low Bur 90 (90).
2. ('15) AIR 1915 Low Bur 108 (109).
3. ('83) AIR 1938 Nag 12 (18) : 28 Nag L R 308.
4. ('21) AIR 1921 Mad 690 (690).
5. ('27) AIR 1927 Lah 889 (889).
6. ('25) AIR 1925 All 293 (294) : 47 All 332.

**O. 20 R. 1**  
**Notes 9-10**

judgment.<sup>7</sup> But it is not necessary that the parties should be *present* at the time of the delivery of the judgment and a suit cannot be dismissed on the ground that the parties were not present at the time of the delivery of the judgment.<sup>8</sup> Nor is a Court bound to communicate the result of a case to the parties.<sup>9</sup>

Where there is nothing on the record to show that the notice was not given to the parties or their pleaders, it must be presumed that they did receive such notice.<sup>10</sup>

The provisions of this rule apply also to cases where a judgment is pronounced by a successor under the next rule.<sup>11</sup>

**10. Non-compliance with Rules 1, 2 and 3.**—A judgment not pronounced at all is not a valid judgment,<sup>1</sup> but the non-compliance with this rule and with Rr. 2 and 3 as to the *manner* in which it is to be pronounced, dated and signed is only an irregularity within the meaning of Section 99 of the Code and does not afford a ground for the reversal in appeal of the decree based on the judgment in the absence of prejudice.<sup>2</sup> A decree that follows such a judgment is valid until set aside on appeal.<sup>3</sup>

**O. 20 R. 2**

**Power to pronounce judgment written by Judge's predecessor.**

**R. 2. [S. 199.]** A Judge may pronounce a judgment written but not pronounced by his predecessor.

[1877, S. 200; 1859, S. 184.]

*Synopsis*

1. Rule does not apply to Chartered High Courts.
2. "Written but not pronounced by his predecessor."

3. "May pronounce."

4. Non-compliance with Rules 1, 2 and 3. See Note 10 to Rule 1.

*Other Topics (miscellaneous)*

Judgment dated and recorded by predecessor, when can be pronounced by successor. See Note 8.  
Rule, whether applies to an order. See Note 2.

Rule, whether mandatory. See Note 2.  
Successor, if can pronounce a separate judgment. See Note 3.

**1. Rule does not apply to Chartered High Courts.**—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction : see Order 49 Rule 3.

7. ('88) AIR 1938 Lah 707 (708). (Limitation for appeal runs from such date—AIR 1925 All 293, Followed.)

[See also ('85) AIR 1985 Lah 895 (896).]

8. ('01) 1901 Pun Ro No. 82, page 267.

('11) 11 Ind Cas 842 (842) (Lah).

9. ('86) AIR 1936 Lah 742 (743).

10. ('20) AIR 1920 Oudh 42 (42) : 22 Oudh Cas 379.

11. ('12) 17 Ind Cas 278 (279) (Mad).

**Note 10**

1. ('67) 9 Suth W R 1 (5, 30). (Written opinions sent to the Registrar by Judges are not judgments.) ('81) AIR 1931 Cal 164 (165).

[See ('85) AIR 1985 Lah 895 (896).]

2. ('20) AIR 1920 Cal 597 (599) : 46 Cal 978.

('34) AIR 1934 Lah 763 (764). (Omission to sign decretal order to be accidental and no prejudice.)

('33) AIR 1933 Nag (12, 13) : 28 Nag L R 308. (Judgment delivered not in the presence of, or without notice to parties is not nullity.)

Marsh, 327. (Judge making local inspection and pronouncing judgment on the spot—Only an irregularity.)

[See ('85) AIR 1985 Lah 895 (896). (Non-compliance is irregularity only so far as an appeal on merits is concerned—For purposes of limitation, non-compliance cannot be regarded as mere irregularity and limitation for appeal from decree will not run until the judgment is announced to the parties.)]

3. ('25) AIR 1925 All 298 (295) : 47 All 332.

**2. "Written but not pronounced by his predecessor."**—The object of the Legislature in enacting this rule is that the judgment should be that of the Judge *who heard the case* though it may be delivered by another; in order, therefore, that this rule may apply, it is necessary that the predecessor must have *written* the judgment.<sup>1</sup> There is a difference of opinion, however, as to whether it should also be *signed* by the predecessor. According to the High Court of Calcutta, the judgment has, under the provisions of Rule 3, *infra*, to be signed at the time of pronouncing it by the successor and therefore it is not necessary that the predecessor should have signed it.<sup>2</sup> The High Court of Patna has, on the other hand, expressed the view that Rule 3 applies only to cases where the judgment is delivered by the *very Judge who wrote it* and not to cases coming under Rule 2, where the judgment is written by one officer and is pronounced by another.<sup>3</sup> It seems to follow from this that the predecessor must have written and also signed the judgment.<sup>4</sup>

There is also a difference of opinion on the question whether it is necessary for the predecessor to have written the judgment at a time *when he had still jurisdiction over the suit*. The general consensus of opinion is that it is not.<sup>5</sup> Thus, when a District Judge retired from office on October 4, 1927, and the judgment was signed by him on October 9, 1927, and the same was pronounced in Court by his successor on October 17, 1927, it was held that the judgment was valid in law.<sup>6</sup> A contrary view has, however, been expressed in the undermentioned cases.<sup>7</sup>

Can a judgment be pronounced by the *predecessor* after his transfer or after he has left his judicial post? According to the Chief Court of the Punjab, there is no illegality in adopting such a course.<sup>8</sup> According to the High Court of Rangoon, the pronouncement of the judgment is a material part of the trial and cannot be performed by any person other than a *Judge of the Court in which the suit was tried*.<sup>9</sup> It would seem to follow from this that a Judge who has ceased to be the Judge of the Court in which the suit was tried cannot pronounce a judgment therein, though it had been written by himself.

**3. "May pronounce."**—The rule is not mandatory and the successor is not bound in all cases to pronounce the judgment written by the predecessor; he may, if he sees reason to do so, refuse to pronounce that judgment and may deliver a judgment according to his own view of the case.<sup>1</sup> Where a judgment is signed and dated by the

#### Order 20 Rule 2 — Note 2

1. ('85) 7 All 857 (859).
2. ('04) 81 Cal 1057 (1064).
3. ('20) AIR 1920 Pat 578 (581): 5 Pat L Jour 147.
4. ('85) 7 All 857 (859).
5. ('18) 19 Ind Cas 785 (786): 35 All 368.
6. ('04) 1904 All W N 131 (131).
7. ('20) AIR 1920 All 332 (340): 42 All 362. (Arguments heard by acting Subordinate Judge subsequently reverted as Munsif—Judgment written after reversion.)
8. ('06) 80 Bom 241 (243). (Judgment written by a Judge after his transfer.)
9. ('08) 85 Cal 756 (761). (Judgment after Judge had left the judicial post.)
10. ('07) 84 Cal 293 (295). (Judgment written when Judge was on leave.)
11. ('72) 8 Beng L R 98. (Judgment written by a Judge after he had been relieved from his office.)
12. ('72) 17 Suth W R 475 (476) (Do).
13. ('16) AIR 1916 Lah 78 (78): 1916 Pun Re No. 80 (Do).

14. ('12) 14 Ind Cas 371 (372) (Lah). (Order on a particular issue pronounced by successor after he ceased to have jurisdiction.)
15. ('97-01) 2 Upp Bur Rul 246. (Judgment written by a Judge after making over charge of his office.)
16. ('36) AIR 1936 Rang 147 (147): 14 Rang 136 (FB). (Judgment written by an ex-Judge after he has ceased to be a Judge is valid as a judgment.)
17. ('31) AIR 1931 All 90 (91): 53 All 183.
18. ('94) 7 C P L R 18 (19).
19. ('19) AIR 1919 Lah 265 (269): 1919 Pun Re No. 80. (Judgment written after transfer.)
20. ('16) AIR 1916 Lah 78 (78): 1916 Pun Re No. 80. (Judgment or order written and pronounced by Judge after he gave over charge of his office.)
21. ('24) AIR 1924 Rang 358 (359): 4 Upp Bur Rul 171.

#### Note 3

1. ('24) AIR 1924 Rang 358 (359): 4 Upp Bur Rul 171.
2. ('11) 8 Ind Cas 1096 (1096): 33 All 229.

**O. 20 R. 2** predecessor himself and there is nothing to show that it was not pronounced by him,  
**Notes 3-4** the successor cannot proceed to pronounce it for a second time.<sup>3</sup>

**4. Non-compliance with Rules 1, 2 and 3.** — See Note 10 to Rule 1 above.

**O. 20 R. 3**

**R. 3.** [S. 202.] The Judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

[1877, Ss. 201, 202 and 203; 1859, S. 185.]

#### Local Amendment

#### MADRAS

*Substitute the following for Rule 3 :*

"3. The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by Section 152 or on review, provided also that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge."

#### Synopsis

1. Rule does not apply to Chartered High Courts.
2. Applicability of the Rule.
3. "Shall not afterwards be altered or added to."
4. "Save as provided by Section 152 or on review."
5. Non-compliance with Rules 1 to 3.

**1. Rule does not apply to Chartered High Courts.** — This Rule does not apply to Chartered High Courts<sup>1</sup> or to the Chief Court of Oudh<sup>2</sup> in the exercise of the ordinary or extraordinary original civil jurisdiction.

But, the principle underlying the rule applies, *viz.*, that a decree once passed is immutable, subject to review or to any subsequent order or decree which may be passed on appeal and subject to the provisions of O. 20 R. 11, sub-rule (2).<sup>3</sup>

**2. Applicability of the Rule.** — There is a conflict of opinion as to whether this rule, in so far as it requires the Judge to sign and date the judgment at the time of pronouncing it, applies to cases where the successor pronounces the judgment of the predecessor under the provisions of this rule. See also Note 2 to Rule 2 above.

**3. "Shall not afterwards be altered or added to."** — The jurisdiction of the Court to reconsider its order continues so long as the order has not been perfected

(<sup>36</sup>) AIR 1936 Rang 147 (149):14 Rang 186 (FB).  
 (If he is in doubt as to the correctness of the judgment that has been written by his predecessor he ought either to act in accordance with the provisions of O. 18 R. 15, or to hear the case *de novo*.)

2. (<sup>20</sup>) AIR 1920 Lah 288 (288).

#### Order 20 Rule 3 — Note 1

1. See O. 49 R. 3.
2. See the U. P. Act IV of 1925, S. 16 (2).
3. (<sup>37</sup>) AIR 1937 Cal 222 (224). (Consent decree cannot be varied even by consent of parties: AIR 1916 Mad 604, Followed.)

under this Rule,<sup>1</sup> but ceases once the judgment is signed, except as provided by Section 152 or on review.<sup>2</sup> The Court cannot therefore, after the judgment is signed, alter it, or add to it, in any manner, except as provided by this rule, and this even with the consent of the parties.<sup>3</sup> Thus, it cannot alter the grounds on which the judgment proceeded,<sup>4</sup> or add findings on issues omitted to be decided by the judgment.<sup>5</sup> Nor can a successor alter the judgment which had been pronounced by his predecessor on any point.<sup>6</sup> Where a Judge pronounces a judgment but suspends the drawing up of the decree till a succession certificate is produced by the plaintiff, he cannot, on the plaintiff's failure to produce the certificate, cancel the judgment and deliver a different one inconsistent with the former.<sup>7</sup>

The words "after such *revision* as may be deemed necessary" in the rule as substituted by the High Court of Madras, do not authorise the Judge to revise the transcript and to substitute fresh words for the words originally dictated; they do not contemplate a revision of the *effective part* of the judgment but should be of the nature referred to in Section 152, and one relating to clerical and arithmetical mistakes arising from any accidental slip or omission.<sup>8</sup>

Where, on an application to set aside an execution sale, a conditional order is passed providing that the sale would be set aside if the decretal amount is paid within a certain date and that otherwise, the application would stand dismissed, the order is final in itself and no further reference to the Court is necessary for the purpose of implementing it. Hence, after such an order is passed, the Court has no jurisdiction to alter the order except on review.<sup>9</sup> See also Notes to Section 148 *ante*.

**4. "Save as provided by Section 152 or on review."**—This rule recognises two exceptions to the general rule that a Judge cannot, after he has once signed the judgment, reconsider the matter over again—

(1) Under Section 152 of the Code, *clerical or arithmetical mistakes in judgments, decrees or orders or errors due to accidental slips or omissions* can be corrected by the Court.<sup>1</sup> See also Note 2 to Section 152.

(2) Under O. 47 R. 1 the Court may grant a review of the judgment where the conditions of that rule are satisfied. See Order 47 Rule 1.<sup>2</sup>

### Note 3

1. ('09) 4 Ind Cas 441 (442) (Cal).

2. ('19) 20 Ind Cas 3 (5) (Lah).

('38) AIR 1933 Oudh 385 (386). (Order setting aside ex parte decree is judgment and cannot be set aside save under S. 152 or on review.)

('38) AIR 1933 Oudh 241 (242): 8 Luck 502. (Order of Sub-Judge in appeal allowing plaintiff to amend plaint on payment of deficit court-fee and costs—Court has no power to further extend time.)

('24) AIR 1924 Pat 696 (697).

('31) 8 Oudh W N 1288 (1289, 1240). (No clerical or arithmetical mistake, etc.—Judgment cannot be altered except by review.)

('30) AIR 1939 Cal 732 (733): 43 Cal W N 1148 (1149). (Judgment setting aside ex parte small cause decree, delivered and signed—Finding that claim in that suit not proved to be true—Subsequent order restoring that suit to file for trial on merits is without jurisdiction.)

3. (1900) 24 Mad 1 (10, 11, 13): 27 Ind App 197 (PC).

('25) AIR 1925 Mad 457 (458, 459).

4. ('67) 7 Suth W R 286 (287).

5. ('02) 4 Bom L R 129 (132).

6. ('89) 16 Cal 749 (752): 16 Ind App 104 (PC).

('25) AIR 1925 Pat 47 (47, 48): 3 Pat 654.

[But see ('18) AIR 1918 Low Bur 7 (8).]

7. ('09) 31 All 153 (155).

8. ('29) AIR 1923 Mad 663 (664).

9. ('39) AIR 1939 Cal 581 (581): 1 L R (1939) 1 Cal 468.

### Note 4

1. See Note 3 to S. 152.

('08) 1908 Pun L R No. 40.

[See also ('99) 2 Oudh Cas 235 (237, 238).

('07) 6 Cal L Jour 22 (24, 25)]

2. ('10) 5 Ind Cas 443 (444): 13 Oudh Cas 28.

('31) 136 Ind Cas 253 (254) (Oudh).

('81) 1881 All W N 57 (57).

('81) 1881 All W N 95 (95): 3 All 846.

**O. 20 R. 3**  
**Notes 4-5**

It has been held in the undermentioned cases<sup>3</sup> that where a Court has passed an order under a misapprehension of facts, it is open to it under its inherent powers to set aside such order when the true facts are brought to light and that this rule has no application to such cases.

As to whether and how far questions decided by an order of remand can be re-opened at the hearing after return of the findings after remand, see Rules 23 and 26 of Order 41.

**5. Non-compliance with Rules 1 to 3.** — The failure to date an order is no doubt an irregularity but it does not invalidate the order and does not prevent it from having a legal operation from the date on which it is made; the date can be proved by other evidence.<sup>1</sup> Similarly, it has been held that an accidental omission to *sign* an order is only an irregularity.<sup>2</sup> See also Note 10 to Rule 1.

**O. 20 R. 4**

**R. 4.** [S. 203.] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of Small  
Cause Courts.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other  
Courts.

[1877, Ss. 201, 202, 203; 1859, S. 185.]

*Synopsis*

1. Rule does not apply to Chartered High Courts.
2. "Judgment," meaning of. See Section 2, sub-section (9).
3. Object of judgments.
4. Personal knowledge.

5. Appreciation of evidence.
6. Contents of judgments.
7. Construction of judgments.
8. Judgments of Small Cause Courts.
9. Other judgments.

*Other Topics (miscellaneous)*

Judgment adopting reasons of analogous judgment. See Note 9.

"Need not contain." See Note 8.

On what materials the judgment is to be based. See Note 5.

Oral testimony, weight of — Considerations. See Note 5.

Unsatisfactory and unintelligible judgment. See Note 6.

**1. Rule does not apply to Chartered High Courts.** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary *original civil jurisdiction*: see O. 49 R. 3. It has accordingly been held by the High Court of Bombay that though in an ordinary case a Judge in the exercise of such jurisdiction should give his reasons for his decision, the absence of reasons would not detract from the legal validity of the decision.<sup>1</sup> The rule would, of course, apply to Chartered High Courts in the exercise of their *appellate* jurisdiction.<sup>2</sup> The rule does

3. ('34) AIR 1934 All 287 (288).

('34) AIR 1934 Nag 284 (285) : 31 Nag L R 53.

**Note 5**

1. ('91) 1 Mad L Jour 478 (479).

2. ('34) AIR 1934 Lah 763 (764). (Order in execution proceedings could have been appealed against notwithstanding the irregularity, and it could not be attacked in subsequent proceedings where it has not been appealed against.)

**Order 20 Rule 4 — Note 1**

1. ('27) AIR 1927 Bom 113 (115) : 51 Bom 287.

[See also ('33) AIR 1933 Mad 510 (511). ("Petition is struck off" is not legal disposal.)]

2. ('79) 2 Mad 67 (70) : 6 Ind App 170 (P C).

('89) 11 All 460 (469, 470) : 16 Ind App 205 (P C).

('66) 5 Suth W R 68 (66) (P C).

('69) 11 Suth W R 33 (33) (P C).



not apply to the Chief Court of Oudh in the exercise of its ordinary or extraordinary original civil jurisdiction.<sup>3</sup>

**O. 20 R. 4**  
**Notes 1-5**

**2. "Judgment," meaning of.** — See Section 2, sub-section (9), *ante*.

**3. Object of judgments.** — The object of insisting upon a judgment in respect of a decision of the Court is to enable an appellate or revisional Court to find out whether the Judge has applied his mind to the case, and whether the decree or order is according to law.

**4. Personal knowledge.** — A Judge cannot import his own private knowledge or opinion into a case but must decide it on the *evidence* before him.<sup>1</sup> If he intends to use his personal knowledge, he is bound to give evidence like any other witness.<sup>2</sup> A judgment based upon such knowledge without any reference to the evidence in the case is not one in accordance with law and is liable to be set aside.<sup>3</sup>

**5. Appreciation of evidence.** — It is a fundamental principle that the decision of a Court rests, not upon mere suspicion, or surmises or conjectures, but upon legal grounds established by *legal testimony*.<sup>1</sup> A judgment, therefore, based on the evidence of witnesses whom the opposite party had no opportunity to cross-examine,<sup>2</sup> or based on evidence recorded in a different suit,<sup>3</sup> is not a judgment that can be maintained.

An omission to make special mention of the oral evidence,<sup>4</sup> or to refer to every detail in the evidence,<sup>5</sup> does not warrant a presumption that the evidence has not been adequately or reasonably considered; but where a Judge makes only a colourable pretence of considering the evidence without really having done so, the judgment cannot be accepted as a proper one.<sup>6</sup>

On questions of fact, a judgment of the Court of the first instance must, except as provided by O. 18 R. 15, be based upon an examination of the evidence taken before the Judge himself, who delivers the judgment.<sup>7</sup> It must be based upon a consideration of the whole evidence on both sides and not merely upon some isolated piece of evidence.<sup>8</sup> In considering the evidence, the following points may be usefully mentioned —

(1) It is not the proper way of appreciating the evidence to approach it with prejudice and suspect everything and everybody.<sup>9</sup>

(2) The mere fact that a witness is related to a party or supports the party does not necessarily make his evidence interested or unreliable: nor does the rejection of a portion of his testimony vitiate the whole testimony on that ground alone.<sup>10</sup>

[See also ('84) AIR 1984 Cal 571 (577).]

3. See the U. P. Act IV of 1925, S. 16 (2).

#### Note 4

1. ('76) 25 Suth W R 152 (153).
- ('75) 3 Ind App 259 (286) (P O).
- (1865) 2 Suth W R Act X 29 (29).
- ('66) 11 Moo Ind App 213 (221) (P C).
- ('86) AIR 1986 Mad 278 (280). (Judge should not import into judgment facts coming to his knowledge in trial of other cases.)
2. (1841-46) 3 Moo Ind App 245 (260) (P C).
- ('67) 7 Suth W R 189 (189).
3. ('11) 10 Ind Cas 955 (955): 38 Cal 153.
- ('28) AIR 1928 Cal 311 (312).

#### Note 5

1. ('66) 11 Moo Ind App 28 (44) (P C).
- ('32) AIR 1932 P O 202 (207) (P O).
- ('26) AIR 1926 P O 97 (100): 29 Oudh Cas 805:

1 Luck 403 (P C). (Discussion about speculative theories built on medical books without any facts established by the evidence.)

- ('25) AIR 1925 Oudh 171 (172).
- ('10) 8 Ind Cas 353 (354): 1910 Pun Re No. 93.
- ('13) 21 Ind Cas 413 (414) (Cal).
- ('22) AIR 1922 Oudh 178 (183).
- ('04) 6 Bom L R 789 (789).
2. ('68) 9 Suth W R 587 (588).
3. ('25) AIR 1925 Mad 280 (280).
4. ('20) AIR 1920 Cal 869 (870).
5. ('31) AIR 1931 All 210 (210).
- ('28) AIR 1928 Oudh 480 (480).
- ('17) AIR 1917 Pat 288 (289).
6. ('17) AIR 1917 Pat 288 (289).
7. ('66) 4 Bom H O R A C 98 (101, 102).
8. ('66) 6 Suth W R 9 (10).
9. ('88) 15 Cal 684 (693, 697): 15 Ind App 81 (P C).
10. ('05) 32 Cal 84 (94, 95): 31 Ind App 160 (P C).

**O. 20 R. 4**  
**Notes 5-8**

(3) The fact that a witness had given evidence in other cases is not always a legitimate objection to his credibility though it may be a legitimate objection to a man's credit that he is a professional witness.<sup>11</sup>

(4) The testimony of a person who testifies that a certain conversation took place is of more value than that of one who says that it did not.<sup>12</sup>

(5) When the oral testimony adduced in an action is directly conflicting and irreconcilable, the only safe guide for the Judge is that afforded by the conduct of the parties and the contents of the documents produced.<sup>13</sup>

**6. Contents of judgments.** — It is the duty of the Court to adjudicate on a claim as brought.<sup>1</sup> A judgment is bad if it is based on a question neither raised in the written statement nor included in any issue,<sup>2</sup> though it is open to a Court to find that the case of a party lies somewhere between the cases of both the parties.<sup>3</sup>

It is the duty of the Courts to write their judgments without unnecessary prolixity and repetition of pleadings.<sup>4</sup> A judgment is unsatisfactory if it is a mere catalogue of documents without any consideration of their probative value,<sup>5</sup> or if it simply repeats the arguments of the counsel on both sides,<sup>6</sup> or if it is unintelligible.<sup>7</sup> It is not desirable that Judges should make remarks against the character of a person who is neither a party nor a witness in the proceedings before them,<sup>8</sup> nor should they give findings on matters which are unnecessary for the disposal of the suit.<sup>9</sup> The statements or their findings must be specific and precise.<sup>10</sup>

**7. Construction of judgments.** — As a general rule, where the language of a judgment is doubtful, the benefit of the doubt ought to go to the judgment-debtor.<sup>1</sup> All parts of the judgment should be read together and construed as a whole;<sup>2</sup> but where the previous part of the judgment cannot be reconciled with the conclusion ultimately drawn, the former should be rejected.<sup>3</sup>

**8. Judgments of Small Cause Courts.** — A judgment of a Small Cause Court need not set out the *reasons* for the decision,<sup>1</sup> though as a matter of practice it is usual

11. ('72) 18 Suth W R 285 (285) (P C).

12. (1841-46) 3 Moo Ind App 347 (357) (P C).

13. ('09) 1 Ind Cas 128 (132) : 31 All 116 : 86 Ind App 9 (P C).

**Note 6**

1. ('11) 9 Ind Cas 678 (674) : 1911 Pun Re No. 1. (Court cannot direct parties to alter their claims.) ('33) AIR 1933 Mad 510 (511). ("Petition is struck off" is not legal disposal.)

[See also ('76) 1 Mad 69 (77, 78) : 8 Ind App 154 (P C).]

2. ('12) 15 Ind Cas 159 (160) (Cal).

3. ('26) AIR 1926 Nag 48 (49).

('11) 12 Ind Cas 208 (208) (Mad).

('95) 17 All 280 (281).

4. ('19) AIR 1919 Mad 805 (307).

5. ('17) AIR 1917 Oudh 374 (374).

6. ('21) AIR 1921 Lah 119 (120) : 2 Lah 271.

7. ('22) AIR 1922 Lah 122 (122).

('14) AI R 1914 Cal 784 (784).

8. ('21) AIR 1921 Bom 394 (395) : 45 Bom 1127.

9. ('85) 11 Cal 544 (545).

('85) AIR 1935 Pat 351 (352). (In cases of alienation by a widow, the question of legal necessity and that relating to bona fide inquiry are separate; and if the parties or their pleaders press only one of the issues, the Court is not bound to decide

the other also.)

10. ('17) AIR 1917 All 212 (212).

**Note 7**

1. ('21) AIR 1921 Oudh 138 (138).

2. ('74) 22 Suth W R 202 (203).

[See also ('83) AIR 1933 Mad 25 (27). (Bona fide slips or errors of language should not be taken advantage of—Order of the Court must be understood in the way it was intended.)]

3. ('78) 19 Suth W R 104 (104, 105).

**Note 8**

1. ('07) 6 Cal L Jour 527 (530, 531).

('18) AIR 1918 Cal 252 (253).

('22) 67 Ind Cas 851 (851) (Cal).

('07) 31 Bom 314 (318).

('25) AIR 1925 Oudh 648 (648).

('26) 97 Ind Cas 538 (539) (Oudh).

('10) 7 Ind Cas 591 (591) : 4 Sind L R 17.

('22) AIR 1922 Mad 360 (360). (Dissenting from AIR 1920 Mad 310.)

('36) AIR 1936 Mad 918 (914).

('37) AIR 1937 Sind 243 (244).

[But see ('20) AIR 1920 Mad 310 (310).

('35) AIR 1935 Pat 452 (452). (In this case the Small Cause Court Judge had given reasons which were held to be arbitrary—High Court held that although a Small Cause Court Judge is not

to give reasons except in unimportant cases.<sup>2</sup> But the judgment must set out *the points for determination* and the decision on each of those points.<sup>3</sup> A mere statement such as "issue not proved, suit dismissed,"<sup>4</sup> or "the plaintiff fails, suit dismissed,"<sup>5</sup> or "claim decreed with costs,"<sup>6</sup> or a general statement after setting out the points "I find all the issues for the plaintiff" without dealing with each point separately,<sup>7</sup> is not a valid judgment.

The judgment must also be sufficiently intelligible,<sup>8</sup> and must indicate clearly that the Judge has applied his mind to the case and that the decree or order is according to law.<sup>9</sup> The test whether this rule has been used or abused lies, in fact, in the answer to the question whether the judgment has been made intelligible. When the Judge has to deal with a question of fact he need not give anything more than his actual decision on the question, namely his answer to it. But in cases involving difficult questions of law or mixed questions of fact and law, the Judge should set out so much of his reasoning as will make clear the road by which he has reached the conclusion.<sup>10</sup>

The mere fact that the judgment of a Small Cause Court does not set out the points for determination is, however, no ground for setting it aside, if otherwise the judgment is intelligible and the Judge has applied his mind to the case.<sup>11</sup>

**9. Other judgments.** — Clause 2 of this rule requires that a judgment of a Court other than a Small Cause Court, should contain —

- (1) a concise statement of the case,
- (2) the points for determination,
- (3) the decision thereon, and

bound to deal elaborately with the arguments etc. in the case, he is bound to state reasons for his decision and such reasons should not be arbitrary. The view that Small Cause Court is bound to state reasons for decision is directly against the words of this rule and hence not correct.])

2. ('29) AIR 1928 Rang 252 (252) : 1 Rang 274. ('33) AIR 1933 Sind 62 (65). (It is desirable that judgment should indicate that the Court has applied its mind to the evidence so that it may be of help to the High Court in revision.) ('25) AIR 1925 Oudh 283 (284). [See ('34) AIR 1934 Pat 243 (244).]
3. ('28) AIR 1928 All 688 (688). ('33) AIR 1933 Nag 272 (272) : 30 Nag L R 14. ('25) AIR 1925 Oudh 283 (284). ('11) 12 Ind Cas 740 (740) : 7 Nag L R 146. ('96) 6 Mad L Jour 50 (51). ('10) 6 Ind Cas 682 (683) (Mad). ('26) 99 Ind Cas 632 (633) (Lah). ('26) 95 Ind Cas 584 (584) (Lah). ('36) AIR 1936 Mad 913 (914). (A statement of issues only does not necessarily indicate the points to be determined although in some cases it may well do so. Each case must be judged by itself.)
4. ('28) 108 Ind Cas 386 (387) (Lah). ('18) 18 Ind Cas 216 (216) (Lah). ('99) 23 Bom 334 (337).
5. ('96) 6 Mad L Jour 50 (51).
6. ('25) AIR 1925 Oudh 283 (284).
7. ('25) AIR 1925 Mad 1229 (1229).
8. ('82) AIR 1982 Oudh 143 (144) : 7 Luck 526. ('22) AIR 1922 Pat 337 (337, 338).

- ('38) AIR 1938 Oudh 225 (226) : 14 Luck 211.
9. ('32) AIR 1932 Oudh 143 (144) : 7 Luck 526. ('33) AIR 1933 All 339 (340). ('33) AIR 1933 Sind 62 (65). ('28) 108 Ind Cas 386 (387) (Lah). ('30) AIR 1930 All 832 (832). ('13) 18 Ind Cas 216 (216) (Lah). ('01) 1901 Pun Re No. 57, page 180. ('91) 13 All 533 (536). ('99) 23 Bom 334 (336). ('28) AIR 1928 All 688 (688). (People must be satisfied that justice has been done.) ('32) AIR 1932 Cal 257 (258). ('05) 8 Oudh Cas 44 (44). ('11) 12 Ind Cas 740 (740) : 7 Nag L R 146. ('37) AIR 1937 Sind 243 (244). ('38) AIR 1938 Oudh 225 (226) : 14 Luck 211. ('36) AIR 1936 Mad 486 (487). (Where the judgment in a small cause suit shows that the Judge has applied his mind to the points for determination and he has also recorded his decisions thereon, there is sufficient compliance with the law.)
10. ('32) AIR 1932 Mad 336 (340, 343) : 55 Mad 671. ('95) 1895 Pun Re No 78, p. 373. ('96) 1896 Pun Re No. 41, p. 115. ('26) AIR 1926 Oudh 478 (479). [See also ('20) AIR 1920 Lah 50 (51). ('37) AIR 1937 Cal 308 (309). (Though evidence need not be recorded in *extenso*, Court should record summary of evidence on which it relies in its judgment.)]
11. ('17) AIR 1917 Low Bur 34 (34). ('92) 1892 All W N 160 (160).

**O. 20 R. 4**  
**Note 9**

(4) the reasons for such decision.<sup>1</sup>

In writing judgments in appealable cases, the provisions of this rule should be strictly followed.<sup>2</sup>

The judgment should state not merely the finding on the point raised, but must also state what the evidence consists of, and how it proves the plaintiff's or defendant's case.<sup>3</sup> A judgment unsupported by reasons cannot be accepted as legally binding on the parties.<sup>4</sup> But a judgment is not defective merely because specific issues were not framed, if all the points arising have in fact been determined.<sup>5</sup> Nor is a judgment bad, merely because it does not fully state the reasons for its conclusion but states that it adopts the reasons given in a judgment in a previous suit between the same parties, the evidence being almost the same.<sup>6</sup>

As to the judgments of Criminal Courts, see Sections 265 and 366 to 372 of the Criminal Procedure Code and the undermentioned cases.<sup>7</sup>

**O. 20 R. 5**

**R. 5. [S. 204.]** In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

[1877, S. 204; 1859, S. 186.]

### *Synopsis*

1. Chartered High Courts.
2. Decision on each issue necessary.
3. Object of judgment. See Note 8 to Rule 4.

### *Other Topics (miscellaneous)*

Appealable cases—Findings on unnecessary points.  
See Note 2.

"Sufficient for the decision of the suit." See Note 2.

### **Note 9**

1. ('05) 9 Cal W N 60 (66).
- ('33) AIR 1933 Sind 327 (327) : 27 Sind L R 194. (Judge should consider every objection and his grounds for allowing or dismissing it.)
- ('27) AIR 1927 Lah 418 (419).
- ('33) AIR 1933 Rang 174 (175). (Merely because a particular item of evidence is not discussed it does not mean that Judge has not considered it.)
- (1864) 1 Suth W R 214 (215). (Decision under S. 359 of Act VIII of 1859).
- ('71) 15 Suth W R 180 (181). (Do.)
- ('26) AIR 1926 Cal 1221 (1221). (The rule will apply to *ex parte* cases also.)
- [See ('34) AIR 1934 Mad 8 (8). (Order of a District Munsif under S. 78 of the Madras Village Courts Act is not governed by this Code and therefore order is not defective if reasons are not stated.)]
2. ('07) 1907 Pun L R No. 27.
3. (1865) 8 Suth W R 176 (177).
- [See also ('88) AIR 1988 Nag 204 (206). (Hotly contested suit—Trial Judge must deal with facts and evidence elaborately and arrive at proper findings on issues.)]

4. ('95) 19 Bom 323 (326).
- ('84) 8 Bom 368 (371).
- ('90) 14 Bom 452 (454).
- (1863) 9 Moo Ind App 492 (508) (PC).
- ('69) 12 Moo Ind App 495 (502) (PC).
- ('69) 12 Suth W R 254 (254). (Death of the Deputy Collector before giving his reasons for a decree.)
- ('70) 5 Mad H C R 174 (175).
- ('91) 1891 Bom P J 204 (205).
- ('96) 1896 Bom P J 260.
- ('88) AIR 1988 Pat 69 (70). (To state merely that Judge is in agreement with the finding of Court below is not sufficient judgment.)
- [See also ('90) 1890 Bom P J 280 (282).]
5. ('09) 4 Ind Cas 1124 (1124) (Mad).
- ('11) 10 Ind Cas 291 (291) (Mad).
6. ('12) 15 Ind Cas 434 (434) (Mad).
7. ('86) 18 Cal 110 (111).
- (1865) 11 Cal 449 (450).
- ('91) 15 Bom 11 (12, 13).
- ('98) 20 Cal 358 (357).
- ('95) 22 Cal 241 (243).
- ('96) 1 Cal W N 169 (170).
- ('97) 19 All 506 (508) (FB).

**1. Chartered High Courts.** — This rule does not apply to Chartered High Courts<sup>1</sup> or to the Chief Court of Oudh<sup>2</sup> in the exercise of the ordinary or extraordinary original civil jurisdiction.

**O. 20 R. 5  
Notes 1-3**

**2. Decision on each issue necessary.** — It is imperative upon the Court to pronounce its findings upon all such issues as may be necessary for the disposal of the suit.<sup>1</sup> There should be a finding on each issue *separately* and not on all issues together.<sup>2</sup> In appealable cases, it is always desirable that the Court should, as far as may be practicable, pronounce its opinion on all the important points which have been raised in the case (whether such findings are necessary or unnecessary for the decision of the case),<sup>3</sup> and this is ordinarily expected in cases where evidence has been allowed to be given on all the issues.<sup>4</sup> The concluding words of the rule do not preclude the Judge from giving his findings on all the issues, though some of them may be unnecessary for the decision of the case,<sup>5</sup> though such findings should not form part of the Court's decree.<sup>6</sup>

**3. Object of judgment.** — See Note 3 to Rule 4.

**R. 6. [S. 206.]** (1) The decree shall agree with the judgment;

**O. 20 R. 6**

**Contents of decree.**

it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) [S. 221.] The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

[1877, *Cf.* S. 257; 1859, S. 189; *Cf.* S. 206.]

**Order 20 Rule 5 — Note 1**

1. See Order 49 Rule 3.

2. See the U. P. Act (IV of 1825), S. 16 (2).

**Note 2**

1. ('81) 4 Mad 134 (136).

('04) 7 Oudh Cas 840 (841). (Rent Court.)

('98) 1 Oudh Cas 40 (41). (Do.)

2. ('12) 17 Ind Cas 881 (882) (Cal).

('86) 1886 Bom P J 71.

3. ('22) AIR 1922 P C 405 (408) : 50 Cal 243 : 50 Ind App 247 (P O).

('84) AIR 1934 Nag 78 (81) : 30 Nag L R 213.

('66) 5 Suth W R 63 (66).

('04) 26 All 234 (235).

('14) AIR 1914 Mad 685 (686).

('23) AIR 1923 Nag 322 (324).

('67) 8 Suth W N 481 (482).

('93-1900) 1893-1900 Low Bur Rul 1.

('85) 1885 Bom P J 71.

('26) AIR 1926 All 86 (39) : 48 All 44. (Court must

decide every issue though question raised in the issue was one which might have been disposed of on the allegations in the plaint itself.)

('20) AIR 1920 Pat 251 (252, 253).

('35) AIR 1935 Mad 282 (288) : 58 Mad 771.

[See also ('84) 10 Cal 1095 (1097).]

[But see ('85) 11 Cal 544 (545).]

4. ('66) 10 Moo Ind App 476 (488) (P C).

('89) 11 All 460 (470, 471) : 16 Ind App 205 (P C).

('18) AIR 1918 Mad 1135 (1137). (Confining its decision to one issue after evidence recorded on all issues is improper.)

('20) AIR 1920 Pat 271 (271, 272). (Finding obligatory when a specific issue is raised and evidence is adduced by both parties.)

5. ('82) 4 Mad 134 (136).

('07) 1907 Pun Re No. 121, p. 550.

('05) 9 Cal W N 60 (67, 69).

('90) 1890 Bom P J 13.

6. ('03) 26 All 234 (236).

**O. 20 R. 6**  
**Notes 1-3**

**LAHORE****Local Amendments**

After sub-rule (1) *add* the following :

"(1A). In addition to the particulars mentioned in clause (1), the decree shall contain the addresses of the plaintiff and the defendant as given in O. 7 R. 19 and O. 8 R. 11 or as subsequently altered under O. 7 R. 24 and O. 8 R. 12 respectively."

**MADRAS**

After sub-rule (2), the following be *inserted* as sub-rule (2A) :

"(2A). In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant."

**Synopsis**

- |  |   |
|--|---|
| 1. Chartered High Courts.              | 7. Decree not in accordance with the judgment.          |
| 2. Scope of the Rule.                  | 8. Set-off of costs towards sums admitted or found due. |
| 3. Form and contents of decree.        | 9. Appeal. See Note 19 to Section 152.                  |
| 4. Amendment of decree.                | 10. Revision.   |
| 5. Construction of decree.             |   |
| 6. Provision for costs — Sub-rule (2). |   |

**Other Topics (miscellaneous)**

Decree for accounts — Construction. See Note 5.

Decree in respect of a religious office — Construction. See Note 5.

Form of decrees in particular cases. See Note 3.

Prospective decree — Irregular. See Note 3.

Suit against legal representative. See Note 3.

Suit for ejectment — Applicability of doctrine of penalties. See Note 5.

**1. Chartered High Courts.** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction<sup>1</sup> (see Order 49 Rule 3).

As to the applicability of this rule to proceedings under certain Tenancy Acts, see the undermentioned Acts.<sup>2</sup>

**2. Scope of the Rule.** — It is imperative that the decree should agree with the judgment.<sup>1</sup> As has been seen in Note 6 to Section 152 *ante*, where the decree does not agree with the judgment, the Court has an inherent power to amend it so as to bring it into conformity with the judgment.<sup>2</sup> Where, however, the decree does agree with the judgment, it cannot subsequently be altered or added to by the Court passing it, except under Section 152 *ante*, or under Rule 11, *infra*.<sup>3</sup>

Where a decree or any part of a decree is passed by consent of parties, it should always so appear on the face of the decree when drawn up.<sup>4</sup>

Where a judgment is pronounced, the decree must automatically follow it and the Court has no power to direct that the preparation of the decree be stopped until the payment of deficit court-fees.<sup>5</sup>

**3. Form and contents of decree.** — Decrees drawn up in suits should contain all the particulars required by this rule<sup>1</sup> and should use the forms prescribed in

**Order 20 Rule 6 — Note 1**

1. ('88) 12 Bom 174 (185).

2. The Chota Nagpur Tenancy Act (VI of 1908), S. 261. (Sub-rules (2) and (3) of this rule apply.)  
The Agra Tenancy Act (III of 1926), Sch. 2.

**Note 2**

1. ('24) AIR 1924 All 818 (821) : 46 All 864.

2. [See also ('23) AIR 1923 Rang 113 (114) : 4 Upp Bur Rul 135.]]

3. ('04) 14 Mad L Jour 359 (367).

('85) 7 All 276 (280).

('10) 13 Oudh Cas 28 (80, 81).

[See also ('01) 4 Oudh Cas 82 (84).]

4. ('81) AIR 1981 P C 107 (109) : 27 Nag L R 139 (P C).

5. ('32) AIR 1932 Pat 228 (231) : 11 Pat 532.

**Note 3**

1. ('79) 2 All 342 (344).

Appendix D to Schedule I, with such variations as the circumstances of each case may require.<sup>3</sup> A decree properly prepared should indicate against whom, and in favour of which of the parties, it has been made and should state the names of all the persons against whom it has been passed and who will be affected thereby; where a defendant is not one of the persons against whom the decree is made, there is no decree against him.<sup>3</sup> If, during the pendency of the suit, the plaintiff dies and his minor son is allowed to represent him, the decree must describe the new plaintiff as "substituted plaintiff as representative of his father, the deceased plaintiff," and not as "the minor plaintiff."<sup>4</sup> In a suit against a legal representative, the decree should state that it is against the defendant in that character.<sup>5</sup> As to the form of decrees in various other kinds of suits, see the undermentioned cases.<sup>6</sup>

('17) AIR 1917 All 281 (288) : 39 All 13.

2. [See also ('73) 19 Suth W R 152 (153).]

3. ('17) AIR 1917 All 281 (283) : 39 All 13.

('71) 15 Suth W R 126 (126).

4. ('91) 18 Cal 111 (120) : 17 Ind App 173 (P C).

5. ('85) 8 Mad 208 (213).

('87) 10 Mad 316 (318, 319).

('89) 12 Mad 325 (329).

('04) 27 Mad 243 (248) (F B).

('87) 14 Cal 316 (320).

('84) 8 Bom 309 (310).

Marsh 611.

6. *Suit against deceased person's estate :*

('04) 29 Bom 96 (101).

*Suit against Hindu widow :*

('08) 25 All 330 (332).

('94) 18 Bom 679 (683).

('94) 18 Bom 452 (454).

('64) 1864 Suth W R 250 (250).

('68) 9 Suth W R 107 (109, 110).

('73) 20 Suth W R 187 (187).

('81) 6 Cal 479 (481).

*Suit against Mahomedan widow :*

('70) 5 Bom L R 570 (575) (PC).

*Suit against manager of family :*

('84) 7 Mad 201 (203).

('84) 7 Mad 328 (335).

('99) 22 Mad 166 (168).

('82) 4 Mad 96 (98) (FB).

*Suit against karnavan ;*

('84) 7 Mad 413 (416).

('87) 10 Mad 355 (356).

*Suit against Uralars :*

('86) 9 Mad 473 (474).

*Suit on Bill of Exchange :*

('89) 16 Cal 804 (806).

*Suit for contribution :*

('04) 31 Cal 597 (611, 612) : 31 Ind App 94 (PC).

(Joint decree not to be passed against all defendants.)

(1865) 3 Suth W R 170 (171).

('71) 15 Suth W R 52 (54).

('75) 24 Suth W R 250 (251).

('70) 14 Suth W R 143 (143).

('71) 15 Suth W R 192 (192). (In a suit against heirs inheriting equally, joint decree may be passed.)

('71) 16 Suth W R 78 (79).

('66) 8 Mad H O R 187 (188).

('73) 5 N W P H C R 215 (216, 217).

('67) 7 Suth W R 194 (194).

('67) 7 Suth W R 300 (301).

('67) 8 Suth W R 514 (515).

('69) 11 Suth W R 538 (539).

('75) 23 Suth W R 283 (283, 284).

('75) 23 Suth W R 421 (422).

('98) 25 Cal 565 (569, 570).

('08) 35 Cal 303 (309, 310) : 35 Ind App 32 (PC).

*Suit for damages :*

('68) 9 Suth W R 299 (299).

('68) 10 Suth W R 299 (299). (Court cannot direct the amount of damages to be assessed in execution.)

('70) 13 Suth W R 139 (140).

*Suit to set aside deed for fraud or undue influence :*

('74) 21 Suth W R 340 (342) : 1 Ind App 192 (PC).

('85) 11 Cal 61 (68) : 11 Ind App 211 (PC).

('81) 5 Bom 450 (460, 462, 463).

('08) 31 Mad 153 (155, 156).

*Suit for ejectment :*

('94) 18 Bom 107 (108).

('75) 23 Suth W R 399 (399).

('99) 26 Cal 639 (644, 645, 646).

*Suit relating to endowed property :*

(1900) 24 Bom 50 (54) : 26 Ind App 199 (PC).

('08) 81 Mad 47 (49).

('74) 21 Suth W R 334 (335).

*Suit relating to right of privacy :*

('04) 1 All L Jour 118 (120).

*Suit for possession in which enquiry is to be made as to value of improvements :*

('81) 3 Mad 382 (384) (FB). (Inquiry must be made before decree.)

*Suit for maintenance :*

(1900) 24 Bom 386 (390).

('70) 2 N W P H C R 170 (172).

('81) 6 Cal 631 (633).

('74) 6 N W P H C R 41 (43). (Prospective decree is irregular.)

('85) 9 Bom 108 (110).

('87) 9 All 33 (34).

('92) 19 Cal 139 (143) (FB).

('95) 22 Cal 903 (908).

('84) 7 Mad 80 (82).

('87) 10 Mad 283 (286) (FB).

('98) 22 Bom 669 (672).

('99) 26 Cal 441 (447, 448, 449).

('84) 6 All 632 (634).

**O. 20 R. 6**  
**Notes 3-4**

The decree must be quite *distinct* from the judgment<sup>7</sup> and must be self-contained and capable of execution without reference to any other documents.<sup>8</sup> A copy of the judgment with the schedule of costs appended thereto does not constitute a proper decree.<sup>9</sup>

In preparing a decree, Courts ought to clearly define and specify what their intentions are.<sup>10</sup> The parties and their pleaders should also see that the decrees are properly drawn up.<sup>11</sup>

Courts in India cannot make a decree of non-suit.<sup>12</sup> No decree need be drawn up in matters which are not civil suits,<sup>13</sup> or in cases of orders passed under Section 47 of the Code.<sup>14</sup> But the Court will not be deterred from making a decree by the mere fact that there may be difficulties in carrying it out<sup>15</sup> or because there is no specific provision for passing a decree in the particular case.<sup>16</sup>

In the case of appellate decrees, it will be always expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of reference to the superseded decree.<sup>17</sup>

**4. Amendment of decree.**— See Section 152 *ante*, and the undermentioned cases.<sup>1</sup>

*Suit by co-sharer or purchaser from co-sharer for possession :*

- ('90) 12 All 556 (558). (Suit for joint possession.)
- ('96) 20 Bom 627 (629).
- ('98) 15 All 412 (413). (Decree for joint possession may be given if the plaintiff asks for it and evidence shows that he is entitled to it.)
- ('96) 20 Bom 569 (570). (Exclusive possession can only be awarded on proof of exclusive title.)
- ('15) AIR 1915 Lah 310 (310).
- ('04) 26 All 588 (590, 591) (FB).
- ('05) 27 All 88 (90).
- ('05) 27 All 153 (155).
- ('05) 2 All L Jour 481 (482).
- ('94) 1894 All W N 166 (167).
- ('77) 1 Bom 95 (96).
- ('96) 20 Bom 467 (468).
- ('78) 2 Bom 676 (678).
- ('95) 19 Bom 36 (40).
- ('81) 5 Bom 505n (505n).
- ('82) 6 Bom 564 (566, 567).
- ('81) 5 Bom 499 (504).
- ('14) AIR 1914 All 210 (210).
- [See also ('71) 8 Bom H O R A C 98 (99).
- ('83) 7 Bom 225 (228).
- ('94) 18 Bom 452 (453).
- ('94) 18 Bom 679 (683).]
- 7. ('20) AIR 1920 Lah 395 (396) : 1 Lah 228. (Paragraph in judgment not in form of decrees is not decree.)
- 8. ('12) 15 Ind Cas 785 (788) (Cal).
- ('79) 4 Cal 69 (72).
- ('82) 8 Cal 975 (979).
- [See ('69) 12 Suth W R 99 (99).]
- 9. ('71) 15 Suth W R 826 (827).
- 10. ('68) 10 Suth W R 96 (97).
- ('67) 7 Suth W R 2 (3).
- ('81) 6 Cal 319 (323). (Material findings should be embodied in the decree.)
- ('75) 24 Suth W R 479 (479).
- ('14) AIR 1914 Cal 784 (784). (Meaning doubtful —Decree was set aside.)

- ('96) 18 All 344 (347). (However, in this case reference was made to pleadings in the suit to ascertain meaning of the decree.)
- ('68) 10 Suth W R 487 (488).
- [See also ('71) 15 Suth W R 154 (155).]
- 11. ('68) 10 Suth W R 96 (97).
- ('72) 18 Suth W R 303 (304).
- ('73) 20 Suth W R 111 (112).
- ('86) 8 All 492 (495).
- ('82) 8 Cal 687 (689).
- ('14) AIR 1914 Bom 23 (24) : 38 Bom 331.
- [See however ('28) AIR 1928 Rang 215 (216). (Decree not properly drawn up—Party not responsible.)]
- 12. ('87) 9 All 690 (697).
- 13. [See ('88) 11 Mad 26 (35) : 14 Ind App 160 (P C).]
- 14. ('02) 6 Cal W N 283 (284).
- 15. (1863) 1 Mad H C R 415 (417).
- 16. ('08) 30 All 290 (295, 296). (Dismissal of appeal under O. 41 R. 11 is a decree.)
- 17. ('72) 14 Moo Ind App 465 (492).

**Note 4**

- 1. *No amendment where decree is in accordance with judgment :*
- ('98) 20 All 337 (339). (Decree erroneous but in accordance with judgment.)
- ('82) 1882 All W N 72 (73).
- ('06) 1906 All W N 220 (221).
- No limitation for bringing decree in accordance with judgment :*
- ('85) 7 All 276 (280).
- Decree not agreeing with judgment — Person interested should apply for amendment :*
- ('15) AIR 1915 All 351 (352).
- '74) 21 Suth W R 41 (41). (Ought not to appeal.)
- '98) 1893 All W N 123 (124).
- '05) 27 All 485 (486, 488).
- Amendment should be after notice to parties—Decree affirmed on appeal—What decree should be amended :*



**5. Construction of decree.**—See Notes 76 and 77 to Section 47 *ante*, and the cases noted below.<sup>1</sup>

**6. Provision for costs—Sub-rule (2).**—Ordinarily the judgment does not set forth the actual amount of the costs awarded in the suit.<sup>1</sup> The *decree* must, however, state specifically the actual amount of costs, and by whom and in what proportions they are to be paid; and no costs can be recovered unless they are so mentioned.<sup>2</sup> A mere specification of the costs alone without any allotment of responsibility is not a sufficient compliance with the rule.<sup>3</sup>

('70) 14 *Suth W R* 26 (26). (Decree confirmed by High Court — Lower Court cannot make any alteration in it, not even to correct a clerical error.)

('97) 24 *Cal* 759 (762).

*What Court can amend :*

('76) 1 *Bom* 1 (6, 7).

('81) 1881 *All W N* 60 (61).

('69) 12 *Suth W R* 99 (99).

[See also ('33) *AIR* 1933 *Bom* 200 (202). (Owing to misdescription decree against a person with a wrong name given—Record can be amended in execution so as to show the correct description of the person against whom decree was passed.)]

#### Note 5

**1. Decree must be construed on its own terms :**

('87) 11 *Bom* 537 (539).

('32) *AIR* 1932 *Oudh* 77 (78) : 7 *Luck* 421. (Language of decree plain — Court cannot look at its judgment to interpret decree.)

('84) 6 *All* 30 (33).

(1865) 4 *Suth W R Misc* 20 (20).

('72) 17 *Suth W R* 19 (20).

('25) *AIR* 1925 *Pat* 291 (293).

('91) 18 *Cal* 108 (110) (P C).

('76) 1 *Bom* 158 (162).

('11) 12 *Ind Cas* 334 (335) (Mad). (Principle applies whether decree is declaratory or executory.)

*Where ambiguous reference may be made to the record :*

('91) 13 *All* 343 (344).

('94) 18 *Bom* 542 (545).

('92) 19 *Cal* 159 (172) : 18 *Ind App* 165 (P C). (When a decree simply dismissed a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided.)

('12) 13 *Ind Cas* 82 (83) (Cal).

('71) 15 *Suth W R* 530 (530).

('73) 19 *Suth W R* 343 (344).

('90) 18 *Mad* 318 (315).

('91) 14 *Mad* 29 (30, 32).

('98) 21 *Mad* 344 (361) : 25 *Ind App* 102 (P C).

('16) *AIR* 1916 *Mad* 520 (521). (Mortgage decree drawn up as money decree by mistake — Decree can be amended.)

('87) 11 *Bom* 177 (179).

*Construction should be in accordance with law :*

('98) 20 *All* 397 (399).

('70) 2 *N W P H C R* 70 (71). (Decree of one Court cannot effectually declare or confirm any charge or interest in immoveable property situate within the jurisdiction of another Court.)

('73) 19 *Suth W R* 251 (251, 252).

('98) 20 *All* 523 (527) (F B).

('87) 9 *All* 418 (419, 420). (A decree takes priority in respect of the date on which it was passed, and not in respect of the priority of the debt which it enforces.)

('91) 13 *All* 288 (289, 290) (F B).

*Declaratory decree — Executability :*

('88) 12 *Bom* 416 (418).

('78) 4 *Cal L Rep* 97 (99).

('92) 15 *Mad* 286 (287).

*Where the decree amounts to a money decree :*

('74) 21 *Suth W R* 150 (151, 152).

('81) 3 *All* 216 (219, 220, 221).

('80) 2 *All* 345 (348, 349).

('80) 2 *All* 342 (344).

('79) 5 *Cal L Rep* 176 (178). (Declaration that plaintiff is entitled to obtain possession on payment of a certain sum is not a money decree.)

*Miscellaneous :*

(1848) 3 *Moo Ind App* 175 (196, 197) (P C). (Decree for accounts is one affirming plaintiff's rights and for further enquiry into amount due.)

(1865) 4 *Suth W R Misc* 13 (13). (Ordinarily, Appellate Court will not differ from the interpretation placed by the lower Court.)

('76) 1 *Bom* 1 (6, 7). (Appellate Court can differ from lower Court's construction of decree.)

('88) 12 *Bom* 23 (25, 26). (Mention as to when a particular right is to become enforceable is not a condition precedent.)

('16) *AIR* 1916 *Mad* 795 (798). (Courts are not bound to construe a decree in the mode in which the parties intended it to operate.)

('86) 10 *Bom* 435 (437). (Doctrine of penalties does not apply to stipulations contained in decrees.)

('15) *AIR* 1915 *Cal* 8 (8). (Direction in a mortgage decree to realize balance personally does not come within Art. 182 (7), Limitation Act.)

('73) 19 *Suth W R* 41 (42) (P C).

('72) 17 *Suth W R* 175 (175).

('94) 17 *Mad* 343 (355, 356) : 21 *Ind App* 71 (P C). (Decree directing the appointment of a fit person to the religious office.)

#### Note 6

**1.** (1900) 24 *Mad* 25 (26). (Order determining costs must be treated as continuation or completion of the judgment.)

**2.** ('70) 13 *Suth W R* 23 (23, 24).

('83) *AIR* 1933 *Pat* 135 (138, 139). (Even when suit is dismissed, decree ought to be prepared showing amount of costs and giving directions in respect thereto even if each party has to bear its own costs.)

('70) 14 *Suth W R* 387 (388). (Costs are not consequential upon partial relief being granted in suit.)

**3.** ('71) 15 *Suth W R* 4 (6).

**O. 20.R. 6**  
**Notes 6-9**

But it is not necessary in an *appellate* decree to state specifically the sums which go to make up the costs of the first Court.<sup>4</sup>

Where, in a suit against a minor, the Court considers that the guardian should be personally ordered to pay the costs, it should be so stated in the decree or order.<sup>5</sup>

The usual practice is that unless the judgment awards separate costs to the several defendants in a suit, the decree should not award separate costs to them.<sup>6</sup>

See also Section 35, *ante*.

**7. Decree not in accordance with the judgment.** — Where the judgment awards costs without specifying the actual amount, the costs must be calculated according to law.<sup>1</sup> Where, therefore, the assessment of costs is not according to law,<sup>2</sup> or where the decree awards costs in a case in which the judgment is silent,<sup>3</sup> or where the decree awards interest at a higher rate than that specified in the judgment,<sup>4</sup> the decree to that extent is at variance with the judgment and can be amended under the provisions of Section 152 of the Code or under the Court's inherent powers. See Section 152, Note 6.

As to whether interest which is inadvertently omitted in the decree, though mentioned in the judgment, can be awarded in execution, see the case noted below.<sup>5</sup>

**8. Set-off of costs towards sums admitted or found due.** — Where in a suit by *A* against *B*, a decree is passed against *B* for payment of a certain sum of money to *A*, but *A* is ordered to pay the costs of *B*, *B* can set off the amount of costs against the amount payable by him to *A*.<sup>1</sup> It has been held that costs made payable under *different orders* in the same suit, may be set off against each other.<sup>2</sup>

A set-off cannot be allowed for costs not *actually awarded*<sup>3</sup> nor for sums of money which one party might get from the other on the latter's applying for delivery of possession.<sup>4</sup>

See also the undermentioned case.<sup>5</sup>

**9. Appeal.** — See Note 19 to Section 152, *ante*.

('72) 18 Suth W R 286 (286). (But the Court need not go into particulars, or append to the judgment a schedule setting forth different items of costs.)

4. ('74) 21 Suth W R 74 (75).

5. ('74) 21 Suth W R 298 (298).

('76) 25 Suth W R 316 (316). (No expression of opinion in the judgment can import any such liability for costs into the decree.)

6. ('35) AIR 1935 Pat 41 (41).

**Note 7**

1. ('04) 7 Oudh Cas 43 (45).

2. ('04) 7 Oudh Cas 43 (45).

('32) AIR 1932 All 937 (840) : 54 All 490. (Decree taxing them improperly — Decree differs from judgment.)

('01) 1901 All W N 94 (95). (Costs incorrectly assessed by the ministerial officers.)

3. ('94) 4 Mad L Jour 280 (281).

4. [See ('05) 27 All 485 (486).]

5. ('30) AIR 1930 Cal 349 (350).

**Note 8**

1. ('14) AIR 1914 Oudh 416 (417) : (Suit for sale on mortgage.)

('93) 17 Bom 82 (84). (Suit for redemption.)

('79) 4 Cal 742 (744). (Do.)

('84) 6 All 351 (357). (Pre-emption suit.)

('12) 15 Ind Cas 337 (338) : 34 All 596. (Do.)

('06) 28 All 676 (677, 678). (Do.)

(1900) 8 Oudh Cas 823 (824). (Do.)

('08) 6 Oudh Cas 23 (24). (Decree for possession on payment of a sum to defendant — Award of costs also to the plaintiff.)

2. ('83) 9 Cal 797 (801, 802) : 10 Ind App 118 (PC).

3. ('71) 16 Suth W R 308 (309).

4. ('07) 11 Cal W N lxiv.

5. ('30) AIR 1930 Bom 516 (517) : 55 Bom 377.

(Where the petitioning creditor's petition is ordered to be dismissed with costs, no set-off is permissible to the creditor against the money ordered to be paid to him at least to the extent of the lien for costs of the attorneys of the debtor.)

**10. Revision.** — See Note 20 to Section 152, Note 21 to Section 115, and also the undermentioned cases.<sup>1</sup>

**O. 20 R. 6.**  
**Note 10**

**R. 7. [S. 205.]** The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

**O. 20 R. 7**

[1877, Ss. 204, 205, 206; 1859, S. 189.]

### Synopsis

1. Chartered High Courts.

3. Limitation.

2. Date of the decree.

4. Registration Act, Section 77.

**1. Chartered High Courts.** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction,<sup>1</sup> but it has been held by the High Court of Madras<sup>2</sup> that even in cases of decrees passed on the original side of the High Court, the practice is to make the decree bear the same date as the judgment.

**2. Date of the decree.** — The date of the decree and the date of the *signing* of the decree are two different things. The date of the decree must correspond to the date on which the judgment is pronounced, no matter what the date of the signing of the decree may happen to be.<sup>1</sup> The reason is, that it is on the date of the judgment that the Court must be deemed to have expressed what the decree is.<sup>2</sup> The decree, therefore, though drawn up afterwards, *relates back* to<sup>3</sup> and operates from<sup>4</sup> the date of the judgment. Thus, where one of the plaintiffs dies subsequent to the date of delivery of judgment but before the decree is actually drawn up, this fact does not affect the validity of the decree.<sup>5</sup> Where, however, a Court gives a judgment but refuses or is unable to give a decree, till a condition is performed and draws up a decree after the performance of the condition, it must be held that the judgment given is only a provisional one which does not become operative until the decree is prepared, and that the latter date is the *date of the judgment* as well as of the *decree*.<sup>6</sup> See also the undermentioned cases.<sup>7</sup>

#### Note 10

1. ('08) 11 Oudh Cas 208 (210). (Can interfere when lower Court declined to correct clerical error.)
- ('94) 4 Mad L Jour 280 (281). (Misconstruction of a rule of practice is a ground for interference.)

#### Order 20 Rule 7 — Note 1

1. See Order 49 Rule 3.
2. ('13) 21 Ind Cas 545 (545) (Mad).

#### Note 2

1. ('80) AIR 1930 Rang 67 (68).
- ('16) AIR 1916 Cal 511 (512).
- ('96) 1 Cal W N 98 (98).
- ('84) 10 Cal 652 (659, 660).
- ('18) AIR 1918 Bom 217 (218) : 42 Bom 309.
- ('81) 7 Cal 547 (551) : 8 Ind App 159 (PC).
- ('86) 18 Cal 104 (106) (FB).
- ('90) 12 All 461 (468).
- ('99) 28 Bom 442 (444).

('95) 18 Mad 374 (376).

('22) AIR 1922 Nag 113 (113).

('05) 3 Low Bur Rul 62 (64) (FB).

('23) AIR 1923 Pat 129 (130) : 1 Pat 771.

('27) AIR 1927 Rang 335 (335). (A wrong entry of the date of signing of the decree cannot be the basis of a contention that time for redemption is not given in accordance with law.)

2. ('24) AIR 1924 Cal 1064 (1065).

3. ('90) 17 Cal 347 (357) : 16 Ind App 195 (PC).

('21) 65 Ind Cas 650 (652) (Cal).

4. ('05) 32 Cal 483 (491).

('91) 14 Mad 150 (152).

5. ('02) 6 Cal W N 196 (196).

6. ('16) AIR 1916 Sind 2 (3) : 9 Sind L R 171.

[See also ('05) 32 Cal 483 (491).

('85) 8 Mad 137 (139).

('79) 4 Cal 629 (632, 639).

('87) 14 Cal 50 (54).]

7. ('33) AIR 1933 Cal 239 (240). (Through mis-

**O. 20 R. 7**  
**Notes 3-4**

**3. Limitation.** — Section 12 of the Limitation Act provides that, in computing the period of limitation for *appeal* or for review, the time requisite for obtaining a copy of the decree shall be excluded. Suppose now that the decree is actually *signed* on a date subsequent to that on which the judgment is pronounced, and a party applies for copies of the decree and judgment after the date of the signing of the decree. Can the period between the pronouncing of the judgment and the signing of the decree be excluded in computing the period of limitation, in addition to the period actually taken in obtaining the copies? On this point there has been a conflict of opinion. According to the practice of the Calcutta High Court, such period should be excluded as being part of the time requisite for obtaining the copy.<sup>1</sup> This practice has been followed by the High Court of Patna.<sup>2</sup> All the other High Courts have, on the other hand, held that such period cannot be excluded in computing the period of limitation.<sup>3</sup> In *Pramathanath Roy v. William Arthur Lee*,<sup>4</sup> it was held by their Lordships of the Privy Council that no period can be regarded as requisite under the Limitation Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain an order, and that there is no warrant for the proposition that the time *actually consumed* in obtaining the decree must be deducted. Their Lordships referred to the Calcutta view but did not decide as to the correctness or otherwise thereof.

Section 12, sub-section 2 of the Limitation Act does not apply to applications for *execution* of a decree, and even according to the Calcutta<sup>5</sup> and Patna<sup>6</sup> High Courts, the period of limitation for an application for execution of a decree runs from the date of the judgment and not from the date on which the decree is drawn up and signed.

**4. Registration Act, Section 77.** — It has been held by the High Court of Madras<sup>1</sup> that for the purposes of Section 77 of the Registration Act the period of 30 days is to be reckoned not from the time when the judgment is pronounced, but from the time when the decree is actually drawn up and signed.

**Local Amendment**

**ALLAHABAD**

Add the following new Rule 7A :

"7A. A Court, other than a Court subordinate to the District Court exercising insolvency jurisdiction, passing an order under Section 47 or Section 144 of the Code of Civil Procedure or one against which an appeal is allowed by Section 104 or Rule 1

take of Court decree dated wrongly—Execution application in time from wrong date but barred from correct date—*Held*, execution is in time and act of Court should not prejudice a party.) ('85) AIR 1935 Cal 125 (126). (Decree not drawn up on non-judicial stamp paper — Non-judicial paper subsequently annexed defaced and names of parties and cause title of case put down—Decree is in order and can be executed.)

**Note 3**

1. ('86) 13 Cal 104 (107).
- ('72) 18 Suth W R 512 (512).
- ('05) 32 Cal 175 (177).
2. ('16) AIR 1916 Pat 267 (267) : 1 Pat L Jour 573 (FB).
- ('19) AIR 1919 Pat 506 (507).
3. ('90) 12 All 461 (468, 469, 474) (FB).
- ('88) AIR 1933 Nag 125 (127) : 29 Nag L R 220. (Dissenting from AIR 1924 Nag 271).
- ('99) 28 Bom 442 (446).
- ('95) 18 Mad 874 (876, 877).

('15) AIR 1915 Mad 808 (808). (Even though time was granted for payment of entire court-fees.)

(1900) 18 C P L R 78 (79, 80).

('26) AIR 1926 Nag 849 (849, 850) : 22 Nag L R 60. (Explaining AIR 1924 Nag 271).

('25) AIR 1925 Oudh 600 (601).

('05) 3 Low Bur Rul 62 (64, 65) (FB).

4. ('22) AIR 1922 P C 352 (353); 49 Ind App 307 : 49 Cal 999 (PC).

5. ('24) AIR 1924 Cal 351 (352).

('98) 25 Cal 109 (110).

('95) 1 Cal W N 93 (94).

('09) 3 Ind Cas 391 (392) (Cal).

('10) 5 Ind Cas 660 (662) (Cal). (Court has power to reconstruct a decree lost by fire.)

('18) 19 Ind Cas 410 (410) (Cal).

[See also ('17) AIR 1917 P C 85 (85) (PC). (A decision under S. 48, C P C.)]

6. ('20) AIR 1920 Pat 111 (111); 5 Pat L Jour 490.

**Note 4**

1. ('15) AIR 1915 Mad 865 (866) : 38 Mad 291.

**O. 20 R. 7A**  
**(Allahabad)**

of Order 43, or an order in any case, against which an appeal is allowed by law, shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties."

O. 20 R. 7A  
(Allahabad)

**R. 8.** [New.] Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

O. 20 R. 8

Procedure where Judge has vacated office before signing decree.

**1. Scope and applicability.** — This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction: see Order 49 Rule 3, clause 5.

Where the decree was imperfect, and the Judge who pronounced it had left the district and it was impossible to draw up a decree from the judgment, it was held in the undermentioned case<sup>1</sup> that there is no alternative but to order a new trial.

**R. 9.** [S. 207.] Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

O. 20 R. 9

Decree for recovery of immoveable property.

[1877, S. 207; 1859, S. 190.]

### Synopsis

1. Scope of the Rule. | 2. Decree for possession of land.

#### Other Topics (miscellaneous)

Decree discrepant in area and boundaries, whether invalid. See Note 1.

Decree for possession of village — What passes under. See Note 2.

**1. Scope of the Rule.** — In suits relating to immovable property the decree should contain a description of the property *sufficient to identify* the same, and where it can be identified by *boundaries* or by *survey numbers*, the decree should specify such boundaries or numbers. The reason is that, otherwise, the decree may in many cases become impossible of execution by reason of the indefiniteness of the property dealt with by it.<sup>1</sup>

#### Order 20 Rule 8 — Note 1

1. ('79) 19 Suth W R 267 (268).

#### Order 20 Rule 9 — Note 1

1. ('76) 25 Suth W R 39 (40).

('75) 23 Suth W R 285 (285).

('73) 19 Suth W R 81 (82).

('69) 12 Suth W R 99 (99). (Evidence cannot be taken in the execution department to ascertain what is decreed.)

('72) 18 Suth W R 34 (35).

('75) 24 Suth W R 479 (479).

('78) 4 Cal 69 (72).

('84) 6 All 30 (38).

**O. 20 R. 9**  
**Notes 1-2**

But the omission to comply with the strict letter of the rule does not render the decree invalid.<sup>2</sup> The Court can ascertain the subject upon which the decree operates, from the acts and conduct of the parties.<sup>3</sup>

**2. Decree for possession of land.** — A decree for possession of a village passes with it the village account books and other documents relating to the management of the village.<sup>1</sup> Similarly, it will pass with it any buildings or other constructions erected thereon<sup>2</sup> except where the defendant is not a trespasser and is entitled under law to remove the building.<sup>3</sup>

**O. 20 R. 10**

**R. 10.** [S. 208.] Where the suit is for moveable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

**Decree for delivery of moveable property.**

[1877, S. 208; 1859, S. 191.]

*Synopsis***1. Scope of the Rule. | 2. "Amount of money to be paid."**

**1. Scope of the Rule.** — A person entitled to the delivery of moveable property from another is not bound to sue for the *delivery of the property* itself; he may sue for the *value* thereof.<sup>1</sup> Even if he *does* sue for the delivery of the property, the decree need not always be for the delivery of the property in the first instance; the Court may, in proper cases, decree only the value of the property as damages.<sup>2</sup> Thus, where the defendant is not in possession of the property claimed, the Court need not decree delivery thereof but may pass a decree for the value of such property.<sup>3</sup> But where the Court considers it proper to direct a restoration of the property, the decree should also state the amount of money to be paid as an alternative if delivery cannot be had.<sup>4</sup>

The giving of the alternative remedy does not, however, give the decree-holder any option of refusing to take delivery of the property and of insisting upon the money portion of the decree; he cannot execute his decree without having recourse to the procedure prescribed by O. 21 R. 31.<sup>5</sup> Nor can the judgment-debtor claim any option

('68) 10 Suth W R 96 (97). (Decree for possession of a share of lands without specifying the share by boundaries is only a decree for an undivided share.)

[See ('73) 20 Suth W R 142 (142).]

2. ('81) 5 Bom 208 (213).

('05) 1905 Pun Re No. 74, p. 237. (Decreed as the property 'in suit' where plaint gives all the necessary details.)

('71) 16 Suth W R 171 (172). (Boundaries described in the plaint no longer in existence — Evidence may be taken to ascertain their former position.)

('99) 8 Cal W N 287n.

('68) 9 Suth W R 94 (96).

[See ('10) 8 Ind Cas 941 (942): 4 Sind L R 184.]

3. ('92) 19 Cal 812 (821, 822): 19 Ind App 69 (PC). ('74) 22 Suth WR 330 (331). (12 WR 99, Explained.)

('14) AIR 1914 Cal 775 (775).

('17) AIR 1917 Cal 407 (409). (There is no error in leaving the ascertainment of boundaries to be decided in execution proceedings.)

**Note 2**

1. ('87) 11 Bom 485 (487).

2. (1865) 2 Suth W R 123 (125).

('82) 8 Cal 582 (590, 591).

3. ('66) 6 Suth W R 228 (229) (FB).

('04) 27 Mad 211 (217).

**Order 20 Rule 10 — Note 1**

1. [See ('24) AIR 1924 Nag 176 (178).]

2. ('80) 1880 Pun Re No. 81, p. 189.

3. ('16) AI R 1916 Mad 814 (817): 39 Mad 1 (FB). ('99) 22 Mad 478 (480, 481).

4. ('71) 16 Suth W R 240 (243, 244).

[See ('80) 1880 Pun Re No. 81, p. 189.]

5. ('27) AIR 1927 Cal 652 (653): 55 Cal 26.

of either surrendering the property or paying the money decreed.<sup>6</sup>

The words "moveable property" in the rule mean *specific* moveable property such as is referred to in Articles 48 and 49 of the Limitation Act.<sup>7</sup> A suit for the recovery of a certain quantity of grain payable under a *karar* for maintenance is not one for specific moveable property within the meaning of this rule.<sup>8</sup>

No decree can be passed under this rule for delivery of property against *several defendants* jointly, unless there is a *combination* among them; if it is found that any one of them took possession of the property, the decree should be made against him only, and to the extent of the property taken by him.<sup>9</sup>

**2. "Amount of money to be paid."**—The money to be paid as an alternative is the value of the property together with damages for the time the plaintiff has been kept out of it.<sup>1</sup> Where the plaintiff valued the property claimed at Rs. 1360 and produced evidence to show that this was the value, but the defendant simply refused to accept the valuation and would not produce the articles, which he did not deny were in his possession, it was held that, under the circumstances, the valuation made by the plaintiff ought to be accepted by the Court.<sup>2</sup>

Where a decree is passed in terms of an award ordering delivery of moveable property, and a part of such property is lost subsequently before delivery, the decree cannot be modified by the Court by inserting in it an order to pay the value of the property so lost.<sup>3</sup>

If there is a dispute as to the property claimed the Court must, of course, determine it before passing the decree; it cannot leave the matter to be settled in *execution*.<sup>4</sup>

**R. 11. [S. 210.] (1)** Where and in so far as a decree is **O. 20 R. 11**

**Decree may direct payment by instalments.** for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

**Order, after decree, for payment by instalments.** (2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the

(85) AIR 1935 Cal 99 (51) : 61 Cal 711.

('08) 18 Mad L Jour 444 (444).

6. ('08) 18 Mad L Jour 444 (444).

7. ('99) 22 Mad 478 (481).

8. ('24) AIR 1924 Nag 176 (178).

9. ('09) 1 Ind Cas 205 (206, 207) (Cal).

**Note 2**

1. ('73) 19 Suth W R 123 (125).

('71) 16 Suth W R 240 (243, 244).

2. ('07) 1907 All W N 227 (227).

1 Strange 505 : 1 Sm L O 356 (1903) Edn : 43 Eng Rep 664, Armory v. Delamirio.

3. ('98) 17 Bom 657 (661).

4. ('75) 7 N W P H C R 75 (77).

O. 20 R. 11  
Note 1

judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

[1877, S. 210; 1859, S. 194.]

### Local Amendments

#### MADRAS

*Substitute* the following for Rule 11:

"11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which money is payable.

(2) After the passing of any such decree, the Court may, on the application of the judgment-debtor and *after notice* to the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise as it thinks fit."

#### NAGPUR

In sub-rule (2) for the words "and with the consent of the decree-holder" the words "and after notice to the decree-holder" shall be *substituted*.

#### RANGOON

In sub-rule (2) for the words "and with the consent of the decree-holder," *substitute* the words "and after notice to the decree-holder."

#### SIND

In sub-rule (2) for the words "and with the consent of the decree-holder," *substitute* the words "and after notice to the decree-holder."

### Synopsis

- |   |   |
|---|---|
| 1. Legislative changes.   | 9. "With or without interest."  |
| 2. Scope of the Rule.   | 10. Order for instalments after decree — Sub-rule (2).  |
| 3. Decree must be for the payment of money.   | 11. Taking of security.   |
| 4. "The Court."   | 12. Limitation for application under sub-rule (2).  |
| 5. Postponement of payment.   | 13. Limitation for execution of decree passed under this Rule. See Authors' Limitation Act, Notes to Article 182, clause 7. |
| 6. Order for payment by instalments.  | 14. Appeal.   |
| 7. Sufficient reason.   |   |
| 8. "Notwithstanding anything contained in the contract under which the money is payable." |   |

### Other Topics (miscellaneous)

Appeal — Court-fee. See Note 14.

Decrees under O. 34 R. 6 — Applicability of rule. See Note 8.

Decree with a default clause — Limitation. See Note 13.

Default clause — Waiver. See Note 13.

Instalment decree — When not to be passed. See Note 7.

Proper Court to act under this rule. See Note 4. Rent decrees under the Bengal Tenancy Act — Applicability of rule. See Note 2.

Rule, whether applies to mortgage decrees. See Note 2.

#### 1. Legislative changes. —

1. The words "shall be postponed" in sub-rules (1) and (2) are new. Owing to the absence of these words in the old Code, the Court could not order that the decree amount shall not to be paid until the expiration of a fixed time.<sup>1</sup>



2. The words "notwithstanding anything contained . . . payable" are also new. See Note 7 below.

3. For the words "in all decrees" the words "where and in so far as a decree" have been substituted.

4. The proviso in the old Section has been omitted.

**2. Scope of the Rule.** — Where a decree in a suit is for the payment of money, the Court may, under this rule, order the payment of the decree amount to be postponed or to be made in instalments.<sup>1</sup> If it decides to pass such order *at the time of passing* the decree, it may do so if there are sufficient grounds therefor [sub-rule (1)]. *After the passing of the decree* it can pass such an order only if the decree-holder gives his consent thereto [sub-rule (2)].<sup>2</sup>

The rule applies to decrees for the *payment of money*. It does not apply to decrees for recovery of money by sale of property, as in the case of mortgage decrees.<sup>3</sup> But, independently of this rule, a decree may, in a suit on a mortgage or for partition, be passed on a *compromise* between the parties, providing for payment by instalments and for sale of the mortgaged property in default.<sup>4</sup>

This rule does not apply to cases coming under the Dekkhan Agriculturists' Relief Act<sup>5</sup> or rent decrees under the Bengal Tenancy Act.<sup>6</sup> In a suit for arrears of rent under the Agra Tenancy Act against a person other than a permanent tenure-holder or a fixed rate tenant, the Revenue Court cannot make a decree payable by instalments under this rule.<sup>7</sup> But it has been held that the provisions of the U. P. Agriculturists' Relief Act relating to instalment decrees do not derogate from the provisions of this rule and that the Court can pass an instalment decree under this rule even where such decree would not be permissible under the provisions of the Agriculturists' Relief Act.<sup>8</sup>

This rule is not in any way controlled by the provisions of the Imperial Bank Act which limit the powers of the Bank in the matter of advancing loans on longer terms than six months and, therefore, a Court cannot refuse to exercise the discretion vested in it under this rule simply on the ground that such a course would postpone the realization of the dues by the Bank for over six months.<sup>9</sup>

**3. Decree must be for the payment of money.** — A decree for deficiency passed under O. 34 R. 6 of the Code is only a decree for the payment of money within the meaning of this rule.<sup>1</sup>

**Note 2**

1. See also ('07) 31 Bom 348 (353).
2. ('81) 3 All 809 (811). (Decree-holder's remedy against the surety held barred.) ('67) 4 Bom H O R A C 77 (78). ('81) 5 Bom 604 (608). (1864) 1 Suth W R Misc 1 (1). ('79) 1879 Pun Re No. 144, p. 418. ('26) AIR 1926 Bom 250 (251) : 50 Bom 262. [But see (1864) 1 Suth W R Misc 5 (6). (Peculiar circumstances.)]
3. ('79) 2 All 320 (322). ('81) 5 Bom 604 (608). ('88) 7 Bom 332 (335). ('86) 1886 Bom P J 90. ('87) 1887 Pun Re No. 49, p. 105. ('99) 2 All 649 (651). (Decree in suit to enforce a lien on an annuity called nankar.)

- [See also ('79) 2 All 129 (132, 133). (*Quare*). ('79) 3 Bom 202 (208). (Where it is not clear whether a decree was passed simply for recovery of money.)]
- [See however ('13) 20 Ind Cas 8 (10) (Lah.).]
4. ('16) AIR 1916 All 331 (331). (Partition.) [See ('07) 34 Cal 886 (890, 891). ('25) AIR 1925 Bom 509 (509).]
  5. [See ('95) 19 Bom 318 (320).]
  6. ('07) 11 Cal W N 857 (858).
  7. ('32) AIR 1932 All 436 (437) : 54 All 521.
  8. ('88) AIR 1988 All 52 (52). (Instalments only over a period of 4 years permissible under the Agriculturists' Relief Act — Courts can grant under this rule instalments over a longer period.)
  9. ('38) AIR 1938 Nag 330 (331, 332).

**Note 3**

1. ('11) 11 Ind Cas 736 (736) (Cal).

**O. 20 R. 11**  
**Notes 4-7**

**4. "The Court."** — It is the Court which *passed the decree* that can act under this rule.<sup>1</sup> In cases coming under the Dekkhan Agriculturists' Relief Act, however, it is provided by Section 15B of that Act that the Court which *carries out the decree* can order the payment by instalments or extend the time for payment.<sup>2</sup>

**5. Postponement of payment.** — Under Section 210 of the old Code, there was a conflict of opinion as to whether the Court could make an order *postponing* the payment under a decree.<sup>1</sup> The introduction of the words "shall be postponed" in this rule makes it clear that such an order can be passed.

A judgment-debtor who has enjoyed the benefit of the arrangement for delay in execution by virtue of an order passed under this rule cannot subsequently resile from such arrangement.<sup>2</sup>

**6. Order for payment by instalments.** — A decree payable in instalments on a certain condition (*e. g.*, that the defendant should mortgage certain property by way of security) is not illegal on that ground.<sup>1</sup> As to the construction of decrees for payment of money in instalments, see the undermentioned cases.<sup>2</sup> See also Note 2 above.

**7. Sufficient reason.** — The Court has a discretion, under this rule, to order payment of the decree amount in instalments. But such discretion should, as in the case of the exercise of all discretions under the Code, be exercised in a *judicial* and not in an arbitrary manner.<sup>1</sup> The onus is on the defendant to show that he is entitled to the indulgence under this rule.<sup>2</sup> Where he has opposed the claim on frivolous grounds and effected a fraudulent conveyance of his property, subsequent to the institution of

**Note 4**

1. ('18) AIR 1918 Mad 1174 (1175) : 40 Mad 233 (FB).
- ('84) AIR 1934 Rang 165 (166) : 12 Rang 320. (Court to which decree is transferred for execution cannot pass instalment order under this rule.)
- ('84) AIR 1934 Rang 197 (198). (Do.)
- ('90) 12 All 571 (577).
- ('21) AIR 1921 Pat 340 (340).
- ('32) AIR 1932 All 278 (282) : 54 All 578 (FB). [See also ('88) 7 Bom 332 (335).]
2. ('95) 19 Bom 318 (320). [See also ('32) AIR 1932 Bom 99 (101).]

**Note 5**

1. ('10) 5 Ind Cas 421 (422) (Mad). (Yes, under its inherent power.)
- ('84) 7 Mad 152 (154, 155). (Order postponing period of payment is not a nullity.)
- ('80) 2 All 649 (650). (No.)
2. ('12) 13 Ind Cas 204 (205) (Mad).

**Note 6**

1. ('27) AIR 1927 Oudh 236 (236).
2. ('88) 15 Cal 751 (755) (PO).
- ('84) 10 Cal 305 (310, 311) : 10 Ind App 162 (PO).
- ('87) 9 All 33 (34). (Decree for maintenance by payment of a fixed rate per mensem for lifestands exactly on the same footing as a decree ordering payment by instalments.)
- ('12) 15 Ind Cas 389 (390) (Oudh).

**Note 7**

1. ('10) 6 Ind Cas 552 (552, 553) (Cal).

('33) AIR 1933 All 90 (90) : 54 All 539.

('33) AIR 1933 Nag 330 (331).

('34) AIR 1934 Pesh 2 (3). (No special reason for special indulgence—Normal course should be followed.)

(1862) 1 Hyde 98 (98).

2 Hay 68.

('36) AIR 1936 Lah 51 (55). (Discretion of the Court is to be exercised within bounds and not in a manner so as to constitute a virtual denial of the creditors' rights.)

('35) AIR 1935 Rang 495 (495). (The discretion to order payment of a decretal amount by instalments must never be exercised so as to constitute a virtual denial of the decree-holder's rights.)

('35) AIR 1935 Cal 559 (560). (Even a Small Cause Court Judge should give reasons for directing payment by instalments.)

[See ('38) AIR 1938 All 52 (53). (Judge directing the judgment-debtor, a respectable gentleman, to pay money by instalments and allowing interest on decretal amount—Decision *held* not such as could be interfered with in second appeal.)]

[See also ('66) 6 Suth W R 89 (89).]

2. ('36) AIR 1936 Lah 51 (55). (Debtor ought to place evidence on record to show inability to pay in a lump sum—In absence of such evidence Court is not entitled to presume debtor's inability to pay in a lump sum.)

('35) AIR 1935 Cal 559 (560). (Simply because instalment is prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course. Con-

the suit, he deserves no consideration at the hands of the Court, especially where the interest agreed upon between the parties is moderate.<sup>3</sup> Nor should a decree be passed the effect of which is to stay execution unconditionally,<sup>4</sup> or to make the instalments extend over a long period without guaranteeing satisfaction or making any provision for the payment of interest.<sup>5</sup> Again, the mere fact that the defendant is unable to pay or is hard pressed or embarrassed,<sup>6</sup> or that his estate is under the management of the Court of Wards,<sup>7</sup> or that he is expecting to get a cross decree against the plaintiff in a pending litigation which would enable him to claim a set-off,<sup>8</sup> is not a sufficient reason to enable the Court to order payment by instalments or to postpone payment.

Where, however, the rate of interest is exorbitant or unconscionable,<sup>9</sup> or where the decree for immediate payment will deprive the defendant of his means of livelihood,<sup>10</sup> or where the defendant has made payments towards principal and interest, which exceed the principal sum,<sup>11</sup> a decree for instalments can be properly passed. Again, a lender who abandons his proper remedy in order to avoid the consequence of the original contract is not entitled to the relief prayed for under this rule, if it would be a hardship to the judgment-debtor.<sup>12</sup>

**8. "Notwithstanding anything contained in the contract under which the money is payable."**—Where an instalment bond provided for payment by instalments, with a default clause to the effect that the whole sum would be due immediately on default, and a suit was brought for the whole amount on default, it was held by the Bombay High Court under Section 210 of the old Code, that the Court had no jurisdiction to ignore the express contract of the parties as to the consequences of such default and pass a decree for instalments.<sup>1</sup> The introduction of the words "notwithstanding anything contained in the contract under which the money is payable" in the present rule now makes it clear that the Court has a discretion to pass a decree for instalments notwithstanding the contract between the parties. In their Statement of Objects and Reasons, the Special Committee observe as follows :

"The Committee have added words to sub-rule (1) of this rule in order to override the ruling of the Bombay High Court in the case of *Raghu Govind v. Dipchand* (I. L. R. 4 Bombay 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India."

**9. "With or without interest."** — The granting or refusal of interest, and the rate at which it is to be granted on the instalments ordered to be paid, are in the

considerations which should guide the Court in allowing instalments stated.)

3. ('29) 71 Ind Cas 303 (304) (Pesh).

[See also ('97) AIR 1937 Lah 16 (17). (A debtor making defaults in payment of instalments as provided by the bond executed by him is not entitled to a provision for payment of the decretal amount by instalments, more so when there is no evidence to show that he is unable to pay the amount.)]

4. ('25) AIR 1925 Mad 908 (909).

5. ('66) 1 Agra 270 (271). (Instalments extending over 20 years.)

('33) AIR 1933 All 90 (90) : 54 All 539. (Court passing decree for Rs. 884 and ordering that defendant should pay in six monthly instalments of Rs. 60 each and allowing no future interest —It is not proper exercise of discretion.)

('78) 2 All 129 (182). (Instalments extending over 10 years.)

('66) 1 Agra 116 (117). (Instalments hardly sufficient to cover interest.)

('35) AIR 1935 Cal 559 (560).

6. ('25) AIR 1925 Mad 908 (909).

('33) AIR 1933 Nag 380 (331).

('78) 2 All 129 (131, 134).

('06) 2 Nag L R 179 (187).

('10) 6 Ind Cas 552 (553) (Cal).

('82) 1882 All W N 102 (102).

('35) AIR 1935 Cal 559 (560).

7. ('23) AIR 1923 Lah 256 (256).

8. ('26) AIR 1926 Lah 604 (605) : 7 Lah 393.

9. ('07) 31 Bom 348 (353).

10. ('25) AIR 1925 Rang 33 (33).

11. ('11) 11 Ind Cas 891 (893) (Low Bur).

12. (1900-02) 1 Low Bur Rul 81 (81). (Equitable mortgage.)

#### Note 8

1. ('80) 4 Bom 96 (100).

2 Hay 95.

[See also ('01) 1901 Pun L R No. 187.]

**O. 20 R. 11**  
**Notes 9-11**

*discretion of the Court.*<sup>1</sup> Where no interest is provided for in an instalment decree, it must, under the provisions of Section 34 of the Code, be deemed to have been refused, and cannot be granted by the executing Court.<sup>2</sup> Where, however, interest is provided for in the decree, but the *rate* is not mentioned, the Court can, in execution, grant the usual *court rate* of interest.<sup>3</sup> The High Court of Rangoon has held in the undermentioned case<sup>4</sup> that where a decree allows interest, to disallow it in passing an order under this rule would be without jurisdiction.

**10. Order for instalments after decree — Sub-rule (2).** — As has been seen in Note 2 *ante*, no order for instalments can be made after the passing of the decree under this sub-rule, unless the decree-holder gives his *consent* thereto. But the consent need not be an express one. It was held in the undermentioned case<sup>1</sup> that the non-opposition by the decree-holder after notice to him may amount to consent within this rule.

An order for postponement or for instalments under this sub-rule does not amount to a variation of the decree itself<sup>2</sup> and can be made in execution proceedings<sup>3</sup> or even when an appeal is pending from the decree.<sup>4</sup> Nor does the rule direct the decree to be amended by virtue of such order.<sup>5</sup> Where default is committed in the payment of instalments ordered to be paid, the Court can grant relief against forfeiture,<sup>6</sup> though it cannot alter the terms of the decree either with regard to the decretal amount or the rate of interest which is to be paid thereon.<sup>7</sup>

Where parties agree after decree that the decretal amount should be paid by instalments and the Court, accepting the compromise, passes an order striking off the execution proceedings, the Court must be deemed to have passed an order under the provisions of this sub-rule.<sup>8</sup> But, unless recognized by the Court in some form, the arrangement between the parties will not, by itself, amount to a direction by the Court under this rule<sup>9</sup> and cannot be enforced in execution.<sup>10</sup> Where the Court has recognized the compromise between the parties for payment by instalments, it cannot, on default of payment in any of the instalments, refuse to execute the decree and drive the plaintiff to a separate suit.<sup>11</sup>

**11. Taking of security.** — The security that may be taken under sub-rule (2) for the due performance of the decree can be enforced in *execution* and O. 34 R. 14 is no

#### Note 9

1. ('79) 3 Bom 202 (203). (Six per cent. interest awarded — High Court refused to interfere.)
2. See Note 17 to Section 34.  
[See also ('70) 14 Suth W R 324 (324).]
3. See Note 17 to Section 34.  
[See also ('80) 6 Cal L Rep 231 (232).]
4. ('83) AIR 1933 Rang 323 (325).

#### Note 10

1. ('84) 7 Mad 152 (154, 155).
2. ('78) 2 Cal L Rep 143 (146).  
[See however ('32) AIR 1932 All 273 (280) : 54 All 573 (FB).]
3. ('24) AIR 1924 Bom 118 (119).
4. ('27) AIR 1927 Mad 416 (419, 420).
5. ('17) AIR 1917 Mad 188 (188). (Such order, however, was held in substance to be one amending the decree — This view, it is submitted, is not correct—A decree cannot be varied or altered except under S. 152 or on review.)
6. ('22) AIR 1922 Bom 170 (171) : 46 Bom 463.

- (25) AIR 1925 Bom 404 (405).
7. ('26) AIR 1926 Bom 368 (368).
8. ('23) AIR 1923 Lah 381 (382).
- (85) 11 Cal 143 (145).
- (07) 5 Cal L Jour 25 (26, 27).
- (84) 6 All 16 (17).
- (1900) 1900 Pun Re No. 96, page 389. (Application after decree for an order for payment by instalments was treated as one under this sub-rule.)  
[See ('82) 4 All 240 (242).]  
(84) 6 All 228 (230).
- (89) 16 Cal 16 (18). (But a mere order for stay for 15 days to enable judgment debtor to pay is not an order under this rule.)  
[See also ('85) AIR 1935 Mad 17 (20).]
9. ('87) 14 Cal 348 (350).
10. ('81) 3 All 585 (588, 589) (FB).  
(84) 6 All 623 (625).
11. ('83) AIR 1933 Lah 758 (759).  
(87) AIR 1937 Cal 286 (287). (Decree-holder can enforce terms by execution.)

bar thereto.<sup>1</sup>

Where, by an order under sub-rule (2), the judgment-debtor was to execute a mortgage to the decree-holder, the subsequent adjudication of the judgment-debtor as an insolvent cannot affect the rights of the decree-holder to have the mortgage executed in his favour.<sup>2</sup>

**O. 20 R. 11**  
**Notes 11-14**

**12. Limitation for application under sub-rule (2).**—An application under sub-rule (2) for postponement or for payment in instalments of the decree amount should be made within six months of the decree, under Article 175, Schedule I of the Limitation Act.<sup>1</sup> But, if an order for instalments is actually passed on a time-barred application, it is not a nullity.<sup>2</sup> It must be assumed that the Court by oversight decided the question of limitation wrongly.<sup>3</sup> Where there has been an appeal from a decree, the time for the application for an order for instalments runs only from the date of the decree of the *Appellate Court*, even though the latter confirmed the judgment of the lower Court and dismissed the appeal.<sup>4</sup>

**13. Limitation for execution of decree passed under this Rule.**—See the Authors' Commentaries on the Limitation Act, Notes to Article 182, clause 7.

**14. Appeal.**—An order passed under this rule *refusing* to allow the payment of the decretal amount in instalments is not appealable under O. 43 R. 1. It must be regarded as a matter separate from and not forming part of the decree.<sup>1</sup> An order *granting* a decree for instalments or postponing the time for payment of the decretal amount under sub-rule (1) will of course be incorporated in the decree itself and can therefore be attacked in an appeal against the *decree*.<sup>2</sup> If, however, it is not so incorporated, the order will not be appealable.<sup>3</sup> An order for instalments made under sub-rule (2) must necessarily be one made *after* the decree and on the *consent* of the decree-holder. No appeal can lie against such consent order.<sup>4</sup> In Rangoon, however, by virtue of the amendment of sub-rule (2), an order can be passed after decree for payment in instalments, after *notice* to the decree-holder and *without his consent*. The order not being a *consent* order, and being one in execution, discharge or satisfaction of the decree within the meaning of Section 47 is appealable as a *decree*.<sup>5</sup>

As to the court-fee payable on a memorandum of appeal against an instalment-decree, see the undermentioned case.<sup>6</sup>

**Note 11**

1. ('26) AIR 1926 Mad 194 (197, 200).
- (25) AIR 1925 Bom 509 (510).
- (70) 14 Suth W R 324 (324). (Sale of property in execution is to be preferred to realization through a receiver.)
2. ('25) AIR 1925 Rang 189 (190, 191) : 2 Rang 673.

**Note 12**

1. [See also ('87) 14 Cal 348 (850).  
(24) AIR 1924 Lah 342 (844).  
(94) 1894 Pun Re No. 26, page 69.]
2. ('87) AIR 1937 Cal 236 (237). (The proper remedy of the person who objects to the order is to take appropriate steps for getting that order set aside and so long as that order is not set aside, it is binding on him.)
3. ('32) AIR 1932 All 273 (281) : 54 All 573 (FB).
4. ('32) AIR 1932 Rang 54 (55).

**Note 14**

1. ('28) AIR 1928 Lah 931 (931).
- (13) 20 Ind Cas 673 (673) : 7 Low Bur Rul 71.
2. ('31) AIR 1931 Rang 152 (152).
- (83) AIR 1933 Pesh 31 (33).
- (22) AIR 1922 Lah 355 (355). (High Court will not interfere with discretion of lower Court.)
- (11) 11 Ind Cas 736 (737) (Cal). (Discretion will not be interfered with in second appeal.)
3. ('31) AIR 1931 Rang 152 (152).  
[See also ('35) AIR 1935 Mad 17 (20). (Such order is not a decree.)]
4. ('26) AIR 1926 Rang 192 (192) : 4 Rang 247.
5. ('26) AIR 1926 Rang 192 (192) : 4 Rang 247.
- (29) AIR 1929 Rang 191 (192).
6. ('14) AIR 1914 Lah 390 (390) : 1915 Pun Re No. 12. (Court-fee payable is on difference between getting money immediately and by instalments.)

D. 20 R. 12

**R. 12.** [Ss. 211, 212.] (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits,<sup>2</sup> the Court may pass a decree —

Decree for possession  
and mesne profits.

- (a) for the possession of the property ;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until —
  - (i) the delivery of possession to the decree-holder,
  - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court,<sup>10</sup> or
  - (iii) the expiration of three years from the date of the decree,<sup>11</sup> whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

[ 1877, Ss. 211, 212 ; 1859, Ss. 196, 197. See Ss. 2 (12), 144. ]

#### Local Amendment

#### MADRAS

Add the following sub-rule (3) :

"(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry ; and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass the final decree."

#### Synopsis

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Rule applies only where specific interest in land is claimed.</li> <li>4. Enquiry as to mesne profits is no longer a proceeding in execution.</li> <li>5. Mesne profits.</li> <li>6. Interest forming part of mesne profits.</li> <li>7. Value of mesne profits, if affects jurisdiction.</li> <li>8. Court-fees.</li> </ol> | <ol style="list-style-type: none"> <li>9. Right to apply for ascertainment of future mesne profits, when arises.</li> <li>10. Notice of relinquishment — Clause (c).</li> <li>11. Three years from the date of the decree.</li> <li>12. Limitation.</li> <li>13. Res judicata.</li> <li>14. Order after preliminary decree determining period and mode of accounting, if a decree.</li> <li>15. Appeal.</li> </ol> |
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#### Other Topics (miscellaneous)

Calculation of mesne profits—Cultivation expenses, deduction of. See Note 5.

Case remanded by Appellate Court — Procedure. See Note 15.

"Decree." See Note 2.

Decree for mesne profits against co-sharers. See Note 5.

Decree for mesne profits — When becomes operative. See Note 8.

First application for mesne profits dismissed for default — Subsequent application, if maintainable. See Note 4.

Form of decree for possession and mesne profits. See Note 2.

Mesne profits—Court, whether could award more than is claimed. See Note 5.

Non-mention of period during which mesne profits are awarded—Effect. See Note 11.

Persons liable for mesne profits. See Note 5.

Relinquishment without notice — Whether amounts to delivery. See Note 10.

Suit by a member of a joint Hindu family — Rule, if applicable. See Note 3.

Suit for mesne profits alone. See Notes 2 and 13.

"The Court." See Note 2.

### 1. Legislative changes. —

1. The provisions of Section 244, clauses (a) and (b) of the Code of 1882, which enacted that any question relating to the ascertainment of mesne profits as to which the decree directed an enquiry, were to be determined by the *executing Court*, have been omitted under the present Code. The result is that such an enquiry is no longer a proceeding *in execution* but is one *in suit*.<sup>1</sup> The substantial change under the new Code is, as pointed out by Sir John Wallis, C. J., "that the award of mesne profits in all cases is to be by a *preliminary decree* and that when ascertained, they are to be embodied in a *final decree*, whereas under Sections 211 and 212 (of the old Code) they were to be ascertained in execution."<sup>2</sup> In other respects this rule corresponds to Sections 211 and 212 of the old Code, except that sub-clause (ii) in clause (c) has been newly added for the benefit of the judgment-debtor.

2. The Explanation to Section 211 of the old Code which contained the definition of 'mesne profits' has been re-enacted in Section 2 clause (12) of the present Code.

**2. Scope of the Rule.** — This rule deals with the decree to be passed in a suit for *possession* of immovable property *and* for rent or mesne profits, past and future, against a person in *wrongful possession* of such property. It does not apply to suits for *mesne profits* alone<sup>1</sup> or for damages which are not *mesne profits*.<sup>2</sup> But a suit for a declaration of title and in the *alternative* for possession and mesne profits is within this rule.<sup>3</sup>

In so far as this rule enables the Court to pass a decree for *future* mesne profits (*i. e.*, profits accruing subsequent to the institution of the suit) it is an exception to the general rule that a Court has no jurisdiction to give the plaintiff a decree on a cause of action that had not accrued to him at the date of the suit.<sup>4</sup> The object of enabling the Court to pass such a decree is to avoid multiplicity of suits.<sup>5</sup> But the rule

### Order 20 Rule 12 — Note 1

1. ('31) AIR 1931 Pat 1 (4).

2. ('18) AIR 1918 Mad 484 (486) : 41 Mad 188 (F B). (On reference.)

('25) AIR 1925 All 588 (589) : 47 All 543.

('26) AIR 1926 Pat 218 (223, 229) : 5 Pat 361 (F B).

### Note 2

1. ('72) 9 Bom H C R 7 (9). (Decision under Ss. 196, 197 of Act VIII of 1859.)

2. ('35) AIR 1935 All 186 (187). (Prospective damages on tort must be given in decree itself and cannot be determined in execution—Order of Court in decree that it will be determined in execution does not give executing Court jurisdiction to determine it —O. 20 R. 12 has no application.)

('14) AIR 1914 Cal 579 (579). (Suit for injunction and damages.)

('28) AIR 1928 Pat 565 (566) : 7 Pat 491.

('38) AIR 1938 All 445 (446) : 1 L R (1938) All 658. (There is no provision in O. 20, C. P. Code, for the passing of a preliminary decree in a suit

for damages in respect of personal injuries or in respect of breach of contract. If the principle of granting a preliminary decree is to be extended beyond the list mentioned in Order 20, that extension must be governed by the principle of *ejusdem generis*.)

[See ('68) 1 Beng L R 167 (169). (Bengal Rent Act, X of 1859—Share in an *unauchovki jumma* is not in the nature of mesne profits.)

('85) AIR 1935 Mad 307 (308). (Suit for mesne profits is not identical in law with a suit for damages for trespass.)]

[See also ('26) AIR 1926 Nag 260 (262).]

3. ('17) AIR 1917 Cal 562 (563).

[See ('11) 10 Ind Cas 117 (117) (Cal).]

4. ('28) AIR 1928 Pat 565 (566) : 7 Pat 491.

('26) AIR 1926 Nag 260 (262).

('80) AIR 1930 Mad 30 (33, 37) : 53 Mad 838.

('21) AIR 1921 Lah 85 (88) : 2 Lah 383.

('37) AIR 1937 Mad 46 (48) : 1 L R (1937) Mad 234.

5. ('26) AIR 1926 Pat 218 (223) : 5 Pat 361 (F B).

('99) 21 All 425 (432).

**O. 20 R. 12**  
**Notes 2-3**

is only a *directory* and not a mandatory one. It does not compel the plaintiff to claim future mesne profits. Nor is the Court bound to pass a decree for such *mesne profits*.<sup>6</sup> (See Note 13 *infra*). Ordinarily, a decree for *mesne profits* can only follow a decree for possession and when the plaintiff fails to obtain a decree for possession, a claim for mesne profits should not be allowed.<sup>7</sup> In cases falling within this rule, the Court may pass —

- (1) a decree for possession of the immovable property; (this is a *final* decree, and subject to just objections, is capable of being executed.)
- (2) either a final decree for *past mesne profits*, or rent<sup>8</sup> or a preliminary decree for such profits, directing an enquiry as to the amount thereof, and
- (3) a preliminary decree, directing an enquiry as to the amount of *future mesne profits*.

In the undermentioned case<sup>9</sup> it was held by the Madras High Court that in the case of past mesne profits, it is optional with the Court to direct an inquiry into such mesne profits and that the Court can at once pass a final decree without directing any enquiry; but that in the case of mesne profits subsequent to the institution of the suit, it is obligatory on the Court to direct an enquiry and to pass only a preliminary decree in the first instance and then a final decree. But the same High Court has in a later decision<sup>10</sup> dissented from this view and held that where it is unnecessary to have any enquiry, it is open to the Court to dispense with such enquiry even in the case of mesne profits subsequent to the institution of the suit, and at once pass a final and executable decree in respect of such profits.

When a Court passes a preliminary decree under this rule and directs an enquiry as to *mesne profits*, it should, at the same time, decide the basis upon which the *mesne profits* are to be assessed.<sup>11</sup>

Where an enquiry is directed as mentioned above, a *final* decree in respect of such mesne profits is to be passed in accordance with the result of such enquiry.<sup>12</sup>

A decree ordering the delivery of possession and directing an enquiry as to mesne profits will thus be partly preliminary and partly final.<sup>13</sup> Where a decree is passed for past and future mesne profits *without directing an enquiry*, the decree is not *preliminary* but *final*.<sup>14</sup>

As to the proper way of framing a decree under this rule, see Form No. 33, Appendix D, Schedule I.<sup>15</sup>

**3. Rule applies only where specific interest in land is claimed.** — This rule applies only to suits for land or other property in which the plaintiff has a *specific*

[See also ('21) AIR 1921 Lah 85 (88) : 2 Lah 383. (Claim not contested—Must be granted.)

('23) AIR 1923 Mad 168 (169). (Do. Absence of issue, no ground for refusal.)]

6. ('81) AIR 1931 All 429 (432) : 53 All 951 (S.B.). ('97) 19 All 165 (161 to 165) : 24 Ind App 22 (P.C.). (Under the Code of 1882).

('37) AIR 1937 Mad 46 (48) : I J. R. (1937) Mad 284. (AIR 1918 Mad 484, Followed.)

7. ('38) AIR 1938 Cal 554 (558). (In this case plaintiff precluded from obtaining khas possession by a revenue sale during pendency of suit—Held, entitled to mesne profit till date of sale.)

8. ('37) AIR 1937 All 86 (89). (Preliminary decree not necessary where the exact amount has been ascertained.)

9. ('37) AIR 1937 Mad 46 (48) : I L R (1937) Mad 284.

10. ('38) AIR 1938 Mad 727 (729) : I L R (1938) Mad 1050.

11. ('34) AIR 1934 Cal 503 (504).

12. ('31) AIR 1931 Mad 717 (718) : 54 Mad 980.

13. ('29) AIR 1929 Cal 383 (383, 384).

('14) AIR 1914 Cal 804 (804).

('14) AIR 1914 Mad 526 (532) : 18 Ind Cas 586 (591) : 37 Mad 186.

('14) AIR 1914 Cal 60 (63).

('16) AIR 1916 Mad 767 (767). (Decree for possession alone can be executed.)

14. ('25) AIR 1925 Mad 1276 (1276).

15. ('18) AIR 1918 Cal 742 (743).



*interest*. It will not apply, for instance, to a suit by a member of a Hindu joint family, for a partition of the joint property inasmuch as the plaintiff has no specific interest in such property until decree,<sup>1</sup> and the defendants cannot be said to be in wrongful possession of any property of the plaintiff. Where, however, the family has been living under a *clear arrangement* that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares, the right to mesne profits will arise if the enjoyment of those shares is, in any way, disturbed.<sup>2</sup>

Apart from this rule, however, a member of a joint Hindu family who is *excluded* from participation in the profits of the family property may be entitled to *an account* of the management of the property from the persons in possession and to a share of such profits. Such a right is not a right to *mesne profits* received by a person in wrongful possession, but is appurtenant to the plaintiff's right under Hindu law in his share of the lands.<sup>3</sup> In fact a member of a Hindu family suing for partition and for profits is really suing for *an account of the profits received* by the manager or the persons in possession, so that the proceeds so received by the latter, which are also divisible property, may be divided and his share therein also given to him.<sup>4</sup>

#### 4. Enquiry as to mesne profits is no longer a proceeding in execution. —

The assessment of mesne profits is, under the present rule, a proceeding in the suit, and it has nothing to do with the execution department.<sup>1</sup> The enquiry is a continuation of the *suit* which results in a final decree.<sup>2</sup> No application for the ascertainment of mesne profits can be entertained in the execution department under the present Code.<sup>3</sup> But, if the Court passing the decree erroneously gives a direction to the plaintiff to apply for the ascertainment of mesne profits in execution, is such a direction *ultra vires* and is the executing Court bound to ascertain such profits? The High Court of Calcutta held in the undermentioned case<sup>4</sup> that such a direction is *ultra vires* and that the

#### Note 3

1. ('86) 14 Cal 493 (509) : 14 Ind App 37 (P C).  
(75) 1 Bom 561 (570).
- (13) 21 Ind Cas 590 (591) : 9 Nag L R 145.  
[But see ('19) AIR 1919 Mad 868 (868). (Where the point was conceded, the suit does not seem to be one for partition between coparceners.)]
2. ('89) 16 Cal 397 (412) : 16 Ind App 71 (P C).
3. ('28) AIR 1928 Mad 147 (149, 150) : 46 Mad 47.  
(93) 17 Bom 271 (279).
- (84) 7 Mad 564 (569). (Manager bound to account to infant plaintiff suing for partition.)
4. ('23) AIR 1923 Mad 147 (149) : 46 Mad 47.  
(78) 2 Mad 128 (137).  
(80) 5 Bom 589 (595).  
[See ('95) 19 Bom 532 (536, 537). (The words "mesne profits" in this decision must be taken to have been used only in the sense of a right to account.)]  
[See also ('82) 5 Mad 236 (238, 239) : 9 Ind App 125 (PC).]

#### Note 4

1. ('81) AIR 1981 All 538 (539).
- (34) AIR 1934 All 465 (467).
- (28) AIR 1928 Pat 278 (279). (Court can appoint a commissioner to ascertain mesne profits.)
- (27) AIR 1927 Oudh 220 (220).  
[See ('92) 14 All 531 (536). (The direction for ascertainment need not be contained in the decree.)]

2. ('25) AIR 1925 All 588 (589) : 47 All 543.  
(34) AIR 1934 All 465 (467).  
(28) AIR 1928 Bom 236 (237) : 52 Bom 360.  
(09) 4 Ind Cas 1040 (1041) : 33 Mad 78.  
(27) AIR 1927 Mad 71 (72).  
(26) AIR 1926 Cal 175 (175).  
(10) 5 Ind Cas 272 (273) (Cal).  
(17) AIR 1917 Pat 334 (335) : 2 Pat L Jour 394.  
(25) AIR 1925 P C 117 (117) : 4 Pat 507 : 52 Ind App 188 (PC). (Under old Code, one in execution.)  
(03) 25 All 385 (387).  
(91) 18 All 53 (64, 65) : 17 Ind App 150 (PC).  
(99) 24 Bom 345 (349, 350).  
(85) 8 Mad 137 (139).  
(92) 19 Cal 132 (136).  
(86) 14 Cal 50 (53, 54).  
(07) 6 Cal L Jour 462 (467).  
(79) 4 Cal 629 (632).  
(76) 25 Suth W R 270 (270).  
(74) 21 Suth W R 212 (213).  
(14) AIR 1914 Cal 60 (63).  
(88) AIR 1938 Bom 320 (321).
3. ('11) 11 Ind Cas 939 (940) : 39 Cal 220.  
(19) AIR 1919 All 193 (194) : 41 All 517.  
[But see ('93) 17 Bom 85 (39). (Decision under old law.)]
4. ('18) AIR 1918 Cal 742 (743). (Second application for ascertainment of mesne profits when the first application is dismissed for default will not lie.)

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**Notes 4-8**

executing Court can decline to carry out the direction. But in a recent case<sup>5</sup> the same High Court has held that such a decree might be a wrong decree, but is valid so long as it is not corrected by proper proceedings. The High Courts of Bombay<sup>6</sup> and Madras<sup>7</sup> have, on the other hand, held that the decree is not a nullity but that the case was one of a mere irregularity in the *exercise* of jurisdiction, and that the executing Court is bound to enquire into the mesne profits as per the direction in the decree. It has been held by the Allahabad High Court<sup>8</sup> that a direction by the trial Court to the executing Court to ascertain mesne profits is a nullity.

Applying the principle laid down by the Judicial Committee in *Lachminarain v. Balmakund*<sup>9</sup> that when once a preliminary decree has been passed the suit cannot be dismissed unless and until the decree is varied or reversed in appeal, the High Courts of Madras<sup>10</sup> and Patna<sup>11</sup> have held that a suit cannot be dismissed for default in prosecuting an application for the ascertainment of mesne profits under this rule.

After a preliminary decree, the practice is that the suit is adjourned to a definite date for further hearing.<sup>12</sup>

**5. Mesne profits.**—The expression “mesne profits” is defined by Section 2, clause (12), *ante* as :

“The profits which a person in *wrongful possession* of property actually received or might, with ordinary diligence, have received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.”

The object of awarding a decree for mesne profits is to *compensate* the person entitled to be in possession for his having been kept out of possession and thus deprived of the profits of the property.<sup>1</sup> Hence, it is only a person who is entitled to actual possession that can claim mesne profits.<sup>2</sup> On the other hand, the very foundation of the cause of action for mesne profits is *wrongful possession* of the defendant.<sup>3</sup> No decree

5. ('84) AIR 1934 Cal 472 (474).

[See also ('88) 42 Cal W N 748 (751).]

6. ('29) AIR 1929 Bom 217 (218, 219).

[See also ('38) AIR 1938 Bom 320 (321). (The Court which is directed to make the inquiry in execution ought merely to determine the amount and not pass an order for its recovery. It is for the trial Court to pass a final decree for recovery of the amount due.)]

7. ('80) AIR 1930 Mad 30 (31, 35) : 53 Mad 838.

8. ('39) AIR 1939 All 445 (446) : ILR (1939) All 658.

9. ('24) AIR 1924 P C 198 (200) : 4 Pat 61 : 51 Ind App 321 (PC).

The undermentioned cases before the decision of the Privy Council are no longer good law :

('19) AIR 1919 Pat 581 (583).

('19) AIR 1919 Cal 71 (72).

('01) 28 Cal 242 (245).

('12) 15 Ind Cas 709 (710, 711) (Cal).

10. ('28) AIR 1928 Mad 522 (523).

('24) AIR 1924 Mad 473 (473, 474).

('28) AIR 1928 Mad 1165 (1166, 1168). (Withdrawal without leave of the Court of an application for mesne profits—No bar to fresh application.)

11. ('26) AIR 1926 Pat 141 (142) : 5 Pat 228.

12. ('28) AIR 1928 Mad 1165 (1168).

#### NOTE 5

1. ('01) 28 All 252 (255).

('68) 11 Suth W R 88 (84).

('69) 11 Suth W R 25 (25).

('68) 9 Suth W R 457 (458).

('16) AIR 1916 Mad 328 (330).

('94) 21 Cal 244 (247). (Trespasser liable to person entitled to possession though not owner.)

('88) 12 Bom 416 (418). (“Mesne profits” is different from a periodical payment in *eternum*—Word “mesne” implies a *terminus ad quem* as well as a *quo*, the *terminus* being usually the date of decree.)

('35) AIR 1935 Lah 379 (380, 381).

[See ('35) AIR 1935 Pat 80 (81). (“Mesne profits” may mean damages, i.e., compensation for what the person entitled to possession has lost by the wrongful act of the defendant or it may mean the actual profits received by the defendant—Distinction between these two ideas is kept in English law in the terms “damages” and “account of profits” but is often forgotten in India.)]

2. ('35) AIR 1935 Lah 379 (380).

3. ('27) AIR 1927 Cal 182 (189) : 53 Cal 992.

('82) AIR 1932 Cal 600 (616, 617) : 59 Cal 859.

('33) AIR 1933 Mad 825 (830) : 57 Mad 49. (Court has only to see whether possession of defendant is wrongful—It is not justified in going further and inquiring into degree of defendant's misconduct or culpability.)

('17) AIR 1917 Cal 107 (112).

(1864) 1864 Suth W R Gap No. 880 (881).

('22) AIR 1922 Oudh 91 (92) : 25 Oudh Cas 2. (Voidable transaction—When avoided, is treated as void from the outset.)

('28) AIR 1928 Pat 565 (566) : 7 Pat 491.

for mesne profits can therefore be passed against a person who is *not in possession* at all,<sup>4</sup> or who is in *rightful* possession.<sup>5</sup> But possession through another, such as a "tenant," is sufficient to create liability for mesne profits if such possession is wrongful.<sup>6</sup>

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**Note 5**

The following cases are instances of *rightful* possession —

- (1) The possession of a possessory mortgagee so long as the mortgage subsists.<sup>7</sup>
- (2) The possession of the defendant against whom a conditional decree has been passed to the effect that on payment of a certain sum the plaintiff is to get possession and such payment has not been made.<sup>8</sup>
- (3) The possession of a co-sharer of joint property, in the absence of proof of ouster or exclusion of another co-sharer.<sup>9</sup>
- (4) The possession of a person who has entered on the land as a trespasser, but from whom the owner has accepted rent.<sup>10</sup>

The following cases are instances of *wrongful* possession —

- (1) The possession of a mortgagor after the date of a foreclosure decree against him.<sup>11</sup>
- (2) The possession of a person declared by a decree to be in wrongful possession.<sup>12</sup>

(16) AIR 1916 Mad 497 (498).

(72-'92) 1872-1892 Low Bur Rul 451.

(67) 7 Suth W R 225 (226, 228).

(66) 5 Suth W R 219 (220).

(67) 8 Suth W R 172 (174).

(39) AIR 1939 Nag 23 (26). (Plaintiff in claim suit establishing his title to property—Possession of auction-purchaser becomes wrongful so far as mesne profits are concerned — Plaintiff is entitled to claim mesne profits from him.)

(36) AIR 1936 Cal 629 (637). (Where a settlement by the Government is *ultra vires*, the possession of the person claiming under the Government is wrongful possession and the Government is liable for mesne profits to the person dispossessed.)

(39) AIR 1939 All 529 (533). (It is not necessary that possession in order to be wrongful for purposes of a claim for mesne profits must have been obtained in consequence of some improper act.)

4. ('17) AIR 1917 All 117 (118).

[See ('96) AIR 1936 Mad 137 (137). (Plaintiff obtaining decree for possession against defendant — Defendant obtaining stay of execution is liable for mesne profits till possession is delivered although he may not himself be in possession — Mere fact that he says that he is willing that plaintiff should take possession is not enough.)]

5. ('99) 9 Mad L Jour 163 (164).

(34) AIR 1934 Lah 322 (323).

(21) AIR 1921 Mad 609 (610).

(94) 17 Mad 251 (252, 253). (Defendant's possession under revenue sale not wrongful — No liability for damages, but to an account of stewardship.)

(36) AIR 1936 Bom 276 (277). (Possession of person purchasing land with notice of prior contract for sale of land to another person is not wrongful.)

[See also ('06) 8 Cal L Jour 182 (185, 186). (Pos-

session in execution of decree subsequently set aside.)]

6. ('36) AIR 1936 Cal 629 (637). (Where a settlement by the Government is *ultra vires*, the possession of the person claiming under the Government is wrongful possession and the Government is liable for mesne profits to the person dispossessed.)

(35) AIR 1935 P C 49 (50); 62 Cal 490; 62 Ind App 53 (P C).

7. ('30) AIR 1930 Rang 152 (152).

8. ('18) AIR 1918 P C 118 (120); 41 All 63; 45 Ind App 234; 21 Oudh Cas 228 (P C).

(21) AIR 1921 Nag 132 (132).

9. ('33) AIR 1933 Nag 316 (317); 30 Nag T. R 71.

(31) AIR 1931 P C 209 (211); 51 Ind App 299; 11 Pat 22 (P C). (But compensation can be awarded, though not mesne profits.)

(71) 6 Beng L R App 70 (71, 72).

(68) 3 Agra 11 (12).

(26) AIR 1926 Cal 860 (861).

(14) AIR 1914 Cal 209 (210). (Where there is ouster, the ousted person can sue for mesne profits.)

(29) AIR 1929 Nag 291 (294). (Do.)

(35) AIR 1935 Cal 478 (481).

[See ('35) AIR 1935 Pat 80 (81, 82). (Suit for partition by Hindu coparcener—Until actual partition he is not entitled to mesne profits—But from date of institution of suit, he is entitled to an account of the profits of the property allotted to him on partition as he is entitled to partition of the property as it is at the date of the institution of the suit—But the account must be taken in the partition suit itself and not by a separate suit.)]

10. ('24) AIR 1924 P C 213 (215); 46 All 728; 51 Ind App 326; 27 Oudh Cas 208 (P C).

11. ('69) 12 Suth W R 35 (36).

(74) 22 Suth W R 539 (540).

(83) 12 Cal L Rep 479 (483, 484).

12. (1865) 4 Suth W R Misc App 7 (7).

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Note 5

- (3) The possession of a defaulter after the confirmation of the sale of the property under the Bengal Revenue Sales Act.<sup>13</sup>
- (4) The possession of a person against whom a decree for possession has been passed.<sup>14</sup>
- (5) The possession of the vendee after the pre-emptor has become entitled to possession, that is, immediately on depositing the purchase-money.<sup>15</sup>

Where *A*, the manager of a joint Hindu family, alienates the family property for no necessity to *X*, and at the instance of *B*, another member of the family, the sale is held not binding on him, is *X* liable for any mesne profits and if so from what date? If, as has been seen in Note 3 *ante*, *B* can have no *specific interest* in the family property until partition and consequently cannot sue the manager for past mesne profits under this rule, it is conceived, he cannot also on the same grounds claim mesne profits from a purchaser from the manager until partition. It will also follow that after the institution of a suit by *B* for partition and mesne profits, his share becomes a specified interest from that date and mesne profits can be awarded against the purchaser from that date. This is the result arrived at in the undermentioned cases,<sup>16</sup> but the *grounds* of the decision therein, it is respectfully submitted, are not correct. These cases proceed on the view that possession under a voidable sale is rightful possession until set aside and that therefore mesne profits can be awarded only from the *institution of the suit* where the plaintiff repudiates the transaction. Where a transaction is held not binding on a person and is therefore set aside against him, it must be deemed to be not binding on him from the *very beginning* of the transaction and not merely from the date of suit. In *Satgur Prasad v. Harnarain Das*,<sup>17</sup> where *A* sued *B* for setting aside a deed executed by *A* to *B* on the ground of undue influence and fraud, it was held by their Lordships of the Privy Council that if the document was set aside, the defendant would be liable for mesne profits from the date when he got into possession under the deed, and not merely from the *institution of the suit*. It has been held by the Madras High Court<sup>18</sup> that, after the above decision of the Privy Council, it cannot be laid down as a general proposition that, where a person is in possession of property under a voidable transaction and a suit is brought against him to avoid the transaction and to get possession, there is no right to claim mesne profits prior to the date of the suit and that it must depend upon the circumstances of each case whether the plaintiff has been guilty of such conduct as to disentitle him to past profits.

*Extent of liability.*—The period for which mesne profits can be awarded is clearly confined to the period during which the defendant *was in possession*<sup>19</sup> or to the period during which he was active in keeping the plaintiff out of possession.<sup>20</sup> Thus, if the defendant is deprived of possession by virtue of an order of attachment under

13. ('81) AIR 1981 Cal 805 (806).

14. ('27) AIR 1927 Nag 9 (10). (Decree for possession under S. 9 of the Specific Relief Act.)

('86) AIR 1986 Mad 187 (187).

('35) AIR 1935 Cal 206 (208) : 62 Cal 217.

[See also (1875) 23 Suth W R 226 (226). (Possession by intermediate holders is wrongful.)]

15. ('36) AIR 1936 All 549 (553).

16. ('17) AIR 1917 All 479 (480, 481) : 89 All 61.

('24) AIR 1924 Mad 81 (88) : 46 Mad 815.

('18) AIR 1918 Mad 178 (180). (AIR 1917 All 479, Relied on.)

17. ('92) AIR 1992 P C 89 (91) : 59 Ind App 147 : 7 Luck 64 (P C).

18. ('86) AIR 1986 Mad 887 (893) : I L R (1987) Mad 66.

19. ('81) AIR 1981 Cal 668 (664).

('19) AIR 1919 Cal 167 (167).

('67) 8 Suth W R 450 (450).

('68) 10 Suth W R 486 (487).

('18) 21 Ind Cas 590 (592) : 9 Nag L R 145. (As against a wrong-doer possession relates back to the time when the right to enter accrued.)

('79) 7 Ind App 38 (51) : 2 Mad 128 (P C).

20. ('74) 21 Suth W R 246 (246, 247).

('74) 21 Suth W R 269 (270).

('71) 15 Suth W R 221 (222). (Mere obstruction without dispossession not enough.)

('69) 1 N W P H O R 278 (274).

Section 146 of the Code of Criminal Procedure,<sup>21</sup> or is dispossessed by another trespasser,<sup>22</sup> he cannot be held liable for the period during which he had no possession. A transferee from the defendant *pendente lite* is liable for mesne profits<sup>23</sup> but his liability starts only from the time *he entered into possession*.<sup>24</sup> Where a preliminary decree gives the plaintiff mesne profits before suit but does not specify the exact date from which the mesne profits are to be assessed, the decree entitles the plaintiff to mesne profits before suit for such period as the *law* entitles him to, *i. e.*, for three years before the suit.<sup>25</sup>

*Principles relating to assessment.*—"Mesne profits," observed Lord Hobhouse in delivering the judgment of the Board in *Grish Chunder v. Shoshi Shikreswar*, [I. L. R. 27 Calcutta 951 (1967) P. C.], "are in the nature of damages which the Court may mould according to the justice of the case."<sup>26</sup> The assessment of mesne profits is therefore a matter for the exercise of *judicial discretion* in each case.<sup>27</sup> The question to be decided is the amount of profits which the wrongdoer while in possession received or which without wilful default he *might* have received.<sup>28</sup> *The test* is, as pointed out

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**Note 6**

21. ('24) AIR 1924 Cal 1010 (1012): 51 Cal 853.  
[See also ('24) AIR 1924 Mad 224 (225). (Suit for mesne profits by party defeated in S. 145 proceedings—Need not vacate Magistrate's order.)]
22. ('97) 24 Cal 413 (416).  
('23) AIR 1923 Nag 108 (105): 18 Nag L R 195.  
('69) 11 Suth W R 444 (444). (Third party attaching and getting possession of land in dispute in satisfaction of some claim against defendant.)  
('17) AIR 1917 Cal 107 (109). (Trespasser's heir not liable for period during which possession was with executor.)
23. ('11) 11 Ind Cas 939 (939, 940): 39 Cal 220.
24. ('21) AIR 1921 Pat 102 (102): 6 Pat L Jour 166.
25. ('38) AIR 1938 Cal 563 (566).
26. ('38) 40 Pun L R 443 (445).  
[See also ('38) AIR 1938 All 8 (10, 11): I L R (1938) All 71. ('Mesne profits' is unliquidated damages—A claim for mesne profits is not a claim in respect of a 'debt' within S. 7 (1) (b), U. P. Encumbered Estates Act, 1934.)  
('87) AIR 1937 Pat 568 (571).]
27. ('31) AIR 1931 Mad 650 (651, 652): 54 Mad 955 (FB).  
('67) 8 Suth W R 447 (447).  
('02) 29 Cal 622 (625).  
('18) AIR 1918 Mad 178 (180).  
('78) 8 Cal 645 (653) (PC).  
('81) 6 Cal 794 (808).  
('76) 1 Mad 69 (83, 84): 3 Ind App 154 (PC).  
('74) 22 Suth W R 406 (407).  
('75) 23 Suth W R 99 (102): 2 Ind App 48 (PC).  
('16) AIR 1916 Mad 14 (17). (A executing a sale deed to B and giving possession but not registering the sale deed — Subsequent suit by A for mesne profits from B — No mesne profits were awarded.)  
('23) AIR 1923 Nag 55 (56). (Court bound to enquire.)  
('11) 21 Mad L Jour 965 (968). (Respective income of plaintiff and defendant in one *faisi* is *prima facie* evidence.)  
('75) 23 Suth W R 15 (16). (To be decided upon evidence.)  
('94) 7 C P L R 59 (61). (And not by striking
- average.)  
('23) AIR 1923 Bom 37 (38, 39). (No evidence to show receipt of profits — No decree can be passed.)  
('69) 12 Suth W R 104 (105). (Case of landlord dispossessing ryot.)  
('71) 15 Suth W R 428 (428). (Do.)  
('08) 30 Cal 536 (538). (Do.)  
('23) AIR 1923 Bom 398 (398). (Tenant holding over.)  
('14) AIR 1914 All 1 (2). (Do.)  
('28) AIR 1928 Sind 173 (174). (*Held*, tenant liable for mesne profits.)  
('91) 18 Cal 540 (544) (PC). (Mesne profits relating to alluvial land — Court can presume cultivation.)  
('89) 16 Cal 40 (60, 61): 15 Ind App 195 (PC). (Minor liable for mesne profits.)  
(1864) 1 Suth W R Misc 20 (20).  
('71) 16 Suth W R 294 (294).  
(1865) 2 Suth W R Misc 50 (50). (Award limited to the amount claimed in plaint.)  
('80) 6 Cal 472 (475).  
('83) 9 Cal 112 (115, 116). (Court can award more than is claimed provided the deficient court-fee is paid.)  
('82) 8 Cal 295 (297). (Do.)  
('66) 5 Suth W R 127 (128) (PC). (Court cannot give mesne profits more than claimed although a greater amount may be proved.)  
('71) 15 Suth W R 61 (62). (Do.)  
('67) 7 Suth W R 140 (141).  
('68) 9 Suth W R 217 (218).  
('71) 16 Suth W R 302 (302).  
('84) AIR 1934 All 465 (469).  
[See (1887) 2 Moo Ind App 72 (80, 81, 82) (PC). (For actual mode of calculation.)]  
[But see ('70) 14 Suth W R 82 (83).]
28. ('30) AIR 1930 Cal 908 (910).  
('27) AIR 1927 Cal 182 (185, 189): 53 Cal 992.  
('18) 19 Ind Cas 974 (978) (Cal).  
('12) 15 Ind Cas 1 (2) (Cal).  
('11) 11 Ind Cas 504 (505) (Cal).  
('84) 10 Cal 785 (791): 11 Ind App 88 (PC).  
('21) AIR 1921 Cal 363 (365).

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**Note 5**

by their Lordships of the Judicial Committee, not what the plaintiff has lost by his exclusion but what the defendant has or *might* reasonably have made by his wrongful possession.<sup>29</sup> What the plaintiff might have made, or the character of possession before trespass, can only be relevant as evidence of what the defendant might with ordinary diligence have received.<sup>30</sup> A trespasser cannot say that he kept the land waste and that therefore he is not liable for mesne profits.<sup>31</sup>

The principles by which the Courts should be guided in awarding and assessing mesne profits are that the possession which has been wrongfully retained should not be a source of profit to the wrongful possessor, and that the person wrongfully kept out of possession is put in the same position financially as if right had been done.<sup>32</sup>

Where the trespasser is in actual possession, the mesne profits should be awarded on the basis of the *actual* profits received or which might have been received with ordinary diligence less the deductions referred to in the undermentioned case.<sup>33</sup> Where, however, the trespasser is not in actual possession, but has himself leased the property to third persons, he will be liable only to the extent of the rent which he *actually* received from his lessee, unless it can be shown that he might, with ordinary diligence, have

- ('19) AIR 1919 Cal 917 (918).
- ('68) 9 Suth W R 374 (375).
- ('67) 8 Suth W R 103 (104, 105).
- (1865) 2 Suth W R Misc 10 (11).
- ('66) 5 Suth W R Misc 37 (38).
- ('70) 14 Suth W R 294 (295).
- ('03) 25 All 266 (269).
- ('88) 10 All 15 (19).
- ('80) 2 All 651 (653, 654).
- ('67) 2 Agra Misc 6 (6).
- (1862-64) 1862-64 Suth W R 40 (41) (FB).
- 1 Hay 577 : Marsh 201.
- ('25) AIR 1925 Mad 297 (297, 299).
- ('98) 8 Mad L Jour 273 (274).
- ('16) AIR 1916 Mad 328 (330).
- ('21) 62 Ind Cas 25 (27) (Pat).
- ('21) AIR 1921 Pat 102 (102, 103) : 6 Pat L Jour 166.
- ('06) 1906 Upp Bur Rul Civil Procedure 50.
- ('28) AIR 1928 Rang 102 (106) : 6 Rang 60.
- 29. ('30) AIR 1930 P C 82 (83) : 57 Ind App 105 : 9 Pat 621 (P C).
- ('32) AIR 1932 Cal 600 (619) : 59 Cal 859.
- ('33) AIR 1933 Nag 316 (318) : 30 Nag L R 71.
- ('29) AIR 1929 P C 300 (302, 303) : 56 Ind App 290 : 57 Cal 1 (P C).
- ('39) AIR 1939 Nag 23 (26).
- ('36) AIR 1936 Cal 22 (24). (Assessment of mesne profits with reference to kabuliats filed by parties and rents recorded in settlement khatian — Principle is correct.)
- ('38) 40 Pun L R 448 (445). (But the application of this general rule to a particular case will depend on its own peculiar facts — 'Mesne profits' are in the nature of damages, which the Court may mould according to the justice of the case, and in determining the mode of assessment it is necessary for the Court to ascertain the nature of the plaintiff's possession before ouster and the character of the property.)

*The following cases cannot be considered good law after the Privy Council decision :*

- ('79) 4 Cal 882 (888).
- ('75) 23 Suth W R 108 (108).

- ('69) 11 Suth W R 461 (461).
- ('72) 17 Suth W R 257 (258).
- ('68) 10 Suth W R 463 (463).
- ('99) 3 Cal W N 748 (749).
- ('69) 11 Suth W R 533 (533).
- ('69) 12 Suth W R 52 (54).
- ('71) 7 Beng L R 175 (178).
- ('75) 24 Suth W R 271 (272).
- ('72) 17 Suth W R 348 (348).
- ('71) 16 Suth W R 21 (22).
- ('70) 13 Suth W R 37 (37, 38).
- ('95) 8 C P L R 58 (60).
- (1862) 1862 Beng L R Sup Vol 1004n.
- ('74) 22 Suth W R 126 (128).
- ('67) 8 Suth W R 101 (102).
- ('73) 19 Suth W R 125 (126).
- ('66) 5 Suth W R Misc 35 (35).
- 30. ('30) AIR 1930 P C 82 (83) : 9 Pat 621 : 57 Ind App 105 (P C).
- ('33) AIR 1933 Nag 316 (318) : 30 Nag L R 71. (Defendant habitually cultivating the land — But in view of the imminence of the suit letting it out — The profits that he might have made with due diligence must be calculated on the basis of actual cultivation and not on the rental value.)
- ('08) 35 Cal 1000 (1005).
- 31. ('16) AIR 1916 Mad 328 (330).
- 32. ('17) AIR 1917 Pat 421 (422).
- 33. ('26) AIR 1926 Cal 847 (847).
- ('34) AIR 1934 Cal 503 (505).
- ('02) 6 Cal W N 732 (734).
- ('87) 4 Cal 566 (569).
- ('28) AIR 1928 Cal 474 (475).
- ('23) AIR 1923 Nag 64 (64).
- ('09) 12 Oudh Cas 154 (155, 156).
- ('82) 8 Cal 332 (335) : 9 Ind App 1 (P C).
- ('68) 9 Suth W R 445 (447) (F B).
- ('26) AIR 1926 All 404 (404, 405). ("Future mesne profits from date of suit" includes also collections by defendants after suit for arrears though due for periods before suit.)
- [See also ('80) AIR 1980 Oudh 51 (52). (Do.)]

received more rent.<sup>34</sup> And *prima facie* it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land and that the true owner wrongfully dispossessed has been a loser by that amount.<sup>35</sup> But the lessee himself will, it is conceived, be also liable, as a person in wrongful possession, to the extent of the *actual profit* realised by him.<sup>36</sup>

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Note 5**

*Illustration*

*B* trespasses upon the land belonging to *A* and subsequently lets it out to *C* for a rental of Rs. 800 per annum. *C* gets a gross profit of Rs. 700 and the expenses of cultivation amount to Rs. 150. *A* sues *B* and *C* for possession and mesne profits. *B* will be liable to pay *A* Rs. 800, the rent which he received from *C*, and *C* will be liable for Rs. 250, the net profit realised by him after deducting the expenses of cultivation and after deducting the rent paid to *B*. But *B* and *C* cannot be made liable *jointly* and *severally*, for the total of the profits realised by both of them together.<sup>37</sup>

Where two or more persons are in wrongful possession of the plaintiff's land, a decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiff out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution; or the respective liabilities of such trespassors may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff's favour.<sup>38</sup>

*Deductions.* — In awarding mesne profits it is proper that the following deductions should be made from the gross profits of the defendant in possession<sup>39</sup> :

34. ('29) AIR 1929 P C 800 (303) : 56 Ind App 290 : 57 Cal 1 (PC).

(34) AIR 1934 Cal 503 (505). (Decree against Secretary of State and his tenants — As against Secretary of State basis is that of rent actually received by him.)

('26) AIR 1926 Cal 1233 (1234, 1235).

('26) AIR 1926 Cal 860 (861).

('27) AIR 1927 Rang 116 (117).

('68) 9 Suth W R 445 (447).

(1862) 1862 Beng L R Sup Vol 1004n (1004n).

('91) 18 Cal 99 (107) : 17 Ind App 90 (PC).

('66) 1 Agra Misc 17 (18).

('72) 17 Suth W R 156 (157).

('08) 7 Cal L Jour 197 (199, 200). (Khamar land.)

('71) 15 Suth W R 258 (259). (Julkar land.)

('11) 10 Ind Cas 312 (313) (Cal). (Godown.)

('35) AIR 1935 P C 49 (50) : 65 Ind App 53 : 62 Cal 499 (PC). (The person in wrongful possession is not liable for failure to realise the highest possible rates of rent and premium from the tenants.—It is enough if taking account of both rent and premium, if any, a fair return has been realised from the land.)

('35) AIR 1935 Cal 206 (207) : 62 Cal 217.

[But see ('18) AIR 1918 Nag 89 (89). (Trespasser held liable to actual profits though he had leased the land to another — This is not good law.)]

35. ('88) AIR 1938 Mad 825 (826) : 57 Mad 49.

36. This can be inferred from the Privy Council decision in ('29) AIR 1929 P C 800 (303) : 56 Ind App 290 : 57 Cal 1 (PC).

('31) AIR 1931 Cal 802 (804).

('80) 6 Cal L Rep 857 (859).

37. ('29) AIR 1929 P C 800 (303) : 57 Cal 1 : 56 Ind App 290 (PC). (Reversing AIR 1927 Cal 182

on this point.)

('20) AIR 1920 Pat 747 (748).

('81) 9 Cal L Rep 1 (5, 6).

('10) 6 Ind Cas 69 (72, 73) : 37 Cal 559. (Effect of release of some of the joint tort-feasors considered.)

('10) 8 Ind Cas 707 (707) (Cal). (No combination between the landlord and the tenure-holder in dispossessing the plaintiff established—No joint liability.)

(1865) 2 Suth W R Misc 51 (52). (The liability under the decree in this case was joint and several — However, it was held that the claim must be limited to the particular lands with which particular defendants were shown to have been connected.)

('66) 6 Suth W R 113 (114, 115).

('66) 6 Suth W R 230 (230).

[See also ('70) 14 Suth W R 76 (77).]

('70) 14 Suth W R 175 (176, 177).

('72) 17 Suth W R 148 (149). (Not only the zamindar but also the ijaridar, who took izara of the suit land pending litigation, is liable for mesne profits.)

*The following cases are no longer good law :*

('69) 12 Suth W R 354 (355).

('80) 6 Cal L Rep 357 (359).

[See also ('72) 17 Suth W R 148 (149). (Izardar liable with his zamindar.)]

38. ('32) AIR 1932 Cal 600 (617) : 59 Cal 859.

('33) AIR 1933 Cal 554 (558).

('78) 19 Suth W R 218 (219).

('82) 9 Cal L Rep 1 (4).

39. ('88) AIR 1938 P C 189 (142) : 31 Sind L R 340 : 1 L R (1937) Bom 388 : 64 Ind App 215 (PC). (Mesne profits are not gross receipts.)



**O. 20 R. 12**  
**Note 5**

(1) Public charges such as Government rent, revenue or cesses which are made for the preservation of the estate.<sup>40</sup>

(2) The cost of cultivation.<sup>41</sup>

It was held in certain decisions<sup>42</sup> that the expenses of collecting rents and profits cannot be deducted unless the defendant entered upon the property under a *bona fide* claim of right. This view, however, has been held by the Calcutta High Court in a recent case<sup>43</sup> not to be good law after the decision of the Privy Council in *Secretary of State for India v. Saroj Kumar Acharjya*.<sup>44</sup> So, it has been held by the Calcutta High Court<sup>45</sup> that even where the dispossession is wanton and malicious, in calculating the amount of mesne profits, collection charges are to be deducted from the gross realization. The Allahabad High Court<sup>46</sup> has held that it is only where there has been a gross and contemptuous trespass that no deduction should be allowed for collection charges; but that where the defendant is a tenant holding over after the expiry of the term of his lease under the mistaken impression that he was entitled to a renewal of the lease, he is entitled to claim a deduction on account of collection charges. A deduction of 10 per cent., it has been held, can be allowed as collection charges where there is no specific evidence on the point.<sup>47</sup> But where the defendant has elected to let in evidence as to the actual charges of collection and the result of such evidence shows that the collection charges were less than 10 per cent., the defendant is not entitled to a deduction of 10 per cent.<sup>48</sup>

It has been held that in the case of endowed lands, the judgment-debtor is entitled to a deduction of the expenses incurred by him in carrying on the worship of

40. ('94) 21 Cal 142 (148) : 20 Ind App 160 (PC). (Government revenue.)

('94) AIR 1934 Cal 503 (505).

('11) 12 Ind Cas 335 (386) (Mad).

('02) 24 All 376 (380). (Tortious and malicious trespass—Expenses of collection of rents incurred by trespasser not allowed—1 All 518, Followed.)

('01) 23 All 252 (255, 256, 259). (Ordinary trespasser—Trespasser is entitled to charges of collection—1 All 518 disting.)

('80) 1 All 518 (521).

('88) 10 All 13 (14, 15). (Government revenue.)

('24) AIR 1924 Nag 427 (428) : 20 Nag L R 112.

('93) 17 Bom 35 (39).

('71) 16 Suth W R 171 (172, 173).

('17) AIR 1917 Mad 79 (79). (Government revenue.)

('09) 2 Ind Cas 464 (465) (All). (Do.)

[But see ('79) 4 Cal 566 (569).]

41. ('13) 18 Ind Cas 615 (615) (Mad).

('94) AIR 1934 Cal 503 (505).

('19) AIR 1919 Pat 392 (392) : 4 Pat L Jour 301.

(1865) 3 Suth W R Misc 30 (30).

('01) 23 All 252 (256, 257, 259).

('85) AIR 1935 All 943 (945).

[See also (1892) 1892 App Cas 75 (89), McArthur v. Cornwall. (Followed in 23 All 252).]

42. ('77) 1 All 518 (521) (FB). (Stuart, C. J. dissenting.)

('88) 10 All 13 (15). (Possession tortious.)

(1900) 22 All 262 (265, 266). (Possession not *bona fide*.)

('67) 7 Suth W R 230 (231).

('68) 9 Suth W R 473 (474). (Allowance should be made for expenditure of capital for extraordinary profits.)

('71) 15 Suth W R 203 (203). (Expenses allowed at 10 per cent.)

1 Hay 577.

('29) AIR 1929 Oudh 55 (56).

('24) AIR 1924 Nag 427 (428) : 20 Nag L R 112.

('68) 7 Suth W R 78 (78, 79).

1 Hay 277. (Defendant cannot take credit for rent uncollected.)

('02) 24 All 376 (380).

('01) 23 All 252 (256, 259).

('68) 9 Suth W R 457 (458). (Surunjamee allowed.)

('09) 2 Ind Cas 464 (465) (All). (Trespasser *bona fide*.)

('98) 20 All 208 (209). (Expenses incurred in obtaining decrees for rent—Not allowed.)

(1900) 27 Cal 951 (969, 970) : 27 Ind App 110 (PC). (Charges for collection allowed at 10 per cent.)

('12) 16 Ind Cas 866 (867) (Oudh). (Expenses allowed.)

('68) 9 Suth W R 369 (370). (Principle accepted, though percentage reduced.)

[See also ('21) AIR 1921 Cal 699 (707).]

('08) 7 Cal L Jour 197 (200).]

43. ('88) AIR 1938 Cal 563 (568).

44. ('85) AIR 1935 P C 49 (52) : 62 Ind App 53 : 62 Cal 499 (PC). (8 Cal 392 (PC) and 27 Cal 951 (PC), Followed.)

45. ('88) AIR 1938 Cal 563 (568).

46. ('87) AIR 1937 All 328 (333).

47. ('85) AIR 1935 P C 49 (52) : 65 Ind App 53 : 62 Cal 499 (PC).

('87) AIR 1937 All 328 (333).

('88) AIR 1938 Cal 563 (568).

48. ('88) AIR 1938 P C 189 (142) : 32 Sind L R 499 (PC).



the idols.<sup>40</sup> Under Section 2, clause 12 *ante*, mesne profits will not include profits due to the improvements made by the person in wrongful possession.<sup>50</sup> See also the under-mentioned case.<sup>51</sup>

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**Notes 6-6**

*Onus of proof.* — It is for the plaintiff who comes into Court with a claim for mesne profits to establish first his right to immediate possession.<sup>52</sup> The *onus* of proving the amount of profits actually received is on the person receiving them; but the burden of proving the profits that the person in occupation might with ordinary diligence have received therefrom, is on the person claiming them.<sup>53</sup> If the plaintiff lets in *prima facie* evidence to show that the profits were somewhere about the sum he alleges, the burden of proving that they were less, shifts to the defendant.<sup>54</sup>

**6. Interest forming part of mesne profits.** — There was no definition of 'mesne profits' in the Code of 1859. The definition in the Code of 1877 did not include interest on mesne profits as part of mesne profits. But the Code of 1882 as well as the present Code includes interest as part of mesne profits.<sup>1</sup> But this does not mean that the Court is obliged, in every case, to award interest.<sup>2</sup> It may refuse interest having regard to the circumstances of the case.<sup>3</sup> The reason is that mesne profits are in the nature of damages which the Court may mould according to the justice of the case.<sup>4</sup> Under the old Code, where mesne profits were left to be ascertained in *execution*, the executing Court could grant interest even though the decree was silent in respect thereof.<sup>5</sup> Under the present Code, however, the executing Court is not empowered to ascertain the mesne profits and cannot award any interest where both the *preliminary* and the *final* decrees are silent on the matter.<sup>6</sup> The reason is that the duty of the

49. ('72) 17 Suth W R 208 (209).

50. [See ('22) AIR 1922 P C 91 (93) (P C). (The increased rent due to improvement to be deducted although it was effected not by the person in actual possession at the time of the decree for possession but by a person who was in wrongful possession before him and from whom he obtained possession.)]

51. ('38) AIR 1938 Pat 573 (574). (Where in consequence of a reversal of an execution sale, mesne profits are awarded to a tenant and against a landlord decree-holder, such mesne profits should not include the rent payable by the tenant to the landlord. Such rent is liable to be deducted from the mesne profits.)

52. ('21) AIR 1921 Mad 42 (44, 46): 44 Mad 987. ('74) 21 Suth W R 276 (276, 277).

53. ('25) AIR 1925 Mad 145 (146): 47 Mad 800. ('33) AIR 1933 Mad 825 (828): 57 Mad 49. ('25) AIR 1925 Mad 297 (297).

('72) 18 Suth W R 251 (251). (Actual receipts to be proved by the person in wrongful possession.) (1865) 3 Suth W R Miso 25 (25). (Do.)

('28) AIR 1928 Mad 387 (389). ('35) AIR 1935 P C 49 (50): 62 Ind App 53: 62 Cal 499 (P C).

54. ('24) AIR 1924 Nag 117 (118): 20 Nag L R 52. ('74) 21 Suth W R 269 (270).

('82) 8 Cal 343 (351).

[See also ('70) 2 N W P H O R 217 (220). (Jamabandi papers filed by patwaris *prima facie* evidence of the profits of the estate.)]

**Note 6**

1. ('88) AIR 1988 P C 189 (142): 32 Sind L R 492 (P C).

2. ('84) 10 Cal 785 (791): 11 Ind App 88 (P C). ('19) AIR 1919 Cal 184 (186). (Observations in 6 Cal L Jour 462, Approved.) (1862) Marsh 105.

('38) AIR 1938 Cal 563 (568). ('37) AIR 1937 P C 143 (145, 146): 16 Pat 382: 64 Ind App 240: 31 Sind L R 360 (P C).

('37) AIR 1937 All 328 (333). (Where plaintiffs had been kept out of their money by conduct of defendants, it is only fair that defendants should pay a reasonable rate of interest upon the sum awarded.)

3. ('84) 10 Cal 785 (791): 11 Ind App 88 (P C). ('26) AIR 1926 Cal 1233 (1235).

(1900) 27 Cal 951 (967): 27 Ind App 110 (P C). ('34) AIR 1934 All 465 (469).

('31) AIR 1931 Mad 513 (520). (Interest may be disallowed on special grounds.)

('16) AIR 1916 Mad 895 (896). (Power to order interest on mesne profits beyond three years is discretionary.)

('21) AIR 1921 Pat 430 (432). (Rate of interest on mesne profits.)

4. (1900) 27 Cal 951 (967): 27 Ind App 110 (P C).

5. (1900) 27 Cal 951 (967): 27 Ind App 110 (P C).

('12) 17 Ind Cas 915 (916) (All).

('03) 25 All 275 (276).

('14) 18 Cal W N 76n.

('09) 2 Ind Cas 464 (465) (All).

[See ('21) AIR 1921 Cal 699 (700).]

[See also ('07) 6 Cal L Jour 462 (470, 471).]

6. ('31) AIR 1931 Mad 650 (652): 54 Mad 955 (F B). (Overruling AIR 1927 Mad 954.) (1900) 22 All 262 (265).

**O. 20 R. 12**  
**Notes 6-7**

executing Court is simply to carry out the decree and not to *add* to it or *vary* it in any way. But when the *preliminary* decree is silent as to interest, the Court can award interest in the *final* decree.

If mesne profits are payable month to month or at intervals of other periods, then interest also should be calculated according to such periods.<sup>7</sup> The rate of interest usually awarded by the Court is six per cent.<sup>8</sup> In the undermentioned decision,<sup>9</sup> the Calcutta High Court made a distinction between the period before the delivery of possession of the property to the plaintiff and the period after such delivery and held that while in respect of the former period a higher rate of interest should be paid, in respect of the latter period it was enough if the usual court-rate allowed on money decrees was paid. But this view has been criticised by the Privy Council<sup>10</sup> which has held that there is no reason for making any such distinction and that in the absence of a statutory provision or a special contract there is no ground for awarding interest on mesne profits at a higher rate up to the date of delivery of possession and at a lower rate subsequently. As to the period for which the interest should be calculated, see the undermentioned cases.<sup>11</sup> Where under a redemption decree accounts are directed to be taken as to the mesne profits payable by the defendant and it is also directed that the plaintiff should pay interest on the mortgage money from the date on which it fell due to the date on which it was deposited in Court, it is proper that the plaintiff should be charged with counter interest on the amount thus due as interest from him.<sup>12</sup>

**7. Value of mesne profits, if affects jurisdiction.**—See Note 5 to Section 6 and the undermentioned case.<sup>1</sup>

*See also the following cases under the old Code holding that executing Court cannot allow interest when trial Court is silent on the point:*

- ('82) 8 Cal 332 (335, 336) (P C).
- (1900) 22 All 262 (264, 265).
- 7. ('03) 25 All 275 (276).
- ('67) 7 Suth W R 173 (173).
- ('79) 4 Cal 882 (884).
- ('38) AIR 1938 Cal 563 (569). (When profits are earned or might have been earned by the wrongdoer yearly, interest on those profits must be calculated yearly and year by year.)
- 8. ('22) AIR 1922 All 117 (118) : 44 All 579.
- ('21) AIR 1921 Cal 699 (707). (*Bona fides* of trespasser to be considered when awarding interest.)
- ('07) 7 Cal L Jour 197 (201).
- (1841) 3 Moo Ind App 220 (227) (P C). (Court can award interest though not prayed in the plaint.)
- ('29) AIR 1929 Oudh 184 (145). (Rate of interest in the discretion of Court. Twelve per cent. allowed.)
- ('79) 3 Cal L Rep 517 (519). (Interest can be calculated upon the rental at the end of each year.)
- ('03) 30 Cal 506 (507). (Twelve per cent awarded.)
- ('12) 14 Ind Cas 396 (398) (Mad) (3½ per cent. held proper.)
- ('78) 3 Cal 654 (661). (Interest Act no bar.)
- ('21) AIR 1921 Lah 234 (235). (12 per cent. awarded.)
- ('37) AIR 1937 P C 143 (146) : 16 Pat 382 : 64 Ind App 240 : 31 Sind L R 360 (P C). (Rate of interest depends on variety of circumstances but in absence of special circumstances, 6 per cent. is fair rate.)
- ('88) AIR 1938 Cal 563 (568). (Do.)
- ('85) AIR 1935 PC 49 (52) : 62 Ind App 53 : 62 Cal

- 499 (P C). (In absence of special circumstances 6 per cent. is fair rate of interest.)
- ('37) AIR 1937 All 328 (333).
- ('86) AIR 1936 All 549 (553).
- 9. ('08) 7 Cal L Jour 197 (201).
- 10. ('37) AIR 1937 P C 143 (146) : 64 Ind App 240 : 16 Pat 382 : 31 Sind L R 360 (P C).
- [See also ('38) AIR 1938 Cal 563 (568). (The above Privy Council view followed.)]
- 11. ('24) AIR 1924 All 801 (802) : 46 All 842. (Preliminary decree awarding mesne profits — But amount ascertained subsequently—Interest to be calculated from the date of the preliminary decree.)
- ('80) 6 Cal L Rep 357 (360). (Case under the 1877 Code — Interest may be allowed from commencement of suit.)
- ('69) 11 Suth W R 25 (25). (Under the Code of 1859—Not good law—Interest allowed from the date of ascertainment of mesne profits.)
- ('68) 9 Suth W R 217 (218). (Do.)
- ('68) 10 Suth W R 391 (391). (Do.)
- ('79) 4 Cal 674 (676, 677). (Case under 1877 Code — Interest at six per cent. to be calculated upon each year's mesne profits up to date of decree — Interest on consolidated sum from date of ascertainment.)
- ('24) AIR 1924 Pat 781 (788) : 4 Pat 57. (Interest up to date of realisation of mesne profits can be allowed.)
- 12. ('88) AIR 1938 P C 139 (142) : 32 Sind L R 492 (P C).

**Note 7**

- 1. ('37) AIR 1937 Cal 761 (762) : I L R (1937) 2 Cal 176. (Person deliberately undervaluing mesne profits accruing before institution of suit

**8. Court-fees.** — Under Section 11 of the Court-fees Act (VII of 1870), where the amount of *past* mesne profits (*i. e.*, profits before the date of the suit) decreed or ascertained is in excess of the amount claimed in the plaint, execution of the decree will not be allowed unless the deficient court-fee is paid.<sup>1</sup> But the Court has no jurisdiction to levy court-fee on the *application* to ascertain the profits after the preliminary decree.<sup>2</sup> The fee can be levied only after ascertainment and before execution. Nor can the Court refuse to execute the decree for *possession* because the court-fee due in respect of mesne profits is not paid.<sup>3</sup>

No court-fee is payable on *future* mesne profits (*i. e.*, profits after the institution of the suit) under Section 11 of the Court-fees Act.<sup>4</sup> In Madras, however, that Section has been amended by Madras Act V of 1922 by which such profits are chargeable with court-fee and the decree will not be executed until such fee is paid.<sup>5</sup>

Where a court-fee is payable on mesne profits, it is to be calculated *ad valorem* on the amount claimed or decreed.<sup>6</sup>

**9. Right to apply for ascertainment of future mesne profits, when arises.** — The right to apply for the ascertainment of future mesne profits arises on the happening of any one of the three events mentioned in clause (c) and not on the date of the preliminary decree itself.<sup>1</sup> Where a decree for possession is made conditional on the payment of a certain sum of money, the decree-holder will not be entitled to mesne profits until such payment is made.<sup>2</sup>

*Decree silent as to future mesne profits.* — Where the right to future mesne profits is *negated* in the preliminary decree, the Court has no jurisdiction to award the same in a *final* decree.<sup>3</sup> Similarly, where the decree is *silent* as to the mesne profits it cannot be awarded in execution.<sup>4</sup> But where the decree simply says, "the

—He cannot claim greater amount exceeding pecuniary jurisdiction of the Court.)

#### Note 8

1. ('15) AIR 1915 Cal 696 (698).
- (‘83) AIR 1933 Pat 81 (83); 12 Pat 188.
- (‘97) 24 Cal 173 (176).
- [See also (‘06) 33 Cal 1232 (1235).]
2. (‘26) AIR 1926 Pat 218 (224); 5 Pat 361 (FB).
- (‘35) AIR 1935 All 206 (206, 207).
- (‘31) 129 Ind Cas 662 (663, 664) (Pat).
3. (‘31) AIR 1931 Mad 717 (720); 54 Mad 980.
4. (‘91) 15 Bom 416 (418).
- (‘14) AIR 1914 Cal 858 (859).
- (‘10) 5 Ind Cas 880 (880) (Mad). (Case before Madras Act V of 1922.)
- (‘98) 21 Mad 371 (372) (Do.).
- [See however (‘07) 30 Mad 32 (34). (Where court-fee was directed to be paid on subsequent rent awarded — Case before Madras Act V of 1922.)
- (‘81) 129 Ind Cas 662 (663, 664) (Pat).
- (‘20) AIR 1920 Low Bur 94 (95, 96); 10 Low Bur Rul 276.]
5. [See (‘37) AIR 1937 Mad 46 (48); 1 L R (1937) Mad 284. (But in respect of future mesne profits no portion of the court-fee is payable before the final decree is passed.)
- (‘38) AIR 1938 Mad 727 (730); 1 L R (1938) Mad 1050.]
6. (‘81) AIR 1981 All 588 (589).
- (‘28) AIR 1928 Mad 19 (19); 45 Mad 280.
- (‘20) AIR 1920 Pat 592 (592).

- (‘18) AIR 1918 Pat 623 (624); 3 Pat L Jour 101.
- (‘17) AIR 1917 Pat 79 (79); 3 Pat L Jour 67.
- (‘32) AIR 1932 Pat 228 (230, 231); 11 Pat 582.
- [See also (‘33) AIR 1933 Pat 81 (83, 84); 12 Pat 188.
- (‘33) AIR 1933 Pat 234 (235); 12 Pat 694.]

#### Note 9

1. (‘24) AIR 1924 Pat 781 (782); 4 Pat 57.
- [See (‘35) AIR 1935 Nag 76 (77). (Right to apply for mesne profits by way of restitution under S. 144 accrues on the day on which the applicant was wrongly deprived of possession).]
2. (‘28) 1928 Mad W N 51 (52).
3. (‘23) AIR 1923 Mad 43 (43).
- [See (‘31) 1931 Mad W N 846 (847). (Preliminary decree omitting to direct enquiry into mesne profits — Though final decree cannot award mesne profits or direct enquiry into mesne profits, yet where the final decree actually directs an enquiry into mesne profits, in such a case it is not a nullity and the executing Court cannot refuse to execute it.)]
- [See also (‘31) AIR 1931 Mad 650 (651); 54 Mad 955 (F B).]
4. (‘72) 18 Suth W R 122 (123).
- (‘75) 24 Suth W R 193 (195); 2 Ind App 219 (PC).
- (‘70) 18 Suth W R 11 (13).
- (‘74) 22 Suth W R 160 (161).
- (‘73) 19 Suth W R 154 (155).
- (‘71) 15 Suth W R 292 (293).
- (‘85) 7 All 197 (199).
- (‘01) 6 Cal W N 672 (674).

**O. 20 R. 12**  
**Notes 9-13**

claim in this suit be decreed with costs and mesne profits" the plaintiff will be entitled to such profits up to the date of his re-admission into the land.<sup>5</sup> In a case where a right to mesne profits is found in the judgment but no such direction is found in the decree (which ought to have been drawn up in accordance with the judgment), it has been held by the High Court of Calcutta<sup>6</sup> that there is nothing wrong in the Court assessing mesne profits on an application for such ascertainment without a formal amendment of the decree, and passing a final decree on such assessment.

**10. Notice of relinquishment — Clause (c).** — The relinquishment of possession by the judgment-debtor *with notice* to the decree-holder *through Court* absolves him from further liability in respect of future mesne profits.<sup>1</sup> The mere filing of a petition without notice<sup>2</sup> is not enough to escape liability unless the decree-holder waives the notice.<sup>3</sup> In the undermentioned case<sup>4</sup> it was held that notice of relinquishment given at a time when it was too late for cultivation was not sufficient to absolve the defendant from liability.

**11. Three years from the date of the decree.** — The period of three years mentioned in sub-clause (iii), clause (c) should be reckoned from the date of the preliminary decree, and where the same has been appealed from, from the date of the appellate decree.<sup>1</sup> The words "*whichever event first occurs*" clearly indicate that the *maximum* period for which future mesne profits can be awarded is three years from the date of the decree finally passed.<sup>2</sup> If the decree without specifying any period simply awards possession with *wasilat* from a particular date, the decree-holder is ordinarily entitled to mesne profits up to the date of re-delivery of possession to him,<sup>3</sup> unless the period of three years elapses before such re-delivery.<sup>4</sup>

**12. Limitation.** — See Authors' Commentaries on the Limitation Act, Articles 109 and 181 and Notes thereto.

**13. Res judicata.** — Where the decree is *silent* as to future mesne profits, a subsequent suit therefor is not barred by *res judicata*.<sup>1</sup> Even where the preliminary decree *contains a direction* relating to the ascertainment of mesne profits, a subsequent

[See ('86) AIR 1936 Sind 72 (75) : 80 Sind L R 17. (Parties referring question of past mesne profits to Judge as arbitrator — Judgment not mentioning anything about future mesne profits — Question can be gone into by executing Court — Even assuming that question had been referred to the Judge, inasmuch as the Judge had not dealt with it, there is no bar to its being dealt with subsequently.)]

5. ('29) AIR 1929 P C 300 (301) : 56 Ind App 290 : 57 Cal 1 (P C).

('82) 8 Cal 178 (190) : 8 Ind App 197 (P C).

('20) AIR 1920 All 323 (328) : 42 All 497.

6. ('29) AIR 1929 Cal 719 (721).

**Note 10**

1. ('21) AIR 1921 Cal 699 (706). (Mesne profits allowed as the surrender was not genuine.)

2. ('11) 12 Ind Cas 272 (272) (Mad).

3. ('21) AIR 1921 Cal 368 (364, 365).

4. ('16) AIR 1916 Mad 895 (895, 896).

**Note 11**

1. ('08) 80 Cal 660 (665) (F B).

('21) AIR 1921 Cal 699 (705).

('29) AIR 1929 Cal 388 (388, 384).

('01) 28 All 152 (158) : 27 Ind App 209 (P C). (If

appeal to Privy Council, from date of Privy Council's decree.)

('18) AIR 1918 Pat 260 (261) : 3 Pat L Jour 116. (Do.)

('30) AIR 1930 Cal 808 (809, 810). (Do.)

('12) 14 Ind Cas 801 (802) (Low Bur).

2. ('08) 85 Cal 1017 (1019).

('99) 9 Mad L Jour 334 (335).

('15) AIR 1915 Mad 226 (226).

3. ('82) 8 Cal 178 (189, 190) : 8 Ind App 197 (P C).

('97) 19 All 296 (299).

('27) AIR 1927 Cal 182 (184, 187) : 53 Cal 992.

('12) 16 Ind Cas 866 (866, 867) (Oudh).

('69) 12 Suth W R 75 (75).

('71) 16 Suth W R 25 (27).

('74) 22 Suth W R 328 (328).

4. ('25) AIR 1925 P C 113 (113, 114) (P C).

('09) 2 Ind Cas 464 (465) (All).

(1900) 24 Bom 149 (153).

(1900) 24 Bom 345 (349, 350).

**Note 13**

1. ('32) AIR 1932 Bom 222 (228) : 56 Bom 292.

(Not following earlier decision in AIR 1920 Bom 39.)

('31) AIR 1931 Cal 788 (789) : 58 Cal 1040.

suit for such profits will not be barred, even though the plaintiff omitted to apply for a final decree.<sup>3</sup> See also the undermentioned case<sup>3</sup> and Note 125 to Section 11 and Note 24 to Order 2 Rule 2. **O. 20 R. 12 Notes 13-15**

**14. Order after preliminary decree determining period and mode of accounting, if a decree.** — An order passed in supplemental proceedings after the preliminary decree with regard to the mode of accounting and the period for which the defendant is liable for mesne profits amounts, according to the High Court of Calcutta,<sup>1</sup> to another *preliminary decree*, but according to the High Court of Allahabad,<sup>2</sup> only to an *interlocutory order* in a pending suit. For a fuller discussion, see Note 10 to Section 2, clause (2).

**15. Appeal.** — Under the old Code the ascertainment of mesne profits was done in execution and the order relating thereto was appealable as having the force of a decree under Section 244 (Section 47). Under the present Code, the ascertainment is made in the *suit itself* and the result of it should be embodied in a *final decree* which is appealable as such.<sup>1</sup>

When the decree of the trial Court dismissing a suit for possession and mesne profits is reversed in appeal, the Appellate Court should not remand the case for enquiring into the mesne profits but should pass a preliminary decree for possession directing an enquiry into mesne profits under this rule.<sup>2</sup> *Vide also* the amendment made to this rule by the High Court of Madras.

## R. 13. [S. 213.] (1) Where a suit is for an account of any property and for its due administration<sup>2</sup> under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary

**Decree in administration suit.**

('16) AIR 1916 Cal 678 (674). (This rule contemplates relation between only plaintiff and defendant and not between co-defendants.)

('30) AIR 1930 Mad 90 (31, 32) : 53 Mad 838.

('37) AIR 1937 Mad 46 (49) : ILR (1937) Mad 284.

*For cases under the old Code which held that a second suit for future mesne profits was not barred, see the following cases :*

('67) 7 Suth W R 364 (365).

('81) 8 Cal 178 (190) : 8 Ind App 197 (PC).

('84) 7 All 170 (173, 174).

('95) 22 Cal 434 (443) : 22 Ind App 68 (PC).

('79) 5 Cal 563 (565).

('76) 25 Suth W R 327 (328).

('76) 25 Suth W R 215 (215, 216).

('72) 18 Suth W R 122 (123).

('69) 12 Suth W R 126 (127).

('69) 11 Suth W R 839 (840).

('68) 10 Suth W R 486 (486).

('68) 10 Suth W R 62 (64).

('90) 1890 Pun Re No. 60, page 159.

[See also ('24) AIR 1924 Mad 473 (473, 474).

(Preliminary decree awarding mesne profits — Rejection of petition praying ascertainment of the profits for default — Subsequent fresh petition not barred as *res judicata*.)

('70) 2 N W P H C R 176 (177). (Decree silent as to mesne profits—Decree-holder applying for

mesne profits in execution — Application dismissed.)]

[But see ('67) 2 Agra 268 (268).]

2. ('29) AIR 1929 Mad 785 (786).

3. ('37) AIR 1937 Mad 879 (881). (Decree on basis of award — No provision for enquiry into futuro mesne profits—Fresh suit for such mesne profits not barred.)

### Note 14

1. ('24) AIR 1924 Cal 160 (162).

('30) AIR 1930 Cal 89 (91) : 56 Cal 350.

[But see ('12) 13 Ind Cas 186 (186) (Cal).]

2. ('25) AIR 1925 All 588 (589) : 47 All 543.

[See ('32) AIR 1932 Oudh 271 (272).]

### Note 15

1. ('28) AIR 1928 Bom 236 (238) : 52 Bom 360. (Dismissal of an application for final decree as barred amounts to a decree and is appealable.)

('25) AIR 1925 All 588 (589) : 47 All 543.

('18) AIR 1918 Pat 260 (261) : 3 Pat L Jour 116.

('10) 5 Ind Cas 337 (338) (Cal).

('01) 23 All 152 (157) : 27 Ind App 209 (PC).

[See also ('28) AIR 1928 Pat 565 (566) : 7 Pat 491.]

2. ('22) AIR 1922 Mad 112 (114, 115) : 45 Mad 449.

('70) 13 Moo Ind App 490 (496) (PC).

[See also ('74) 22 Suth W R 461 (461).

('75) 23 Suth W R 449 (450).]

**O. 20 R. 13**  
**Notes 1-2**

decree, ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts<sup>8</sup> and liabilities, the same rules shall be observed as to the respective rights of secured<sup>9</sup> and unsecured creditors and as to debts and liabilities provable,<sup>10</sup> and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

[1877, S. 213.]

### *Synopsis*

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|---|--|
| <ol style="list-style-type: none"> <li>1. Analogous law.</li> <li>2. Administration suits.</li> <li>3. Hindu Law.</li> <li>4. Mahomedan Law.</li> <li>5. Who may file an administration suit.</li> <li>5a. Against whom administration suit can be filed.</li> <li>6. Complaint in administration suits.</li> <li>7. Decree in administration suits.</li> </ol> | <ol style="list-style-type: none"> <li>8. Estate insufficient to pay all the debts — Sub-rule (2).</li> <li>9. Rights of secured creditors. See Note 8.</li> <li>10. Provable debts and liabilities under the Insolvency Act.</li> <li>11. Barred debt.</li> <li>12. Court-fees.</li> <li>13. Appeal.</li> </ol> |
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### *Other Topics (miscellaneous)*

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|---|--|
| <p>Costs out of the estate. See Note 7.</p> <p>Inapplicability to suits against Administrator-General. See Note 8.</p> <p>Jurisdiction. See Note 2.</p> <p>Principles of distribution. See Note 10.</p> | <p>Priority for individual creditors in execution. See Note 7.</p> <p>Secured creditor, whether affected. See Notes 7 and 8.</p> <p>Suits by creditors. See Note 5.</p> <p>Suits by executors. See Note 5.</p> |
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**1. Analogous law.** — This rule corresponds to Section 34 and Part I, Schedule I of the Administration of Estates Act, 1925, (15 Geo., V, Ch. 23). The main difference between Part I, Schedule I and this rule consists in the addition of the words "and as to the priorities of debts and liabilities" after the words "contingent liabilities respectively." See Note 8 *infra*.

**2. Administration suits.** — "Administration" means the management of the estate of a deceased person who has left no executor.<sup>1</sup> It consists in —

- (i) Payment of the funeral expenses of the deceased.

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### **Order 20 Rule 13 — Note 2**

1. ('85) AIR 1935 Pesh 63 (64). (Where a debtor asks another person to take up the administration of his estate for liquidation of his liabilities

and a composition deed is drawn up, a decree passed in accordance with this deed is not an administration decree.)

- (ii) Collection, realisation and preservation of assets.
- (iii) Payment of debts and legacies.
- (iv) Acts in respect of adverse claims to assets.
- (v) Dealings with creditors and legatees.
- (vi) Distribution finally among the heirs and next of kin.<sup>2</sup>

The object of an administration suit is to have the estate administered under a decree of Court. In such a suit the whole administration and settlement of the estate are assumed by the Court; the assets are marshalled and a decree is made for the benefit of creditors and other persons entitled to the property.<sup>3</sup>

Thus, the suit is, in essence, one for an account and application of the estate of the deceased, for the satisfaction of the dues of all the creditors.<sup>4</sup> It cannot be dismissed at the preliminary stage except where the plaint discloses no cause of action or the suit is premature.<sup>5</sup>

An administration suit is not a suit *relating to immovable property* and, therefore, the Court is not incompetent to administer properties or to deal with questions of title in respect of properties situate *outside* its jurisdiction.<sup>6</sup> Again, the jurisdiction of the Court, as to such a suit, does not depend upon the fact whether the deceased is one to whose estate the Succession Act applies.<sup>7</sup>

Though sub-section (1) does not *expressly prohibit* the filing of an administration suit in respect of the property of a *living* person, it has been held by the High Court of Bombay that such a suit is *not* maintainable.<sup>8</sup>

Before the Court takes upon itself the administration of the property, the preliminary decree for administration should be passed.<sup>9</sup> The Court may also make an order for grant of maintenance *pendente lite* but this power has to be exercised with caution.<sup>10</sup> Where a preliminary decree has been passed under this rule, the Court can stay proceedings taken by another decree-holder and direct him to come in and prove his claim in the administration suit.<sup>11</sup> It has been held that a creditor who has neglected to come in under the administration decree cannot subsequently sue the creditors who have proved their debts and received dividends, for a re-distribution of the assets and for a *pro rata* refund by such creditors.<sup>12</sup>

**3. Hindu Law.**—An administration suit is filed only in respect of the estate of the deceased and therefore if the property of a Hindu passes by *survivorship*, there is no *estate* of the deceased left for administration and a suit for administration is not maintainable.<sup>1</sup>

**4. Mahomedan Law.**—Under the Mahomedan law, the funeral expenses of the deceased should be defrayed first from out of the assets, then his debts and then

Encyclopaedia of American & English Law Vol. 1, p. 643 referred to in 32 Bom 381 (384).

2. ('28) AIR 1928 Mad 760 (763).

3. ('18) AIR 1918 Cal 883 (885) : 44 Cal 890.

('31) AIR 1931 Mad 683 (684) : 55 Mad 21.

[See ('89) AIR 1989 Rang 365(368). (Suit for rents and profits of property held in trust which is alleged to have failed is not administration suit.)]

[See also ('84) AIR 1984 Cal 800(804):60 Cal 512.]

4. ('18) AIR 1918 Cal 883 (885) : 44 Cal 890.

('31) AIR 1931 Mad 683 (688) : 55 Mad 21.

('35) AIR 1935 Cal 89(45) : 61 Cal 711. (Although a few of the directions that are given in the suit resemble those given in an administration suit, suit for recovery of immovable and movable prop-

erties from defendants alleged to be in wrongful possession of them cannot be held to be an administration suit.)

5. ('81) AIR 1931 Cal 45 (48) : 57 Cal 1358.

6. ('06) 33 Cal 180(191, 192):32 Ind App 198(PC).

('28) AIR 1928 Mad 760 (763).

('06) 29 Mad 239 (280). (Affirmed in 34 Mad 257.)

7. ('81) 1881 Pun Re No. 68, p. 153.

8. ('08) 32 Bom 381 (385).

9. ('30) AIR 1930 Bom 336 (336).

10. ('18) AIR 1918 Pat 338 (340).

11. ('39) AIR 1939 Mad 204 (207, 208).

12. ('36) AIR 1936 Bom 428 (428).

Notes 3

1. ('08) 32 Bom 381 (385)

**O. 20 R. 13**  
**Notes 4-6**

the legacies. The residue is to be thereafter distributed amongst the heirs of the deceased.<sup>1</sup> A suit by the heirs or the creditors or the legatees of a deceased Mahomedan for the enforcement of their claims against the estate of the deceased, becomes essentially a suit for *administration*,<sup>2</sup> though in such cases partition of the estate may be an incident thereof,<sup>3</sup> and even the heirs of the deceased who are not parties to such a suit are bound by the proceedings and cannot claim anything but what remains after the debts of the deceased have been paid.<sup>4</sup>

**5. Who may file an administration suit.** — A suit for administration of the estate may be instituted by any person *interested in the estate*. Thus, the following persons may maintain a suit for administration —

- (i) Any person entitled to a share in the deceased's estate, such as next of kin.<sup>1</sup>
- (ii) A legatee or an annuitant.<sup>2</sup>
- (iii) A creditor of the deceased. But the creditor should sue on behalf of himself and on behalf of all the creditors.<sup>3</sup>
- (iv) An executor or administrator, where there are disputes between the heirs or the legatees and where there is a doubt as to the manner in which he should administer the estate.<sup>4</sup>
- (v) The legal personal representative of the deceased.<sup>5</sup>

An order for administration will not be made in a suit therefor, unless the plaintiff proves his claim or establishes his right to bring the suit.<sup>6</sup> But it is not obligatory on the Court to pass a decree for administration, if the defendant before decree satisfies the plaintiff's claim. It may dismiss the suit.<sup>7</sup>

**5a. Against whom administration suit can be filed.** — A suit for administration is maintainable against persons who were in possession of the property during the lifetime of the deceased as agents or managers and who continued to be in possession after his death.<sup>1</sup> In an administration suit where a legatee sues the executor for payment of a legacy and for administration of the estate of the deceased, the executor, if there is one, is the only necessary party and not the other legatees.<sup>2</sup> The next of kin and the intermeddler with the estate of the deceased are proper parties to an administration suit.<sup>3</sup>

**6. Plaint in administration suits.** — As to the form of plaint in such suits, see Schedule I, Appendix A, Forms Nos. 41 to 44.

**Note 4**

- 1. ('82) 8 Cal 20 (24).
- 2. ('15) AIR 1915 Cal 655 (657). (Mahomedan widow can have her claim to dower settled only by administration suit.)
- ('97) 1 Cal W N 336 (337). (Heirs opposing probate may maintain suit for administration against administrator *pendente lite*.)
- ('82) 8 Cal 370 (374). (Creditor's suit—Treated as administration suit.)
- ('79) 4 Cal 142 (159) (FB). (Do.)
- ('75) 24 Suth W R 3 (4). (Do.)
- 3. ('28) AIR 1928 Mad 760 (762, 763).
- 4. ('94) 21 Cal 311 (317, 318).

**Note 5**

- 1. ('28) AIR 1928 Mad 760 (762).
- 2. (1877) 7 Ch D 58 (59), *Wollaston v. Wollaston*.

- 3. ('75) 15 Beng L R 296 (301).

('84) 10 Cal 713 (734).

(1876) 2 Ch D 109 (110), *Worraker v. Prayer*.

('89) AIR 1939 Mad 204 (207). (Although suit is filed only by one creditor, decree enures for benefit of all creditors of deceased—No creditor stands in better position than others unless he holds vested interest in property.)

4. ('09) 3 Ind Cas 164 (165) : 33 Bom 429,

5. ('32) AIR 1932 P O 146 (151) (PO).

6. (1887) 36 Ch D 269 (276, 277), *Battany v. Walford*.

7. ('14) AIR 1914 Mad 646 (647).

**Note 5a**

1. ('82) AIR 1932 Lah 823 (380).

2. ('32) AIR 1932 Cal 337 (338) : 58 Cal 77.

3. ('83) AIR 1933 Mad 74 (79) : 56 Mad 273.



**7. Decree in administration suits.** — In drawing up decrees in administration suits the forms prescribed in the Code should be followed as far as possible.<sup>1</sup> For forms of preliminary decree, see Schedule I, Appendix D, Forms Nos. 17 and 19, *infra*, and for forms of final decrees, see Forms Nos. 18 and 20, *infra*. In a suit by a creditor for administration, it cannot be held that the other creditors are represented by the plaintiff in the sense that they are, in effect, *parties* to the suit.<sup>2</sup> But a decree for the administration of the estate of a deceased person is a decree in favour of all creditors and persons entitled to the effects of the deceased, and therefore a creditor who has attached the property of the deceased is not entitled to any priority in respect of his claims and will only rank among other creditors.<sup>3</sup> But the pendency of an administration suit will not debar a *secured* creditor from enforcing his security.<sup>4</sup> After the passing of the preliminary decree it is not proper for the Court to sanction a compromise to which all parties to the suit are not parties,<sup>5</sup> or to discharge the receiver appointed by the Court and direct him to make over the estate to the plaintiff.<sup>6</sup> So also, a *supplementary* decree cannot be passed after the preliminary decree has been passed, the only other decree that can be passed in the case after the preliminary decree being the *final* decree.<sup>7</sup>

Although a Court in pursuance of a decree in an administration suit is competent to direct one of the parties to the suit to restore or hand over to the administrator or receiver assets belonging to the estate which are in the possession of such party, it is not open to the Court in an administration suit to direct a debtor to pay a debt (which is disputed by the alleged debtor) to the administrator or the receiver.<sup>8</sup>

The Code makes no provision as to when a final decree in an administration suit should be passed or as to the contents of such decree; this must depend upon the circumstances in each case.<sup>9</sup>

**8. Estate insufficient to pay all the debts — Sub-rule (2).** — Where the estate of the deceased, in respect of which administration by Court is sought, is *insufficient* to pay all the debts of the deceased in full, sub-rule (2) will apply. Under that sub-rule, the law of insolvency in respect of the following heads should be observed in the administration of such estates —

(i) as to the respective rights of secured and unsecured creditors (see Sections 28 and 47 of the Provincial Insolvency Act, 1920, and Section 48 and clauses 9 to 17 of Schedule II of the Presidency Towns Insolvency Act, 1909),

(ii) as to the debts and liabilities of the estate provable (see Sections 45 and 46 of the Provincial Insolvency Act, 1920, and Sections 46 and 48 of the Presidency Towns Insolvency Act, 1909), and

(iii) as to the valuation of annuities and future and contingent liabilities (see

**Note 7**

1. ('05) 32 Cal 561 (566).

[See ('36) AIR 1936 Lah 879 (882). (The forms are merely to be used as a guide in framing decrees; they can be varied and adopted according to the circumstances in each case.)]

[See also ('25) AIR 1925 P C 261 (262) (P C). (Change in form of preliminary decree was recommended.)]

2. ('81) AIR 1981 Mad 688 (684) : 55 Mad 21.

3. ('88) 15 Cal 202 (209, 210).

('39) AIR 1939 Mad 204 (205).

4. ('81) 7 Cal 733 (735).

5. ('05) 32 Cal 561 (565, 566).

6. ('01) 5 Cal W N 417 (419).

7. ('38) AIR 1938 Rang 372 (374).

8. ('36) AIR 1936 Lah 365 (365).

9. ('36) AIR 1936 Lah 879 (883). (Where after passing of a preliminary decree in an administration suit the Court passed an order which determined all the matters in dispute between the parties but refused to frame a final decree sheet, such order must be construed as a final decree to that extent and is appealable.)

**O. 30 R. 13** Section 34 of the Provincial Insolvency Act, 1920, and Section 46 of the Presidency  
**Notes 8-13** Towns Insolvency Act).

The object of this sub-rule is not to apply *all* rules of insolvency to insolvent estates but only the rules in respect of the three heads mentioned above.<sup>1</sup>

**9. Rights of secured creditors.** — See Note 8 above.

**10. Provable debts and liabilities under the Insolvency Act.** — The dividends due to the creditors should, in an administration suit, be calculated on the amount of the debt at the *date of the preliminary decree* and not at the date of *proof*.<sup>1</sup> Unsecured creditors are entitled to interest up to the date of the preliminary decree and not up to the date of payment,<sup>2</sup> but secured creditors are entitled to interest from the proceeds of the sale of secured property up to the date of payment.<sup>3</sup> The general principle governing the position of creditors of an estate under administration by the Court is that creditors will, on due cause shown, be let in at any time, *while the fund is in Court*, except where they have been guilty of remissness in the assertion of their claim and other creditors are prejudiced thereby.<sup>4</sup> See Sections 45 to 50 of the Provincial Insolvency Act, 1920, and Schedule II, Rules 2, 9, 11, 15, 23 to 27 of the Presidency Towns Insolvency Act, 1909.

**11. Barred debt.** — A creditor whose claim is barred before the preliminary decree cannot come in and claim to be paid out of the estate.<sup>1</sup> If a debt is *due* to the deceased by the next of kin, but is barred by limitation, it has been held in England that an executor can retain a share, inasmuch as the debt still existed though only the *remedy* is barred.<sup>2</sup> This rule has also been followed in India.<sup>3</sup>

**12. Court-fees.** — A suit for administration is in the nature of a suit for an account and the plaint is chargeable with court-fee under Section 7 (iv) (f) of the Court-fees Act, 1870.<sup>1</sup> A creditor who comes in with a claim after a preliminary decree has been passed in the administration suit need not pay any court-fee on such claim.<sup>2</sup>

**13. Appeal.** — An order directing an account to be taken in an administration suit was not a decree under the old Code and was not appealable.<sup>1</sup> Under the present Code, a preliminary decree directing accounts to be taken will of course be appealable under Section 96 of the Code.

#### Note 8

1. ('19) AIR 1919 Cal 908 (910, 912): 45 Cal 658.  
 [See however ('14) AIR 1914 Mad 281 (282):  
 38 Mad 500 (508). (This rule is inapplicable to  
 suits against Administrator-General.)]

#### Note 10

1. ('71) 6 Beng L R App 140 (141).
2. ('29) AIR 1929 Mad 242 (248).
3. ('29) AIR 1929 Mad 242 (248).
4. ('05) 9 Cal W N 167 (169, 170).

#### Note 11

1. ('81) AIR 1981 Mad 688 (684): 55 Mad 21.
2. (1848) 8 Hare 589 (552), Courtney v. Williams,  
 (Referred in 7 Cal 644.)  
 (1875) 20 Eq 644 (646, 647), In re Cordwell's  
 Estate, (Referred in 2 Bom 75.)

(1891) 8 Ch 212 (221), In re Akerman.

(1904) 2 Ch 66 (71), In re Wheeler.

[See also (1894) 1 Ch 671 (674), Taylor v. Wade.]

3. ('81) 7 Cal 644 (647).

[See also ('78) 2 Bom 75 (81, 88).]

#### Note 12

1. ('18) AIR 1918 Cal 888 (886): 44 Cal 890  
 (895, 896).

('15) AIR 1915 Bom 59 (60): 39 Bom 545.

('14) AIR 1914 Lah 490 (491): 1914 Pun Re No. 100.

('88) 18 Cal L Rep 160 (161). (Referred in 7 Bom  
 125).

2. ('81) AIR 1981 Mad 688 (684): 55 Mad 21.

[See however ('89) AIR 1989 Rang 115 (117):  
 1989 Rang L R 184.]

#### Note 13

1. ('88) 9 Cal 778 (777).

**R. 14.** [S. 214.] (1) Where the Court decrees a claim to pre-emption<sup>2</sup> in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall — **O. 20 R. 1**

Decree in pre-emption suit.

(a) specify a day on or before which the purchase-money shall be so paid,<sup>6</sup> and

(b) direct that on payment into Court<sup>9</sup> of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued<sup>8</sup> from the date of such payment, but that, if the purchase-money and the costs if any are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption,<sup>15</sup> the decree shall direct, —

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

[1877, S. 214.]

*Synopsis*

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Pre-emption.</li> <li>3. Pre-emption under Mahomedan law.</li> <li>4. Pre-emption by custom.</li> <li>5. Pre-emption by contract.</li> <li>6. Shall specify a day before which purchase-money shall be paid.</li> <li>7. Extension of time.</li> <li>8. Plaintiff's title, when accrues.</li> </ol> | <ol style="list-style-type: none"> <li>9. Payment into Court.</li> <li>10. Tender of money, if sufficient.</li> <li>11. "On or before the day referred to." See Note 7.</li> <li>12. Right to rents and profits.</li> <li>13. Vendor's title in pre-emption suits.</li> <li>14. Set-off of costs against purchase-money.</li> <li>15. Rival pre-emptors — Sub-rule (2).</li> <li>16. Appeal.</li> </ol> |
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**O. 20 R. 14**  
**Notes 1-2**

*Other Topics (miscellaneous)*

Conditional decrees under this rule. See Note 16.  
Effect of non-payment — If the decree should state. See Note 7.  
Inapplicability where vendee not entitled to immediate possession. See Note 8.

Payment of costs under this rule. See Note 9.  
Payment of money and rights thereto. See Note 9.  
Value for jurisdiction. See Note 2.

**1. Legislative changes. —**

1. The words "whose title thereto shall be deemed to have accrued from the date of such payment" are new. See Note 8, *infra*.
2. Sub-rule (2) is new.

**2. Pre-emption.** — The right of pre-emption is the right of a person to purchase property before opportunity to purchase it is offered to others.<sup>1</sup> Such a right may, however, be defeated by waiver or acquiescence on the part of the claimant.<sup>2</sup>

The doctrine of pre-emption does not apply to *execution sales*, apparently because the would-be pre-emptor can, in such a case, as well have bid at the auction.<sup>3</sup>

The right of pre-emption arises only on a *sale* of immovable property.<sup>4</sup>

Where a plaintiff having a right to pre-empt joins with himself, in a suit for pre-emption, a *stranger*, he forfeits his right to pre-empt,<sup>5</sup> but not so where the other persons joined are members of the plaintiff's family.<sup>6</sup> See also the undermentioned cases.<sup>7</sup>

**Order 20 Rule 14 — Note 2**

1. The Concise Oxford Dictionary.
2. ('08) 85 Cal 402 (411) : 35 Ind App 60 (PC).  
(Delay in asserting right to pre-emption construed as waiver.)  
(('89) 11 All 164 (174). (Acquiescence in mortgage by conditional sale is not relinquishment of right of pre-emption upon conditional sale becoming absolute.)  
*Mere fact that negotiations were made with vendee without resorting to suit does not amount to waiver :*  
(('94) 16 All 300 (302).  
(('97) 19 All 334 (336).
3. ('05) 27 All 670 (677). (Private sale by receiver is not a compulsory sale and right of pre-emption exists.)  
(('92) AIR 1932 Nag 44 (45) : 28 Nag L R 11. (Sale in execution in presence of a compromise decree—No right of pre-emption.)  
(('71) 15 Suth W R 455 (456).
4. ('92) 14 All 333 (335). (Gift—No right of pre-emption.)  
(('88) 15 Cal 184 (186). (Perpetual lease—No right of pre-emption.)  
(('05) 32 Cal 988 (991). (Sham sale—No right of pre-emption.)  
[See also ('08) 25 All 334 (336). (No suit for pre-emption will lie, the basis of which is a decree for pre-emption in another suit.)
5. ('83) 5 All 180 (181, 183).  
(('83) 5 All 197 (200, 201).  
(('97) 19 All 324 (326).
6. ('82) 4 All 259 (260).  
(('97) 19 All 811 (811).
7. ('85) 7 All 107 (111). (Decree for pre-emption — Property transferred by decree-holder—He can thereafter execute the decree.)

- (('88) AIR 1933 Lah 481 (483) : 14 Lah 421.
- (('01) 23 All 129 (130). (Guardian of minor is competent to exercise or refuse to exercise on behalf of the minor a right of pre-emption.)
- (('04) 26 All 549 (553). (In suit for pre-emption vendor is not a necessary party.)
- (('11) 9 Ind Cas 414 (414) (Oudh). (Jurisdiction of Court is to be decided by the valuation set forth in the plaint.)
- (('87) 9 All 471 (473). (Price alleged in deed of sale not true contract price — Vendor and vendee concealing real price — Court should ascertain the market price at the time of the sale.)
- (('97) 19 All 148 (152). (Sale to two, one of whom alone is liable to be pre-empted—Interest separable — Pre-emption only of his interest allowable.)
- (('98) 20 All 100 (102). (Land having been sold to stranger, subsequently re-sold by the stranger before suit to a co-sharer having equal rights with those seeking pre-emption—No right of pre-emption.)
- (('99) 21 All 374 (379). (Right to pre-empt must subsist both at the time of the sale and at the time of the institution of suit.)
- (('99) 21 All 441 (444, 445). (Right to pre-empt lost during pendency of suit — Suit to be dismissed.)
- (('96) 13 All 392 (394). (Claimant for pre-emption under *wajib-ul-arz* does not forfeit his right by mortgaging his share to a stranger in contravention of the *wajib-ul-arz*—*Contra* 5 All 180.)
- (('76) 1 All 591 (592). (Plaint in suit for pre-emption not stating plaintiff's readiness and willingness to pay any amount which Court might find to be actual price. It is discretionary with the Court to grant a decree—See also (1881) 3 All 758 (755).)
- (('84) 6 All 455 (456). (Every suit for pre-emption must include whole of the property subject to

**3. Pre-emption under Mahomedan law.** — The Mahomedan law is the only system of law which provides substantive rules relating to pre-emption.<sup>1</sup> In the Madras Presidency, the right of pre-emption under the Mahomedan law is not recognised on the ground of its being opposed to public policy, which favours the free and unrestricted transfer of property.<sup>2</sup>

The undermentioned are some of the cases bearing upon the Mahomedan law of pre-emption.<sup>3</sup> See also the Punjab Pre-emption Act (I of 1913), Section 11, the Agra Pre-emption Act, 1922, and the Oudh Laws Act, 1876.

**4. Pre-emption by custom.** — A right of pre-emption is recognised by custom among Hindus in Behar,<sup>1</sup> Gujarat<sup>2</sup> and the United Provinces.<sup>3</sup> See also the under-mentioned cases.<sup>4</sup>

pre-emption conveyed by one transfer—See also (1884) 6 All 423 (426, 427.)  
(‘89) 11 All 108 (117). (Claimant disqualified to sue as to part cannot claim the remainder.)

#### Note 3

1. (‘83) 5 All 110 (113, 117).  
(‘89) 5 All 180 (182).
2. (‘70) 6 Mad H C R 26 (31).
3. (‘98) 20 All 88 (89). (Sunnis—Plaintiff dying before suit—Right does not survive to his heirs. —See however 12 Ind Cas 720 (720) (Bom)—Heirs and representatives, if executors or administrators, right survives.)  
(1900) 22 All 343 (350, 351). (Sale invalid — No right of pre-emption.)  
(‘94) 16 All 344 (352, 353). (Sale of land—Value exceeding Rs. 100 — Price paid and possession delivered to transferee—No sale deed executed—Transaction complete and right of pre-emption arose.)  
(‘06) 28 All 127 (129). (Owner of the dominant tenement has in respect of a sale of the servient tenement a right of pre-emption.)  
(‘98) 15 All 104 (107). (Vicinity would give no right of pre-emption under Mahomedan law.)  
(‘94) 16 All 247 (251). (No right of pre-emption in respect of thoroughfare.)  
(‘88) 15 Cal 224 (226). (Alienation in favour of co-sharer and stranger jointly — Co-sharer also loses his right of pre-emption.)  
(‘90) 17 Cal 543 (547) (F B). (Formalities.)  
(‘05) 32 Cal 982 (986). (Suit for pre-emption brought by Sunni claimant against a Shia vendor and Hindu purchasers is governed by the Sunni Hanafi law.)  
(‘90) 12 All 229 (231, 234). (Shia law — Property owned by more than two sharers — No right of pre-emption.)  
(1900) 22 All 102 (104, 105). (Mahomedan of the Shia sect cannot maintain claim for pre-emption based on the ground of vicinity under the Mahomedan law when both the vendor and vendee are Sunnis.)

#### Note 4

1. (‘12) 15 Ind Cas 659 (662) : 89 Cal 915 : 39 Ind App 101 (P O).  
(‘08) 35 Cal 575 (585).  
(1869) 1863 Beng L R Sup Vol 35 (47).  
2. (‘69) 6 Bom H O R A C 268 (264).

3. [See for instance (‘90) 12 All 234 (254, 258).]

4. *One coparcener has no right of pre-emption against another :*

(‘66) 6 Suth W R 250 (252).

(‘79) 4 Cal 831 (834, 835) (F B).

(‘87) 14 Cal 761 (766).

*Persons not entitled to pre-empt :*

(‘98) 20 All 419 (420). (Wajib-ul-arz — Cosharers and owners of separate plots of muafi land — Muafidars held not entitled to pre-empt.)

(‘01) 23 All 427 (428). (Hissedar of superior class not entitled to pre-emption upon sale to hisse-dar of inferior class.)

(‘94) 16 All 412 (414).

(‘95) 17 All 447 (450). (Vendor who is not a cosharer.)

(‘04) 26 All 547 (548). (Do.)

(‘05) 32 Cal 988 (990). (Persons not born or domiciled in the district in which the land is situated.)

(‘84) 6 All 17 (19). (Maintenance-holder.)

*Classes of persons entitled to pre-empt :*

(‘78) 1 All 452 (453). (Hindu widow.)

(‘98) 20 All 148 (150). (Hindu daughter.)

(‘04) 26 All 574 (579) : 30 Ind App 212 (P C). (Non-residing cosharer entitled to pre-empt.)

(‘04) 26 All 544 (545).

(‘01) 23 All 260 (261). (No implication of subordination.)

(‘87) 9 All 480 (483). (Recorded cosharer to be preferred to person claiming to be cosharer by virtue of benami purchase.)

*Miscellaneous :*

(1900) 22 All 1 (11, 29, 32) (F B). (Perfect partition extinguishes co-sharer's right of pre-emption.)

(‘14) AIR 1914 All 75 (75, 76) : 36 All 456. (Claim can be based in the alternative on contract, custom or Mahomedan law.)

(‘70) 2 N W P H C R 222 (223). (Claims to pre-emption based on contract as well as custom may be united in one suit.)

(‘06) 28 All 590 (592). (Generally custom to be presumed to be co-extensive with Mahomedan law.)

(‘01) 23 All 32 (33). (*Ekjadi*, meaning of.)

(‘90) 12 All 234 (254). (Custom ordinarily co-extensive with Mahomedan law.)

**O. 20 R. 14**  
**Notes 5-7**

**5. Pre-emption by contract.** — Pre-emption can be claimed on the basis of a contract between the person claiming to pre-empt and the vendor, if the vendee has notice of such contract.<sup>1</sup> (See Transfer of Property Act, Section 40.)

Thus, a right of pre-emption in respect of a property may be conferred on a mortgagee thereof.<sup>2</sup> The price in such cases may or may not be fixed beforehand.<sup>3</sup> It has been held that the right cannot be enforced against an execution purchaser of the equity of redemption.<sup>4</sup>

**6. Shall specify a day before which purchase-money shall be paid.** — It is necessary under this rule that the decree should *specify a day* before which the purchase-money shall be paid.<sup>1</sup> It is not a compliance with the rule to say that the money should be paid within a certain period; the *date* by which the amount should be paid should be specified.<sup>2</sup>

Where the vendee has paid off encumbrances on the property the amount should be included in the "purchase money" unless he has paid off the encumbrance in bad faith or improvidently.<sup>3</sup>

**7. Extension of time.** — The general principles embodied in O. 20 R. 3 apply to pre-emption decrees under this rule and hence Section 148 does not enable the Court to enlarge the period fixed by the decree for paying the purchase-money.<sup>1</sup> But where the last day allowed to the plaintiff to deposit the purchase money is a holiday, the money may be deposited on the next court-day on general principles of law.<sup>2</sup>

*Effect of appeal on time fixed for payment.* — The mere presentation of an appeal does not operate as a stay of proceedings in the lower Court (Order 41 Rule 5). Hence, the time for payment fixed by a pre-emption decree is not extended by the fact that an appeal has been preferred against the decree,<sup>3</sup> though the Appellate Court

(1863) 1863 Beng L R Sup Vol 35 (47).

('06) 28 All 434 (435). (Custom need not be immemorial.)

**Note 5**

1. ('98) 2 Cal W N 575 (576).

('09) 4 Ind Cas 743 (744) (Cal).

2. ('1900) 22 All 238 (240, 242).

[See ('88) 1888 Pun Re No. 138, page 372. (In this case the mortgagee was held to have waived his right.)]

3. (1721) 9 Modern 2 (3), Orby v. Trigg. (Referred to in 22 All 238 and 24 Mad 449.)

4. ('10) 7 Ind Cas 663 (663) : 34 Bom 567.

[See also ('92) 15 Mad 480 (481, 482). (Refusal to bid at the court auction precludes enforcement of right afterwards.)]

**Note 6**

1. ('84) 6 All 370 (373).

('13) 18 Ind Cas 994 (996) : 1913 Pun Re No. 3.

*Prior to the Code of 1877 there was difference of opinion on the point :*

('75) 1 All 132 (134).

('75) 1 All 293 (295, 296).

[See ('68) 10 Suth W R 53 (54).]

2. ('26) AIR 1926 All 159 (158).

('06) 1906 Pun Re No. 48, page 172 (FB).

('21) AIR 1921 Lah 6 (9) (FB).

3. ('24) AIR 1924 Oudh 1 (1, 5, 6).

**Note 7**

1. ('18) 19 Ind Cas 347 (347) : 16 Oudh Cas 5.

('84) AIR 1984 Oudh 17 (18) : 9 Luck 215.

('10) 5 Ind Cas 443 (444) : 13 Oudh Cas 38.

('10) 8 Ind Cas 812 (813) (Lah).

('24) AIR 1924 Lah 359 (359).

('13) 21 Ind Cas 585 (586) : 35 All 582.

('14) AIR 1914 Oudh 383 (383) : 17 Oudh Cas 377.

('15) AIR 1915 Oudh 197 (197, 198).

('91) 13 All 400 (403).

('20) AIR 1920 Oudh 25 (29) : 28 Oudh Cas 254.

('89) AIR 1989 Nag 107 (109).

[See also ('09) 8 Ind Cas 497 (498) (All).]

[Compare also ('13) 18 Ind Cas 994 (996) : 1913 Pun Re No. 3. (Inherent power — Costs not directed to be paid within any specific period — Time extended.)]

*But see the following two cases :*

('16) AIR 1916 Pat 268 (269) : 1 Pat L Jour 92.

('13) 18 Ind Cas 86 (87) : 1913 Pun Re No. 60. (Money sent by money order—Delay due to post office—Time may be extended under S. 148.)

2. ('24) AIR 1924 All 218 (220) : 46 All 328. (Overruling A I R 1922 All 278 and AIR 1918 All 13.)

('81) 3 All 850 (851).

('70) 2 N W P H C R 112 (112).

('77) 1877 Pun Re No. 31, p. 67.

('13) 18 Ind Cas 994 (995) : 1913 Pun Re No. 3.

('08) 11 Oudh Cas 144 (146).

('31) AIR 1931 Lah 388 (389).

3. ('96) 18 All 223 (226).

('38) AIR 1938 All 118 (114). (18 All 223, Followed.)

may, if it thinks fit, enlarge the time.<sup>4</sup> Where the appeal is dismissed or the decree of the lower Court is varied and the appellate decree is silent about the extension of time, there is a conflict of opinion as to whether the time fixed by the original decree is to be calculated from the date of the appellate decree. See Note 9 to Section 148 *ante* and the undermentioned case.<sup>5</sup> Where, however, the Appellate Court *increases* the sum to be paid by the plaintiff in a pre-emption suit and he deposits the excess amount ordered *within a reasonable time after the appellate decree*, the payment is a valid one.<sup>6</sup>

**O. 20 R. 14**  
**Notes 7-8**

*Effect of failure to deposit within the time allowed.* — On the plaintiff's default in paying the purchase-money within the time allowed, the suit should be dismissed,<sup>7</sup> though the decree does not contain a specific provision to that effect.<sup>8</sup> But where the plaintiff has appealed against the *very condition* in the decree that he should pay the purchase-money within a certain period, the Appellate Court should not dismiss the suit simply on the ground of non-payment within the time so fixed.<sup>9</sup>

Where a suit for pre-emption by a son *in his own individual capacity* is dismissed owing to his failure to pay the purchase-money within the time allowed, a fresh suit by his father, for pre-emption, in assertion of his own individual right is not barred.<sup>10</sup>

**8. Plaintiff's title, when accrues.** — The pre-emptor's title to the property accrues from the date of the payment of the purchase-money into Court and not from the date of the sale or of the decree.<sup>1</sup> A registered instrument is not necessary for passing the title.<sup>2</sup> The words "whose title thereto shall be deemed to have accrued from the date of such payment" have been newly inserted in this rule to make this clear and to supersede the opinion expressed by the Madras High Court in the undermentioned case<sup>3</sup> that a registered instrument is necessary for passing title to the pre-empted property.<sup>4</sup> It has been held that where, at the time of the deposit in

('89) AIR 1939 Nag 107 (109). (Plaintiff failing to make payment within period fixed by Court — His right of pre-emption is lost—Mere fact that plaintiff files appeal and executes security bond does not extend time.)

4. ('80) 2 All 744 (745).

('68) 3 Agra 254 (255).

('23) AIR 1923 All 516 (517) : 45 All 456.

('96) 18 All 223 (226).

('39) AIR 1939 Nag 140 (141). (Plaintiff can appeal though he has not paid the money within the time fixed—Appellate Court can also extend time.)

('39) AIR 1939 Nag 120 (121). (Do.)

[See also ('90) 1890 Pun Re No. 70, p. 187 (F B). (O. 41 R. 32.)]

[Compare ('94) 1894 Pun Re No. 137, p. 514. (No authority to extend time on application before hearing appeal.)]

5. ('32) AIR 1932 Oudh 63 (66) : 7 Luck 350. (Where the decree is set aside, failure to pay within the prescribed period does not extinguish the right of pre-emption.)

6. ('14) AIR 1914 All 248 (248) : 86 All 514.

7. ('75) 1 All 293 (295).

('96) 18 All 223 (227).

('18) AIR 1918 Lah 165 (166).

('39) AIR 1939 Nag 107 (108). (The decree which is conditionally in the plaintiff's favour ceases to

be so the moment the due date passes without payment. After that it becomes a decree in the defendant's favour.)

8. ('03) 1903 Pun Re No. 53, p. 205.

('98) 1898 Pun Re No. 47, p. 160.

('82) 14 All 529 (531).

('88) 1888 All W N 4 (5).

9. ('12) 17 Ind Cas 868 (868) (All).

10. ('85) 1885 Pun Re No. 1, p. 1.

#### NOTE 8

1. ('80) AIR 1930 Lah 273 (277) : 11 Lah 123 (FB). (Overruling 1908 Pun Re No. 25.)

('33) AIR 1933 Lah 791 (792).

('29) AIR 1929 All 958 (954) : 51 All 998. (Title does not date from decree.)

('95) 1895 All W N 18 (14).

('25) AIR 1925 Lah 202 (203) : 5 Lah 486. (Title does not date from sale.)

('23) AIR 1923 Lah 529 (530). (The Punjab Pre-emption Act does not in any way modify the explicit direction of O. 20 R. 14, C. P. C.)

('85) AIR 1935 Lah 523 (525) : 16 Lah 1065.

[But see ('02) 1902 Pun Re No. 93, page 411 (FB). (Title dates from sale—This case should be deemed as overruled by AIR 1930 Lah 273 (FB).)]

2. ('29) AIR 1929 All 237 (238).

3. ('01) 24 Mad 449 (463).

4. See Notes on Clauses by Select Committee.

**O. 20 R. 14**  
**Notes 8-10**

Court, there are crops on the land, they also pass to the pre-emptor.<sup>5</sup>

Although the rule says that on payment of the purchase-money into Court the defendant shall deliver possession of the property to the plaintiff, this does not apply to the following cases :

- (a) Where the property is in the possession of a usufructuary mortgagee.<sup>6</sup>
- (b) Where the pre-emptor is already in possession of the property.<sup>7</sup>

**9. Payment into Court.** — The payment of purchase-money into Court may be made in currency notes.<sup>1</sup> But Government promissory notes are not "money" and the deposit thereof is not valid.<sup>2</sup> A payment made out of Court to the vendee is sufficient compliance with the decree, provided the vendee certifies to the Court *within the period allowed for payment* the fact of his receipt of the money,<sup>3</sup> but not otherwise.<sup>4</sup>

A payment is not valid if it is not a payment of the *full amount* stated in the decree, however small may be the sum by which it falls short.<sup>5</sup>

Where the decree directs the payment of the purchase-money *and* costs within a specified time, the payment of the purchase-money alone within the time limited is not enough; the costs also must be deposited within that time.<sup>6</sup> But this is not so where, though costs are awarded, no time limit is fixed for their payment.<sup>7</sup>

The plaintiff does not forfeit his right of pre-emption by raising the purchase-money by a mortgage of the property sought to be pre-empted.<sup>8</sup>

On payment into Court the money stands to the credit of the vendee and the pre-emptor's rights are not affected by the fact that a creditor of his attaches the money and is allowed by the Court to remove it.<sup>9</sup>

See also the undermentioned cases.<sup>10</sup>

**10. Tender of money, if sufficient.** — A tender of the purchase-money to the Court within the time limited is sufficient compliance with the decree, although, through the laxity of the Court officials or other such cause, the actual deposit is made

5. ('23) AIR 1928 Nag 327 (329).

6. ('23) AIR 1923 All 507 (508) : 45 All 482.

('32) AIR 1932 All 138 (138, 139). (Pre-emptors get only constructive possession.)

('85) AIR 1935 Lah 523 (525) : 16 Lah 1065. (If property is in possession of mortgagees, pre-emptor merely pre-empt equity of redemption — On payment of money he need not execute decree for possession.)

7. ('14) AIR 1914 All 440 (441).

('97) 20 Mad 305 (310).

**Note 9**

1. ('92) 1892 Pun Re No. 67, page 245.

2. ('90) 1890 Pun Re No. 70, page 187 (FB).

3. ('21) AIR 1921 All 159 (160).

('89) 1889 Pun Re No. 21, page 69.

4. ('16) AIR 1916 Lah 249 (250) : 1916 Pun Re No. 73.

5. ('23) AIR 1923 Lah 250 (251). (One Rupee.)

'18) 18 Ind Cas 600 (601) (Lah). (One anna)

'24) AIR 1924 Lah 384 (385). (About Rs. 2.)

6. ('24) AIR 1924 Lah 359 (359).

('84) 1884 Pun Re No. 96, page 276.

7. ('13) 18 Ind Cas 994 (996) : 1913 Pun Re No. 3.

See also the following cases :

'88) 10 All 400 (405). (Per Straight, J.)

'10) 6 Ind Cas 954 (955) : 1910 Pun Re No. 56.

('24) AIR 1924 Oudh 104 (105) : 26 Oudh Cas 345. (Payment of costs not made condition precedent to enforcement of right.)

8. ('17) AIR 1917 All 156 (157).

('02) 24 All 119 (123).

9. ('97) 19 All 256 (259).

('02) 1902 Pun Re No. 21, page 85.

('96) 1896 Pun Re No. 78, page 245.

('13) 21 Ind Cas 67 (68) (All). (Decree appealed against — Money lies in Court at peril of party ultimately found entitled to it.)

[See however ('14) AIR 1914 All 458 (459) : 36 All 398. (In case part of deposit money is attached by and paid to the pre-emptor's creditor after the pre-emption decree is set aside in the first appeal by the vendee, the pre-emptor will have to make good the deficit.)]

10. ('17) AIR 1917 Lah 400 (401). (Compromise decree in pre-emption suit—Plaintiff required to hand over certain land to defendant within a certain period—Ceasing to cultivate with a view to hand over possession was held sufficient compliance.)

('73) 6 N W P H C R 46 (47). (Deposit with request that it should be retained till mutation of names in favour of plaintiff—*Held*, that deposit was not saddled with condition precluding pay-



later on.<sup>1</sup> But a tender to the Court after its usual working hours is not valid.<sup>2</sup>

**11. "On or before the day referred to."** — See Note 7 above.

**12. Right to rents and profits.** — The rights of a pre-emptor are different from those of an ordinary purchaser. Under a pre-emption decree the right to possession of the property and the consequential right to mesne profits accrue to the pre-emptor only from the date when he pays the amount of the purchase-money finally declared by the Court. Till then the original purchaser retains possession and is entitled to the rents and profits.<sup>1</sup> As to whether the vendee is entitled to the crops on the land existing on the date of payment, see Note 8 above.

**13. Vendor's title in pre-emption suits.** — A pre-emptor is not entitled in a pre-emption suit to put the vendor to proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is, therefore, bound to take the title which the vendee was ready to take.<sup>1</sup>

**14. Set-off of costs against purchase-money.** — The rule does not provide for cases where costs, instead of being awarded against the pre-emptor, were awarded in *his favour* by the decree. Under the doctrine of equitable set-off, he is entitled to deduct such costs when depositing the purchase-money.<sup>1</sup> It has been held that when the decree directs the purchase-money to be deposited within a specified time but does not require the costs awarded to the defendant to be deposited, the plaintiff is not bound to deposit such costs although he deducts from the purchase-money the costs awarded to him.<sup>2</sup>

**15. Rival pre-emptors — Sub-rule (2).** — Sub-rule (2) is new and prescribes the form of decree to be passed where there are rival pre-emptors. Under the old Code, Courts decided such cases on general principles suited to the emergencies of each case.<sup>1</sup> The present rule enables rival claimants to pre-emption to join as plaintiffs in a suit for pre-emption and to obtain in that suit a decision not only as to their right to pre-empt but also as to their rival claims.<sup>2</sup> But where the plaintiffs do not ask the Court

ment before mutation.)

#### Note 10

1. ('16) AIR 1916 Lah 77 (77, 78).
- ('15) AIR 1915 Oudh 171 (172).
- ('08) 11 Oudh Cas 144 (145).
- ('81) 1881 Pun Re No. 79, page 175.
- ('80) 1880 Pun Re No. 31, page 68.
2. ('10) 8 Ind Cas 812 (813) (Lah).
- ('20) AIR 1920 Oudh 25 (28, 29); 23 Oudh Cas 254.
- [See also ('23) AIR 1923 All 250 (250): 45 All 276. (Payment into the treasury without informing the Court not a due compliance.)]

#### Note 12

1. ('16) AIR 1916 PC 179 (181) : 44 Cal 675 : 44 Ind App 80 (P O).
- ('33) AIR 1933 All 91 (92). (Pre-emptor's suit dismissed in appeal in High Court—Pre-emptor withdrawing money from Court — Suit decreed in appeal to Privy Council—Pre-emptor not entitled to rents and profits till he re-deposits money.)
- ('90) 12 All 284 (287) (F B).
- ('97) 19 All 261 (264, 266) (F B).

#### Note 13

1. ('15) AIR 1915 All 154 (155) : 37 All 529.

#### Note 14

1. ('22) AIR 1922 Lah 142 (148) : 2 Lah 294.
- ('38) AIR 1938 All 118 (114).

('88) 1888 Pun Re No. 70, page 183.

(1900) 3 Oudh Cas 323 (324).

('12) 15 Ind Cas 337 (337, 338) : 34 All 596.

('11) 10 Ind Cas 454 (455) (All).

('06) 3 All L Jour 804 (806, 807) : 28 All 676.

('84) 6 All 351 (357).

('39) AIR 1939 All 228 (229) : 11 L R (1939) All 261.

('37) AIR 1937 All 756 (757).

2. ('39) AIR 1939 All 228 (230) : 1 L R (1939) All 261. (Reversing on Letters Patent Appeal A I R 1937 All 756.)

#### Note 15

1. See also the following cases :

('84) 6 All 370 (373, 375).

('84) 6 All 455 (456).

('88) 10 All 182 (187).

('89) 11 All 164 (167).

('75) 1 All 291 (293).

('99) 21 All 292 (296).

('85) 7 All 720 (728).

('85) 1885 All W N 329 (329).

('92) 1892 Pun Re No. 29, page 116.

('81) 1881 Pun Re No. 20, page 35.

('81) 1881 Pun Re No. 102, page 236.

('05) 27 All 465 (467).

2. ('29) AIR 1929 P C 58 (60) : 56 Ind App 80 51 All 267 (P O).

**O. 20 R. 14**  
**Notes 15-16**

to adjudicate upon their respective rights *inter se*, a joint decree may be passed and if the amount is deposited in compliance with the decree, the defendant has no concern in the way in which the property is to be shared by the plaintiffs; but the mere fact that a joint decree is passed in favour of all has not the necessary result of passing title to all the joint decree-holders even if only one of them pays the amount. In order to determine in what proportion the joint plaintiffs are to share the property, the circumstances under which the payment was made must in each case be enquired into.<sup>8</sup>

**16. Appeal.** — A plaintiff, who has obtained a decree for pre-emption conditional on his paying a certain sum within a certain period, may appeal against the decree whether or not he has deposited the money in Court within the time limited.<sup>1</sup> A vendee does not forfeit his right of appeal against a pre-emption decree merely because he has withdrawn the money deposited by the plaintiff.<sup>2</sup> A plaintiff depositing purchase-money in Court under a pre-emption decree is entitled to a refund of the amount on the reversal of the decree in appeal.<sup>3</sup> A decree with a condition that unless the purchase-money is paid within the time fixed the suit shall stand dismissed, is a complete decree and a subsequent order dismissing the suit is not a decree against which an appeal can be preferred.<sup>4</sup> Further, an order passed on an application for payment of the pre-emption money in compliance with a decree under Rule 14 is not appealable under Section 47 of the Code as it is not an order relating to execution, discharge or satisfaction of a decree.<sup>5</sup>

**O. 20 R. 15**

**R. 15.** [S. 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

[1877, S. 215.]

*Synopsis*

1. Scope of the Rule.
2. Preliminary decree directing the taking of accounts.
3. Mode of taking accounts.
4. "Fixing the day on which the partnership shall stand dissolved."

5. Defendant's right to what is found due to him.
6. Court-fee in partnership suits.
7. Appeal.
8. Letters Patent Appeal.

**1. Scope of the Rule.** — This rule contemplates the passing of a preliminary decree in suits for dissolution of partnership so as to enable the Court to pass a final

3. ('29) AIR 1929 All 958 (954) : 51 All 998.

**Note 16**

1. (1900) 1900 Pun Re No. 92, page 379.  
(96) 18 All 223 (226).  
(94) 16 All 126 (128).  
(91) 13 All 876 (878) (F B).  
(95) 1895 Pun Re No. 67, page 333.  
(90) 1890 Pun Re No. 161, page 522.  
[See also ('12) 17 Ind Cas 868 (868) (All).]
2. ('07) 1907 Pun Re No. 16, page 74.

3. ('96) 18 All 262 (264).

('18) 19 Ind Cas 1 (1,2) (All). (But not to interest.)

4. ('20) AIR 1920 Oudh 25 (27) : 23 Oudh Cas 254. (Dissenting from 21 Ind Cas 193.)

5. ('82) 4 All 420 (422).

[See ('15) AIR 1915 Oudh 171 (172).]

[See also ('29) AIR 1929 All 958 (955) : 57 All 998. (Deposit of the pre-emption money within time fixed by the Court is neither proceeding in execution of decree nor step-in-aid of it.)]  
[But see ('98) 1898 Pun Re No. 38, page 184.]

adjudication of the specific rights of the parties. The words "may pass a preliminary decree" show that the passing of such a decree is in the judicial discretion of the Court. While, on the one hand, it will be an improper exercise of the discretion to pass a preliminary decree where the shares of the parties in, and the fact and date of dissolution of, the partnership are admitted,<sup>1</sup> on the other hand, where such facts are not admitted, the Court *ought* to pass a preliminary decree defining and declaring the rights of the parties before giving a final adjudication in the suit.<sup>2</sup> In *Ramchunder Shaha v. Manick Chunder Banikya*,<sup>3</sup> Pontifex, J., observed as follows :

"At the first hearing of the suit, really what the Court had to determine was, whether there had been a partnership, and what were its conditions; was it dissolved, or ought it to be dissolved; and who were the parties interested in the partnership, and in what shares; and upon determining these questions, it ought, in the first instance, to have directed that accounts should be taken as set forth in Form No. 192 (now Form No. 21, Appendix D), subject, of course, to any such alterations as the nature of the case might require. It is only after taking these accounts and obtaining the report of the officer of the Court, or, if there is no such officer, when the Judge himself has arrived at a decision on the accounts, that a final decree should be made according to Form No. 198 of the Fourth Schedule of the Code (now Form No. 22 of Appendix D)."

If, however, the Court has passed an order defining and declaring the said rights, the mere fact that no formal decree has been drawn up in those terms will be a mere irregularity not vitiating the trial.<sup>4</sup>

Under Section 265 of the Contract Act as it originally stood, a partner had to *apply* to the *District Court* to wind up the business of the firm to provide for the payments of its debts and to distribute the surplus according to the shares of the partners respectively, and there was a conflict of opinion as to whether a *suit* for such relief in the ordinary Court lay.<sup>5</sup> The Section was amended by the Contract Amendment Act (IV of 1886), and under that Section a suit for dissolution of partnership could be brought in the ordinary Courts like any other suit.<sup>6</sup> See now the Partnership Act (IX of 1932).

**2. Preliminary decree directing the taking of accounts.**—Besides making the declarations as to the rights of the parties referred to in Note 1 above, the Court should, in the preliminary decree, direct an account to be taken of the dealings and transactions of the partnership, of the credits, property and effects due and belonging to it, and should, if need be, appoint a receiver for realising the partnership property.<sup>1</sup>

As to the nature of the rights conferred by such a decree, see the undermentioned case.<sup>2</sup> Although it is desirable that the preliminary decree should state who is to be the accounting party, yet the Court can, even subsequently, decide the question.<sup>3</sup>

The ordinary form for the preliminary decree is given as Form No. 21 in Appendix D. This form should ordinarily be followed unless there is any special reason for modifying it. The form is applicable also where the Court is asked to declare that

**Order 20 Rule 15 — Note 1**

1. ('14) AIR 1914 Oudh 399(404):17 Oudh Cas 193.
2. (1841) 3 Moo Ind App 175 (197, 198) (P C).
- (71) 15 Suth W R 352 (353). (In a suit of the nature of the one for dissolution of a partnership, it is incorrect to make an absolute decree for a specific sum of outstanding balances, without anything to guide the Court in fixing the amount.)
3. ('81) 7 Cal 428 (480).
4. ('14) AIR 1914 Lah 389 (841).
5. ('88) 5 All 500 (503). (A suit lay in the ordinary Court.)
- (88) 1888 All W N 205 (205). (Do.)
- ('84) 8 Bom 272 (277). (Do.)

('84) 8 Bom 494 (496). (Do.)

('81) 7 Cal 157 (162). (Suit did not lie in ordinary Court.)

('81) 7 Cal 428 (483). (Do.)

6. [See ('18) AIR 1918 All 288 (289): 40 All 446. (A suit by a surviving partner against the representative of a deceased partner for partnership accounts.)

**Note 2**

1. ('97) 20 Mad 318 (315, 316).
2. ('29) AIR 1929 Mad 641(647): 52 Mad 563 (F13).
3. ('36) AIR 1936 Lah 78 (80). (It is open to the Court to give instructions at any time to facilitate and regularise the taking of accounts.)

**O. 20 R. 15  
Notes 2-5**

a dissolution has taken place and an account is still required.<sup>4</sup>

**3. Mode of taking accounts.**—The Court may itself take the accounts of the partnership or appoint a commissioner for the purpose. In the latter case the Court may give directions, if any are required, as to the mode of taking accounts. It may call upon either party to furnish a statement of particulars relating to the business and its transactions.<sup>1</sup> All the account books and other documents relating to the partnership and in the possession of either party should be produced.<sup>2</sup> Sufficient time should be given to the parties for the purpose and evidence should be taken if necessary.<sup>3</sup> A commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners.<sup>4</sup> In a suit for dissolution of partnership and the settlement of accounts, ordinarily the partnership business must be wound up so that all questions between the parties in respect of the partnership may be finally decided, and a procedure which leaves outstanding such questions or is calculated to give rise to fresh questions is not proper.<sup>5</sup>

As to the power of the Court to go into the accounts of firm anterior to a date on which there has been a settlement of accounts between the parties, see the undermentioned case.<sup>6</sup>

**4. "Fixing the day on which the partnership shall stand dissolved."**—The preliminary decree should fix a day on which the partnership should stand dissolved or be deemed to have been dissolved. The fixing of the day is a judicial act and should be done arbitrarily. Ordinarily, if a notice of dissolution has been given by one of the partners, the dissolution will be declared as and from that date.<sup>1</sup> Otherwise and in the absence of any other circumstance, the dissolution should be ordered to date from the plaint.<sup>2</sup> It can be ordered to date from the judgment only in exceptional cases.<sup>3</sup>

**5. Defendant's right to what is found due to him.**—If, on the taking of accounts, it is found that any balance is due to the defendant, the Court can pass a decree in his favour for the amount.<sup>1</sup>

4. ('38) AIR 1938 Lah 758 (759) : I L R (1939) Lah 178.

**Note 3**

1. ('81) 7 Cal 428 (433).
2. ('14) AIR 1914 P C 33 (33) (P C). (Accounts taken by a commissioner appointed for that purpose, without production or discovery of partnership books and documents are not properly taken.)
3. ('18) AIR 1918 Lah 166 (169). (It will not do to pass an *ex parte* final decree on the mere statements of the plaintiff.)
4. ('37) AIR 1937 Bom 81 (89).

[See also ('36) AIR 1936 Lah 458 (460). (Question as to in whose possession the account books are is to be decided by the Court after taking evidence and cannot be left to the commissioner—Latter's business is merely to examine accounts produced before him and to report to Court the result of such examination and to suggest a scheme for the winding up of the business—But a party at whose instance commissioner was asked to decide the question as to in whose possession the account books were, cannot afterwards object.)]

5. [See ('36) AIR 1936 Lah 458 (459). (Ordinarily the liabilities have to be paid and assets to be collected and the business has to be wound up.)]

6. ('38) AIR 1938 Lah 758 (759) : I L R (1939) Lah 178. (If it is necessary to examine the account books of the firm from an earlier date in order to discover what credits are still due to the partnership, the examination of these accounts would not be barred by the suing partner's acceptance of the existing accounts as correct.)

**Note 4**

1. ('18) AIR 1918 Mad 264 (264).
2. ('18) AIR 1918 Mad 264 (264).
3. (1881) 17 Ch D 529 (531), *Lyon v. Tweddell*. (Referred to in AIR 1918 Mad 264.)

**Note 5**

1. ('10) Ind Cas 211 (211, 212) (All).
- ('10) 6 Ind Cas 162 (168) (All).
- ('24) AIR 1924 All 854 (855) : 46 All 858.
- ('07) 34 Cal 892 (898, 895).
- ('11) 10 Ind Cas 250 (253) (Lah).
- ('26) AIR 1926 All 582 (583). (When once there has been a preliminary decree ordering the taking of accounts, if the plaintiff desires to withdraw his claim but the defendant desires the case to proceed, the proper course is to transpose the plaintiff to the position of defendant and make the defendant plaintiff.)
- [But see ('06) 3 All L Jour 238 (234). (Not accepted as good law.)]

**6. Court-fee in partnership suits.** — The plaint or memorandum of appeal in a partnership suit is chargeable with an *ad valorem* court-fee, the valuation being fixed under Section 7, clause (iv) (f) of the Court-fees Act.<sup>1</sup>

**O. 20 R. 15  
Notes 6-8**

The defendant in such a suit is not bound either to value *his* claim or to pay any court-fee. If, however, on the taking of accounts any amount is found due to him, he is bound to pay court-fee thereon before a decree for the amount is passed in his favour.<sup>2</sup>

**7. Appeal.** — An appeal lies from a preliminary decree passed under this rule.<sup>1</sup> But mere directions given to the commissioner in the matter of taking accounts are not decrees and are not appealable.<sup>3</sup>

**8. Letters Patent Appeal.** — An order appointing the Official Receiver as the receiver in a partnership suit was held by the Rangoon High Court to be a "judgment" within the meaning of Clause 13 of the Letters Patent and as such appealable.<sup>1</sup> The same High Court has, however, held that orders by way of directions to the commissioner in the matter of taking accounts are not "judgments" within the meaning of the said Clause of the Letters Patent and hence not appealable.<sup>2</sup>

**R. 16.** [S. 215A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

**O. 20 R. 16**

Decree in suit for account  
between principal and agent.

transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary,

in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Shall pass a preliminary decree."</li> <li>3. Suit by principal — Right of agent to the amount found due to him.</li> </ol> | <ol style="list-style-type: none"> <li>4. Valuation for court-fee and jurisdiction.</li> <li>5. Appeal.</li> <li>6. Stay of proceedings.</li> </ol> |
|---|---|

### Other Topics (miscellaneous)

Final decree, ex parte—Right of defendant to reopen accounts. See Note 2.  
"In any other suit." See Note 1.

Suit for delivery of account papers. See Note 2.

"Where it is necessary." See Note 2.

#### Note 6

1. ('10) 6 Ind Cas 882 (892) : 32 All 517.
- (38) AIR 1938 Mad 980 (981) : 56 Mad 705. (Appellant in such suits, whether defendant or plaintiff, is in the position of plaintiff and can file appeal on any valuation he likes.)
- ('81) 6 Bom 148 (146).
- (33) AIR 1938 Nag 127 (128) : 29 Nag L R 34. (Suit for partnership accounts — Preliminary decree—Appeal—Appellant can fix provisional valuation for court-fees.)

- (86) AIR 1936 Lah 458 (460).
2. ('11) 10 Ind Cas 250 (258) (Lah).
- ('14) AIR 1914 Sind 137 (137) : 8 Sind L R 122.

#### Note 7

1. ('96) 23 Cal 406 (408, 412).
- ('01) 1901 Pun Re No. 13, p. 47.
2. ('28) AIR 1928 Sind 100 (100, 101) : 23 Sind L R 87.

#### Note 8

1. ('27) AIR 1927 Rang 139 (139) : 5 Rang 99.
2. ('25) AIR 1925 Rang 43 (45) : 2 Rang 469.

**O. 20 R. 16**  
**Notes 1-2**

**1. Scope of the Rule.**— The rule applies to the following kinds of suits, *viz.* —

- (1) suits for accounts between principal and agent;<sup>1</sup>
- (2) suits in which plaintiff has a right to a rendition of accounts from the defendant;<sup>2</sup> and
- (3) suits in which it is necessary that an account should be taken in order to ascertain the amount due to or from any party.<sup>3</sup>

The purpose of a preliminary decree in such suits is merely to ascertain whether the defendant is liable to account to the plaintiff,<sup>4</sup> and the preliminary judgment, therefore, need not be exhaustive or specify all details.<sup>5</sup>

**2. "Shall pass a preliminary decree."**— Where the plaintiff has established that the defendant was his agent<sup>1</sup> or that the defendant is otherwise liable to account to him,<sup>2</sup> it is the duty of the Court to pass a preliminary decree directing an account to be taken of the transactions between the parties. But no such decree need be passed if the liability to account is not established,<sup>3</sup> or if the necessity for accounts is not made out.<sup>4</sup>

A preliminary decree in a suit contemplated by this rule finally declares the liability of the defendant for such sum as may be found due<sup>5</sup> but does not terminate the suit.<sup>6</sup>

In a suit for accounts, it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree.<sup>7</sup>

The proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and not proceedings in execution.<sup>8</sup>

For the procedure to be observed in taking accounts, see the undermentioned cases.<sup>9</sup>

**Order 20 Rule 16 — Note 1**

1. ('21) AIR 1921 Sind 42 (43) : 15 Sind L R 16.
2. ('19) AIR 1919 Lah 217 (218).  
( '29) AIR 1929 Lah 182 (184).  
[See also ('96) 23 Cal 884 (890) (FB).]
3. ('17) AIR 1917 All 431 (431).  
( '18) 18 Ind Cas 336 (336) (All). (Suit to recover balance of *anamat* money retained in the hands of defendant for payment to creditors.)  
( '37) AIR 1937 All 276 (278).
4. ('26) AIR 1926 Nag 898 (896).
5. ('81) AIR 1931 Cal 358 (359).

**Note 2**

1. ('87) 14 Cal 147 (159, 158) : 13 Ind App 123 (P O).  
( '05) 27 All 374 (377).  
( '25) AIR 1925 Cal 1069 (1072) : 52 Cal 766.  
( '81) 6 Cal 754 (756).  
( '81) 7 Cal 654 (656).
2. ('88) 1883 All W N 218 (218).  
( '05) 1905 All W N 1 (1).
3. ('29) AIR 1929 Cal 418 (421).  
(1900) 4 Cal W N 105 (107). (The trespasser is not liable to account but is liable for damages, therefore no preliminary decree for account can be passed against him.)
4. ('25) AIR 1925 Cal 1069 (1074) : 52 Cal 766.  
( '16) AIR 1916 Cal 244 (245). (It is only where it is necessary, in order to ascertain the amount of money due to or from any parties, that an account should be taken, that the Court shall

before passing the final decree, pass a preliminary decree directing such account to be taken as it thinks fit.)

- ( '30) AIR 1930 Mad 721 (722) : 53 Mad 475. (In every suit for an account of pecuniary transactions, it is not imperative for the Court to pass a preliminary decree in the first instance—It can be dispensed with where the facts are so simple that the taking of accounts would only involve unnecessary and unprofitable delay.)
- ( '28) AIR 1928 Nag 299 (300). (The mere fact that a preliminary decree was not passed under O. 20 R. 16, C. P. Code, in a suit for accounts will not render the decree passed in the suit illegal, if nobody has been prejudiced by the correct procedure not being adopted and a decision has been arrived at after framing proper issues and taking evidence upon the incomings and outgoings.)
5. ('12) 13 Ind Cas 374 (375) (Cal). (Final decree passed *ex parte* — Defendant must be given an opportunity to be heard as to how much is due from him.)
6. ('81) AIR 1981 Lah 268 (269).
7. ('36) AIR 1936 P O 825 (829).
8. ('87) AIR 1987 P O 168 (164) : 18 Lah 502 : 64 Ind App 191 : 31 Sind L R 867 (P O).
9. ('92) 19 Cal 174 (178 to 181) : 19 Ind App 38. (P O).  
( '81) 6 Cal 754 (757, 758).  
( '81) 7 Cal 654 (656, 657).  
( '87) 14 Cal 147 (158) : 13 Ind App 123 (P O).

**3. Suit by principal — Right of agent to the amount found due to him. —****O. 20 R. 16  
Notes 3-6**

If in a suit by the principal, accounts between him and the agent are taken and nothing is found due to the principal but something is found due to the agent, a decree can be passed in the defendant's favour for the amount, on his paying the necessary court-fee.<sup>1</sup>

**4. Valuation for court-fee and jurisdiction.**— Suits for accounts are governed by the provisions of Section 7, clause (iv) (f) of the Court-fees Act.<sup>1</sup> The plaintiff's valuation will be the value both for the purposes of the court-fee and for the purpose of jurisdiction.<sup>2</sup> If a defendant appeals against the whole preliminary decree in such a suit, he will be bound by the valuation given in the plaint.<sup>3</sup>

**5. Appeal.**— An appeal lies from a preliminary decree in a suit for accounts.<sup>1</sup> Notwithstanding that a final decree has been passed in the case, the final decree will be subject to the result of the appeal from the preliminary decree.<sup>2</sup> See Notes to Section 97, *ante*.

**6. Stay of proceedings.**— An Appellate Court, in which an appeal from the preliminary decree is pending, can stay further proceedings under the preliminary decree (such as enquiry into accounts), pending the hearing of the appeal.<sup>1</sup>

**R. 17. [New.] The Court may either by the decree directing** **O. 20 R. 17**

**Special directions as to  
accounts.**

an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

**[R. S. C., O. 33 R. 3.]**

('68) 10 Suth W R 279 (280). (Suit for delivery of account papers — Court should direct delivery of them.)

('71) 15 Suth W R 260 (260, 261).

('72) 17 Suth W R 409 (410).

('74) 22 Suth W R 191 (192).

('26) AIR 1926 Nag 898 (396). (Objection to particular item should be taken when question as to accounts is tried.)

('13) 19 Ind Cas 901 (902) (Cal). (Unless fraud and undue influence are proved accounts cannot be re-opened.)

(1872) 9 Ch D 529 (532, 538), *Williamson v. Barbour*.

('87) 11 Bom 78 (85). (*Williamson v. Barbour*, (1872) 9 Ch D 529, *Referred*.)

**Note 3**

1. ('10) 6 Ind Cas 162 (163) : 32 All 525.

('38) AIR 1938 Sind 247 (248, 249).

('07) 34 Cal 892 (894, 895).

('37) AIR 1937 All 276 (279).

[See ('06) 3 All L Jour 233 (234). (Defendant should claim a set-off—Otherwise Court cannot pass a decree in his favour.)

('32) AIR 1932 Lah 619 (620). (Do.)]

**Note 4**

1. ('08) 1908 Pun Re No. 150, p. 681. (Appeal.)

2. See Section 8 of the Suits Valuation Act, 1887.

('94) 18 Bom 40 (42).

('35) AIR 1935 Lah 689 (689).

[See also ('88) 12 Bom 675 (677).]

3. ('17) AIR 1917 Mad 668 (669) : 39 Mad 725 (FB).

**Note 5**

1. ('21) AIR 1921 Sind 42 (44) : 15 Sind L R 16.

2. ('12) 16 Ind Cas 167 (159) : 34 All 493.

('13) 19 Ind Cas 630 (631) (Cal).

**Note 6**

1. ('04) 81 Cal 722 (724) (FB).

**O. 20 R. 17**  
**Notes 1-3***Synopsis*

- |                       |   |
|-----------------------|---|
| 1. Scope of the Rule. | 3. Omission to give directions in preliminary decree. |
| 2. Settled accounts.  |   |

**1. Scope of the Rule.**—The rule is new and corresponds to O. 33 R. 3 of the Rules of the Supreme Court in England. It, however, enacts no new provision of law but only recognises an already existing practice in the matter of taking accounts. It is in the discretion of the Court to give special directions or not under this rule.<sup>1</sup> Under the English practice the Court may treat the account books as *prima facie* evidence in partnership cases.<sup>2</sup> Similarly, account books kept by a trustee may be ordered to be taken as *prima facie* evidence against the *cestui que trust* if the latter has had access to these books.<sup>3</sup> In other cases special directions should be obtained from the Court,<sup>4</sup> and such directions will be given if the ordinary proof of accounts is not available owing to lapse of time or other causes,<sup>5</sup> or if the accounts are beyond the control of the accounting party.<sup>6</sup>

**2. Settled accounts.**—In proceedings by way of taking accounts, a settled account may be set up or pleaded in the absence of any special directions in the matter, in the preliminary decree.<sup>1</sup>

**3. Omission to give directions in preliminary decree.**—Though the necessary directions in the matter of taking accounts are generally given in the preliminary decree, yet the omission of such directions in the decree will only amount to a mere irregularity.<sup>1</sup> In fact this rule contemplates such directions being given subsequently also.

Their Lordships of the Privy Council have held that in a decree directing accounts to be taken, it is a better practice for the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree.<sup>2</sup>

**O. 20 R. 18**

**Decree in suit for partition of property or separate possession of a share therein.**

**R. 18.** [New.] Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, —

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54 ;

**Order 20 Rule 17 — Note 1**

1. ('21) AIR 1921 Sind 42 (48) : 15 Sind L R 16. ('15) AIR 1915 Bom 42 (44) : 89 Bom 422.
2. (1878) 9 Ch D 547 (551), Gething v. Keighley.
3. (1865) 15 WR (Eng) 417, Banks v. Cartwright.
4. (1869) 11 W R (Eng) 871, Cooke v. Cooke.
- (1854) 28 L J Ch 1008 (1004), Newberry v. Benson.
5. (1857) 7 De G M & G 68 (76), Ewart v. Wil-

liams.

6. (1841) 5 Beav 515 (517, 518), Turner v. Corney.

**Note 2**

1. (1885) 28 Ch D 111 (116), Holgate v. Shuth.

**Note 3**

1. ('21) AIR 1921 Sind 42 (48) : 15 Sind L R 16.
2. ('36) AIR 1936 P C 325 (329) (PC).



(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

**O. 20 R. 18**  
**Notes 1-3.**

### Synopsis

- |   |                                      |
|---|--------------------------------------|
| 1. Scope of the Rule.                   | 5. Preliminary decree.               |
| 2. Jurisdiction of Court and Collector. | 6. "Giving such further directions." |
| 3. Moveable property.                   | 7. Final decree.                     |
| 4. Joint Hindu family property.         | 8. Stamp for final decree.           |
|   | 9. Appeal.                           |

### Other Topics (miscellaneous)

A second preliminary decree. See Note 9.

Decree for joint possession — Construction. See Note 5.

Execution of partition decree — Limitation. See Note 7.

Mesne profits. See Note 6.

Partition suits—Costs. See Note 5.

"Shall declare the rights of the several parties." See Note 4.

**1. Scope of the Rule.** — Sub-rule (1) refers to partition decrees relating to an "estate assessed to Government revenue" referred to in Section 54 of the Code, while sub-rule (2) deals with partition decrees relating to any *other* immovable property or to *moveable* property. In the former case the rule does not contemplate the passing of a *preliminary* and of a final decree.<sup>1</sup> The Court has merely to pass a decree *declaring* the rights of the several parties interested in the property, the actual partition so as to affect the Government revenue, being left to be made by the Collector.<sup>2</sup> In the latter case, *i. e.*, a case coming under sub-rule (2), the Court *may* pass a preliminary decree if the separation cannot be made conveniently without further inquiry : see Note 5, *infra*. Where the decree does not contain any direction as required by sub-rule (1), the decree is defective, and unless the defect is rectified the parties cannot ask for the transmission of the proceedings to the Collector.<sup>3</sup>

Where in a suit for partition, a decree has been passed under sub-rule (1), an application to the Court by the parties for the transmission of the papers to the Collector is not one for *execution*.<sup>4</sup>

**2. Jurisdiction of Court and Collector.** — See Section 54, Note 7, *ante*. As has been seen in that Note, where the Collector disregards the directions in the decree, the Court has the power to interfere and set right his action.<sup>1</sup>

**3. Moveable property.** — Where in a suit for partition of moveable property the plaintiff files a list of properties, and the defendant either denies that they are liable to partition or that they exist, it is incumbent on the Court, before passing

#### Order 20 Rule 18 — Note 1

1. ('14) AIR 1914 Oudh 332 (333).

2. ('25) AIR 1925 Lah 445 (446) : 6 Lah 442.

('14) AIR 1914 Oudh 332 (333).

3. ('85) AIR 1935 Sind 192 (192). (It is incumbent upon the plaintiffs to have decree corrected within the time allowed by law)

4. ('39) AIR 1939 Bom 454 (455): 41 Bom L R 921

(923, 924). (There is nothing in cases of this sort for the Court to execute—Asking the Court to send the papers to the Collector is really asking the Judge to do a ministerial act.)

#### Note 2

1. ('87) AIR 1937 Bom 173 (176). (Civil Court has jurisdiction to set aside in toto or modify partition effected by the Collector.)

**O. 20 R. 18**  
**Notes 3-8**

a preliminary decree, to determine the following points<sup>1</sup>—

- (1) whether such properties exist, and if so in whose possession ;
- (2) whether they are partible ; and
- (3) what is their value.

**4. Joint Hindu family property.** — See the undermentioned cases.<sup>1</sup>

**5. Preliminary decree.** — In cases coming under sub-rule (2), the Court *may* pass a preliminary decree. It is not obligatory to do so in every case. For instance, it is not necessary to pass a preliminary decree if the shares can be ascertained without difficulty in execution.<sup>1</sup> But where a partition cannot be conveniently made without further enquiry, a preliminary decree may be passed declaring the rights of the several parties interested in the property leaving the actual partition to be made later on.<sup>2</sup> It has been held that it would be premature to decide in the preliminary decree whether certain property in the defendant's possession about which partition is claimed is available for partition or not, and that the question should be left to be decided at the enquiry subsequent to the preliminary decree.<sup>3</sup> After a preliminary decree has been passed in a partition suit, the proper course for the plaintiff desiring an absolute separation of his share is to apply for a final decree and not to bring a fresh *suit* for that purpose.<sup>4</sup> There is no limitation for such an application inasmuch as the rule does not contemplate any such application being made by the party, and it is the duty of the Court to pass the final decree after the necessary enquiries.<sup>5</sup> In fact the Court cannot, after a preliminary decree has been passed in a partition suit, dismiss it for default in depositing the fee for a commissioner to make a final partition ; all that the Court can do in such a case is to adjourn the proceedings *sine die*.<sup>6</sup>

Any party to the suit whose interest it is that further proceedings be taken, may move the Court to pass a final decree ; but ordinarily it is the plaintiff who moves.<sup>7</sup>

Under the old Code it was not necessary to pass first a preliminary decree and then a final decree in a partition suit.<sup>8</sup> It was, however, usual to pass an interlocutory order declaring the rights of the several parties interested in the property and then a decree. See the undermentioned cases.<sup>9</sup> As to whether there can be more than one

**Note 3**

1. ('19) AIR 1919 Oudh 208 (210).  
 [See also ('75) 7 N W P H C R 75 (77).]

**Note 4**

1. ('15) AIR 1915 Mad 1065 (1065). (Preliminary decree for partition effects severance in status.)
- ('99) 23 Bom 184 (187). (Suit for partition by purchaser—Court need not determine shares of other coparceners.)
- ('99) 23 Bom 188 (190). (Suit for partition by member of joint Hindu family—Others can have their respective shares determined and allotted to them on payment of proper court-fee.)
- ('25) AIR 1925 Lah 408 (405); 6 Lah 124. (Hindu daughters in joint possession of life interest can have partition.)
- ('89) 16 Cal 397 (405); 16 Ind App 71 (PC). (Partition of talukdari estate belonging to Hindu family—Form of decree.)
- ('87) 14 Cal 498 (504) : 14 Ind App 37 (PC). (Do.)
- ('85) AIR 1985 Mad 266 (267). (Coparcener in Hindu joint family is entitled to interest during the period of the suit if the defendants have been receiving interest during such period.)

**Note 5**

1. ('12) 17 Ind Cas 390 (390) (Lah).
2. ('09) 8 Ind Cas 247 (252) (Cal). (Parties to bear costs in partition suits—In exceptional cases defendants must be made liable.)
- ('14) AIR 1914 All 272 (278) : 36 All 461. (Decree for joint possession is a preliminary decree.)
- ('29) AIR 1929 Oudh 117 (119). (Decree for joint possession cannot be construed as a preliminary decree for partition.)
3. ('25) AIR 1925 Pat 433 (433).
4. ('29) AIR 1929 Oudh 456 (457) : 5 Luck 280. (Distinguishing 18 All 309.)
5. ('29) AIR 1929 Oudh 456 (457) : 5 Luck 280. (Following AIR 1920 Oudh 281.)
6. ('25) AIR 1925 Pat 433 (433, 434).  
 ('82) AIR 1982 Mad 519 (522).
7. ('24) AIR 1924 P C 198 (198) : 4 Pat 61 : 51 Ind App 321 (PC).
8. ('28) AIR 1928 Mad 147 (148) : 46 Mad 47.
9. ('98) 20 All 311 (312, 318). (Interlocutory order of declaratory nature could be made.)
- ('78) 2 Mad 88 (87); 6 Ind App 177 (PC). (Contents of interlocutory order.)

preliminary decree in a case, see the discussion under Section 2 (2), Note 10, *ante*. As to the maintainability of an appeal against a preliminary decree after the final decree has been passed, see Section 97 Note 5, *ante*.

**O. 20 R. 18**  
**Notes 5-6**

**6. "Giving such further directions."** — These words include also directions for inquiry as to future mesne profits or interest, and it is in the *preliminary decree* that such directions should be given. Where such decree is silent as to future mesne profits or interest, can the final decree award the same or direct an inquiry in respect of the same? As regards *mesne profits* it has been held that the final decree cannot award it or direct an enquiry in respect of it. The reason is that Rule 12 and this rule should be read together and inasmuch as, under Rule 12, the final decree can only provide for mesne profits where an inquiry into the same has been directed by the preliminary decree, the same principle will also apply to cases coming under this rule.<sup>1</sup> But it has been held by the Madras High Court in a recent decision<sup>2</sup> that a Court can pass a final decree for mesne profits in a partition suit although there has been no preliminary decree in respect of such profits. It has also been held by the Chief Court of Oudh<sup>3</sup> that where a preliminary decree passed on compromise between the parties in a suit for partition omits to make any mention of mesne profits, still it is open to the Court to direct an enquiry into mesne profits where it finds that the intention of both the parties is that mesne profits should be paid to each other. In any case where the final decree directs such an enquiry, there is no want of jurisdiction and the executing Court cannot go behind it.<sup>4</sup> As to the maintainability of a separate suit for mesne profits where the decree in the partition suit is silent on the point, see Section 11, Note 125 and the undermentioned cases.<sup>5</sup>

As regards *interest*, where the preliminary decree in a partition suit directs accounts to be taken but is silent as to interest, it has been held by the Bombay High Court<sup>6</sup> that it is competent to the Court to award by its final decree, interest in a proper case. The learned Judges base their decisions on certain English cases, according to which a Court has "power on further directions to order payment of interest on a sum found due from a defendant although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it." It was also pointed out that the case of taking an account under the present rule is similar to the case of taking an account in an administration suit under O. 20 R. 13 and that, if the forms of preliminary and final decrees in administration suits (Appendix D, Forms 17 and 18) are looked at, it will be clear that the Legislature does recognize that even where the preliminary decree does not contain any direction as to interest, yet, in the final decree, interest may be awarded.

(81) 7 Cal 318 (320). (Do.)

(95) 18 Mad 73 (87). (Do.)

(08) 31 Mad 540 (542). (Appointment of commissioner to make partition not obligatory).

(95) 22 Cal 425 (432, 434).

(1900) 28 Mad 127 (129). (Art. 181, Limitation Act, not applicable to application for the appointment of a commissioner.)

(70) 14 Suth W R 92 (93).

**Notes 6**

1. ('19) AIR 1919 Mad 998 (999) : 42 Mad 296.

(81) 1931 Mad W N 846 (847).

2. ('39) AIR 1939 Mad 81 (89, 90). (Under this rule, it is not necessary in every case to have two decrees.)

[See also ('86) AIR 1936 Sind 72 (74, 75) : 30 Sind L R 17. (Parties referring question as to mesne

profits to Judge as arbitrator—Judge not deciding question as to future mesne profits—*Held* that such question was not referred to the Judge as arbitrator and was open and then even assuming that it had been referred, as the Judge had not decided it, its decision subsequently was not barred.)]

3. ('38) AIR 1938 Oudh 108 (105).

4. ('81) 1931 Mad W N 846 (847).

5. ('32) AIR 1932 Bom 222 (224) : 56 Bom 292.

(85) AIR 1935 Pat 80 (82). (Suit by purchaser from coparcener for partition and separate possession of share purchased—Question of mesne profits must be determined in the partition suit itself and not by a separate suit.)

6. ('25) AIR 1925 Bom 406 (408, 409) : 49 Bom 282.

**O. 20 R. 18**  
**Notes 7-9**

**7. Final decree.** — Where a preliminary decree for partition has been passed under this rule, the decree cannot be made effective without a final decree.<sup>1</sup> Where, subsequent to the preliminary decree, one of the co-sharers dies and the other parties become entitled to increased shares, the final decree may award them the increased shares.<sup>2</sup> In working out preliminary decrees for partition, the Court may, instead of making an actual division of all the property, give one coparcener a charge over the share of another for any difference in favour of the former.<sup>3</sup> A decree for partition is a joint decree in favour of all the shareholders and therefore execution proceedings taken by one of them are sufficient to keep the decree alive in favour of all.<sup>4</sup> It has been held by the Patna High Court<sup>5</sup> that where, along with the preliminary decree in a partition suit the Court passes an executable order for costs in favour of the plaintiff, it is open to the latter to apply to have such order incorporated in the final decree although limitation for the execution of such order independently may have expired. It has been held that after a preliminary decree has been passed, it is always open to the parties before the final decree, upon proper procedure, to bring in further property for partition.<sup>6</sup> See also the undermentioned case.<sup>7</sup>

**8. Stamp for final decree.** — A final decree for partition is an instrument of partition within Section 2 (15) of the Stamp Act, and is chargeable with stamp duty under Schedule I, Article 45 of that Act.<sup>1</sup>

See also the undermentioned cases.<sup>2</sup>

**9. Appeal.** — Under the present Code a preliminary decree in a partition suit is appealable under Section 96 and, if not appealed against, cannot be questioned in the appeal from the final decree [*vide* Sections 2 (2), 96 and 97]. Under the old Code there was only one decree in a partition suit though the decree might be preceded by an interlocutory order declaring the rights of the several parties interested in the property. As to the appealability of such order and other connected questions under the old Code, see the undermentioned cases<sup>1</sup> which are not of any practical

#### Note 7

1. ('85) AIR 1935 P C 12 (13).
2. ('21) AIR 1921 Pat 296 (297).
3. ('80) AIR 1930 Mad 988 (990).  
[See also ('32) AIR 1932 Mad 97 (97) : 54 Mad 821. (A paying part of B's purchase money—Though it may not amount to charge, equity in A's favour can be enforced by Court against B or his transferee with notice.)]
4. ('78) 8 Cal 551 (552).  
[See also ('32) AIR 1932 Cal 869 (870).]
5. ('38) AIR 1938 Pat 188 (189).
6. ('85) AIR 1935 P C 12 (12, 13) (P O).
7. ('17) AIR 1917 Nag 118 (119).

#### Note 8

1. ('05) 82 Cal 488 (488, 491).  
('32) AIR 1932 Lah 249 (250). (Final decree in partition suit not stamped with general stamp—Decree not having been drawn up on stamp paper was held not to be a decree upon which executing Court can act.)
- ('11) 12 Ind Cas 775 (776) : 35 Mad 26.
- ('05) 29 Bom 366 (368).
- ('86) AIR 1936 Lah 1 (3) : 16 Lah 901. (It is the duty of the Court to decide the proportion of stamp payable by each person who desires his share separated.)

[See ('32) AIR 1932 Rang 120 (122). (Preliminary decree declaring the extent of shares without actually dividing—It does require to be stamped under S. 2 (15), Stamp Act.)]

2. ('82) AIR 1932 Mad 722 (723) : 55 Mad 975. (In a suit for partition a defendant co-sharer can ask for a decree for his share without paying court-fee. The Crown is only entitled to the stamp duty that is leviable on the decree under the Stamp Act.)
- ('36) AIR 1936 Lah 1 (4) : 16 Lah 901. (Final decree in partition suit—Execution by defendant—Defendant need not pay court-fee to have his share separately allotted to him.)

#### Note 9

1. ('97) 24 Cal 725 (735, 736, 738, 739). (In appeal against final decree appellant can take objection to such order.)
- ('95) 18 Mad 78 (87). (Interlocutory order declaring rights is appealable.)
- ('86) 12 Cal 209 (212). (Do.)
- ('86) 12 Cal 273 (275). (Do.)
- ('92) 19 Cal 463 (467) (FB). (Do.)
- ('96) 28 Cal 279 (288). (Do.)
- ('86) 12 Cal 275 (278, 279). (Interlocutory order by which rights of some of the parties alone are determined is not appealable.)

importance now. An order on an application for the appointment of a commissioner to work out the shares in a decree for partition is not appealable.<sup>3</sup>

**O. 20 R. 18**  
**Note 9**

**R. 19.** [S. 216.] (1) Where the defendant has been allowed

**O. 20 R. 19**

**Decree when set-off is allowed.** a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

[1877, S. 216 ; 1859, S. 195.]

**Local Amendment**

**ALLAHABAD**

In sub-rule (1), *substitute* a comma for the full stop at the end, and *add* the following :

"but no decree shall be passed against the plaintiff unless the claim to set-off was within limitation on the date on which the written statement was presented."

**Synopsis**

- |  |   |
|--|---|
| 1. "Where defendant has been allowed a set-off." | 3. Decree for defendant claiming set-off.                   |
| 2. Appeal from decree relating to set-off.       | 4. Applicability of Rule to equitable set-off—Sub-rule (3). |

1. "Where defendant has been allowed a set-off."—The rule applies only where the defendant has been allowed a "set-off" against the plaintiff's claim; and not in any other case. Thus, the rule does not apply to a case where in determining the defendant's liability for mesne profits deductions are made for costs or expenses of cultivation.<sup>1</sup>

2. **Appeal from decree relating to set-off.** — Under the second paragraph of Section 216 of the old Code corresponding to sub-rule (2) of the present rule, the *forum* of appeal in relation to the defendant's claim of set-off depended upon the sum *claimed by him* and not upon the valuation of the suit made by the plaintiff.<sup>1</sup> This has been amended under the present rule so as to give effect to the view that appeals from

(1905) 28 Mad 127 (129). (Order refusing application to appoint commissioner for partition, purporting on face of it to be an order under S. 244 was held to be appealable.)

2. (1918) AIR 1916 Mad 909 (810).

(1913) 18 Ind Cas 701 (701) : 85 All 159. (Civil Procedure Code does not contemplate the passing

of a second preliminary decree.)

**Order 20 Rule 19 — Note 1**

1. (1976) 25 Suth W R 275 (275).

**Note 2**

1. (1905) 32 Cal 654 (659).  
(1988) 10 All 587 (594, 599).

**O. 20 R. 19**  
**Notes 2-4**

decrees relating to set-off should lie to the Courts to which appeals in respect of the original claim of the plaintiff would lie.<sup>3</sup>

A preliminary order disposing of a claim of set-off made by the defendant is not a decree and is not appealable by itself but can be attacked in an appeal from the decree.<sup>3</sup>

**3. Decree for defendant claiming set-off.** — Where the amount due to the defendant by the plaintiff is found to exceed that due to the plaintiff by the defendant, the Court may not only dismiss the suit, but may pass a decree in favour of the defendant against the plaintiff.<sup>1</sup>

The question has arisen as to whether a decree may be passed in favour of the defendant in a suit for accounts, where, on taking accounts, it is found that the balance is in defendant's favour. In such a case, it was observed by Phillips, J., in the undermentioned Madras case<sup>2</sup> that there is really no "set-off" pleaded to which the present rule may apply. The High Courts of Allahabad<sup>3</sup> and Calcutta<sup>4</sup> have, on the other hand, held that a decree may be passed in favour of the defendant in such a case under O. 20 Rr. 15 and 16. In one of the Calcutta cases<sup>5</sup> it was even said that it was a case of equitable set-off and that Rule 19 itself might apply.

**4. Applicability of Rule to equitable set-off—Sub-rule (3).**—Order 8 Rule 6 provides only for a legal set-off being allowed. But the present rule applies also to equitable set-off and provides for a decree being passed giving effect to such set-off.<sup>1</sup> As to the distinction between the two types of claims, see Notes under Order 8 Rule 6. See also the undermentioned cases.<sup>2</sup>

**O. 20 R. 20**

Certified copies of judgment and decree to be furnished.

**R. 20.** [S. 217.] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

[1877, S. 217 ; 1859, S. 198.]

**1. Certified copies of judgment and decrees to be furnished.** — An application for copies under this rule is to be made to the Court which has decided the case and such an application must be deemed to be a proceeding before the Court, although

**2. Notes on Clauses.**

**3.** ('17) AIR 1917 Lah 261 (265) : 1917 Pun Re No. 62.

**Note 3**

- 1.** ('05) 82 Cal 654 (659).
- ('34) AIR 1934 All 548 (545) : 56 All 912. (Court must pass a decree in favour of defendant on his claim of set-off even though the plaintiff's claim is disallowed.)
- 2.** ('20) AIR 1920 Mad 819 (821) : 42 Mad 873. (It could however be treated as a case of equitable set-off.)
- 3.** ('10) 6 Ind Cas 162 (163) : 82 All 525.
- ('24) AIR 1924 All 854 (854, 855) : 46 All 858. (Suit for partnership accounts—Distinguishing 8 All L Jour 288.)
- 4.** ('81) AIR 1981 Cal 358 (358, 359).
- ('07) 84 Cal 892 (895, 896).
- 5.** ('31) AIR 1931 Cal 856 (859).

**Note 4**

- 1.** ('05) 27 All 145 (147).
- ('98) 15 All 9 (11).
- ('96) 1896 Bom P J 728 (728).
- ('17) AIR 1917 Mad 258 (259) : 39 Mad 939.
- 2.** ('86) AIR 1936 All 522 (528). (Suit for arrears of rent on basis of leases — Set-off arising under lease, though inadmissible under O. 8 R. 6 can be claimed.)
- ('36) AIR 1936 Cal 277 (279). (Set-off may be purely defensive or may be by way of counter-claim—In case of defensive set-off, set-off claimed must be recoverable at date of plaintiff's suit—In counter-claim sum claimed by defendant must be legally recoverable when he files written statement claiming set-off Indian Courts make distinction between defensive set-off and counter-claim.)

the Court may have delegated its functions in the matter to some other officer. Hence, an offence committed in connection with such an application comes within the purview of Sections 195 and 476 of the Criminal Procedure Code.<sup>1</sup> See also the undermentioned cases.<sup>2</sup>

**O. 20 R. 20  
Note 1**

### Local Amendments

#### ALLAHABAD

*Add the following :*

"21. (1) Every decree and order as defined in Section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly, what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

**O. 20 R. 21  
(Allahabad)**

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(5) When the Judge signs the decree, he shall make an autograph note stating the date on which the decree was signed."

#### RANGOON

*Add the following :*

"21. As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records Establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey

**O. 20 R. 21  
(Rangoon)**

Certificate to be issued to Land Records Department when interests in land are affected.

in a district in which there is a Land Records Establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey

#### Order 20 Rule 20 — Note 1

- |  |   |
|--|---|
| 1. ('28) AIR 1928 Lah 759 (761, 762).  | Small Cause Courts.)  |
| 2. (1864) 1 Bom H O R 165 (165). (Parties entitled to copies and not merely translations.) | ('78) 2 Cal L Rep 553 (554). (Right of strangers to obtain copies.) |
| ('70) 7 Bom H C R A C 180 (181). (Rule applies to  | ('78) 20 Suth W R 405 (406).  |

**O. 20 R. 21**  
(Rangoon)

has been affected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land or any part thereof is situate.

**O. 20 R. 22**  
(Rangoon)

Form of certificate.

22. The certificate shall be in the prescribed form, and shall be signed by the presiding officer of the Court."

## ORDER XXI.

### EXECUTION OF DECREES AND ORDERS.

#### PAYMENT UNDER DECREE

**O. 21 R. 1**

Modes of paying money  
under decree.

**R. 1. [S. 257.]** (1) All money payable under a decree shall be paid as follows, namely :—

(a) into the Court whose duty it is to execute the decree; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

[1877, S. 257; 1859, S. 206.]

#### Local Amendments

##### CALCUTTA

(1). For clause (a) of sub-rule (1), *substitute* the following clause :

"(a) By deposit in or by postal money order sent to the Court whose duty it is to execute the decree, or"

(2). In sub-rule (2) :

(i) Read the number 2 as 2 (a)

(ii) After the words "the decree-holder," *add* the words "or the person in whose favour the order is made."

(iii) *Add* the following as clause (b) :

"(b) the cost of giving such notice shall be borne by the person making payment who shall have the option of having the notice served either by a process-server of the Court or by a registered post. No such notice shall issue until the said cost shall have been paid."

##### LAHORE

*Add* the following :

"*Explanation* : — The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose."



**NAGPUR****O. 21 R. 1  
Notes 1-3**(1). In sub-rule (1), *after* the words "a decree" *insert* the words "or an order;"(2). *For* clause (a) of sub-rule (1), *substitute* the following clause :

"(a) by deposit in, or by postal money order to, the Court whose duty it is to execute the decree or order ; or";

(3). In clause (c) of sub-rule (1), *after* the word "decree" *insert* the words "or order;"(4). To sub-rule (2), *add* the following proviso :

"Provided that when the payment is made by money order, the notice may be given by registered post by the judgment-debtor direct to the decree-holder."

**PATNA***For* Rule 1 *substitute* the following :

"1. (1) All money payable under a decree or order shall be paid as follows, namely :

(a) by deposit in or by special postal money order to the Court whose duty it is to execute the decree or order ; or

(b) out of Court to the decree-holder; or

(c) otherwise as the Court which makes the decree or order shall direct.

(2) Where a judgment-debtor makes any payment under clause (a) of sub-rule (1), he may give notice thereof to the decree-holder —

(a) either through the Court, on payment of the fees laid down in the rules framed by the High Court under clause (1) of Section 20 of the Court-fees Act, 1870 (Act 7 of 1870), or

(b) notwithstanding anything contained in Order 48 Rule 2, by registered post direct.

Where interest is payable under the decree or order, such notice shall, if duly proved, operate as a bar to the accrual of such interest, upon the amount so paid, after the date of receipt of such notice by the decree-holder."

*Synopsis*

1. Legislative changes.

2. Retrospective operation of the Rules of this Order. See Note 3 to the Preamble.

3. Scope and applicability of the Rule.

4. Payment into Court.

5. Who should make payment.

6. Effect of payment.

7. Decree directing payment to decree-holder.

8. Payment out of Court to decree-holder.

9. Notice of payment.

*Other Topics (miscellaneous)*

Court closed on last day for payment — Procedure. See Note 4.

Inexecutable decrees, applicability of rule. See Note 3.

Liability for interest. See Notes 3, 6 and 8.

"Money payable under a decree." See Note 3.

Tender by debtor to be unconditional. See Note 8.

1. Legislative changes. — Clause (2) of the rule is new.

2. Retrospective operation of the Rules of this Order. — See Note 3 to the Preamble.

3. Scope and applicability of the Rule. — The judgment-debtor is bound to pay the decretal debt in one of the modes specified in the rule.<sup>1</sup> He cannot be relieved**Order 21 Rule 1 — Note 3**

1. ('88) AIR 1988 Mad 528 (524). (Judgment-debtor cannot be required to pay the money to a

third party who has got an unregistered assignment of the decree, merely because he happens to know of it.)

**O. 21 R. 1**  
**Notes 3-5**

from such liability on the ground that the decree-holder is dead.<sup>2</sup>

The rule does not apply to decrees that are *inexecutable* as where a compromise decree provides that on default in payment, the decree-holder shall have the right to file a *suit*.<sup>3</sup> Nor does the rule apply to money payable under an *order*, though such orders are *executable*, under the provisions of Section 36, like decrees. Thus, where a party is ordered to pay the costs of the day to the opposite side, he cannot deposit the costs in Court under this rule.<sup>4</sup> Under Section 11 of the Charitable and Religious Trusts Act (XIV of 1920), the provisions of the Code relating to execution of decrees are applicable to execution of orders under that Act.

**4. Payment into Court.** — Where a payment under a decree has to be made *only into Court*, as in the case of pre-emption decrees under O. 20 R. 14, and the Court is closed on the last day for making such payment, the maxim *lex non cogit ad impossibilia*<sup>1</sup> will apply and the payment can be made on the day the Court re-opens.<sup>2</sup> It has been held by all the High Courts except the High Court of Allahabad that the same rule will apply even where the decree amount may be paid to the *decree-holder* or *into Court*, inasmuch as the judgment-debtor is entitled to choose the method of payment.<sup>3</sup> The High Court of Allahabad<sup>4</sup> is of the opinion that in such cases the judgment-debtor cannot get the time for payment extended by choosing to pay the amount only in Court.

An arbitrator is not an officer of the Court and a payment to him is not a payment into Court.<sup>5</sup> Where a receiver appointed in an administration suit was not authorized to receive certain payments to be made by X but the latter made the payments to the receiver who misappropriated them, it was held by the Privy Council that X was not discharged from liability, by reason of such payments.<sup>6</sup>

The words "all money payable under a decree" do not mean the entire amount payable under the decree. Therefore, even if a portion of the decretal amount is paid into Court, it will be a valid payment and the decree-holder can take out execution only for the balance.<sup>7</sup>

**5. Who should make payment.** — A payment into Court under this rule can be made only by the judgment-debtor, his agent, or his representative. A payment made by a *stranger* will not have the effect of satisfying the decree unless the decree-holder consents thereto.<sup>1</sup> But a payment made by the mortgagee of a party liable to pay is effective, though he is not a party to the suit.<sup>2</sup> In execution of a decree for money

2. ('10) 5 Ind Cas 63 (64) (Cal). (Liable for interest on the whole of the amount due.)

3. ('29) AIR 1929 All 207 (207) : 51 All 527.

[See however ('35) AIR 1935 Pat 885 (398) : 14 Pat 488. (Payment need not be due under executable decree—Payment made under preliminary decree is within this rule.)]

4. ('89) 12 Mad 120 (122).

**Note 4**

1. "The law does not compel a man to do that which he cannot possibly perform."

2. ('81) 8 All 850 (851).

('84) 1884 All W N 217 (217).

('25) AIR 1925 All 687 (687).

('80) 5 Cal 906 (909). (Payment under S. 52 of Bengal Act, VIII of 1869, had to be made in Court.)

[See also ('29) AIR 1929 All 207 (207) : 51 All 527.]

3. ('99) 1 Bom L R 644 (644).

('10) 7 Ind Cas 992 (992) : 35 Bom 85.

('06) 10 Cal W N 535 (539).

('98) 21 Mad 885 (887).

('25) AIR 1925 Mad 748 (744).

('27) AIR 1927 Mad 1196 (1196, 1197). (There is no distinction in this respect between a compromise decree and any other decree.)

('35) AIR 1935 Lah 869 (870).

[See also ('38) AIR 1938 Mad 528 (524).]

4. ('29) AIR 1929 All 207 (207) : 51 All 527.

('38) AIR 1938 All 199 (200) : I L R (1938) All 887.

5. ('24) AIR 1924 Rang 263 (264) : 8 Rang 147.

6. ('32) AIR 1932 PO 191 (198) : 59 Ind App 811 : 7 Luck 882 (PO).

7. ('83) AIR 1933 Pat 89 (90) : 11 Pat 796.

**Note 5**

1. ('17) AIR 1917 Mad 789 (741).

2. ('24) AIR 1924 PO 188 (185) : 51 Ind App 236 : 48 Bom 404 (PO).

obtained by *A* against *B*, a receiver was appointed to collect certain amounts due to *B* by *C*. *C* paid the amount into the hands of the receiver who absconded and did not pay the money into Court. It was held that the payment by *C* to the receiver did not discharge the judgment-debtor from liability under the decree.<sup>3</sup>

**O. 21 R. 1**  
**Notes 5-9**

**6. Effect of payment.** — A payment into Court towards a decree debt operates as a discharge of the decree debt to that extent<sup>1</sup> and where interest has been awarded on the decree amount, it will cease to run on the sum deposited.<sup>2</sup> But if, after having made the payment, the judgment-debtor prevents the sum reaching the hands of the decree-holder, he will be liable for interest until the money becomes available to the decree-holder.<sup>3</sup>

If money is paid into Court under process of execution and the decree-holder or his agent is present, the Court should cause it to be paid to him immediately.<sup>4</sup>

**7. Decree directing payment to decree-holder.** — Even where the decree directs the payment to be made to the decree-holder, payment into Court is a valid compliance with the decree<sup>1</sup> unless perhaps the Court directs that payment should *not* be made otherwise than by payment to the decree-holder.<sup>2</sup>

**8. Payment out of Court to decree-holder.** — A payment made to the decree-holder out of Court also discharges the decree.<sup>1</sup> But the decree-holder is not bound to accept a sum in part satisfaction of his decree and the refusal to receive it will not deprive him of his right to interest.<sup>2</sup> Where a payment out of Court is made through post before a certain fixed date but does not reach the decree-holder within that date, the payment is not effective.<sup>3</sup>

The language of the rule is only permissive and does not prohibit a payment to an *agent* or representative of the decree-holder, and hence a payment out of Court may be made to the decree-holder's agent or representative, or in the case of members of a Hindu joint family, to the manager of the family.<sup>4</sup>

The term "decree-holder" in clause (b) of this rule used in the singular includes the plural also.<sup>5</sup> Where, therefore, the decree is in favour of two or more persons jointly, a payment out of Court, in order to be binding on all, must be made to all the joint decree-holders.<sup>6</sup> See also Notes to Order 21 Rule 15.

**9. Notice of payment.** — The question of notice of payment into Court to the decree-holder is material only where the decree awards *interest*. Where no interest has been awarded by the decree and the decretal amount is paid into Court, it operates as a discharge of the decree, even if no notice is given to the decree-holder.<sup>1</sup> But if the decree *awards interest*, then the decree-holder is entitled to interest till the *date of*

3. ('97) 20 Mad 224(228). (Per Shephard, J.)

#### Note 6

1. ('97) 20 Mad 224 (229).
- (79) 20 Suth W R 131 (131).
2. ('18) AIR 1918 All 284 (284, 285): 40 All 125.
- (39) AIR 1938 Lah 126 (126).
3. ('29) AIR 1929 Nag 227 (228).
- (78) 2 Cal L Rep 183 (184).
4. ('70) 5 Mad H O R App 2 (2).

#### Note 7

1. ('10) 7 Ind Cas 992 (992): 35 Bom 85.
- (25) AIR 1925 Mad 743 (744).
- (35) AIR 1935 Lah 369 (370).
2. ('28) AIR 1928 Nag 246 (246, 247): 19 Nag L R 116.

#### Note 8

1. ('87) 9 All 9 (10).
- (71) 1871 Pun Re No. 29.
2. ('67) 7 Suth W R 20 (20).
3. ('18) AIR 1918 All 403 (404, 405).
4. ('11) 12 Ind Cas 503 (505) (Mad).
- (30) AIR 1930 All 659 (660). (Attaching decree-holder is a representative of the decree-holder and a payment can be made to him out of Court.)
5. ('34) AIR 1934 Mad 330 (332): 57 Mad 696.
6. ('34) AIR 1934 Mad 330 (332): 57 Mad 696.
- (17) AIR 1917 Mad 988 (989).
- (80) AIR 1930 Cal 78 (79).

#### Note 9

1. ('24) AIR 1924 Pat 118 (119): 2 Pat 754.

**O. 21 R. 1**  
**Note 9**

*notice.*<sup>3</sup> Notice of such payment must be in writing and be served on the decree-holder in the way prescribed for the service of summons.<sup>3</sup> Even if the judgment-debtor fails to give notice of the fact of payment, it is the duty of the Court to inform the decree-holder about it when he next applies for execution of the decree.<sup>4</sup>

Clause (2) of this rule does not apply to redemption decrees. They are governed by O. 34 R. 8, which does not require any such notice to be given.<sup>5</sup>

**O. 21 R. 2**

**R. 2. [S. 258.]** (1) Where any money payable under a decree<sup>3</sup> of any kind<sup>4</sup> is paid out of Court,<sup>5</sup> or the decree is otherwise adjusted<sup>6</sup> in whole or in part<sup>7</sup> to the satisfaction of the decree-holder, the decree-holder shall certify<sup>12</sup> such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same<sup>19</sup> accordingly.

(2) The judgment-debtor also may inform the Court<sup>15</sup> of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized<sup>21</sup> by any Court executing the decree.<sup>22</sup>

[1877, S. 258; 1859, S. 206.]

**Local Amendments****MADRAS**

*Substitute the following for the existing sub-rule (2) :*

"Any party to the suit or his legal representatives or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

**PATNA**

In sub-rule (2) for the words "and if after service of such notice," *substitute the following :*

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| <p>2. ('19) AIR 1919 Mad 445 (445) : 42 Mad 576.<br/>(71) 16 Suth W R 304 (304).<br/>(82) AIR 1932 Cal 111 (111) : 57 Cal 751.<br/>[But see ('89) AIR 1939 Nag 191 (192). (Decree awarding interest until payment — Sum paid</p> | <p>into Court — Interest ceases from date of such payment—Relying on AIR 1924 P O 188.)]<br/>3. ('25) AIR 1925 Nag 52 (54).<br/>4. ('21) AIR 1921 Nag 148 (149).<br/>5. ('24) AIR 1924 Mad 102 (102).</p> |
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"and where certification has been made by an endorsement of such payment or adjustment by the decree-holder or by any person authorized by him in that behalf upon the process issued by the Court, the Court shall issue such notice of its own motion. If after service of the notice,"

**O. 21 R. 2**  
**Note 1**

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and applicability of the Rule.</li> <li>3. "Money payable under a decree."</li> <li>4. "Decree of any kind."</li> <li>5. "Is paid out of Court."</li> <li>6. "Or the decree is otherwise adjusted."</li> <li>7. Adjustment in part.</li> <li>8. Oral adjustments.</li> <li>9. When and with whom payment or adjustment should be made.</li> <li>10. Payment to one of several joint decree-holders. See Notes to Order 21, Rule 15.</li> <li>11. Adjustment by guardian of minor party.</li> <li>12. "The decree-holder shall certify."</li> <li>13. Effect of certifying without payment or adjustment being made.</li> <li>14. Certification by one of several joint decree-holders. See Notes to Order 21, Rule 15.</li> <li>15. "The judgment-debtor may also inform Court . . . and apply."</li> <li>16. "Judgment-debtor," meaning of.</li> <li>17. Certification, form of.</li> </ol> | <ol style="list-style-type: none"> <li>18. Limitation for certification.</li> <li>19. "Shall record the same."</li> <li>20. Notice.</li> <li>21. Uncertified payment or adjustment not to be recognized by Court executing the decree.</li> <li>22. "Court executing the decree."</li> <li>23. Court acting under Order 21 Rule 16.</li> <li>23a. Court dealing with application under O. 21 Rr. 90, 95, 97 and 98.</li> <li>24. Suit by judgment-debtor based upon an uncertified payment or adjustment.</li> <li>25. Suit by decree-holder based on uncertified payment or adjustment.</li> <li>26. Effect of fraud.</li> <li>27. Effect on limitation.</li> <li>28. Operation as estoppel.</li> <li>29. Remedies of the judgment-debtor.</li> <li>30. Suit for damages.</li> <li>31. Restitution of uncertified payment on reversal of decree in appeal.</li> <li>32. Criminal proceedings.</li> <li>33. Appeal and revision.</li> </ol> |
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### Other Topics (miscellaneous)

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| <p>Assignee of the decree—Whether comes within the rule. See Note 9.</p> <p>Certificate — In which Court to be filed. See Note 15.</p> <p>Compromise — Whether and when sufficient adjustment. See Note 6.</p> | <p>Judgment-debtor pleading agreement with assignee of decree. See Note 2.</p> <p>Rule, whether confined to parties only. See Note 2.</p> <p>"Show cause." See Note 20.</p> <p>"Such payment or adjustment." See Note 22.</p> |
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#### 1. Legislative changes. —

1. In sub-rule (1) after the words "payable under a decree" the words "of any kind" have been added. See Note 4, *infra*.

2. The words "as a payment or adjustment of the decree" which occurred in the old Code in sub-rule (3) after the word "recognized" have been omitted. See Note 27, *infra*.

3. The words "or if any payment is made in pursuance of an agreement of the nature mentioned in Section 257A" after the words "to the satisfaction of the decree-holder" have been omitted. Section 257A of the old Code has also been omitted. It ran as follows:

"Every agreement to give time for the satisfaction of a judgment debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

Every agreement for the satisfaction of a judgment debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

**O. 21 R. 2**  
**Notes 1-2**

Any sum paid in contravention of the provisions of the Section shall be applied to the satisfaction of the judgment debt; and the surplus, if any, shall be recoverable by the judgment-debtor."

The omission of Section 257A from the present Code renders the under-mentioned decisions<sup>1</sup> now merely of academic interest. The effect of the omission is that the legality of such arrangements between parties after decree must be tested like other agreements.<sup>2</sup>

**2. Scope and applicability of the Rule.** — The object of this rule is to ensure that the Court executing the decree shall not be troubled with any disputes between the parties with regard to any payment or adjustment unless the same has been duly certified or recorded.<sup>1</sup> Sub-rule (1) contemplates a certification by the *decree-holder* and a record by the Court of the payment or adjustment; sub-rule (2) contemplates an application by the *judgment-debtor*. In this case *notice* is to be given to the decree-holder and the Court should give a *judicial decision* whether the payment or adjustment should be recorded as certified.<sup>2</sup> Lastly, sub-rule (3) imposes a bar upon the Court executing the decree and prevents it from recognising any payment or adjustment which has not been certified or recorded as certified as required by the rule.<sup>3</sup>

**Order 21 Rule 2 — Note 1**

1. *In the following cases the agreement was held to be void as being contrary to S. 257A :*

- ('09) 2 Ind Cas 991 (991) (Mad).
- ('81) 3 All 585 (588).
- ('84) 6 All 623 (625).
- ('95) 1895 All W N 149 (150).
- ('86) 9 Bom 176 (179).
- ('88) 12 Bom 499 (501).
- ('88) 13 Bom 54 (55).
- ('98) 22 Bom 693 (700, 701).
- ('03) 27 Bom 96 (100).
- ('04) 28 Bom 62 (65).
- ('04) 28 Bom 310 (313, 314).
- ('04) 28 Bom 383 (386).
- ('14) AIR 1914 Bom 181 (132) : 88 Bom 219.
- ('01) 32 Cal 917 (920).
- ('80) 1880 Pun Re No. 48, page 104.
- ('91) 1 Mad L Jour 332 (333, 334).
- ('03) 26 Mad 19 (26, 27).
- ('19) AIR 1919 Mad 1128 (1129).

*In the following cases it was held that an agreement made with the sanction of Court under S. 257A is valid and enforceable in execution :*

- ('89) 11 All 228 (232, 233).
- ('83) 5 All 492 (495).
- ('84) 6 All 16 (17).
- ('96) 21 Bom 808 (820). (Impliedly sanctioned.)
- ('93) 20 Cal 22 (24).
- ('12) 17 Ind Cas 936 (939) (Cal).
- ('78) 2 Cal L Rep 143 (145).
- ('86) 1886 Pun Re No. 61, page 130.
- ('09) 1 Ind Cas 48 (49) (Lah).
- ('84) 7 Mad 400 (401). (Impliedly sanctioned.)

*Section 257A applies only as between parties to the decree :*

- ('88) 6 Mad 101 (102).
- ('89) 13 Bom 671 (672).
- ('99) 23 Bom 502 (505).

('88) 12 Bom 499 (501).

('89) 1889 Bom P J 377.

[See also ('90) 12 All 571 (575). (Sanction could be given only by Court which passed the decree.)]

*See also the following cases :*

- ('03) 25 All 317 (320, 321).
- ('92) 16 Bom 618 (625).
- ('89) 14 Bom 390 (392). (Section related only to debts enforceable in execution.)
- ('89) 16 Cal 504 (507).
- ('01) 6 Cal W N 27 (30).
- ('85) 11 Cal 671 (672).
- ('06) 1908 Pun Re No. 29, page 151 (FB).
- ('94) 17 Mad 382 (383).
- ('98) 6 O P L R 133 (135).
- ('01) 4 Oudh Cas 284 (288).
- ('35) AIR 1935 Bom 257 (258).
- 2. ('14) AIR 1914 Cal 697 (698).
- ('11) 18 Ind Cas 204 (205) (Mad).
- ('25) AIR 1925 Oudh 364 (365); 28 Oudh Cas 255.

**Note 2**

- 1. ('22) AIR 1922 Bom 380 (380, 381) : 46 Bom 226.
- 2. ('29) AIR 1929 P O 19 (22, 28) : 56 Ind App 30 : 3 Luck 684 (P O).
- 3. ('29) AIR 1929 P O 19 (22) : 56 Ind App 30 : 3 Luck 684 (P O).
- ('33) AIR 1933 Rang 239 (240) : 11 Rang 420. (Decree attached—Payment before adjustment—Application by attaching decree-holder—Plea of uncertified payment cannot be made.)
- ('33) AIR 1933 Sind 305 (306).
- ('29) AIR 1929 All 674 (675).
- '16) AIR 1916 All 219 (219); 88 All 289.
- '12) 18 Ind Cas 21 (22) (All).
- '25) AIR 1925 Bom 309 (309); 49 Bom 548 (FB).
- ('22) AIR 1922 Bom 380 (380, 381) : 46 Bom 226.
- ('89) 18 Bom 171 (176).

The prohibition under sub-rule (3) will apply only when the parties to a transaction entered into for the purpose of satisfying or adjusting a decree stand to one another, at the date of such transaction, in the *relation of judgment-debtor and judgment-creditor*.<sup>4</sup> Thus, where *A*, a transferee decree-holder, applied for execution of the decree and *B*, the judgment-debtor, objected on the ground that he had transferred certain immovable property to *A* in consideration of his paying the judgment debt to the original decree-holder and that *A* having discharged the debt had got the decree transferred to himself, instead of entering up satisfaction of the decree and had fraudulently applied for execution, it was held that there must be an enquiry into the truth of *B*'s allegations.<sup>5</sup> But there is nothing in the wording of this rule to limit the payment to the *decree-holder only*. Thus, where a compromise decree directed the payment of money to a third party and the payment was not certified to the Court, it was held that it could not be relied upon in execution.<sup>6</sup>

This rule does not apply to a compromise which is entered into between the parties to a mortgage suit after a final decree, and which is pleaded in bar of an application for a *personal* decree against the mortgagor under O. 34 R. 6. The reason is that there is no adjustment of the mortgage decree in such a case; nor is the Court to which the application for personal decree is made, a Court *executing* the mortgage decree.<sup>7</sup>

Section 71 of the Dekkhan Agriculturists' Relief Act (Bombay) expressly excludes the application of sub-rule (3) of this rule to payments out of Court made in

- ('20) AIR 1920 Cal 289 (290).
- ('19) AIR 1919 Cal 121 (122).
- ('12) 14 Ind Cas 839 (842) (Cal).
- ('10) 6 Ind Cas 43 (44) (Cal).
- ('93) 20 Cal 32 (35) 36).
- ('98) 25 Cal 86 (89).
- (1865) 4 Suth W R Misc 11 (11).
- ('73) 20 Suth W R 150 (150).
- ('67) 8 Suth W R 318 (320).
- ('67) 7 Suth W R 134 (134).
- ('68) 9 Suth W R 362 (362).
- ('71) 15 Suth W R (O C) 5 (6).
- ('25) AIR 1925 Lah 566 (567).
- ('78) 1878 Pun Re No. 26, page 113.
- ('82) AIR 1932 Mad 250 (252). (Uncertified payment by judgment-debtor to decree-holder after latter's adjudication as insolvent cannot be recognized as against receiver.)
- ('17) AIR 1917 Mad 605 (606, 607).
- ('11) 12 Ind Cas 562 (563) : 36 Mad 357.
- ('07) 17 Mad L Jour 527 (528).
- ('06) 29 Mad 312 (313).
- ('81) 3 Mad 113 (114).
- ('28) AIR 1928 Oudh 195 (198) : 3 Luck 170.
- ('28) 110 Ind Cas 244 (245) (Oudh).
- ('26) AIR 1926 Oudh 620 (620).
- ('24) AIR 1924 Oudh 208 (208).
- ('21) AIR 1921 Pat 135 (137, 138) : 6 Pat L Jour 337.
- ('18) AIR 1918 Pat 278 (278).
- ('31) AIR 1931 Rang 148 (149) : 9 Rang 104. (The Court has no power to stay the confirmation of the sale of the judgment-debtor's properties on the basis of such an adjustment.)
- ('25) AIR 1925 Rang 849 (850).
- ('14) 22 Ind Cas 963 (963) : 1 Upp Bur Rul 191.
- ('11) 11 Ind Cas 780 (781) (Low Bur).
- ('36) AIR 1936 Pat 253 (254).
- ('36) AIR 1936 Lah 842 (843).
- ('27) AIR 1927 Mad 911 (915) : 50 Mad 897.
- ('35) 39 Cal W N 961 (966).
- [See also ('90) 1890 All W N 68 (69).
- ('67) 7 Suth W R 510 (510).]
- [But see ('74) 7 Mad H C R 387 (391). (Case under Code of 1859.)
- ('66) 4 Bom H C R A C 120 (124).]
- 4. ('90) 19 Mad 230 (232, 233).
- ('31) AIR 1931 Mad 399 (400) : 54 Mad 184.
- ('23) AIR 1923 Mad 230 (231).
- ('11) 12 Ind Cas 657 (661, 662) : 35 Mad 659. (Per Sundara Iyer, J.)
- ('27) AIR 1927 Cal 694 (696). (Agreement by judgment-debtor with the proposed assignee can be pleaded in an application for execution by the assignee.)
- ('88) 1888 Pun Re No. 187, page 370.
- [See also ('83) 5 All 269 (271).
- ('27) AIR 1927 Mad 876 (877).
- ('38) AIR 1938 Nag 265 (265). (Money paid previous to decree—O. 21 R. 2 does not apply.)]
- [See however ('37) AIR 1937 Cal 31 (36). (A obtaining decree against *B* and attaching certain properties in execution — *C* purchasing such properties — Arrangement between *A* and *C* regarding satisfaction of decree cannot be set up by *B* as bar to execution in absence of certification under this rule.)]
- 5. ('96) 19 Mad 230 (232).
- 6. ('23) AIR 1923 All 271 (271) : 45 All 304.
- 7. ('86) AIR 1936 Mad 34 (37) : 59 Mad 188 (FB). (O. 28 R. 3 applies to such a case.)

**O. 21 R. 2**  
**Note 2**

proceedings under the Act.<sup>8</sup> As to whether this rule applies to proceedings under the Bengal Tenancy Act, see the undermentioned cases.<sup>9</sup> Sub-rule (3) of this rule has been repealed, so far as the Punjab is concerned, by Section 36 of the Punjab Relief of Indebtedness Act, VII of 1934.<sup>10</sup> Section 80 of the Agra Tenancy Act (III of 1926) deals with certification under this rule.

This rule clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder and when no other interests have come into being. When once a sale in execution has been effected, a third party's interest intervenes which cannot be disregarded. Therefore, after a sale is duly held the Court cannot refuse to confirm the sale on the ground that the decree-holder and the judgment-debtor say that the decree has been satisfied out of Court, and the only method by which the sale can be set aside is by the procedure prescribed in O. 21 R. 89.<sup>11</sup> But, it has been held that where the adjustment has been made *before* the sale and an application for recording the adjustment is made after the sale, the adjustment may be recorded and the sale may be set aside.<sup>12</sup>

The principle that an adjustment cannot be recorded under this rule to the detriment of a third party was applied in the undermentioned case<sup>13</sup> in which it was held that an adjustment cannot be recorded under this rule when such recording will defeat the rights of the Government to court-fees under O. 33 R. 10. See also the undermentioned decision.<sup>14</sup> After a decree has been satisfied and the decree-holder has certified such satisfaction, there is no subsisting decree and a sale held in ignorance of the satisfaction is void and liable to be set aside.<sup>15</sup> But if the satisfaction is not certified, the sale is not vitiated and cannot be impeached.<sup>16</sup>

This rule applies only to the adjustment of a *decree or order*. Hence it does not apply to the adjustment of a *claim* for restitution under Section 144 before such claim is allowed by the Court.<sup>17</sup>

The executing Court is not precluded from recognizing a compromise entered into between the parties after the decree, though such a compromise does not amount to an *adjustment* of the decree.<sup>18</sup>

For cases under Section 206 of the Code of 1859 corresponding to this rule, see the undermentioned cases.<sup>19</sup>

8. ('21) AIR 1921 Bom 142 (142, 148) : 45 Bom 1128.

('39) AIR 1939 Bom 255 (256). (Section applies only to payments and not to adjustments.)

9. (1865) 3 Suth W R Act X 7 (7, 8). (Not applicable.)

('68) 9 Suth W R 372 (373). (Do.)

('74) 22 Suth W R 204 (204). (Applicable.)

10. ('88) AIR 1938 Lah 602 (603). (The Act is retrospective.)

('88) AIR 1938 Lah 126 (127) : ILR (1938) Lah 264 (1938 Lah 842, Dissented from.)

11. ('31) AIR 1931 P C 88 (85); 14 Nag L R 28:58 Ind App 50 (PC). (Overruling AIR 1922 Nag 248.)

('34) AIR 1934 Lah 508 (509); 15 Lah 801. (But if decree-holder is purchaser sale may be set aside.)

('11) 10 Ind Cas 148 (150) (Cal). (Approved in AIR 1931 P C 88.)

('82) AIR 1932 Lah 238 (239).

('28) AIR 1928 Pat 40 (43, 44). (But if decree-holder is purchaser sale may be set aside.)

12. ('39) AIR 1939 Lah 326 (326, 327).

13. ('85) AIR 1935 Sind 111 (112); 29 Sind L R 817.

14. ('85) AIR 1935 Cal 168 (172) : 61 Cal 1006.

(The Court, as a general rule, will not for the purpose of preserving the solicitor's lien interfere in an adjustment or compromise which is a *bona fide* compromise. But if the compromise is not *bona fide* but collusive and is entered into between the parties specifically for depriving the solicitor of his lien, then the Court will interfere for protection of the solicitor who in such an event can claim payment of the costs by either of the parties.)

15. ('11) 9 Ind Cas 452 (452) (Low Bur).

16. ('29) AIR 1929 Cal 374 (376); 57 Cal 403 (FB).

(Judgment-debtor failing to have adjustment recorded can neither sue to set aside the sale on the footing of adjustment, nor apply under S. 47 — Suit is barred by S. 47; enquiry in execution barred by this rule—Remedy is by way of suit for damages.)

('12) 14 Ind Cas 889 (842) (Cal). (Sale not vitiated.)

[But see ('18) AIR 1918 Oudh 109 (111). (Sale vitiated by fraud and is therefore a nullity.)]

17. ('86) AIR 1936 Mad 840 (841).

18. ('37) 172 Ind Cas 999 (1002) (PC).

19. (1865) 2 Suth W R Misc 48 (48).



**3. "Money payable under a decree."**—A mortgage decree is a decree for the payment of money within the meaning of this rule even though it contains a further direction for the sale of the mortgaged properties on default of payment. The adjustment of such a decree out of Court must be certified under this rule.<sup>1</sup> But where a mortgagee decree-holder is in possession of the mortgaged properties under the original contract of mortgage or by virtue of the terms of the decree, income received by the mortgagee from the mortgaged property is not "money payable under a decree" and does not therefore require to be certified.<sup>2</sup> Where, in a suit for possession by A against B, his tenant who set up a right to hold the land under a *mirasi* tenure, the Court declared in favour of B and directed payment of rent as before, it was held that rents paid by B to A out of Court were not "moneys payable under the decree".<sup>3</sup>

The words "money payable under a decree" do not mean any money which the party *may* pay if he chooses, but money which is recoverable by a party in execution against the party liable to pay it. Thus, where a decree merely provided that if one party paid within a certain time a certain sum of money to the other party, the latter was to reconvey certain property to the former and that if default was made in payment, the latter was to enjoy the property with absolute rights, it was held that it was not a decree under which payment of money could be compelled in execution, and that this rule did not apply, so as to bar the Court from recognizing an uncertified adjustment out of Court.<sup>4</sup>

As to adjustments or payments made between the dates of preliminary and final decrees in mortgage suits, see Order 34 Rule 5, Note 14.

An award under the Arbitration Act when filed in Court is a *decree* for the purposes of Section 47 of the Code and this rule consequently applies to adjustments of such awards.<sup>5</sup>

**4. "Decree of any kind."**—Under the old Code, the High Court of Calcutta<sup>1</sup> and the Chief Court of Punjab<sup>2</sup> held that Section 258 of that Code applied to any kind of decree and not merely to money decrees. The High Court of Madras,<sup>3</sup> on the contrary, held that Section 258 was applicable only to *decrees under which money is payable* and not to other kinds of decrees. Under the present Code, the High Courts of Bombay,<sup>4</sup> Calcutta,<sup>5</sup> Lahore<sup>6</sup> and Patna<sup>7</sup> have held that the addition of the words "of any kind" after the word "decree" in sub-rule (1) makes it clear that the provisions of this rule are not confined to money decrees but apply to *every kind of decree*.

(66) 4 Bom H O R 85 (85).

[See also (95) 19 Bom 204 (206). (Change effected by S. 27 of Amending Act, VII of 1888, is retrospective.)

(1865) 2 Suth W R Misc 2 (2).]

**Note 3**

1. ('05) 28 Mad 478 (476, 477, 478). (Over-ruling 24 Mad 412.)

('08) 30 All 248 (249, 250).

('10) 7 Ind Cas 268 (259, 260) (Cal).

('10) 7 Ind Cas 625 (626) (Cal).

('08) 7 Cal L Jour 581 (584, 585).

('30) AIR 1930 Lah 814 (815).

('20) AIR 1920 Pat 731 (733) : 5 Pat L Jour 672.

('23) AIR 1923 Nag 20 (20). (As to whether mortgage decrees are decrees for payment of money, generally see Note 6 to S. 78.)

2. ('18) AIR 1918 Mad 1154 (1155); 39 Mad 1026.

('33) AIR 1933 Lah 831 (832).

('07) 80 Mad 265 (265). (But appropriation of income received under a different contract of

mortgage requires to be certified.)

3. ('94) 18 Bom 690 (692).

4. ('26) AIR 1926 Mad 749 (751) : 49 Mad 716.

5. ('27) AIR 1927 Sind 66 (75).

('21) AIR 1921 Sind 132 (134) : 16 Sind L R 245.

('35) AIR 1935 Nag 250 (257) : 31 Nag L R Sup 43 (FB).

**Note 4**

1. ('81) 6 Cal 786 (788). (Decree for possession.)

('99) 3 Cal W N 137n.

('72) 18 Suth W R 520 (521).

2. ('06) 1906 Pun Re No. 44, page 158. (Decree for foreclosure.)

3. ('99) 22 Mad 182 (184). (Decree for possession.)

4. ('22) AIR 1922 Bom 380 (380, 381) : 46 Bom 226. (Decree for partition.)

5. ('28) AIR 1928 Cal 715 (716, 717). (Decree for partition—AIR 1922 Bom 380, Followed.)

6. ('86) AIR 1936 Lah 842 (843). (Decree for possession of house is within rule.)

7. ('35) AIR 1935 Pat 885 (889) : 14 Pat 498.

**O. 21 R. 2**  
**Notes 4-8**

The High Court of Madras<sup>8</sup> has held that the effect of the change is not to make the rule applicable to all kinds of decrees, whatever be the nature of the relief granted, but that the rule applies only to cases where *money is payable* under the decree, whether there are other reliefs or not, inasmuch as the words "the decree is otherwise . . . ." can only mean the decree under which any money is payable. The effect of the additional words according to that High Court is that where the decree provides for payment of money as well as other reliefs, such as possession or partition of immovable property, an adjustment of such a decree cannot be recognized unless certified in the manner provided by this rule.<sup>9</sup>

**5. "Is paid out of Court."** — This rule deals only with *voluntary* payment out of Court. Where a judgment-debtor pays the amount decreed to the officer of the Court under pressure of process, the payment does not require to be certified under this rule.<sup>1</sup>

See also the undermentioned cases.<sup>2</sup>

**6. "Or the decree is otherwise adjusted."** — An adjustment of a decree is an agreement which extinguishes the decree as such in whole or in part, and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree.<sup>1</sup> But a transaction by which the parties agree to vary the *mode* by which the reliefs granted by the decree are to be realised in execution in that

**8.** ('26) AIR 1926 Mad 749 (750, 751): 49 Mad 716. ('18) 21 Ind Cas 177 (178) (Mad). (Decree for delivery of paddy—Certification not necessary.)

('18) 21 Ind Cas 639 (642) (Mad). (Adjustment of decree for possession—Certification not necessary.)

**9.** ('20) AIR 1920 Mad 469 (470): 43 Mad 476.

('14) AIR 1914 Mad 860 (860).

('18) AIR 1918 Mad 751 (754). (Adjustment in respect of possession also cannot be recognized unless certified.)

**Note 5**

**1.** ('69) 9 Suth W R 462 (462).

**2.** ('84) AIR 1984 Oudh 135 (186, 187). (Pre-emption suit referred to arbitration and award made—Money to be paid to vendee within certain period—Pre-emptor depositing amount in Court and notice issued to vendee—Tender held to be good—O. 21 R. 2 has no application.)

('88) AIR 1988 All 141 (143): ILR (1988) All 294. (Executing Court authorising decree-holder to realise debt due to judgment-debtor from third person—Payment by third person in Court passing decree against him—Payment is not outside Court.)

('40) AIR 1940 Pat 56 (57): 1939 Pat W N 716 (718). (Contention that decree has been satisfied by the decree-holder having been in possession of the judgment-debtor's property and enjoyed the usufruct is equivalent to contending that decree has been paid or adjusted out of Court and Court cannot recognise such payment or adjustment without certification under this rule.)

**Note 6**

**1.** ('16) AIR 1916 Mad 604 (604).

('88) AIR 1988 Lah 806 (807): 14 Lah 668. (Oral agreement to pay decree by instalments in Court—Instalment actually paid—Agreement is adjustment and can be proved if certified within 90 days.)

('88) AIR 1988 Pat 576 (577). (Adjustment includes any step which alters liability under the decree whether by reducing the amount recoverable, or by reducing the number of persons against whom decree could be executed.)

('88) AIR 1988 Pesh 53 (55, 56). (Decree for immediate payment—Subsequent agreement to pay by instalments—Judgment-debtor also agreeing to pay interest though not given by decree—Person standing surety and agreeing to pay by instalments—Agreement accepted by Court—Agreement amounted to fresh contract and could not be executed by executing Court.)

('85) 7 All 424 (431).

'11) 12 Ind Cas 864 (869): 7 Nag L R 136.

'81) AIR 1931 Sind 42 (43): 25 Sind L R 279.

'88) AIR 1988 Rang 853 (854). (A compromise which does not completely extinguish the rights of the plaintiff under the decree but provides for their revival in case of default is not adjustment of decree.)

('86) AIR 1986 Pat 253 (256). (Agreement between judgment-debtor and decree holder that balance of decree remaining after part payment would be paid by instalments and that decree-holder will not be entitled to interest, amounts to adjustment.)

('89) AIR 1989 Nag 107 (109). (Pre-emption decree—Execution of a security bond by surety for decree-holder during pendency of appeal filed by him is not adjustment.)

('88) AIR 1988 Lah 602 (604). (Compromise making over certain decrees owned by judgment-debtor to decree-holder—Balance agreed to be paid by instalments—In default decree-holder to execute decree for each instalment as it fell due—Agreement does not amount to substitution of new decree but is an adjustment.)

('89) AIR 1989 Cal 569 (578): 43 Cal W N 907 (918). (Agreement to pay a certain sum immediately

suit, or the time when the decree becomes executable, is not an adjustment of the decree.<sup>3</sup> Thus, an agreement between the parties to a decree by which arrangements are made to enable the decree-holder to collect moneys due to the judgment-debtor and credit them towards his decree, and which provides for a temporary suspension of execution proceedings, is not such an adjustment of the decree as is contemplated by this rule.<sup>3</sup> Similarly, where the parties agree that certain new or different rights not given by the decree should be included therein and be enforceable in execution, the arrangement is not an adjustment of the decree, but a variation of the decree. Nor can such an arrangement be given effect to by enforcement in execution as it is a fundamental principle that the executing Court cannot go behind the decree. This view has been laid down by the Privy Council in *Pradyumna Kumar Mullik v. Kumar Dinendra Mullik*.<sup>4</sup> The view taken in the undermentioned cases<sup>5</sup> that the arrangement

and a certain other sum by instalments in discharge of larger decretal amount—Property conveyed to decree-holder—Agreement is adjustment.)

('35) AIR 1935 Bom 303 (305). (Oral agreement to accept part of decree amount in instalments in full satisfaction is an adjustment.)

[See ('10) 9 Ind Cas 875 (885): 35 Mad 75. (This decision makes a distinction between an "agreement for the satisfaction of a judgment debt" within the meaning of S. 257A of the Code of 1882 and an agreement which is an adjustment of the decree.)

('26) AIR 1926 Mad 184 (185). (Adjustment of decree is not the same thing as satisfaction of decree—Adjustment is some method of settling the decree which is not provided for in the decree itself—Decree-holder agreeing to receive a percentage of the judgment debt in full satisfaction—Agreement is adjustment.)]

See also the undermentioned cases as to particular modes of adjustments:

('92) 2 Mad L Jour 221 (224, 225). (Composition-deed whereby the judgment-debtor is released from liability.)

('11) 12 Ind Cas 169 (169) (Mad). (Agreement to discharge debt by services rendered.)

('25) AIR 1925 Rang 349 (349, 350). (Agreement not to execute decree in consideration of discharge of another decree.)

('18) AIR 1918 Mad 751 (753, 754). (Agreement to hold properties in common while decree is for division by metes and bounds.)

('89) 1889 Bom P J 33. (Adjustment by execution of mortgage.)

('26) AIR 1926 All 501 (503): 48 All 475. (Award of arbitration made out of Court.)

('17) AIR 1917 Pat 371 (372). (Do.)

('08) 7 Cal L Jour 581 (584, 585).

('73) 19 Suth W R 155 (155).

('68) 10 Suth W R 354 (355).

('67) 7 Suth W R 510 (510).

('12) 13 Ind Cas 326 (327) (Cal).

('09) 4 Ind Cas 999 (1000) (Lah). (Receipt in consideration of compounding a non-compoundable offence is illegal.)

('71) 15 Suth W R O O 5 (6). (Agreement without consideration is no adjustment.)

2. ('16) AIR 1916 Mad 604 (604).

('28) AIR 1928 Cal 527 (529).

('31) AIR 1931 Lah 608 (609).

('27) AIR 1927 Mad 911 (913): 50 Mad 897.

('35) AIR 1935 All 364 (365). (Agreement by decree-holder limiting methods of execution—Agreement though not an adjustment is binding on parties.)

('35) AIR 1935 Mad 429 (430). (Mortgage decree against A and B directing A's property to be sold first and then B's property—Compromise between decree-holder and A that B's property to be sold first—B not party to it—Compromise is not adjustment.)

[See also ('22) AIR 1922 Cal 311 (313).]

[See however ('26) AIR 1926 Oudh 385 (387): 29 Oudh Cas 26. (An agreement which puts an end to the liability under the decree by substituting a new liability under the agreement may be an adjustment—AIR 1916 Mad 604, Dissented from.)

('36) AIR 1936 Cal 518 (519). (Act of parties agreeing to vary decree is not adjustment—But arrangement by judgment-debtor with decree-holder providing for satisfaction differing from one mentioned in decree is adjustment.)]

[But see ('12) 13 Ind Cas 326 (327) (Cal).]

('35) AIR 1935 All 155 (156). (Decree payable in instalments—Execution taken by decree-holder—Application by judgment-debtor that matter has been adjusted between parties by compromise by which decree was allowed to be paid again in instalments and Court accepting it—Court can allow adjustment.)]

3. ('85) 7 All 424 (431).

4. ('87) AIR 1937 P O 256 (259): 64 Ind App 302: ILR (1938) 1 Cal 66:31 Sind L R 637 (P.C). (Third person paying off decretal amount, becoming assignee of mortgagee and advancing fresh loan to mortgagor—Fresh deed by mortgagor covenanting to pay decretal amount and fresh loan and securing repayment by additional property—Clause in fresh deed allowing assignee to include additional property within final decree for sale as if comprised in first mortgage and also to treat money due on second mortgage as if included in first—Second mortgage held not an adjustment of decree—AIR 1935 Cal 596, Reversed.)

[See also ('87) AIR 1937 Sind 229 (230): 31 Sind L R 491.

('37) AIR 1937 Cal 222 (224).]

5. ('87) AIR 1937 Cal 286 (287). (In this case

**O. 21 R. 2**  
**Note 6**

entered into between the parties can be enforced in execution is, it is submitted, not correct. It is not necessary that the judgment-debtor must have carried out all the terms of the arrangements made by him with the decree-holder; a *completed contract* by which he promises to do something at a future date can be accepted by the decree-holder as a legal and immediate adjustment in satisfaction of his decree.<sup>6</sup> But an inchoate agreement, which if completed would bar the execution of the decree, cannot be pleaded as an adjustment within the meaning of this rule.<sup>7</sup> The reason is that an inchoate agreement is an agreement not yet concluded by the parties and therefore the judgment-debtor cannot claim that the decree against him has been adjusted to the satisfaction of the decree-holder while the matter is still in the stage of negotiation. Similarly, where the decree-holder has agreed to accept the *doing* of certain acts by the judgment-debtor as satisfaction of the decree, the adjustment is not complete till such acts are done.<sup>8</sup>

There is no question of the "adjustment" of a decree when it is transferred to one of the judgment-debtors.<sup>9</sup>

Where there is a dispute as to whether a decree has or has not been adjusted by a compromise, the executing Court will have to determine whether there was a compromise, whether the compromise amounted to an adjustment and what the effect of the adjustment is on the decree.<sup>10</sup>

The adjustment contemplated by this rule is one to the satisfaction of the decree-holder. Hence, the *acceptance* of the decree-holder is necessary for an

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- however the decision can be supported on the ground that the compromise and the order of the Court thereon amounted to an order for instalments under O. 20 R. 11.)
- (37) 41 Cal W N 1188 (1134).
- (29) AIR 1929 Cal 687 (689) : 57 Cal 789.
- (36) AIR 1936 Sind 191 (195) : 30 Sind L R 249.
6. ('27) AIR 1927 Lah 544 (545). (Adjustment need not be embodied in writing.)
- (30) AIR 1930 Lah 384 (385).
- (33) AIR 1933 Mad 28 (80) : 63 Mad L Jour 598 (603, 609, 610) : 56 Mad 198.
- (35) AIR 1935 Lah 589 (590). (Adjustment to be complete must extinguish the decree even if it is to be performed at some future date—AIR 1933 Lah 782, Reversed.)
- (38) AIR 1938 Rang 202 (203) : 1938 Rang L R 385 (FB).
- (36) AIR 1936 Bom 277(280):60 Bom 729. (Actual payment not necessary for valid adjustment.)
- (38) 42 Cal W N 813 (314).
- (37) AIR 1937 Nag 217 (220) : 19 Nag L Jour 175 (178).
- (37) AIR 1937 Cal 222 (224).
- (36) AIR 1936 Pat 619 (620) : 15 Pat 390.
- (38) AIR 1938 Rang 353 (354). (Executory contract may form subject of adjustment.)
- [But see ('25) AIR 1925 Mad 206 (207).
- (30) AIR 1930 Mad 410 (411). (Dissented from in AIR 1933 Mad 28.)
- (31) AIR 1931 Lah 608 (609).
- (36) AIR 1936 Sind 191 (195) : 30 Sind L R 249.
- (37) AIR 1937 Sind 229(230) : 31 Sind L R 491.]
7. ('18) AIR 1918 Mad 896 (897).
- (34) AIR 1934 Rang 190 (190).
- (38) AIR 1938 Pesh 53 (55).
- (38) AIR 1938 Mad 28 (32) : 56 Mad 198.
- (22) AIR 1922 All 13 (15) : 44 All 258.
- (27) AIR 1927 Lah 544 (545).
- (30) AIR 1930 Lah 231 (232).
- (27) AIR 1927 Lah 537 (538).
- (35) AIR 1935 Lah 347(349):I L R (1938) Lah 470. [See ('12) 16 Ind Cas 972 (973, 974) (Cal).]
8. ('38) AIR 1938 Rang 202 (203) : 1938 Rang L R 385 (FB).
- (35) AIR 1935 Lah 973 (973). (Decree-holder's rights under the decree to be surrendered on execution of a registered deed of transfer of certain immovable property—Deed not registered—Adjustment is not complete.)
- (35) AIR 1935 Mad 581 (582).
- (38) 42 Cal W N 813 (314).
- (36) AIR 1936 Rang 289 (290). (Decree-holder agreeing that if judgment-debtor transfers some land and pays certain amount he would regard decree as fully adjusted — Land not transferred by judgment-debtor nor payment made — There is no adjustment of decree within the meaning of Order 21 Rule 2.)
- [See however ('30) AIR 1930 Mad 429 (429). (It would defeat the provisions of this rule if it is held that an agreement to adjust need not be certified.)]
9. ('38) AIR 1938 Oudh 106 (106).
10. ('30) AIR 1930 Lah 384 (385).

adjustment under this rule.<sup>11</sup> An arrangement which, although not consented to by the decree-holder, is binding upon him by operation of law cannot be an adjustment under this rule.<sup>12</sup>

**O. 21 R. 2**  
**Notes 6-9**

The question whether an executing Court can entertain an objection to the execution of the decree based on an arrangement between the parties prior to the decree has already been discussed in Section 47, Note 31, *ante*. An adjustment of a decree pending an appeal from it is not a 'pre-decree' arrangement but an 'adjustment' within the meaning of this rule.<sup>13</sup>

See also Section 47 Note 41.

**7. Adjustment in part.**—A decree may be adjusted in part and the judgment-debtor is entitled to apply for a certificate of part satisfaction.<sup>1</sup> Where there is a money decree against two or more defendants, an agreement discharging one or some only of the judgment-debtors is an adjustment of the decree in part and should be certified.<sup>2</sup>

Where a decree has been adjusted in part, it can be executed as to the remaining portion.<sup>3</sup>

**8. Oral adjustments.**—It has been held by the High Courts of Allahabad, Bombay, Calcutta, Lahore and Patna and by the Judicial Commissioner's Courts of Nagpur and Sind that evidence to prove an oral adjustment subsequent to the decree is not inadmissible by reason of Section 92 of the Evidence Act.<sup>1</sup> They proceed on the view that the words "as between the parties to any such instrument" in that Section suggest that the Section applies to *dispositive documents* between contracting parties and that a decree is not an "instrument" between parties in the sense in which that expression is used in that Section. But the High Court of Madras<sup>2</sup> has held that Section 92 of the Evidence Act is not confined in its operation to dispositive instruments but applies to decrees also and that therefore no evidence in proof of an oral agreement in adjustment of the decree is admissible.

**9. When and with whom payment or adjustment should be made.**—The adjustment under this rule must be to the satisfaction of the *decree-holder* and, therefore, an adjustment to which the decree-holder is not a party cannot be recorded by the executing Court.<sup>1</sup> The term "decree-holder" in this rule includes his assignee and

11. ('85) AIR 1935 All 513 (514). (Decree for rent of house—Cost of repairs incurred by judgment-debtor cannot be adjusted towards decree amount unless such adjustment is consented to by decree-holder.)

(37) AIR 1937 Cal 211 (212) : I L R (1937) 1 Cal 781.

12. ('87) AIR 1937 Cal 211 (212) : I L R (1937) 1 Cal 781. (Scheme framed by majority of depositors of banking company for return of their deposits in spite of opposition from decree-holder depositor of company — Scheme sanctioned by Court — Scheme though made binding on him by law cannot amount to adjustment within the meaning of O. 21 R. 2.)

13. ('86) AIR 1936 Mad 494 (495).

#### Notes 7

1. ('80) 5 Cal 448 (449, 450).

('85) AIR 1935 Lah 973 (973).

2. ('08) 81 Mad 467 (468).

('17) AIR 1917 Pat 438 (434).

('83) AIR 1933 Pat 576 (577).

3. ('88) AIR 1938 Bom 100 (101).

#### Note 8

1. ('29) AIR 1929 All 79 (81).

('33) AIR 1933 Lah 806 (807) : 14 Lah 668.

('26) AIR 1926 Cal 643 (644).

('27) AIR 1927 Lah 544 (545). (Adjustments need not be in writing.)

('20) AIR 1920 Nag 198 (199) : 16 Nag L R 204.

('31) AIR 1931 Sind 42 (43) : 25 Sind L R 279.

('86) AIR 1936 Pat 619 (620) : 15 Pat 390.

('85) AIR 1935 Bom 308 (305).

[But see ('22) AIR 1922 All 13 (15, 16) : 44 All 258. (Per Walsh, J.)]

2. ('27) AIR 1927 Mad 911 (912, 913, 915) : 50 Mad 897.

('30) AIR 1930 Mad 673 (678).

[See however ('85) AIR 1935 Mad 424 (425). (Plea of judgment-debtor that decree has been adjusted by decree-holder accepting certain amount less than what is due under decree in full settlement — Such adjustment can be proved by oral evidence.)]

#### Note 9

1. ('89) AIR 1939 Pat 411 (412) : 18 Pat 318.

**O. 21 R. 2  
Notes 9-12**

the latter can certify a payment even before his transfer is recognized under O. 21, R. 16.<sup>2</sup> The judgment-debtor also can apply to record a payment made by him to the transferee.<sup>3</sup> The reason is that it is the *transfer* and not the Court's recognition that passes the title to the decree. But the contrary view has been taken in the under-mentioned decisions<sup>4</sup> in which it has been held that until the transfer of the decree is recognized under O. 21 R. 16, the transferee is not a decree-holder. Where an order recognizing the transfer of a decree is cancelled and before the order of cancellation is set aside in appeal the judgment-debtor pays the decretal amount to the original decree-holder, the payment is binding on the transferee decree-holder.<sup>5</sup>

A judgment-creditor has a right to absolve his judgment-debtor from liability at any time before other persons have acquired a right to realize the debt. Therefore, after a decree has been certified in Court as having been satisfied, it is not open to any creditor of the decree-holder to attach the decree on the ground that the satisfaction was certified collusively in order to defraud his creditors.<sup>6</sup> There is also nothing in this rule to prevent the holder of a decree which is attached, to enter satisfaction of his decree after the attachment, if the payment or adjustment had been made before the attachment.<sup>7</sup> As to the validity of payments or adjustment made after attachment of the decree, see Notes to Order 21 Rule 53.

**10. Payment to one of several joint decree-holders.** — See Notes to O. 21, Rule 15, *infra*.

**11. Adjustment by guardian of minor party.** — The provisions of O. 32, R. 7 apply to a compromise entered into even after a decree has been passed, and an adjustment of a decree to which a minor is a party requires the sanction of the Court.<sup>1</sup> A payment or adjustment certified to the Court without the leave of the Court is not binding on a minor decree-holder and cannot be recognized by the Court executing the decree.<sup>2</sup>

**12. "The decree-holder shall certify."** — It is the *duty* of the decree-holder to report to the Court any payment or adjustment made out of Court.<sup>1</sup> It has been held that when once a Court is seised of an application to enter up satisfaction of a decree, it is bound to make an enquiry and see whether the decree has been satisfied. The Court will not be justified in permitting the decree-holder to withdraw his petition.<sup>2</sup>

2. ('12) 17 Ind Cas 617 (618) (Mad).

3. ('12) 14 Ind Cas 702 (703) (Mad).

4. ('35) AIR 1935 Nag 230 (234) : 81 Nag L R Sup 111. (Adjustment made with transferee of decree before transfer is recognized under R. 16 does not require certification under this rule and can be pleaded by judgment-debtor in bar of execution by transferee although not certified under this rule.)

('37) AIR 1937 Mad 605 (606). (Adjustment made with original decree-holder before recognition of transfer under R. 16 and certified by such decree-holder can be set up against transferee when he applies for execution.)

5. ('71) 1871 Pun Re No. 29.

6. ('09) 2 Ind Cas 523 (523, 524) (Mad).

7. ('92) 2 Mad L Jour 288 (290).

('19) AIR 1919 Mad 198 (199).

**Note 11**

1. ('01) 26 Bom 109 (114).

('33) AIR 1933 Rang 186 (188).

('06) 29 Mad 809 (810).

('17) AIR 1917 Mad 409 (411).

('24) AIR 1924 Nag 185 (186).

(See also ('36) AIR 1936 Mad 494 (495).)

2. ('01) 26 Bom 109 (114).

('33) AIR 1933 Rang 186 (188).

('21) AIR 1921 Bom 142 (143) : 45 Bom 1128.

('25) AIR 1925 Mad 230 (232).

('28) AIR 1928 Pat 40 (44).

(See also ('37) AIR 1937 Lah 887 (389).)

**Note 12**

1. ('27) AIR 1927 Mad 947 (948).

('80) 2 Mad 216 (218). (Party applying for execution must state payment or adjustment.)

('26) AIR 1926 Nag 164 (166). (As per O. 21 R. 11.) [See also ('85) 1885 All W N 45 (46). (Certificate after death of judgment-debtor is not bad.)]

2. ('19) AIR 1919 Mad 198 (199). (Following AIR 1916 Mad 795.)

(See also ('39) AIR 1939 Mad 163 (164). (Decree-holder's application for certification of payment after attachment of decree—Objection by attaching decree-holder — Application dismissed for

As to the remedy of the judgment-debtor in case the decree-holder does not certify the payment or adjustment, see Notes 30 and 32, *infra*.

**O. 21 R. 2**  
**Notes 12-15**

**13. Effect of certifying without payment or adjustment being made.—**

Where a decree-holder admits and certifies to the Court satisfaction of the decree, he cannot afterwards apply to execute the decree on the ground that he was induced to certify by means of fraud or coercion or that the certification was made under a mistake.<sup>1</sup>

**14. Certification by one of several joint decree-holders.—**See Notes to Order 21 Rule 15.

**15. "The judgment-debtor may also inform Court . . . . and apply."—**

Where a judgment-debtor pays the amount due under the decree out of Court, he is not bound to wait till the decree-holder fails to certify the payment<sup>1</sup> or till the decree is actually drawn up,<sup>2</sup> but may himself inform the Court of such payment and apply for its being recorded as certified. Where such application is resisted by the decree-holder on the ground that no such payment or adjustment was made, the Court cannot straightway dismiss the application.<sup>3</sup> It is bound to investigate and decide any question upon which the parties may not be agreed, upon such materials as they may legally place before it.<sup>4</sup> The reason is that the words "to show cause" do not mean merely to *allege* cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.<sup>5</sup>

The dismissal for default of an application under sub-rule (2) does not bar a fresh application by the judgment-debtor for the same purpose, and he is entitled to have an adjudication on the merits subject, of course, to any objection that may be open to the decree-holder.<sup>6</sup>

A certificate of payment or adjustment should be filed in the Court *which has to execute the decree*.<sup>7</sup> It has been held by the High Court of Calcutta in the undermentioned cases<sup>8</sup> that, where an agreement or adjustment has been brought to the notice of the Appellate Court by the judgment-debtor when an appeal from the decree is pending before it and the same is not objected to by the decree-holder, there

default—Subsequent application by judgment-debtor after limitation should be treated as in continuation of the former application by decree-holder.]]

**Note 13**

1. ('70) 1870 Pun Re No. 1. (Fraud—Remedy is by suit.)
- (34) AIR 1934 Nag 143 (144) : 31 Nag L R 21. (Decree certified as fully satisfied through negligence of agent or pleader—Order cannot be reviewed.)
- (71) 1871 Pun Re No. 32. (Duress.)
- (20) AIR 1920 Lah 73 (74). (Mistake.)
- (17) AIR 1917 Low Bur 164 (165). (Mistake—Remedy is by review.)
- [See also ('76) 1876 Pun Re No. 85, p. 171.]]

**Note 15**

1. ('02) 12 Mad L Jour 94 (95). (He may himself apply as soon as he has paid money.)
2. ('24) AIR 1924 Cal 1064 (1065).
3. ('85) 11 Cal 166 (168).
- (17) AIR 1917 Mad 409 (410, 411).
4. ('84) 1884 All W N 40 (40).
- (29) AIR 1929 All 79 (80).
- (19) AIR 1919 All 808 (804) : 41 All 448.

(88) 1888 All W N 82 (83).

(27) AIR 1927 Lah 544 (545).

(22) AIR 1922 Pat 276 (277, 278) : 1 Pat 644. (Judgment-debtor's application cannot be thrown out under cl. 3.—It is a matter under S. 47.)

(28) AIR 1928 Rang 62 (63) : 5 Rang 833.

[See also ('96) 1896 Bom P J 192.]

5. ('85) 11 Cal 166 (168). (Evidence may be given either orally or by affidavit.)

(17) AIR 1917 Mad 409 (410, 411).

(29) AIR 1929 All 79 (80).

6. ('31) AIR 1931 Lah 505 (505).

7. ('13) 21 Ind Cas 639 (641) (Mad).

(35) AIR 1935 Bom 158 (159, 160) : 59 Bom 345. (Collector to whom execution is transferred cannot enquire into a proceeding under this rule.)

(22) AIR 1922 Pat 276 (277) : 1 Pat 644.

(19) AIR 1919 Sind 92 (92) : 13 Sind L R 130. (Casual reference in a plaint in another proceeding is not sufficient.)

[See ('22) AIR 1922 Mad 66 (67). (Decree attached—Intimation by the decree-holder and judgment-debtor to the attaching Court that decree is satisfied is not sufficient.)]

8. ('28) AIR 1928 Cal 527 (530).

(12) 18 Ind Cas 63 (67) (Cal).



**O. 21 R. 2**  
**Notes 15-17**

is a sufficient compliance with the provisions of sub-rule (2). The High Court of Madras<sup>9</sup> has dissented from this view and has held that the filing of a certificate of satisfaction in the wrong Court and obtaining an order recording it cannot be treated as legally valid. Where a decree has been transferred to another Court for execution, the transferee Court is the only Court which has the power to enquire into an application under this rule by the judgment-debtor.<sup>10</sup> A Collector to whom a decree is transferred for execution under Section 68 is not a "Court whose duty it is to execute the decree" within the meaning of this rule.<sup>11</sup>

**16. "Judgment-debtor," meaning of.** — The word "judgment-debtor" in this rule includes persons claiming through him. Thus, a transferee of the equity of redemption in the suit property from a judgment-debtor in a mortgage decree is a "judgment-debtor" for the purposes of this rule.<sup>1</sup> A surety for a judgment-debtor can plead an uncertified payment or adjustment made by him (*the surety*) with the decree-holder.<sup>2</sup> The reason is that when a Court proceeds against a surety under Section 145, it does not purport to execute the decree, but only enforces the bond in the manner provided for the execution of decrees and is not therefore a "Court executing the decree" within the meaning of sub-rule (3).

But the surety cannot plead an uncertified satisfaction or adjustment by *the judgment-debtor* inasmuch as the latter himself could not have pleaded it and the surety cannot be in any better position.<sup>3</sup>

**17. Certification, form of. —**

*Certification by decree-holder.* — There is no particular form in which the decree-holder is required to certify a payment or adjustment.<sup>1</sup> The certification may be done orally,<sup>2</sup> or by statement made in a subsequent execution application,<sup>3</sup> or in a statement in answer to the objections of the judgment-debtor,<sup>4</sup> or in a petition filed by him,<sup>5</sup> or by way of admissions.<sup>6</sup> An intimation by him to the Court that the decree is satisfied is also a sufficient certification.<sup>7</sup> Where a decree for sale was passed in favour

9. ('13) 21 Ind Cas 639 (641) (Mad).

10. ('32) AIR 1932 Bom 202 (203).

('94) 16 All 228 (231).

('35) AIR 1935 Bom 303 (304).

[See also ('80) 5 Cal 448 (450).]

11. ('36) AIR 1936 Bom 277 (279) : 60 Bom 729. (Application for entering satisfaction to be made to the Civil Court.)

('37) AIR 1937 Nag 217 (219) : 19 Nag L Jour 175 (177).

**Note 16**

1. ('07) 30 Mad 537 (540).

('19) AIR 1919 Mad 358 (359). (Purchaser in execution of another money decree can apply to certify satisfaction of mortgage decree against the same property.)

2. ('26) AIR 1926 Sind 105 (106, 107) : 20 Sind L R 362.

('28) AIR 1928 Lah 61 (63).

3. ('23) AIR 1923 Cal 313 (313).

('82) AIR 1932 Cal 729 (730) : 59 Cal 1354.

('26) AIR 1926 Mad 674 (675) : 49 Mad 825.

**Note 17**

1. ('16) AIR 1916 Mad 795 (799).

('24) AIR 1924 Lah 676 (677).

('37) AIR 1937 Mad 511 (513, 514). (It does not matter under what circumstances the payment is brought to the notice of the Court by the

decree-holder.)

2. ('17) AIR 1917 Cal 466 (467).

('71) 1871 Pun Re. No. 32.

('17) AIR 1917 Low Bur 164 (165).

3. ('24) AIR 1924 Lah 676 (677).

('34) AIR 1934 Bom 370 (374) : 58 Bom 610.

('34) AIR 1934 Pat 380 (381).

('19) AIR 1919 Mad 123 (125).

('21) AIR 1921 Sind 159 (160) : 16 Sind L R 207 (F B).

[See ('34) AIR 1934 All 584 (585) : 56 All 921. (Instalment decree — Mere placing of a cross mark after the instalment does not amount to certification.)]

4. ('88) 1888 All W N 115 (116).

5. ('69) 12 Suth W R 358 (358).

6. ('20) AIR 1920 Lah 78 (74).

('35) AIR 1935 Lah 194 (196) : 15 Lah 910.

('29) AIR 1929 Mad 788 (788).

('84) 1884 Bom P J 202.

('88) 1888 All W N 115 (116).

('37) AIR 1937 Mad 511 (513, 514). (Confirming on Letters Patent Appeal, AIR 1936 Mad 472 — Application by transferee decree-holder to recognize transfer—Transfer deed reciting fact of payment by judgment-debtor — Sufficient certification.)

7. ('11) 12 Ind Cas 572 (574) : 35 Bom 516.



of a mortgagee in possession, but the decree failed to provide for the taking of accounts of the profits that might thereafter be received by the mortgagee, and the decree-holder intimated to the Court in his application for sale that the net profits should go in reduction of the decree amount, it was held by the High Court of Madras<sup>8</sup> that the application could be treated as an intention to certify adjustment of the decree and that an enquiry may be directed as to the amounts collected by him. The High Court of Bombay<sup>9</sup> has, however, held that a certification of payment or adjustment without specifying the amount of the payment or without mentioning the terms of the adjustment is not a sufficient compliance with the rule. The certification must be of payment of money due under the decree. Hence, an admission that certain sums of money were received coupled with a statement that they were received on account of interest not allowed by the decree itself but paid in consequence of a separate agreement entered into after the passing of the decree, does not amount to a certification within the meaning of this rule.<sup>10</sup>

*Application by judgment-debtor.* — An application by the judgment-debtor to certify a payment or adjustment cannot be said to comply with the rule where there is no prayer for the issue of a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified.<sup>11</sup>

According to the High Courts of Allahabad,<sup>12</sup> Bombay<sup>13</sup> and Rangoon,<sup>14</sup> where a judgment-debtor contests an application for execution on the ground of payment or adjustment, the statement of objection can be treated as an application under sub-rule (2) provided it is made within 90 days of such payment or adjustment. The High Courts of Calcutta<sup>15</sup> and Madras<sup>16</sup> have, on the other hand, taken a contrary view and have held that to so treat the objection would be to ignore the express language of the rule. The Patna High Court held in the undermentioned decision<sup>17</sup> that an objection to execution can be treated as an application under sub-rule (2). But, in later decisions, the same High Court has held that that sub-rule only applies to cases where the judgment-debtor applies for the recording of satisfaction before the starting of execution proceedings against him and not where he sets up the contention of payment or adjustment, pending the execution proceedings.<sup>18</sup>

8. ('16) AIR 1916 Mad 795 (799, 800).

9. (1900) 2 Bom J. R 901 (905).

10. ('89) AIR 1939 All 581 (583, 584).

[See however ('29) AIR 1929 Mad 783 (789).

11. ('18) AIR 1918 Cal 62 (63).

('29) AIR 1929 All 674 (675). (Deposit of money by judgment-debtor mentioning prior payment is not an application for certification of that prior payment.)

[See ('20) AIR 1920 Cal 289 (290). (Judgment-debtor informing process-server of payment to decree-holder — Execution application dismissed on process-server's report—This is not certification under cl. 2.)]

[See however ('81) 1881 All W N 168 (168). (Judgment-debtor not asking for notice in express words — Decree holder asked to show cause — But no formal notice—Held sub-rule sufficiently complied with.)

('02) 24 All 85 (89, 90). (Though did not ask for notice, it was in fact served—Held application may be enquired into.)]

12. ('29) AIR 1929 All 79 (80).

('24) AIR 1924 All 297 (298).

('89) AIR 1939 All 581 (583).

[But see ('91) 1891 All W N 11 (11). (Cannot be treated so.)]

13. ('35) AIR 1935 Bom 303 (304).

14. ('28) AIR 1928 Rang 62 (63) : 5 Rang 833.

('11) 11 Ind Cas 780 (781) (Low Bur). (Written statement by the judgment-debtor treated as an application under Rule 2, sub-rule 2.)

('38) AIR 1938 Rang 328 (329). (Objection to execution taken after 90 days of adjustment — Adjustment cannot be recorded.)

15. ('12) 13 Ind Cas 944 (945) (Cal).

16. ('12) 17 Ind Cas 752 (753) (Mad).

[But see ('11) 12 Ind Cas 562 (563) : 36 Mad 357. (Obiter and distinguished in 17 Ind Cas 752.)]

17. ('30) AIR 1930 Pat 526 (527, 528) : 9 Pat 521.

18. ('38) AIR 1938 Pat 204 (205). (The rule that if decree-holder fails to show cause why the payment or adjustment should not be recorded as certified the Court must record it does not apply where pending execution proceedings judgment-debtor pleads payment or adjustment of decree.)

**O. 21 R. 2**  
**Note 18**

**18. Limitation for certification.**—The period of limitation for an application by the judgment-debtor under sub-rule (2) is 90 days from the time when the payment or adjustment was made (see Article 174, Limitation Act). Where a judgment-debtor alleges that the decree-holder had fraudulently kept him from exercising his right to apply under sub-rule (2) by promising that he would himself certify the payment or adjustment, the judgment-debtor cannot claim an extension of time under Section 18 of the Limitation Act (IX of 1908).<sup>1</sup> The reason is that Section 18 does not deal with the *exercise* of the right to apply, but only to cases where a person has been fraudulently kept from the *knowledge* of his right. An order granting a time-barred application to record satisfaction of a decree is, however, not a nullity, but is valid and binding unless set aside in appeal or other appropriate proceedings.<sup>2</sup>

There is no express Article of the Limitation Act applicable to certification by the decree-holder. Such certification is not an *application* within the meaning of Article 181 of the Limitation Act and therefore can be made at any time.<sup>3</sup> See also Note 27, *infra*. In *Shri Prakash Singh v. Allahabad Bank*,<sup>4</sup> it was held by their Lordships of the Privy Council that even if the document by which the decree-holder certifies is styled as an application, and is in the form of a petition, it cannot alter the real nature of the procedure, and convert what is really no more than a certificate, into an application within the meaning of Article 181.

It has been held by the High Courts of Calcutta, Madras and Rangoon and the Chief Court of Oudh, following the decision of the Privy Council in *Shri Prakash Singh's* case, that a certification by the decree-holder is not an *application* to the Court to take some step-in-aid of execution, within the meaning of Article 182, clause 5 of the Limitation Act.<sup>5</sup> The High Court of Allahabad,<sup>6</sup> on the other hand, held that it is a

('96) AIR 1936 Pat 253 (254). (Sub-rule (3) of R. 2, O. 21 clearly contemplates a certification before the objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree.)

**Note 18**

1. ('15) AIR 1915 Cal 78 (73).
- ('11) 13 Ind Cas 63 (66) (Cal).
- ('23) AIR 1923 Rang 103 (106) : 11 Low Bur Rul 863.
- ('19) AIR 1919 Upp Bur 26 (27) : 3 Upp Bur Rul 169.
- ('36) AIR 1936 Pat 270 (273) : 15 Pat 422.
2. ('17) 1917 Low Bur 164 (165).
3. ('29) AIR 1929 P C 19 (22, 23) : 56 Ind App 30 : 3 Luck 684 (P C).
- ('35) AIR 1935 Lah 194 (196) : 15 Lah 910.
- ('34) AIR 1934 Pat 380 (381). (May be made without notice to judgment-debtor.)
- ('35) AIR 1935 Nag 25 (26) : 31 Nag L R 271.
- ('28) AIR 1928 All 629 (631, 632) : 51 All 237.
- ('30) AIR 1930 All 123 (124).
- ('28) 26 All L Jour 991 (991).
- ('21) AIR 1921 Bom 411 (412) : 45 Bom 91.
- ('97) 21 Bom 122 (124).
- ('29) AIR 1929 Cal 687 (689) : 57 Cal 789.
- ('25) AIR 1925 Cal 1012 (1013, 1014) : 54 Cal 143 (150).
- ('19) AIR 1919 Cal 181 (182). (Certification made after decree is barred by limitation does not save time.)
- ('15) AIR 1915 Cal 235 (236).
- ('24) AIR 1924 Lah 676 (677).
- ('16) AIR 1916 Mad 958 (959).

- ('29) AIR 1929 Mad 811 (811).
- ('18) AIR 1918 Mad 620 (621) : 41 Mad 251.
- ('12) 17 Ind Cas 617 (618) (Mad).
- ('27) AIR 1927 Oudh 7 (11) : 1 Luck 428. (Affirmed in AIR 1929 P C 19.)
- ('18) AIR 1918 Oudh 460 (461) : 21 Oudh Cas 161.
- ('21) AIR 1921 Pat 135 (136) : 6 Pat L Jour 837.
- ('19) AIR 1919 Pat 136 (137) : 4 Pat L Jour 159.
- ('30) AIR 1930 Rang 329 (331) : 8 Rang 810.
- ('31) AIR 1931 Sind 28 (30) : 25 Sind L R 360.
- ('19) AIR 1919 Sind 70 (75) : 13 Sind L R 37.
- ('36) AIR 1936 Nag 281 (281) : 1 L R (1937) Nag 106.
- ('39) AIR 1939 All 581 (584).
- ('35) AIR 1935 Mad 922 (923).
- [But see ('22) AIR 1922 Cal 80 (81, 82). (No longer law in view of AIR 1929 P C 19.)]
4. ('29) AIR 1929 P C 19 (23) : 59 Ind App 30 : 3 Luck 684 (P C).
5. ('31) AIR 1931 Cal 719 (725) : 59 Cal 760 (F B). (Overruling AIR 1919 Cal 677 : AIR 1916 Cal 356 : 6 Ind Cas 43 : 8 Ind Cas 391 : 20 Cal 696 and 12 Cal 608.)
- ('30) AIR 1930 Rang 64 (65).
- ('32) AIR 1932 Oudh 148 (151) : 7 Luck 590 (F B). (Recording of a payment is not also a final order within the meaning of Art 182, cl. 5, Limitation Act.)
- ('36) AIR 1936 Mad 118 (119) : 59 Mad 424.
- [But see ('25) AIR 1925 Rang 26 (27) : 2 Rang 398.
- ('19) AIR 1919 Low Bur 117 (118) : 10 Low Bur Rul 84.]
6. ('11) 9 Ind Cas 1028 (1024) (All).

step-in-aid of execution provided the payment or adjustment was actually made. But in a recent decision<sup>7</sup> the High Court of Allahabad also has followed the view of the above-mentioned High Courts and held that the prior decisions of that Court are no longer good law in view of the decision of the Privy Council in *Shri Prakash Singh's* case.

Although there is thus no period of limitation for a certification by the decree-holder under this rule, when once it is brought to the notice of the executing Court that a certain alleged payment or adjustment has not been certified or recorded under this rule, the Court must refuse to recognize such payment or adjustment and the defect cannot be cured by the decree-holder subsequently certifying the payment or adjustment.<sup>8</sup>

**19. "Shall record the same."**—Where a decree-holder certifies a payment or adjustment, the Court is *bound* to record it in accordance with his statement. It has no power to proceed to satisfy itself before recording the satisfaction that such statement is true.<sup>1</sup> But the judgment-debtor will be entitled to show when an application for execution is made that no such payment or adjustment was made or that if it was made, it did not operate to extend the period of limitation for execution.<sup>3</sup>

Where the payment or adjustment is pleaded by the *judgment-debtor* under sub-rule (2), the Court is *not bound* to record the same as certified without requiring proof of it merely because the decree-holder does not appear to show cause why it should not be recorded as certified.<sup>3</sup> After a payment or adjustment is recorded, it is not necessary that a fresh or amended decree should be drawn up.<sup>4</sup>

Sub-rule (3), which provides that an uncertified payment or adjustment shall not be recognized by any Court executing the decree, does not require that the payment or adjustment must be both certified *and* recorded. Thus, where a certificate by the decree-holder was not recorded by the Court as provided in this rule, the judgment-debtor does not lose his protection merely because the Court fails to perform the duty cast upon it to make the record.<sup>5</sup>

(10) 5 Ind Cas 295 (296) : 32 All 257.

(04) 26 All 19 (20).

(90) 12 All 899 (402, 403) (F B).

(87) 9 All 9 (10).

[See also (88) 1888 All W N 23 (24). (Untrue certificate is not a step-in-aid.)

(19) AIR 1919 All 211 (212).]

7. ('38) AIR 1938 All 364 (365, 366) : 55 All 393.

8. ('28) AIR 1928 All 629 (632) : 51 All 287 (F B).

(34) AIR 1934 All 534 (535) : 56 All 921.

(39) AIR 1939 All 581 (584).

**Note 19**

1. ('31) AIR 1931 Rang 332 (333).

(83) AIR 1933 Mad 523 (524). (Court cannot go into question whether satisfaction was intended to defraud or defeat right of some third party who is not before the Court as a party to the suit.)

(34) AIR 1934 Nag 143 (144) : 31 Nag L R 21.

(20) AIR 1920 Lah 73 (74).

(18) AIR 1918 Oudh 460 (461) : 21 Oudh Cas 161.

(25) AIR 1925 Pat 822 (823). (Dismissal of application by judgment-debtor under sub-rule (2) does not bar the decree-holder's certifying the payment under R. 2 (1).)

(38) AIR 1938 All 116 (118).

[See also ('12) 17 Ind Cas 752 (753) (Mad). (Inquiry into the terms of a compromise cannot be made on the application of the judgment-

creditor.)

(38) AIR 1938 Lah 69 (70). (The question whether a compromise extinguishes a decree or not is entirely beside the question as to whether the Court has jurisdiction to record it.)

[See however ('36) AIR 1936 Mad 468 (468).

(Court suspicious that amount certified by decree-holder was less than what was actually paid — Court can hold enquiry after notice to judgment-debtor.)]

2. ('18) AIR 1918 Oudh 460 (462) : 21 Oudh Cas 161.

3. ('28) AIR 1928 Rang 185 (186) : 6 Rang 218. (Court should be satisfied that it is true.)

4. ('25) AIR 1925 Oudh 136 (137). (The Court has no jurisdiction to make such an amendment of the decree.)

(25) AIR 1925 Nag 49 (49) : 20 Nag L R 122.

5. ('15) AIR 1915 Cal 744 (745).

(27) AIR 1927 Mad 155 (155, 156). (The decree-holder cannot withdraw an application made by him to have an adjustment recorded nor can the Court dismiss it.)

(25) AIR 1925 Mad 230 (231).

(19) AIR 1919 Mad 123 (125).

(19) AIR 1919 Pat 290 (291). (Court can take evidence to decide whether decree-holder has certified.)

**O. 21 R. 2**  
**Notes 19-22**

An order recording the adjustment of a decree, brought about by the fraud practised by one party upon another can be vacated under the inherent powers of the Court.<sup>6</sup> But the Court ought not to exercise such powers to vacate the order unless it is prejudicial to one of the parties.<sup>7</sup>

See also Note 2 *supra*.

**20. Notice.**—Sub-rule (1) does not contemplate the issue of a notice to the judgment-debtor.<sup>1</sup> But when the judgment-debtor applies under sub-rule (2), the Court is bound to issue a notice to the decree-holder to show cause why the payment or adjustment should not be recorded as certified.<sup>2</sup> An order allowing a certification without notice to the decree-holder is bad in law<sup>3</sup> and an application will lie to set aside such an *ex parte* order.<sup>4</sup>

**21. Uncertified payment or adjustment not to be recognized by Court executing the decree.**—The prohibition in sub-rule (3) against the recognition of an uncertified payment or adjustment is limited to a "Court executing the decree" and will not extend to a Court, which is not executing the decree, when dealing with such a matter.<sup>1</sup> The object of the prohibition is to compel the judgment-debtor to be careful to apply to the Court to have recorded as certified any payment he may have made on account of the decree, if he desires that it should be recognized by the executing Court as against the decree-holder executing the decree.<sup>2</sup>

Where the liability of the judgment-debtor under a decree is only a *conditional* one, as for instance, where a decree provides that the decree-holder is to execute the decree only in the event of the judgment-debtor failing to comply with a particular condition, it will be open to the latter to prove, where execution is taken out, that the condition has been complied with; sub-rule (3) has no application to such a case.<sup>3</sup>

**22. "Court executing the decree."**—The third clause of Section 258 of the Code of 1877 as well as Section 206 of the Code of 1859 provided that a payment or adjustment made out of Court shall not be recognized by "any Court executing the decree" unless it had been certified or recorded as certified.<sup>1</sup> Section 258 was amended in 1879 by Section 36 of Act XII of 1879 by omitting the words "executing the decree" after "any Court" and the Section as amended was re-enacted in the Code of 1882. This gave rise to a conflict of opinion as to the effect of the amendment. The High

(‘88) AIR 1938 All 116 (118).

(‘87) AIR 1937 Rang 507 (507).

6. (‘15) AIR 1915 Mad 281 (282).

7. (‘20) AIR 1920 Pat 750 (751); 5 Pat L Jour 879.

**Note 20**

1. (‘18) AIR 1918 Oudh 460 (461); 21 Oudh Cas 161.

(‘19) AIR 1919 Pat 136 (137); 4 Pat L Jour 159.

2. (‘23) AIR 1923 Nag 20 (20).

3. (‘30) AIR 1930 Lah 118 (114).

4. (30) AIR 1930 Lah 113 (114).

(‘97-01) 2 Upp Bur Rul 254.

**Note 21**

1. (‘23) AIR 1923 Rang 44 (44).

(‘35) AIR 1935 Pat 885 (890); 14 Pat 488. (Court can recognize uncertified payment in passing final decree as it is not a proceeding in execution.)

For other cases see Notes 22, 24, 25 and 30.

2. (‘95) 17 All 42 (45).

3. (‘26) AIR 1926 Lah 641 (642).

(‘28) AIR 1928 Lah 816 (816).

[See also (‘18) AIR 1918 Cal 62 (63).]

[See however (‘88) AIR 1938 Pat 465 (466); 17 Pat 128. (Installment decree—Provision that in case of default, decree-holder should be entitled to execute—Contention that the instalments had been duly paid and that decree-holder was not entitled to execute—Executing Court cannot recognize such payments unless certified or recorded.)]

**Note 22**

1. (‘79) 4 Bom 295 (297).

(‘82) 5 Mad 397 (400) (FB).

(‘88) 6 Mad 41 (42, 43).

(‘68) 10 Suth W R 854 (855). (Under S. 206 of the Code of 1859.)

[See also (‘74) 22 Suth W R 270 (271). (Do.)]

Courts of Allahabad,<sup>2</sup> Calcutta<sup>3</sup> and Madras<sup>4</sup> and the Chief Court of the Punjab<sup>5</sup> held that the amendment had not the effect of altering the law as it stood before the amendment and that an uncertified payment or adjustment could be recognized by a Court other than a Court executing the decree. A contrary view was taken by the High Court of Bombay.<sup>6</sup> Owing to this conflict of opinion the Section was again amended by Section 27 of the Amending Act VII of 1888 which again restricted the prohibition to the Court executing the decree, thus restoring the law to the state in which it was prior to the amendment of 1879.<sup>7</sup> The rule is now in the same form.

**O. 21 R. 2**  
**Notes 22-23a**

**23. Court acting under O. 21 R. 16.** — Can a judgment-debtor, who is debarred under this rule from pleading an adjustment of the decree with the decree-holder for failure to have it certified, nevertheless plead the same when opposing an application by the assignee of the decree under O. 21 R. 16? The High Court of Bombay<sup>1</sup> held that he can. The High Court of Madras also held the same view in the undermentioned decisions.<sup>2</sup> These cases proceed on the view that when an application is made under O. 21 R. 16 by a transferee decree-holder, it is heard by the Court as a Court which passed the decree and not as a Court which is *executing the decree*. The said Madras decisions have, however, now been overruled by a Full Bench decision<sup>3</sup> according to which the judgment-debtor cannot plead such an uncertified adjustment and evade the operation of this rule. This view is based on the ground that an application under O. 21 R. 16 is an application for execution and, therefore, the Court which passed the decree when dealing with such an application does not cease to be an executing Court as well. The High Courts of Allahabad,<sup>4</sup> Calcutta<sup>5</sup> and Rangoon<sup>6</sup> and the Judicial Commissioner's Courts of Nagpur<sup>7</sup> and Sind<sup>8</sup> have taken the same view. See also the undermentioned decision.<sup>9</sup>

**23a. Court dealing with application under O. 21 Rules 90, 95, 97 and 98.**

— It has been held by the High Courts of Lahore and Patna that an application to set aside a sale under O. 21 R. 90 is not a proceeding in execution of a decree, and an

2. ('81) 8 All 533 (535).

('81) 3 All 538 (540).

3. ('84) 10 Cal 354 (356, 357).

('87) 14 Cal 376 (379).

('83) 9 Cal 788 (790).

4. ('85) 8 Mad 277 (283) (FB).

('89) 12 Mad 61 (62, 63).

[But see ('88) 11 Mad 469 (472). (Not followed in 12 Mad 61).]

5. ('84) 1884 Pun Re No. 83, page 230 (FB). (Overruling 1881 Pun Re No. 47 and 1883 Pun Re No. 11).

6. ('87) 11 Bom 6 (12, 34, 35) (FB). ("Such payment or adjustment" means payment or adjustment of the decree as such. 6 Bom 146, Overruled.)

('86) 10 Bom 155 (165).

7. ('91) 18 All 339 (342).

('95) 19 Bom 204 (206).

('92) 16 Bom 589 (592).

('91) 15 Bom 419 (421).

('93) 20 Cal 32 (36).

('94) 1894 Pun Re No. 54, page 169.

(1900) 10 Mad L Jour 218 (214).

('18) AIR 1918 Mad 751 (754).

('23) AIR 1923 Rang 44 (44).

('35) AIR 1935 Pat 385 (389) : 14 Pat 488.

**Note 23**

1. ('24) AIR 1924 Bom 394 (394).

('23) AIR 1923 Bom 404 (405) : 47 Bom 643.

2. ('17) AIR 1917 Mad 590 (590) : 40 Mad 296.

('24) AIR 1924 Mad 189 (192).

('22) AIR 1922 Mad 510 (510).

('17) AIR 1917 Mad 889 (889).

('11) 12 Ind Cas 657 (662) : 35 Mad 659. (Per Sundara Ayyar, J.; Abdur Rahim, J., contra.) [See also ('10) 7 Ind Cas 55 (57, 58) (Cal).]

3. ('32) AIR 1932 Mad 372 (374) : 55 Mad 720 (FB). (Following AIR 1930 Mad 429 and AIR 1920 Mad 416.)

('33) AIR 1933 Mad 157 (157) : 56 Mad 816. (Following AIR 1932 Mad 372.)

[See also ('15) AIR 1915 Mad 1198 (1140).]

4. ('34) AIR 1934 All 209 (212) : 56 All 694.

('34) AIR 1934 All 445 (447).

5. ('37) AIR 1937 Cal 31 (34).

6. ('36) AIR 1936 Rang 218 (218).

7. ('91) 4 C P L R 132 (133).

8. ('34) AIR 1934 Sind 205 (206).

9. ('37) AIR 1937 Mad 511 (513). (Decree-holder receiving part payment but before it is certified or recorded transferring decree to another by document which says that the part payment has been made and purports to transfer the

**O. 21 R. 2** adjustment or compromise of the matter in dispute cannot be certified under the provisions of O. 21 R. 2 but must be recorded only under the provisions of O. 23 R. 3.<sup>1</sup>  
**Notes 23a-26** On the same principle it has been held by the High Court of Bombay that a proceeding under O. 21 Rules 95, 97 and 98 is not one in execution and the Court dealing with such an application is not an executing Court and is therefore not debarred from recognizing an uncertified adjustment of the decree.<sup>2</sup>

**24. Suit by judgment-debtor based upon an uncertified payment or adjustment.** — It is only a Court *executing the decree* that is debarred from recognising an uncertified payment or adjustment. A *suit* based upon such payment or adjustment is not barred.

#### Illustrations

1. *B* was a surety for *D* on a bond for Rs. 50 passed by *D* to *G*. *G* obtained a decree against *B* on this bond and *B* fully satisfied the decree by paying *G* Rs. 38. The payment was made out of Court and was not certified to the Court. *B* now sued *D* to recover the money so paid by him to *G*. It was held that sub-rule (3) did not bar the suit and that the payment might be proved.<sup>1</sup>

2. *M* obtained a decree against *C* for possession of a *jote* and mesne profits. Subsequently *C* adjusted the decree by paying the amount of mesne profits to *M* and purchasing the *jote* from him by a registered conveyance. After *M*'s death his heirs executed the decree and obtained possession. *C*'s plea of uncertified adjustment having been overruled, *C* now sued *M*'s heirs for possession of the *jote*. It was held that though the adjustment was not certified, the suit based upon it was maintainable.<sup>2</sup>

See also the undermentioned decision.<sup>3</sup>

**25. Suit by decree-holder based on uncertified payment or adjustment.** — Where a judgment-debtor executed a bond in favour of the decree-holder in adjustment of the decree against him, it was held that, in a suit by the decree-holder upon the bond, the uncertified adjustment can be proved.<sup>1</sup> The reason is that the adjustment of a decree out of Court, if not certified to the Court under this rule, is ineffectual only so far as the *execution of the decree* is concerned. Similarly, where the plaintiff brought a suit under O. 21 R. 63 to establish his right to certain attached property on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor, it was held that it was unnecessary that such transfer should be certified under the provisions of this rule.<sup>2</sup>

**26. Effect of fraud.** — *A* obtains a decree against *B*. *B* satisfies the decree by a payment or adjustment made out of Court; but such payment or adjustment is not certified to the Court in time. *A* then applies for execution of the decree fraudulently omitting to state in his application the payment or adjustment as required by O. 21,

right to execute in respect of the balance—  
 Assignee cannot, in spite of the terms of the deed, claim to execute for the whole—AIR 1932 Mad 372, Distinguished—Confirming on Letters Patent Appeal AIR 1936 Mad 472.)

#### Note 23a

- (29) AIR 1929 Lah 886 (887).
- (21) AIR 1921 Pat 107 (108) : 6 Pat L Jour 253.
- (29) AIR 1929 Pat 400 (400).
- (30) AIR 1930 Bom 375 (377) : 54 Bom 479.

#### Note 24

- (88) 12 Bom 235 (237).
- (20) AIR 1920 Nag 265 (265).
- (98) 25 Cal 718 (722, 724).
- (85) 157 Ind Cas 26 (28) (Rang). (Agreement to adjust decree though not certified is a contract

—Suit for specific performance is maintainable.)

#### Note 25

- (85) 7 All 124 (129, 130).
- (92) 16 Bom 589 (592).
- (91) 15 Bom 419 (421).
- (01) 25 Bom 252 (262).
- (82) 1882 Pun Re No. 182, p. 587.
- (1900) 10 Mad L Jour 213 (214). (Bond assigned by judgment-debtor to decree-holder in adjustment—Suit on bond maintainable though adjustment was not certified.)
- (87) AIR 1937 Nag 217 (219) : 19 Nag L Jour 175 (178). (Suit on a mortgage bond.)
- [See also (08) 25 All 817 (827, 828, 829) (FB).
- (94) 17 Mad 382 (389). (As explained in 26 Mad 19.)]
- (91) 18 All 389 (342).

Rule 11 (e). Is *B* entitled to claim an investigation of the question under Section 47 ? The answer is, no. Although the question is one relating to the *satisfaction* of the decree within the meaning of Section 47, it is taken out of the purview of that Section by virtue of the *particular provision* contained in this rule specifically dealing with such questions.<sup>1</sup>

**O. 21 R. 2**  
**Notes 26-27**

**27. Effect on limitation.** — It has been already mentioned in Note 22 *ante*, that Section 258 of the old Code provided that an uncertified payment or adjustment shall not be recognized by any Court executing the decree *as a payment or adjustment* of the decree. Consequently it was held that such a payment could however be relied upon by a decree-holder for the purpose of extending the period of limitation for execution under Section 20 of the Limitation Act.<sup>1</sup> The words "as a payment or adjustment of the decree" have now been omitted in the present rule with the result that the executing Court cannot recognise an uncertified payment or adjustment for *any purpose* whatever.<sup>2</sup>

Now suppose a decree-holder makes an application for execution of his decree more than three years after the date of the decree or after the last starting point of limitation, and mentions in the application a part payment made by the judgment-debtor. Can the Court executing the decree recognize the payment, and hold that by virtue of such payment the decree is not time-barred? The High Courts of Madras,<sup>3</sup>

#### Note 26

1. ('19) AIR 1919 Lah 13(14):1919 Pun ReNo. 135.
- ('26) AIR 1926 Oudh 620 (620).
- ('35) AIR 1935 Mad 257 (257).
- ('28) AIR 1928 Rang 103(105):11 Low Bur Rul 963.
- ('25) AIR 1925 Bom 809(309,310):49 Bom 548(FB).
- ('28) AIR 1928 Cal 342 (343) : 50 Cal 468.
- ('28) AIR 1928 Cal 527 (529, 530).
- ('17) AIR 1917 Cal 422 (425).
- ('12) 18 Ind Cas 424 (425) (Cal).
- ('12) 18 Ind Cas 63 (65) (Cal).
- ('12) 18 Ind Cas 326 (327, 328) (Cal).
- ('92) 20 Cal 32 (36).
- ('12) 18 Ind Cas 944 (945) (Cal).
- ('10) 7 Ind Cas 55 (57, 58) (Cal).
- ('09) 4 Ind Cas 402 (404) (Cal).
- ('26) AIR 1926 Mad 674 (675) : 49 Mad 325.
- ('18) AIR 1918 Mad 644 (644) : 40 Mad 789.
- ('06) 29 Mad 312 (313).
- ('98) 21 Mad 409 (410).
- ('11) 12 Ind Cas 562 (563) : 36 Mad 357.
- ('07) 17 Mad L Jour 527 (528).
- ('26) AIR 1926 Oudh 482 (483).
- ('28) AIR 1928 Oudh 195 (198) : 8 Luck 170(FB).
- ('20) AIR 1920 Pat 833 (835) : 5 Pat L Jour 70.
- ('21) AIR 1921 Pat 185(187, 188):6 Pat L Jour 337.
- ('07-01) 2 Upp Bur Rul 256.
- ('25) AIR 1925 Sind 140 (142) : 18 Sind L R 51.
- ('21) AIR 1921 Sind 10 (11) : 15 Sind L R 77.
- ('19) AIR 1919 Sind 56 (56, 57) : 18 Sind L R 71.
- ('35) AIR 1935 Mad 257 (257). (Uncertified agreement not to sell property of judgment-debtor—Agreement cannot be relied on to prove fraud in conducting sale.)

*The following cases, it is submitted, are not good law :*

- ('08) 12 Cal W N 485 (487).
- ('19) AIR 1919 Cal 202 (203).
- ('98) 21 Mad 356 (358). (Dissented from in 29 Mad 312.)
- ('26) AIR 1926 Mad 945 (945).
- ('25) AIR 1925 Oudh 225 (226) : 27 Oudh Cas 277. (Dissented from in AIR 1926 Oudh 482.)
- ('22) AIR 1922 Low Bur 31 (32).
- ('16) AIR 1916 Bom 217 (218) : 40 Bom 333. (Overruled in AIR 1925 Bom 309.)
- ('10) 7 Ind Cas 940 (943) : 34 Bom 575. (Do.)

#### Note 27

1. ('04) 26 All 36 (38). (Overruling 12 All 569.)
- ('95) 17 All 42 (44, 45).
- ('13) 18 Ind Cas 731 (732) : 35 All 178.
- ('09) 2 Ind Cas 524 (524) : 31 All 590.
- ('85) 7 All 327 (330).
- ('82) 4 All 316 (317).
- ('79) 2 All 291 (293).
- ('97) 21 Bom 122 (125).
- ('87) 11 Bom 506 (513, 514).
- ('94) 21 Cal 542 (549).
- ('71) 15 Suth W R 66 (67).
- ('70) 4 Beng L R 130 (134) (F B).
- ('69) 11 Suth W R 232 (233).
- ('96) 19 Mad 162 (164).
2. ('12) 18 Ind Cas 424 (425) (Cal).
- ('18) AIR 1918 Cal 977 (978) : 45 Cal 630.
3. ('18) AIR 1918 Mad 620 (621, 622) : 41 Mad 251.
- ('16) AIR 1916 Mad 958 (959).
- ('35) AIR 1935 Mad 922 (928).



**O. 21 R. 2**  
**Notes 27-28**

Calcutta,<sup>4</sup> Bombay,<sup>5</sup> Lahore,<sup>6</sup> Patna,<sup>7</sup> Rangoon<sup>8</sup> and Nagpur<sup>9</sup> and the Judicial Commissioner's Court of Sind<sup>10</sup> have held that it will amount to a sufficient certificate and the payment can therefore be recognized, provided the payment is as a *matter of fact made* and provided also the application for execution is within three years of such payment (as otherwise Section 20 of the Limitation Act will not apply). The said decisions proceed on the view that nothing is prescribed in this rule as to the time within which or the manner in which the decree-holder must certify a payment or adjustment. See also Notes 17 and 18, *supra*. The High Court of Allahabad, on the other hand, held the contrary view in a series of cases. In one class of cases<sup>11</sup> it was held that this rule contemplates a formal proceeding consisting of two steps —

*first*, an application by the decree-holder informing the Court of the payment, and,

*secondly*, a formal order of the Court recording the payment, and therefore a statement as to payment in an execution application is not such a certificate as is contemplated by this rule and would not save limitation. It was held in another class of cases<sup>12</sup> that where the decree will be time-barred if the payment sought to be certified by the decree-holder is ignored, such a payment cannot be certified. In a recent Full Bench ruling, however,<sup>13</sup> the same High Court has impliedly overruled these cases and fallen in line with the other Courts. The Judicial Commissioner's Court of Oudh<sup>14</sup> has followed the earlier view of the High Court of Allahabad. It is submitted that in view of the general trend of opinion, the said decision cannot be accepted as correct.

**28. Operation as estoppel.** — It is not open to the executing Court to enquire into the fact of payment or adjustment of a decree which has not been certified or recorded within the period allowed by law, on the ground that the decree-holder is estopped from denying such payment or adjustment.<sup>1</sup> The reason is that sub-rule (3) enacts a special law for a special purpose and the general law of estoppel cannot be allowed to override the special law.

4. ('15) AIR 1915 Cal 235 (236).

(16) AIR 1916 Cal 451 (451) : 43 Cal 207.

(25) AIR 1925 Cal 1012 (1013, 1014) : 54 Cal 143.

(21) AIR 1921 Cal 643 (643, 644).

(19) AIR 1919 Cal 677 (677) : 46 Cal 22.

(22) AIR 1922 Cal 30 (31, 32).

(19) AIR 1919 Cal 181 (182). (As explained in AIR 1925 Cal 1012).

[But see ('22) AIR 1922 Cal 200 (200).]

5. ('21) AIR 1921 Bom 411 (412) : 45 Bom 91.

6. ('24) AIR 1924 Lah 676 (677).

7. ('19) AIR 1919 Pat 136 (137) : 4 Pat L Jour 159.

8. ('80) AIR 1930 Rang 329 (331) : 8 Rang 310.

(25) AIR 1925 Rang 26 (27) : 2 Rang 393.

9. ('86) AIR 1936 Nag 281 (282) : I L R (1937) Nag 106.

10. ('31) AIR 1931 Sind 28 (30) : 25 Sind L R 860.

(20) AIR 1920 Sind 23 (24) : 14 Sind L R 198.

(19) AIR 1919 Sind 70 (75) : 13 Sind L R 37.

[But see ('16) AIR 1915 Sind 48 (48) : 9 Sind L R 27. (Held to be not good law in AIR 1920 Sind 28 in view of AIR 1919 Sind 70 (F B).)]

11. ('24) AIR 1924 All 706 (706) : 46 All 685.

(16) AIR 1916 All 239 (241) : 38 All 204.

(15) AIR 1915 All 811 (811).

(14) AIR 1914 All 112 (112).

(14) AIR 1914 All 235 (236).

12. (See also ('28) AIR 1928 All 55 (57) : 50 All 259. (When a decree-holder applies for execution, he can only invoke a payment certified before execution became time-barred.))

13. ('28) AIR 1928 All 629 (631, 632) : 51 All 237 (F B).

(31) AIR 1931 All 219 (221). (Following AIR 1928 All 629 (F B).)

[See ('38) AIR 1938 All 49 (50). (The payment must however fulfil the requirements of S. 20, Limitation Act, as amended in 1927.)

(34) AIR 1934 All 534 (535) : 56 All 921. (The decree-holder cannot certify payments after controversy arises.)]

[See also ('25) AIR 1925 All 802 (804) : 47 All 873. (Payment made within three years from last starting point of limitation but certified after three years from such starting point—Payment may be recognized as from the date on which it was made and not from the date on which it was certified.)]

14. ('24) AIR 1924 Oudh 393 (392).

**Note 28**

1. ('10) 7 Ind Cas 940 (941, 942) : 34 Bom 575. (Per Ohandavarkar, J.)

(14) AIR 1914 Cal 253 (254).

(19) 13 Ind Cas 326 (327, 328) (Cal).



**29. Remedies of the judgment-debtor.** — Where a judgment-debtor satisfies the decree by a payment or adjustment made out of Court, which is not certified to the Court in time, and the decree-holder applies for execution of the decree in spite of the satisfaction, what is the remedy of the judgment-debtor in such a case? It is clear that the judgment-debtor cannot maintain a suit for a declaration that the decree has been satisfied and is consequently incapable of execution.<sup>1</sup> The reason is that such questions relate to the *satisfaction* of the decree, a separate suit in respect of which is barred by Section 47. If the properties of the judgment-debtor are sold in execution in such circumstances, no separate suit will, for the same reason, lie to set aside the sale.<sup>2</sup> As to whether a suit *for damages* will lie against the decree-holder, see Note 30 below.

**30. Suit for damages.** — Where a decree-holder whose decree has been satisfied by payment out of Court fails to certify satisfaction to the Court and executes the decree and *realises the money* a second time, the judgment-debtor may sue him for the recovery of the money paid out of Court.<sup>1</sup> Such a suit will not be barred by Section 47 for the question in the suit, as observed by Turner, C. J., in *Viraraghava v. Subbakkha*, I. L. R. 5 Madras 397, "relates not to the execution of a decree, but to a contract which formed no subject of inquiry in the suit and could not form a subject of inquiry in execution of the decree."

The cause of action for the suit is *failure of consideration* or breach of an express or implied promise or of a statutory duty to certify the payment.

There is a difference of opinion as to when the cause of action for such a suit arises — whether it arises as soon as the application for execution is presented, or only

('25) AIR 1925 Sind 140 (142) : 18 Sind L R 51.

**Note 29**

1. ('94) 21 Cal 437 (445, 449, 460) (FB).
- ('88) AIR 1938 Lah 1051 (1052) : 15 Lah 75. (AIR 1925 Lah 54 held to be not good law.)
- ('04) 31 Cal 480 (485).
- ('95) 5 Mad L Jour 140 (142).
- ('92) 15 Mad 302 (302, 303).
- ('22) AIR 1922 Lah 428 (431) : 3 Lah 319 (F B). (Overruling 5 Ind Cas 814.)
- ('14) AIR 1914 Low Bur 267 (268) : 7 Low Bur Rul 367.
- The following cases are no longer good law :  
('74) 22 Suth W R 194 (194).
- ('25) AIR 1925 Lah 54 (55).
- ('14) AIR 1914 Lah 427 (427) : 1914 Pun Re No. 42.
- ('18) 21 Ind Cas 557 (558) (Lah).
- ('10) 5 Ind Cas 814 (815) : 1910 Pun Re No. 16.
2. ('92) 19 Cal 683 (688, 689) : 19 Ind App 166 (PC).
- ('98) 20 All 254 (256, 258).
- ('18) AIR 1918 Bom 105 (106) : 43 Bom 240.
- ('19) AIR 1919 Nag 73 (75) : 15 Nag L R 158.

The following cases are no longer good law in view of 19 Cal 683 (PC):

- ('87) 14 Cal 876 (879).
- ('84) 10 Cal 354 (357).
- ('88) 9 Cal 788 (790).
- [See also ('88) 15 Cal 557 (568).
- ('97) 21 Bom 463 (464).]

**Note 30**

1. ('08) 30 All 464 (466).
- ('81) 8 All 538 (540).
- ('69) 1 N W P H C R 237 (239).
- ('28) AIR 1928 Bom 253 (253).

('99) 23 Bom 394 (396).

('79) 4 Bom 295 (297).

('66) 4 Bom H C R A C 76 (77).

('12) 13 Ind Cas 63 (66) (Cal).

('11) 11 Ind Cas 1 (1, 2) (Cal).

('79) 3 Cal L Rep 414 (416).

('74) 22 Suth W R 298 (298).

('73) 20 Suth W R 150 (150).

('70) 13 Suth W R 69 (73) (F B).

('68) 9 Suth W R 210 (211).

('67) 8 Suth W R 449 (449).

('17) AIR 1917 Lah 90 (91).

('77) 1877 Pun Re No. 66, page 172.

('92) 1892 Pun Re No. 79, page 281.

('18) AIR 1918 Mad 720 (721).

('11) 10 Ind Cas 462 (462) (Mad). (Affirming 6 Ind Cas 267 on appeal.)

('85) 8 Mad 277 (283) (F B).

('82) 5 Mad 397 (400) (F B). (Overruling 3 Mad H C R 188.)

('83) 6 Mad 41 (42, 43).

('04) 14 Mad L Jour 359 (369).

('76) 1 Mad 203 (204).

('97) 20 Mad 369 (370, 371).

('04) 17 C P L R 60 (61).

('26) AIR 1926 Oudh 482 (483).

('23) AIR 1923 Rang 88 (92) : 11 Low Bur Rul 429.

('29) AIR 1929 Rang 269 (270) : 7 Rang 310.

('28) AIR 1928 Rang 316 (316) : 6 Rang 573.

('13) 22 Ind Cas 963 (963, 964) : 1 Upp Bur Rul 191.

('93-1900) 1893-1900 Low Bur Rul 621.

('85) AIR 1935 Pat 65 (66). (Suit is maintainable irrespective of whether payment is pleaded or not in execution.)

**O. 21 R. 2**  
**Notes 30-32**

after the amount is *actually recovered* in execution. The High Courts of Allahabad,<sup>2</sup> and Patna,<sup>3</sup> the Judicial Commissioner's Court of Nagpur<sup>4</sup> and the undermentioned decisions<sup>5</sup> of the High Court of Madras have held that the cause of action arises only when damage is actually sustained, that is, when the money is recovered a second time. In the undermentioned cases,<sup>6</sup> however, the High Court of Madras has held that the cause of action arises when the decree-holder fails to fulfil his duty and applies for execution, and that an execution need not actually be levied and money realised a second time before the suit can be maintained. Where the decree-holder has not applied for execution at all, nor realised anything over and above the payments alleged to have been made by the judgment-debtor towards the satisfaction of the decree, the judgment-debtor has no cause of action to sue the decree-holder merely because the payment out of Court has not been certified.<sup>7</sup>

Where the decree-holder transfers the decree after it is satisfied by an uncertified payment or adjustment and the assignee executes the decree, he is not liable to repay the decretal amount realised in execution of the decree, even though he has knowledge of the payment or adjustment.<sup>8</sup> The reason is that there is no privity of *contract* between the parties.

Where an application by the judgment-debtor under sub-rule (2) for recording a payment out of Court is dismissed by the executing Court on a consideration of the merits, the judgment-debtor cannot maintain a suit for recovery of the amount alleged to have been paid twice over, for, such a suit will be barred on general principles of *res judicata*.<sup>9</sup>

**31. Restitution of uncertified payment on reversal of decree in appeal.** — V obtained a decree against G for Rs. 89. G appealed against the decree and pending appeal made a payment of Rs. 60 to the decree-holder which was not certified to the Court. The decree was reversed in appeal and G applied for refund of the amount he had paid. It was held that G was entitled to recover on the ground that "the decree having been reversed, the payment, whether certified or not, could only be regarded as made without consideration and entitling the defendant to have it restored."<sup>1</sup>

**32. Criminal proceedings.** — Sub-rule (3) has no application to a case where a Criminal Court is investigating a charge under Section 210 of the Penal Code of

('39) AIR 1939 Pat 156 (157).

[See also ('27) AIR 1927 Mad 947 (948). (Decree-holder's vakil to whom payment was made did not certify—Judgment-debtor arrested—Suit for damages against vakil—Vakil held liable.)

('35) AIR 1935 Pat 65 (66).]

[But see ('67) 2 Agra 45 (46).

(1865) 3 Suth W R S C C Ref 3 (5).

2. ('33) AIR 1933 All 511 (512).

3. ('39) AIR 1939 Pat 156 (157).

4. ('28) AIR 1928 Nag 219 (222).

5. ('10) 6 Ind Cas 267 (268) (Mad).

('06) 16 Mad L Jour 54 (55, 56).

6. ('07) 30 Mad 545 (546).

[See also ('19) AIR 1919 Mad 778 (775). (Filing of execution petition gives a cause of action.)

('35) AIR 1935 Pat 65 (66). (Payments made not certified—Suit for recovery thereof—Time runs from the date of payment—It is not clear from the report whether the judgment-debtor paid

the amount twice over or not.)

('98) 21 Mad 409 (410). (The fact whether decree-holder recovered money from the judgment-debtor a second time is not clear from the judgment.)]

7. ('39) AIR 1939 All 495 (496) : 1939 All L Jour 403 (404).

('35) AIR 1935 Mad 961 (964). (Actual filing of execution and not failure to certify is cause of action.)

8. ('19) AIR 1919 Mad 424 (426) : 42 Mad 388.

9. ('12) 14 Ind Cas 751 (752) : 1912 Pun Re No. 91.

('95) 18 Mad 26 (27).

('09) 4 Ind Cas 818 (819) (Upp Bur).

#### Notes 31

1. ('87) 11 Bom 724 (726).

('39) AIR 1939 Mad 176 (176). (Payment to decree-holder's pleader not certified—Decree reversed in appeal—Application for restitution is maintainable.)

fraudulently executing a decree.<sup>1</sup> The prohibition in sub-rule (3) only means that the Court cannot consider the alleged adjustment in the *course of the execution of the decree in question*. The sub-rule does not prohibit the Court executing the decree from holding an enquiry under Section 476 of the Criminal Procedure Code into an alleged payment or adjustment with a view to file a complaint against the decree-holder for an offence under Section 210, Penal Code.<sup>2</sup> Any other interpretation would make Section 210, Penal Code, a mere nullity and there could never be any prosecution for such an offence. Where, on the objection of the judgment-debtor, the Court dismisses an application for execution on the ground that the decree has been satisfied by a payment out of Court, the decree-holder is not guilty of an offence under Section 210, Penal Code, because the decree has not been *caused to be executed*.<sup>3</sup>

**O. 21 R. 2**  
**Notes 32-33**

**33. Appeal and revision.** — An order on an application by the judgment-debtor under sub-rule (2) recording or refusing to record, as certified, a payment or adjustment made out of Court, is the determination of a question between the parties relating to the satisfaction of the decree within the meaning of Section 47 and hence, is appealable as a decree.<sup>1</sup> No appeal lies against an order refusing to set aside a dismissal of an application for default<sup>2</sup> or an order refusing to review an order rejecting an application under this rule.<sup>3</sup>

Where a decree-holder certifies a payment made out of Court, but the Court in spite of it orders execution to proceed on the ground that the payment is not proved, the Court fails to exercise a jurisdiction vested in it by law, and the order is therefore revisable by the High Court under Section 115.<sup>4</sup> A Judge declining to proceed with an application for execution, on the ground of an uncertified payment or adjustment out of Court, acts with material irregularity and his order is open to revision.<sup>5</sup>

## COURTS EXECUTING DECREES

**R. 3.** [New.] Where immoveable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

**O. 21 R. 3**

### Synopsis

1. Sale of property situate in more than one jurisdiction.

2. Change of territorial jurisdiction. See Section 97.

#### Note 32

1. ('86) 10 Bom 288 (299). (Case under Amending Act XII of 1879: see Note 22, supra.)
- ('89) 16 Cal 126 (127). (Do.)
- ('86) 9 Mad 101 (101). (Do.)
2. ('31) AIR 1931 Rang 148 (150) : 9 Rang 104.
- ('82) 4 Mad 325 (327).
3. ('96) 23 Cal 971 (975).

#### Note 33

1. ('94) 16 All 129 (129, 130).
- ('87) 11 Bom 57 (58, 59).
- ('03) 7 Cal W N 172 (174). (Even though there may be no pending application for execution, still Court may be said to be executing the decree.)

('91) 14 Mad 99 (100).

('17) AIR 1917 Low Bur 164 (165).

('39) AIR 1939 Bom 255 (256). (Order rejecting application for adjustment filed after disposal of execution application is one under S. 47.) [See also ('33) AIR 1933 Pat 634 (635). (Order on application made by judgment-debtor before final decree in a mortgage suit and after preliminary decree.)]

2. ('97) 2 Upp Bur Rul 254.

('31) AIR 1931 Lah 505 (505).

('20) AIR 1920 Cal 914 (915).

3. ('27) AIR 1927 Lah 809 (810).

4. ('31) AIR 1931 Rang 332 (333).

5. ('35) AIR 1935 Rang 481 (481).

**O. 21 R. 3**  
**Notes 1-2**

**1. Sale of property situate in more than one jurisdiction.** — As has been seen in Note 8 to Section 17, *ante*, it is a general principle of law that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situate *entirely* outside the local limits of its jurisdiction. This rule is an exception to that general rule.<sup>1</sup> Even before this provision was enacted in this Code, it was held by the Calcutta High Court<sup>2</sup> that where property attached in execution of a decree forms one estate and is situate within the territorial jurisdiction of two or more Courts, any one of such Courts has jurisdiction to sell the *entire* estate. See also Note 6 to Section 38 *ante*.

**2. Change of territorial jurisdiction.** — See Section 37.

**O. 21 R. 4**

**Transfer to Court of  
Small Causes.**

**R. 4.** [S. 223, para. 5.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras *or Bombay*, such Court may send to the Court of Small Causes in Calcutta, Madras *or Bombay*, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

[1877, S. 223, para. 5.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Bombay or Rangoon."

### Synopsis

1. Scope of the Rule.

2. "As if it had been passed by itself."

3. Decrees of foreign Court. See Note 1.

4. Jurisdiction of Court of Small Causes to question validity of order of transfer.

**1. Scope of the Rule.** — This rule is not restricted in its application to decrees of British Indian Courts; it applies equally to decrees of such foreign Courts as come within Section 44.<sup>1</sup> See also Order 51 Rule 1, *infra*.

**2. "As if it had been passed by itself."** — The Court of Small Causes in Calcutta, Madras or Bombay, in executing a decree of another Court transferred to it under this rule, has the same powers as it possesses in regard to execution of its own

#### Order 21 Rule 3 — Note 1

1. ('23) AIR 1923 Cal 619 (621).

2. ('86) 12 Cal 307 (312).

('82) 8 Cal 703 (705).

('78) 19 Suth W R 434 (436).

('75) 23 Suth W R 154 (155).

('88) 12 Cal L Rep 404 (406).

('77) 2 Cal L Rep 394 (396).

[But see ('75) 23 Suth W R 233 (234).]

#### Order 21 Rule 4 — Note 1

1. ('18) AIR 1918 Mad 645 (646).

decrees.<sup>1</sup> See also Section 42.

**3. Decrees of foreign Court.** — See Note 1 above.

**4. Jurisdiction of Court of Small Causes to question validity of order of transfer.**—The Court of Small Causes to which a decree is sent for execution under this rule has no jurisdiction to question the correctness or validity of the order of transfer.<sup>1</sup>

**O. 21 R. 4**  
**Notes 2-4**

**R. 5.** [S. 223, para. 6.] Where the Court to which a

**Mode of transfer.**

decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

**O. 21 R. 5**

[1877, S. 223.]

#### Local Amendments

##### ALLAHABAD

For the word "district," where it occurs *after* the words "same" and "different" *read* "Province."

##### LAHORE

In the last sentence after the words "the District Court" and before the words "of the district" *insert* the words "or the Court of any Judge having jurisdiction in the place where the decree is to be executed to whom power to receive plaints has been delegated by the District Judge."

##### ODDH

For the word "district" where it occurs *after* the words "same" and "different" *read* "Province."

##### RANGOON

*Add* the following proviso:

"Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree, such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings."

### Synopsis

**1. Scope of the Rule.**

**2. Power of Court to which decree is sent for execution.** See Ss. 51 and 42.

**3. Transfer of local jurisdiction.** See Section 37.

**1. Scope of the Rule.** — Where two Courts are in the *same district*, one Court may transmit a decree for execution to the other Court *direct without the*

#### Note 2

1. ('07) 84 Cal 828 (827). (Trying a question of title in respect of tiled huts in execution.)

#### Note 4

1. ('36) 165 Ind Cas 625 (626) (Cal). (It is the function of the transferring Court to decide whether the transfer can or cannot be made.)

**O. 21 R. 5** *intervention of the District Court.*<sup>1</sup>  
**Notes 1-3**

But where the Court to which the decree is to be sent is situate in a *different* district, it should be sent to the *District Court* of the district in which the decree is to be executed. Where this procedure is not followed and the decree is sent direct to the Court subordinate to the District Court in another district, that Court cannot execute the decree.<sup>2</sup> It should not, however, dismiss the application, but should send the papers back to the Judge who sent them for adopting the correct procedure.<sup>3</sup> In the undermentioned cases<sup>4</sup> it was held that the failure to send the decree through the District Court is a mere irregularity which can be waived.

The High Court of Madras<sup>5</sup> has framed a rule — Rule 161A of the Civil Rules of Practice — under which the transferee Court is to return the papers to the transmitting Court, if no steps are taken by the decree-holder within six months from the date of transfer. This rule is one of convenience made with the object of inducing decree-holder to take early steps to execute the decree; and a violation thereof does not render the proceedings taken after six months *void ab initio*.

See also the undermentioned case<sup>6</sup> as to the practice in Sind Courts.

**2. Power of Court to which decree is sent for execution.** — See Sections 51 and 42, *ante*.

**3. Transfer of local jurisdiction.** — See Section 37, *ante*.

**O. 21 R. 6**

**Procedure where Court desires that its own decree shall be executed by another Court.**

**R. 6. [S. 224.]** The Court sending a decree for execution shall send —

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

[1877, S. 224; 1859, S. 286.]

**Order 21 Rule 5 — Note 1**

- 1. ('92) 15 Mad 345 (347).
- (‘86) AIR 1936 Cal 571 (572). (Decree transferred without express request by decree-holder — Acquiescence by decree-holder — Jurisdiction of transferee Court to execute not affected.)
- 2. ('95) 22 Cal 764 (766).
- (‘83) AIR 1933 Lah 839 (840, 841). (There is an inherent lack of jurisdiction to execute the decree—Even assuming such jurisdiction, it cannot send decree to another Subordinate Court for execution.)
- (‘14) AIR 1914 Cal 786 (786).

- (‘19) AIR 1919 Pat 324 (324) : 4 Pat L Jour 49. (It is open to the parties at any stage to question the jurisdiction of the Subordinate Judge to execute it.)
- 3. ('14) AIR 1914 Cal 786 (786).
- 4. ('86) AIR 1936 Lah 765 (765).
- (‘37) AIR 1937 Lah 174 (176).
- (‘36) AIR 1936 Lah 891 (894).
- 5. ('15) AIR 1915 Mad 920 (920) : 39 Mad 485.
- 6. ('83) AIR 1933 Sind 843 (844) : 27 Sind L R 812. (Practice in Sind is to hand over the decree and papers to the judgment-creditor on his applying for same unless he is a person not fit to be trusted with such papers.)

**Local Amendments****O. 21 R. 6**  
**Note 1****ALLAHABAD**

Rule 6 shall be re-numbered as 6 (1) and *add* the following sub-rule (2):

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

**N.-W.F.P.**

*Read* Rule 6 as Rule 6 (1) and *add* the following sub-rule (2):

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints in a sealed cover to be taken to the Court to which they are to be sent."

**ODDH**

To Rule 6, *add* the following as sub-rule (2) and re-number 6 as 6 (1):

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

**PATNA**

*Insert* the following words after the word "decree" in clause (a):

"and a copy of the suit register relating to the suit in which the decree was passed and a memorandum showing the costs allowed to the decree-holder subsequent to the passing of the decree."

**RANGOON**

To Rule 6, *add* the following proviso:

"Provided that where a transfer is effected under the proviso to Rule 5 it shall not be necessary to send the above documents."

**Synopsis**

- |  |                                |
|--|--------------------------------|
| 1. Scope of the Rule.                          | 4. Copy of any order.          |
| 2. Certificate, effect of not sending.         | 5. Small Cause Courts.         |
| 3. Presumption as to compliance with the Rule. | 5a. Notice to judgment-debtor. |
|  | 6. Appeal.                     |

**1. Scope of the Rule.** — The documents required to be transmitted by the Court sending the decree for execution to another Court are —

- (1) a copy of the decree,
- (2) a certificate as required by clause (b), and
- (3) a copy of any order for execution that may have been passed.<sup>1</sup>

As to the form of certificate of non-satisfaction, see Appendix E, Form No. 4.

Where a Court, upon an application for transfer of the decree for execution to another Court, places a wrong construction on the decree and mentions in the certificate that a particular amount is due, the statement is *ultra vires* and the judgment-debtor need not have it amended by the transferor Court.<sup>2</sup> In sending the certificate of non-satisfaction, the Court which passed the decree is not called upon to consider whether the decree is still capable of execution; that is a question for determination by the transferee Court when a proper application for execution is presented to it.<sup>3</sup>

When once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court to which

**O. 21 R. 6**  
**Notes 1-5a**

the decree is sent for execution.<sup>4</sup> Where an application for execution has already been made to the Court which passed the decree, a fresh application for execution need not be made to the Court to which the decree is transferred for execution.<sup>5</sup> See also the undermentioned case.<sup>6</sup>

**2. Certificate, effect of not sending.** — The omission to send the certificate as required by clause (b) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution to entertain the application for execution.<sup>1</sup> Nor is it a ground for an application under O. 21 R. 90 to set aside a sale.<sup>2</sup> Similarly, it has been held that a mere mistake in the certificate of non-satisfaction as to the number of the suit or the names of the judgment-debtors will not affect the jurisdiction of the execution Court to proceed with the execution.<sup>3</sup>

**3. Presumption as to compliance with the Rule.** — Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree, it lies upon the judgment-debtor to prove that it was not transmitted, the maxim applicable being *omnia presumuntur rite esse acta* — all things are presumed to have been rightly and duly performed.<sup>1</sup> Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the original side, it was held that even though there was no formal order of transfer, the provisions of this rule were sufficiently complied with.<sup>2</sup>

**4. Copy of any order.** — The words "copy of any order for the execution of the decree" in clause (c) mean a copy of any *subsisting* order and not a copy of an order for execution in the previous execution application.<sup>1</sup>

**5. Small Cause Courts.** — This rule applies to proceedings in the Small Cause Courts in the mofussil and if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree, it may be sent to another Court.<sup>1</sup>

**5a. Notice to judgment-debtor.** — Where the application for transmission of the decree for execution to another Court is made when the decree is already under execution in the Court which passed it, notice should be given to the judgment-debtor and the transfer should not be ordered unless there is sufficient cause to order simultaneous execution.<sup>1</sup> See also Note 17 to Section 39 *ante*.

4. ('10) 8 Ind Cas 852 (853) : 35 Mad 588. (For rateable distribution.)

[But see ('28) AIR 1928 Mad 496 (497) (*Obiter*).]

5. ('36) AIR 1936 Cal 267 (269).

6. ('36) AIR 1936 Lah 369 (369). (Order transferring decree of High Court to another Court for execution may be signed by the Registrar and need not be signed by the Judge.)

**Note 2**

1. ('31) AIR 1931 Cal 649 (649).

2. ('97) 20 Mad 10 (12).

3. ('38) AIR 1938 Pat 513 (514).

[See also ('36) AIR 1936 Lah 765 (765). (Certificate wrongly addressed to the Subordinate Judge instead of to the District Judge — Defect held cured in the circumstances of the case.)

('36) AIR 1936 Cal 571 (572). (Irregularity in manner of transfer does not prevent the transferee Court from having seisin of the execution.)]

**Note 3**

1. ('72) 17 Suth W R 289 (291).

2. ('27) AIR 1927 Cal 782 (783). (Appeal would lie from an order in execution.)

'28) AIR 1928 Rang 15 (16) : 5 Rang 613. (Transfer is not invalid.)

**Note 4**

1. ('89) 13 Bom 371 (373).

**Note 5**

1. ('68) 9 Suth W R 175 (177).

**Note 5a**

1. ('39) AIR 1939 Bom 258 (260) : 41 Bom L R 481 (483). (A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order, but an order which amounts to the grant of a certificate and allows simultaneous execution proceedings to go on in more than one Court is not a mere ministerial order. Such an order is a judicial order.)

('35) AIR 1935 Cal 268 (270).



**6. Appeal.** — An order directing or refusing the issue of a certificate is appealable.<sup>1</sup>

**O. 21 R. 6**  
**Note 6**

**R. 7. [S. 225.]** The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

**O. 21 R. 7**

Court receiving copies of decree, etc., to file same without proof.

[1877, S. 225; 1859, S. 286.]

### Synopsis

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|--|---|
| <p>1. Legislative changes.</p> <p>2. Without any further proof.</p> <p>3. Jurisdiction of the Court which passed the decree. See Section 42, Note 1.</p> | <p>4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.</p> <p>5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction. See Section 88, Note 7.</p> |
|--|---|

**1. Legislative changes.** — The words "or of the jurisdiction of the Court which passed it" which occurred in the old Section have now been omitted. See Note 4.

**2. Without any further proof.** — As soon as a copy of the decree which is sent for execution to another Court is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court.<sup>1</sup>

**3. Jurisdiction of the Court which passed the decree.** — See Section 42, Note 1.

**4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.** — Section 225 of the old Code contained the words "or of the jurisdiction of the Court which passed it." There was a conflict of decisions as to whether the transferee Court can go into the question of the jurisdiction of the Court which passed the decree, if it sees any reason to do so.<sup>1</sup> The said words have now been omitted and it has been held that the transferee Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution.<sup>2</sup> But it has been held that where the decree was passed against a *dead* person, it is a nullity and objection to the decree on this ground can be taken

#### Note 6

1. ('74) 6 N W P H C R 73 (76).  
[See also ('89) AIR 1939 Bom 258 (260); 41 Bom L R 481 (488). (Order which amounts to a grant of a certificate and allows simultaneous execution is a judicial order and is appealable.)]

#### Order 21 Rule 7 — Note 2

1. ('68) 10 Suth W R 46 (50) (FB).

#### Note 4

1. ('89) 11 All 814 (818).  
(95) 17 All 478 (482).  
(04) 28 Bom 378 (382).  
(81) 15 Bom 216 (219). (A case of foreign judgment.)

(86) 10 Bom 65 (68).

(82) 7 Bom 481 (483).

2. ('14) AIR 1914 Bom 27 (27) : 38 Bom 194.

('20) AIR 1920 Mad 1019 (1023) : 43 Mad 675.

('32) AIR 1932 Lah 289 (290) : 13 Lah 25.

('26) AIR 1926 Oudh 385 (388) : 29 Oudh Cas 26.

('81) AIR 1931 Pat 27 (29, 30) : 9 Pat 829.

('96) 9 O P L R 136 (137).

('28) AIR 1923 Mad 212 (214).

('19) AIR 1919 Lah 294 (295); 1919 Pun Re No. 22.

('31) AIR 1931 Rang 252 (259) : 9 Rang 480 (FB).

(Overruling AIR 1930 Rang 337.)

('16) AIR 1916 Upp Bur 1 (2); 2 Upp Bur Rul 119.

('82) AIR 1932 Lah 601 (602).

('87) AIR 1937 Bom 19 (22).

**O. 21 R. 7**  
**Notes 4-8**

in the transferee Court.<sup>3</sup> In the undermentioned case<sup>4</sup> it was held that the transferee Court is not debarred from taking cognizance of objections as to jurisdiction of which the Court which transferred the decree could take cognizance. See also Note 1 to Section 42, *ante*.

This rule dispensing with the further proof of jurisdiction than the certificate of the transmitting Court, applies only to the decrees of *British Indian Courts* and not to foreign decrees transmitted to British Indian Courts for execution under Section 44; the reason is that Section 44 "does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely allows the procedure by which such a judgment can have effect given to it in British India." Notwithstanding the Section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. The Court executing the decree is, therefore, not precluded from ascertaining whether a foreign Court had jurisdiction merely because that Court has itself decided an issue upon that point in its own favour.<sup>5</sup>

**5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction.** — See Section 38, Note 7, *ante*.

**O. 21 R. 8**

**R. 8.** [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent.

[1877, S. 226; 1859, S. 287.]

**Local Amendment****RANGOON**

For the words "of competent jurisdiction" substitute the words "whose pecuniary jurisdiction is not less than the amount of the decree."

**Synopsis****1. Scope of the Rule. | 2. "Competent jurisdiction."**

**1. Scope of the Rule.** — The District Court to which a decree is sent for execution under this rule has a right to entrust the execution of the decree to a Court subordinate to it.<sup>1</sup> An order of a District Court transferring a decree for execution,

[See ('33) AIR 1933 Cal 267 (268).]

[See however ('33) AIR 1933 Nag 211 (212, 218.) (Executing Court can refuse execution if decree is passed without jurisdiction—But want of jurisdiction must be patent or capable of being gathered without necessity of enquiry into facts.)]

**3.** ('35) AIR 1935 Lah 439 (439) : 17 Lah 32. (Affirming on Letter Patent Appeal A I R 1934 Lah 117).

**4.** ('34) AIR 1934 Lah 652 (657). (The change in the wording of the rule has this effect, viz., that the transferee Court cannot, *suo motu*, call for proof of jurisdiction of the Court which passed the decree. But the rule does not deal with the

power of the Court to take cognizance of objection as to want of jurisdiction when raised by the judgment-debtor.)

**5.** ('16) AIR 1916 Bom 307 (308) : 40 Bom 551. ('91) 15 Bom 216 (219).

('15) AIR 1915 Mad 486 (488) : 39 Mad 24 (FB). (Reversing 20 Ind Cas 704.)

('31) AIR 1931 All 689 (691) : 53 All 747. (S. 44 cannot override S. 18.)

('35) AIR 1935 Lah 551 (551).

**Order 21 Rule 8 — Note 1**

**1.** ('81) 8 Ind App 165 (171) (P C).

[See ('35) AIR 1933 Lah 839 (841). (But a Court subordinate to the District Court has no power to transfer execution to another Court.)]

signed by the sheristadar "by order" of the District Judge, is a valid endorsement complying with the provisions of this rule and is not vitiated by the absence of the signature of the Judge.<sup>2</sup>

**O. 21 R. 8**  
**Notes 1-2**

Where an Assistant Judge is invested with all the powers of a District Judge within any part of the district of such Judge, he is the "District Court" in such part for the purposes of this rule.<sup>3</sup>

**2. "Competent jurisdiction."** — There is a conflict of opinion as to the meaning of the expression "Court of competent jurisdiction." It was held by the Madras High Court in the undermentioned case<sup>1</sup> that the expression refers to *territorial* competence and therefore if the attached property is transferred from the jurisdiction of the transferee Court to some other Court, the sale by the transferee Court after the transfer of the property from its jurisdiction, is not valid even though the Court had jurisdiction over such property at the time of the transfer. But in a recent case<sup>2</sup> the same High Court has held that the expression means "competent to sell in execution."

**R. 9. [S. 227.]** Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

**O. 21 R. 9**

**Execution by High Court of decree transferred by other Court.**

[1877, S. 227.]

### *Synopsis*

1. **Scope.**
2. **Ordinary original civil jurisdiction, meaning of.**
3. **Limitation.**

**1. Scope.** — It has been held in a very early case of the Calcutta High Court<sup>1</sup> that the functions of the High Court, in respect of the execution of a decree of another Court, are limited to effecting execution and to the matters arising out of the proceedings in execution, and that the question whether or not the applicant had a right to obtain execution, must be judged by the Court in which the record was.

Where a decree is transferred under this rule to the High Court for execution, the High Court cannot make the decree payable in instalments.<sup>2</sup> The reason is that though the decree could be executed as if it was passed by itself, still the High Court is not the Court which passed the decree, which Court alone can act under O. 20 R. 11, *ante*.

**2. Ordinary original civil jurisdiction, meaning of.** — See Notes to Clause 12 of the Letters Patent of Calcutta, Bombay and Madras High Courts.

**3. Limitation.** — The period of limitation applicable to the execution of a decree transmitted by one Court to another for execution depends upon the character

2. ('96) 23 Cal 480 (482).

('10) 5 Ind Cas 155 (155) (Mad).

3. ('70) 7 Bom H C R A C 87 (40).

**Note 2**

1. ('18) AIR 1918 Mad 17 (17).

2. ('84) AIR 1984 Mad 578 (574, 575).

**Order 21 Rule 9 — Note 1**

1. ('71) 6 Beng L R App 66 (66).

2. ('84) AIR 1984 Rang 197 (198).

**\*O. 21 R. 9  
Note 3**

of the Court *which passed the decree* and not on the character of the Court *executing it*.<sup>1</sup> The *manner* of execution mentioned in this rule refers to the procedure under which the execution is to be had, and has no reference to the law of limitation; it simply applies the High Court machinery to the execution of the decree.<sup>2</sup> Thus, where a decree passed by the Calcutta Small Cause Court was transferred to the High Court at Calcutta for execution, it was held that the period of limitation applicable to the decree was Article 182 of the Limitation Act and that it was not governed by the law of limitation relating to decrees of the High Court.<sup>3</sup>

**APPLICATION FOR EXECUTION****\*O. 21 R. 10****R. 10.** [S. 230, Para. 1.] Where the holder of a decree

**Application for execution.**

desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

[1877, Ss. 230, 231; 1859, S. 207.]

**Local Amendments****LAHORE**

*Add the following proviso :*

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent, the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under Section 39."

**RANGOON**

*Add the following :*

"at the time of presenting the application for execution or at the time of admission thereof the holder of a decree may, if he wishes, deposit in Court the fees requisite for all necessary proceedings in the execution."

**Synopsis**

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Successive applications for execution.</li> <li>2. Who may apply for execution.</li> <li>3. What decrees may be executed.</li> <li>4. Court by which decree may be executed.<br/>See Section 38.</li> <li>5. "Court which passed the decree." See<br/>Section 37.</li> </ol> | <ol style="list-style-type: none"> <li>6. Court to which the decree is sent for execution.</li> <li>6a. Time of presentation of application for execution.</li> <li>7. Executing Court cannot go behind the decree. See Note 8 to Section 38.</li> <li>8. Application for execution.</li> <li>9. Dismissal of application for default.</li> </ol> |
|--|---|

**Other Topics (miscellaneous)**

Application by representatives of deceased decree-holder—Succession certificate, if necessary. See Note 2.

Maintenance decree—Execution of. See Note 3.

**Note 3**

1. ('90) 17 Cal 491 (497).
- ('11) 11 Ind Cas 635 (637) : 36 Mad 108.
- ('08) 31 Mad 24 (27).

('11) 11 Ind Cas 216 (216) (Cal). (So assumed.)

2. ('97) 24 Cal 473 (491).

3. ('90) 17 Cal 491 (496).

**1. Successive applications for execution.** — The Code does not bar a succession of applications for execution.<sup>1</sup> Thus, where an application for execution is withdrawn by the decree-holder without leave to apply again having been granted by the Court, a second application is not barred; Section 141 cannot be invoked so as to apply O. 23 R. 1, since that Section does not apply to execution proceedings.<sup>2</sup> Similarly, O. 2 R. 2 does not apply to proceedings in execution,<sup>3</sup> and when a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, there is nothing which prevents separate and successive applications for execution as regards each of them.<sup>4</sup>

A decree in a suit for money, for principal and interest, is a single money decree and it is not permissible to levy execution thereof piecemeal. The rule is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time and if enforcement is sought for a lesser sum, he must be taken to waive his right to levy execution for the balance.<sup>5</sup> According to the Judicial Commissioner's Court of Nagpur, where an application for execution of part of a decree is made, the judgment-debtor is bound to raise an objection at once and if he fails to do so, the piecemeal execution will not be invalid and a subsequent application is not barred inasmuch as O. 2 R. 2 does not apply to applications in execution.<sup>6</sup>

A subsequent application for execution in respect of reliefs *different* from those claimed in a prior application cannot be said to be one in continuation of the prior application.<sup>7</sup>

**2. Who may apply for execution.** — It is only the decree-holder whose name is on the record that is entitled to apply for execution of the decree.<sup>1</sup> A defendant in a partition suit in which a decree has been passed is in the position of a decree-holder, and will be entitled to apply for execution.<sup>2</sup> In the case of decrees in *representative suits*, a person not on the record, but who was represented in the suit by the decree-holder on record, can apply to be brought on the record and to execute the decree.<sup>3</sup> Similarly, the representatives of a deceased decree-holder can apply to be brought on the record and to execute the decree.<sup>4</sup>

Where an application was made by the guardian *ad litem* of a minor after the latter had attained majority, but the latter ratified the application subsequently, it was held that the ratification rendered the application valid from the date of the ratification.<sup>5</sup>

#### Order 21 Rule 10 — Note 1

1. ('11) 11 Ind Cas 885 (386) (Cal).
2. ('94) 17 All 106 (111, 112) : 22 Ind App 44 (P.C.). (Overruling 10 All 71.)
- (91) 18 Cal 685 (689).
3. ('38) AIR 1938 Bom 864 (365) : 57 Bom 468.
4. ('91) 18 Cal 515 (517).
- (97) 19 All 98 (100). (Possession and mesne profits.)
- (75) 7 N W P H C R 95 (97). (Do.)
- (88) 12 Bom 98 (100). (Do.)
- (09) 4 Ind Cas 408 (409) (Cal).
- [But see ('99) 26 Cal 888 (890). (Following 15 Bom 242.)
- (91) 15 Bom 242 (244). (Though not in accordance with law, yet it is a step-in-aid.)]
5. ('38) AIR 1938 Bom 864 (365, 366) : 57 Bom 468.
6. ('32) AIR 1932 Nag 89 (90) : 28 Nag L R 77.
7. ('38) AIR 1938 Lah 8 (4) : 15 Lah 208.

#### Note 2

1. ('17) AIR 1917 Oudh 182 (185). (Stranger not a party to the suit, cannot apply.)
- (75) 24 Suth W R 10 (11). (Do.)
- (91) 18 Cal 639 (641).
- (69) 11 Suth W R 271 (272).
- See also S. 2 sub-s. (8), note 2.
2. ('23) AIR 1923 Bom 28 (28) : 46 Bom 987.
3. ('23) AIR 1923 Mad 472 (473).
- [See also ('76) 1 All 510 (511). (Decree in favour of a firm in the name of agent—Another agent applying — Proceedings though irregular, not invalid.)
- (87) AIR 1937 Pat 607 (608). (Father of joint Hindu family obtaining decree in respect of debt due to joint family after partition — Sons are interested in decree and can apply for execution.)]
4. ('70) 14 Suth W R 162 (162).
5. ('31) AIR 1931 Lah 600 (601).

**O. 21 R. 10**  
**Notes 2-6**

Where a decree grants a relief to a person named in the decree, it has been held that such person so named can enforce the decree notwithstanding the fact that he is not party to the *suit*.<sup>6</sup>

As to the necessity for the production of succession certificate along with the application for execution where the decree-holder is dead, see the undermentioned cases.<sup>7</sup>

It has been held that an insolvent is not debarred from making an application for execution of a decree which he has obtained before his adjudication.<sup>8</sup>

*Fresh vakalatnama, if necessary for execution proceedings.* — Proceedings in execution are proceedings in continuation of the suit, and therefore a fresh authority is not required for a pleader to appear, act and plead on behalf of the decree-holder in execution proceedings, if he was authorized by a *vakalatnama* in the suit itself.<sup>9</sup> But an application for execution filed by a *vakil* who has no *vakalat* from the decree-holder at all is not one in accordance with law.<sup>10</sup>

Where an agent is authorized to apply for execution of a decree, he is also entitled to *appeal* against an order refusing to execute the decree.<sup>11</sup>

*Joint application for execution.* — Persons entitled to separate amounts under a decree may join in one application. Where, in such a case, one of them subsequently withdraws from the application, it may continue in the name of the other persons.<sup>12</sup>

**3. What decrees may be executed.** — See Section 38, Note 5 and Section 47, Note 33 and the undermentioned cases.<sup>1</sup>

**4. Court by which decree may be executed.** — See Section 38.

**5. "Court which passed the decree."** — See Section 37.

**6. Court to which the decree is sent for execution.** — Where a decree is transferred to another Court for execution under Section 39 and the records are not sent back to the transferor Court, an application made to the Court which passed the decree is not an application made to the *proper* Court within the meaning of Article 182,

6. ('32) AIR 1932 Bom 378 (379).

('32) AIR 1932 Mad 193 (194). (Decree-holder need not be a party to the decree.)

7. ('97) 18 All 84 (35). (Succession certificate necessary — But may be produced during pendency of proceedings—It is not a condition precedent.)

('02) 24 All 138 (142). (Do.)

('92) 19 Cal 482 (485). (Do.)

('94) 16 All 26 (28). (Application without certificate will save limitation.)

('11) 9 Ind Cas 800 (801) (All). (Do.)

('96) 20 Bom 76 (78). (Do.)

('98) 20 Cal 755 (757). (Do.)

('92) 16 Bom 849 (850). (Where claim is by survivorship, certificate is not necessary — But where claiming as heir certificate is necessary.)

('99) 22 Mad 380 (381). (Claim by survivorship — Certificate not necessary.)

('93) 20 Cal 103 (105). (Decree in favour of *mohunt*—Application by his successor — Certificate not necessary.)

('35) AIR 1935 Nag 1 (2) : 31 Nag L R 126. (Application according to O. 21 Rr. 11 to 14—

Absence of succession certificate does not make application as one not in accordance with law.)

8. ('39) AIR 1939 Mad 196 (198).

9. ('12) 13 Ind Cas 365 (369) (Cal).

('25) AIR 1925 Pat 692 (693).

('25) AIR 1925 Pat 369 (372) : 4 Pat 378.

('85) 7 All 564 (565). (An application by pleader after client's death is invalid.)

10. ('35) AIR 1935 Mad 786 (789).

[See also ('37) AIR 1937 Mad 760 (762).]

11. ('86) AIR 1936 Lah 503 (508). (Agent competent to execute decree — Agent can remove objections to execution in both appellate and execution Courts.)

12. ('35) AIR 1935 All 402 (403, 404). (Decree in favour of number of persons awarding separate costs.)

**Note 3**

1. ('70) 2 N W P H C R 303 (304). (Declaratory decrees cannot be executed.)

('02) 26 Bom 707 (710). (But future maintenance awarded by decree must be enforced in execution.)

('92) 19 Cal 189 (146). (Do.)

clause 5 of the Limitation Act.<sup>1</sup> See also Section 42 Note 3. A transfer made in an irregular manner is not null and void and if the irregularity is not objected to, an application made to the transferee Court is in order.<sup>2</sup> Where a decree is transferred to another Court for execution, the mere fact that the transfer is made on the ground that the judgment-debtor has immovable property within the jurisdiction of such Court does not deprive such Court of the power to entertain an application for the arrest of the judgment-debtor.<sup>3</sup>

Where an order has been made by the Court which passed a decree for transfer to another Court, the decree-holder is entitled to apply for execution to the transferee Court, even before the copy of the decree has been received by the latter from the former Court.<sup>4</sup> The reason is that the order of transfer is a judicial order and therefore takes effect from the date on which it was passed.

**6a. Time of presentation of application for execution.** — It is in the discretion of the Judge or officer appointed in that behalf to accept an application for execution beyond office hours.<sup>1</sup>

**7. Executing Court cannot go behind the decree.** — See Note 8 to Section 38.

**8. Application for execution.** — It has been already seen in Note 5 to Section 38, *ante*, that where a decree is reversed, modified or affirmed in appeal, the only decree capable of execution is the appellate decree. Therefore, if a decree of a lower Court is confirmed on appeal while execution proceedings are pending, a fresh application for execution is necessary.<sup>1</sup>

When a decree follows an attachment before judgment, O. 38 R. 11 does not exempt the plaintiff from making an application as required by this rule.<sup>2</sup>

An application under Section 39 for transfer of a decree is not an application for execution;<sup>3</sup> but is only an application to take some step-in-aid of execution.<sup>4</sup> It is necessary, however, even for this purpose that the application for transfer should have been made to the Court *having jurisdiction in the matter*.<sup>5</sup>

(‘25) AIR 1925 Mad 80 (84). (Satisfied decree cannot be executed.)

(‘94) 19 Bom 546 (549). (Do.)

#### Note 6

1. (‘16) AIR 1916 P C 16 (18) : 39 Mad 640 : 43 Ind App 238 (PC). (Affirming AIR 1914 Mad 435 on appeal.)

(‘34) AIR 1934 Lah 728 (730) : 16 Lah 80. (The original Court has no power to execute until the decree is re-transferred.)

(‘31) AIR 1931 Lah 14 (14).

(‘25) AIR 1925 Lah 233 (235).

(‘23) AIR 1923 Pat 384 (384) : 2 Pat 247.

(‘22) AIR 1922 Bom 359 (360) : 47 Bom 56.

[See also (‘86) 1886 All W N 81 (81).]

2. (‘87) 1887 Bom P J 328 (328) Reprint, Page 479 (479).

3. (‘88) AIR 1938 Mad 27 (28, 29).

4. (‘38) AIR 1938 Mad 627 (627, 628) : 56 Mad 692. (Following 35 Mad 588 and dissenting from AIR 1928 Mad 496.)

#### Note 6a

1. (‘38) AIR 1938 Nag 46 (47) : ILR (1938) Nag 451.

#### Note 8

1. (‘80) AIR 1930 Bom 225 (227). (A prayer for

continuation of application is a defect curable by Section 99.)

2. (‘10) 7 Ind Cas 856 (857) : 34 Mad 25.

(‘88) 12 Bom 400 (406).

(‘06) 33 Cal 639 (649).

(‘29) AIR 1929 Nag 148 (150) : 25 Nag L R 94.

3. (‘26) AIR 1926 All 473 (474).

(‘32) AIR 1932 Pat 309 (311) : 11 Pat 785. (Even though in the form of an execution application.)

(‘22) AIR 1922 Cal 3 (4).

(‘35) AIR 1935 Lah 508 (510) : 17 Lah 13. (Reversing on Letters Patent Appeal, AIR 1930 Lah 18 — Application for execution subsequently made to the transferee Court is not one in continuation of the prior application for transfer.)

4. (‘26) AIR 1926 All 473 (474).

(‘33) AIR 1933 Oudh 131 (131, 132).

(‘33) AIR 1933 Sind 78 (80) : 27 Sind L R 109.

(‘32) AIR 1932 Pat 309 (310) : 11 Pat 785. (But an application for transfer to a Court which has no jurisdiction to execute is not a step-in-aid.)

(‘37) AIR 1937 Bom 365 (368) : I L R (1937) Bom 691.

5. (‘32) AIR 1932 Pat 309 (311) : 11 Pat 785.

**O. 21 R. 10**  
**Notes 8-9**

Where a decree-holder makes an application praying for a relief *not granted by the decree*, it is not an application which will save limitation under Article 182 of the Limitation Act.<sup>6</sup> But an application which is merely incorrect in some respects would be one furthering execution.<sup>7</sup>

Where a decree is transferred for execution to another Court, it is the application for execution that initiates the proceedings in execution. The receipt of the decree on transfer is a mere ministerial act.<sup>8</sup>

**9. Dismissal of application for default.**—A Court has inherent power to dismiss an application for execution when the applicant fails, through his own laches, to put the Court in a position to proceed with the application.<sup>1</sup> But such dismissal does not bar a fresh application for execution.<sup>2</sup>

As to whether a Court has power to restore to the file an application dismissed for default, see Notes to Order 9 Rule 9.

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**Local Amendment****RANGOON**

*Add* the following as Rule 10A.

**O. 21 R. 10A**  
**(Rangoon)**

"10A. If no application is made by the decree-holder within six months of the date of the receipt of the papers the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by Section 41."

**O. 21 R. 11**

**R. 11.** [Ss. 256, 235.] (1) Where a decree is for the

**Oral application.**

payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution<sup>3</sup> thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be

**Written application.**

in writing, signed and verified<sup>4</sup> by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

(a) the number of the suit;

6. ('89) 18 Bom 237 (239, 240).

('01) 1901 Pun Re No. 98, p. 330.

7. ('88) 12 Bom 427 (430).

('88) 6 Mad 250 (251).

8. ('88) AIR 1938 Rang 385 (386) : 1938 Rang L R 355. (Decree of British Indian Court transferred for execution to Court in Burma—Separation of Burma from British India taking place in the interval between the receipt of the decree by the Burman Court and the application for execution to that Court by the decree-holder—Decree must be treated as a foreign decree in the

Burman Court for purposes of execution and Burman Court could not execute it.)

**Note 9**

1. ('93) 15 All 84 (95) (F B).

('88) AIR 1938 Mad 418 (422) : 56 Mad 490 (F B).

2. ('98) 15 All 84 (101) (F B).

('95) 18 Mad 131 (133).

[But see ('82) 1882 All W N 97 (97). (Under Code of 1877 when decree-holder did not use due diligence, subsequent application could not be granted. Not law under this Code.)

('79) 2 All 884 (386). (Do.)]



- (b) the names of the parties ;
- (c) the date of the decree;<sup>6</sup>
- (d) whether any appeal has been preferred from the decree;<sup>7</sup>
- (e) whether any, and (if any) what, payment or other adjustment<sup>8</sup> of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;<sup>9</sup>
- (g) the amount with interest (if any) due upon the decree,<sup>10</sup> or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution<sup>11</sup> of the decree is sought; and
- (j) the mode in which the assistance of the Court is required,<sup>12</sup> whether —
  - (i) by the delivery of any property specifically decreed;
  - (ii) by the attachment and sale, or by the sale without attachment, of any property;
  - (iii) by the arrest and detention in prison of any person;
  - (iv) by the appointment of a receiver;
  - (v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.<sup>13</sup>

[1877, Ss. 235, 256; 1861, S. 13; 1859, S. 212. See Ss. 38, and 51 and 135 and O. 40 R. 1.]

#### Local Amendments

##### ALLAHABAD

(1). For clause (f) of sub-rule (2), substitute the following :

"(f) The date of the last application, if any," and,

(2). Add the following proviso to sub-rule (2) :

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application."

**O. 21 R. 11 MADRAS**

(1). In sub-rule (2) *between* clauses (f) and (g), *insert* the following new clause:  
 “(ff) whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer.”

(2). *Add* the following to sub-rule (2) (j) :

“In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of Rule 53 of this Order, there shall not be included any other relief mentioned in this clause.”

(3). *Add* the following proviso at the end of sub-rule (2) :

“Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

**NAGPUR**

*After* sub-clause (v) of clause (j) of sub-rule (2), *insert* the following proviso :

“Provided that, when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

**ODDH**

*For* clause (f) of sub-rule (2), *substitute* the following :

“(f) the date of the last application, if any.”

**PATNA**

(1). *Add* the following as sub-rule (1A) :

“(1A) Where an order has been made under Section 39 for the transfer of a decree for the payment of money for execution to a Court, within the local limits of the jurisdiction of which the judgment-debtor resides, such Court may, on the production by the decree-holder of a certified copy of the decree and an affidavit of non-satisfaction, forthwith order immediate execution of the decree by the arrest of the judgment-debtor.”

(2). *Substitute* the words and figures “sub-rules (1) and (1A)” *for* the word and figure “sub-rule (1)” in sub-rule (2).

**SIND**

*Add* the following as clause (ff) to sub-rule (2) :

“(ff) Whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer.”

*Synopsis*

1. Legislative changes.
2. Scope of the Rule.
- 2a. Applicability of the Rule to execution of decrees under other Acts.
- 2b. “Decree for payment of money.”
3. Immediate execution — Sub-rule (1) — Privilege from arrest.
4. Verification of application.
5. Who may apply for execution. See Notes to O. 21 R. 10.
6. Date of the decree to be given—Clause (c).
7. Whether any appeal has been preferred from the decree—Clause (d).

8. Payment or other adjustment—Clause (e).
9. Previous applications and their results.
10. Amount due upon the decree—Clause (g).
- 10a. Amount of costs awarded — Clause (h).
11. Against whom execution is to issue — Clause (i).
12. Mode in which the assistance of the Court is required — Clause (j).
13. Certified copy of decree to be filed — Sub-rule (3).
14. Concurrent applications for execution. See Note 10 to Section 38.
15. Amendment of application. See Notes to Rule 17.

*Other Topics (miscellaneous)*

Application "in accordance with law" or not. See Notes 2, 8, 9, 11 and 13.	Decree burnt or destroyed. See Note 13.
Breach of sub-rule (2) and defects in applications. See Note 2.	Limitation. See Note 9.
Date of decree to be taken as that of judgment. See Note 6.	Mistake in date of decree. See Note 6.
Death of judgment-debtor. See Note 11.	Omission to specify costs — Clause (h). See Note 10.
	Wrong name of the judgment-debtor. See Note 2.
	Wrong number of the suit—Clause (a). See Note 2.

**O. 21 R. 11  
Notes 1-2**

**1. Legislative changes.** — Sub-rule (1) corresponds to Section 256 of the old Code and sub-rule (2) to Section 235. Sub-rule (3) is new and empowers the Court executing the decree to call upon the decree-holder to produce a certified copy of the decree.<sup>1</sup>

The following are the points of difference between sub-rule (1) and Section 256 —

- (1) Section 256 provided for immediate execution only where the amount decreed did not exceed the sum of one thousand rupees. This rule fixes no such limit.
- (2) Under Section 256 the Court could order immediate execution only by the *issue of a warrant*. Under this rule the order may be made even prior to the preparation of a warrant.
- (3) Under this rule execution cannot issue against the *moveable property* of the judgment-debtor as was possible under the old Code.
- (4) Under the old Code execution could be ordered if the judgment-debtor was "within the local limits of the jurisdiction of the Court." Under this rule it can be ordered only if he is within the *precincts of the Court*.

The following are the important alterations in sub-rule (2) —

- (1) The words "together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed" in clause (g) are new.
- (2) The words "and sale, or by the sale without attachment" in clause (j), sub-clause (ii) are new.
- (3) Sub-clause (iv), clause (j) is new.

**2. Scope of the Rule.** — An application for execution should be in *writing* except in the case dealt with under sub-rule (1), when it may be *oral*. Sub-rule (2) says what particulars a written application for execution shall contain. But every omission to comply with the said requirements is not necessarily such a defect as will vitiate the execution proceedings.<sup>1</sup> Informalities of an immaterial character will not vitiate the proceedings.<sup>2</sup> Thus, the omission to mention the amount of costs<sup>3</sup> or giving a wrong

**Order 21 Rule 11 — Note 1**

1. ('32) AIR 1932 All 85 (88) : 53 All 391.

**Note 2**

1. ('26) AIR 1926 Cal 1146 (1147, 1148).  
 ('33) AIR 1933 Rang 87 (88, 89). (Omission to mention the form of notice to be served on the judgment-debtor is not a defect which would make the application not in accordance with law.)  
 ('24) AIR 1924 Cal 398 (398).  
 ('28) AIR 1928 Mad 129 (131). (Per Devadoss, J. — Jackson, J., Contra — Decision of Devadoss, J. upheld in AIR 1929 Mad 703.)  
 ('83) 6 Mad 250 (251).  
 ('14) AIR 1914 Mad 632 (633).  
 ('11) 1 Ind Cas 240 (242) : 5 Nag L R 8.  
 ('29) AIR 1929 Mad 703 (704) : 52 Mad 760 (F B).  
 2. ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156.

('34) AIR 1934 Lah 58 (59). (Mortgage decree — Property described in plaint and decree — Application for execution need not be in form prescribed under R. 11 — Court should sell the property after getting necessary particulars from decree-holder.)

('33) AIR 1933 Sind 78 (80, 81) : 27 Sind L R 109. (In accordance with law means fulfilling requirements of law — Minor errors, non-availability of relief or intention of applicant merely to extend limitation are immaterial.)

[See also ('36) AIR 1936 All 17 (18). (Minor defects in an application for execution, for instance, the omission to mention the number of the suit or the date of the decree etc., do not by themselves render the application defective or one not in accordance with law.)]

3. ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156.

**O. 21 R. 11**  
**Notes 2-2a**

suit number,<sup>4</sup> or making a mistake in the name of the judgment-debtor,<sup>5</sup> or omitting to state the names of all the persons interested in the decree,<sup>6</sup> or wrongly calculating the pleader's fee,<sup>7</sup> or the failure to draw up the petition in a tabular form,<sup>8</sup> is only an irregularity of an immaterial character which will not vitiate the proceeding. Where, however, the omissions relate to *material* particulars, the application cannot be considered to be one in accordance with law and cannot save limitation.<sup>9</sup> Whether an omission is material or not will depend upon the particular facts of each case.<sup>10</sup>

Where an application for execution complies with the requirements of O. 21, Rules 11 to 14, it is in accordance with law. Although in the absence of a succession certificate the decree-holder may not be entitled to realize the fruits of his decree, yet, the want of a succession certificate will not make the application for execution itself one not in accordance with law.<sup>11</sup> See also Note 2 to Order 21 Rule 10.

Where an application for execution is made, which is not in proper form or is otherwise defective, it is the duty of the Court to dispose of the application either by giving the decree-holder an opportunity to amend his application or by rejecting it.<sup>12</sup>

This rule prescribes the form for an application for *execution*. There is no particular form in which an application for the *transfer* of a decree for execution to another Court should be made. Such application need not contain the particulars mentioned in this rule. Where the application gives sufficient particulars of the decree sought to be transferred to indicate with precision the decree which the Court is to transfer, the application is one in accordance with law.<sup>13</sup>

**2a. Applicability of the Rule to execution of decrees under other Acts.—**

Under the Oudh Rent Act, XXII of 1886 (Section 146), the Orissa Tenancy Act, II of 1913 [Section 198 (j)] and the Madras Estates Land Act, I of 1908 [Section 192 (g)], the Court may order immediate execution, on the oral application of the decree-holder, as enacted in sub-rule (1) of this rule.

In applications for execution of decrees relating to immovable property under the Chota Nagpur Tenancy Act, VI of 1908, Section 210 (3) (b), as amended by Act VI of 1920, [Section 50 (1)], the application shall be accompanied by a certified copy of the decree, as provided in sub-rule (3) of this rule.

4. ('98) 25 Cal 594 (597, 601) (F B).  
( '84) 10 Cal 541 (544).

5. ('30) AIR 1930 Mad 172 (173).

6. ('32) 139 Ind Cas 151 (152) (Lah).  
( '31) AIR 1931 Lah 600 (601).

7. ('18) AIR 1918 Mad 1090 (1092) : 40 Mad 949.

8. ('21) AIR 1921 Low Bur 37 (39) : 11 Low Bur  
Rul 163.

9. (31) AIR 1931 All 722 (723). (Incorrect entries  
in columns 2, 6 and 8.)

( '26) AIR 1926 Pat 533 (534). (Flagrantly defective  
application.)

( '74) 21 Suth W R 309 (310).

( '68) 10 Suth W R 428 (428).

10. ('26) AIR 1926 Cal 1146 (1148).

( '24) AIR 1924 Cal 398 (398).

( '84) AIR 1934 Bom 307 (310) : 59 Bom 1. (In  
accordance with law means that application  
though defective in some particular is one upon  
which execution can lawfully be ordered.)

( '84) AIR 1934 Cal 465 (466). (Application for  
execution not mentioning moneys realised by  
attachment of decrees obtained by judgment-  
debtor—Omission does not vitiate application.)

11. ('35) AIR 1935 Nag 1 (2) : 31 Nag L R 126.

12. ('34) AIR 1934 All 481 (489) : 56 All 791 (F B).  
(Defective application — If no order is passed by  
Court it should be deemed to be pending.)

( '20) AIR 1920 Lah 122 (122).

[See ('37) AIR 1937 Sind 108 (110) : 31 Sind L  
R 14. (Application presented by son of decree-  
holder on latter's behalf—No mention in appli-  
cation that son was acquainted with facts of case  
—Court returning application for amendment as  
not being made by proper person—Application  
held rightly returned as not being proper under  
O. 21 R. 11 (2)—Application cannot be said to  
be pending in Court when it is not filed after  
amendment.)]

13. ('37) AIR 1937 All 397 (399).

As to what particulars are necessary, when an application is made under sub-rule (2) of this rule, to execute a decree against the immovable properties of the judgment-debtor, under the Bengal Tenancy Act, VIII of 1885, and the Orissa Tenancy Act, II of 1913, see Sections 162 and 216 of those Acts respectively.

See also the undermentioned case.<sup>1</sup>

**2b. "Decree for payment of money."** — A decree, to come within the description of a decree for the payment of money, need not state the exact amount due. A decree under which the amount due has to be ascertained subsequently may be a decree for the payment of money.<sup>1</sup>

See also Note 6 to Section 73 *ante*.

**3. Immediate execution — Sub-rule (1) — Privilege from arrest.** — S. 135 *ante* deals with exemptions from arrest. But sub-section (3) thereof provides that "nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for *immediate execution* . . ."<sup>1</sup>

**4. Verification of application.** — The application for execution should be signed and verified by (a) the applicant, or (b) some other person acquainted with the facts of the case. Where there are *several* applicants it is not necessary that *all* of them should verify the application, even though some of them are not acquainted with the facts of the case.<sup>1</sup> Where an application for execution is verified by a person other than the decree-holder, all that is necessary is that the Court should be satisfied that he is acquainted with the facts of the case.<sup>2</sup>

Although this rule permits the signing and verification of an application for execution by some person other than the decree-holder, the application itself must be that of the decree-holder or his recognized agent or pleader.<sup>3</sup>

An application not signed and verified as required by this rule is a defective application which ought to be rejected.<sup>4</sup> Where the period of twelve years from the date

#### Note 2a

1. ('39) AIR 1939 Bom 867 (369). (Consent order in proceedings under the Guardians and Wards Act, for payment of schooling and maintenance expenses of minors by their father was held not to be a decree for the payment of money in favour of the wife and could not be executed as such.)

#### Note 2b

1. (39) AIR 1939 Bom 867 (368). (In the circumstances of this case, however, it was held that the decree was not one for payment of money as the amount under the terms of the decree might be paid to certain third parties also.—Case relating to consent order in proceedings under the Guardians and Wards Act.)

#### Note 3

1. ('68) 9 Suth WR 549 (551). (Case under Small Cause Courts Act, S. 19 of Act XI of 1865.)

#### Note 4

1. ('24) AIR 1924 Pat 23 (25) : 2 Pat 809.
2. ('24) AIR 1924 Cal 811 (811).
- ('29) AIR 1929 Bom 196 (196). (Verification by pleader.)
- ('20) AIR 1920 Lah 122 (122). (Verification by decree-holder's son is sufficient.)
- ('25) AIR 1925 Pat 692 (698). (Do.)
- ('04) 26 All 154 (155). (Verification by attorney.)

('30) AIR 1930 Lah 603 (604). (Application by next friend of decree-holder after his attaining majority— If *bona fide*, will not be dismissed.)

('36) AIR 1936 All 17 (18). (Application signed and verified by person purporting to be mukhtar-i-am of decree-holder — Mukhtarnama not produced — Opportunity to satisfy Court that application was signed and verified in accordance with law not availed of.—Rejection is proper.)

('34) AIR 1934 Nag 224 (225). (Signing and verification by pleader who represented the client in the case out of which the execution proceedings arise is sufficient.)

[See ('37) AIR 1937 Sind 108 (110) : 31 Sind L R 14. (Application presented by son on father's behalf — Son not acquainted with facts — Return of application for amendment held proper.)]

[But see ('05) 28 Mad 396 (398). (Application by next friend after majority held to be not in accordance with law.)]

3. ('37) AIR 1937 Mad 760 (761).

4. [See ('36) AIR 1936 All 17 (18). (Application signed and verified on behalf of decree-holder by person purporting to be mukhtar-i-am of decree-holder — Mukhtarnama not filed — Court not satisfied that he was authorized to sign—Rejection of application is proper.)]

**O. 21 R. 11  
Notes 4-8**

of a decree expired when the Court was closed and the decree-holder presented an unverified petition for execution on the re-opening day, it was held by the High Court of Madras<sup>6</sup> that the petition ought to be rejected and not to be allowed to be amended.

**5. Who may apply for execution.** — See Notes to Order 21 Rule 10.

**6. Date of the decree to be given—Clause (c).** — The date of the decree is the date on which the judgment was pronounced.<sup>1</sup> See also Notes to O. 20 R. 7. An error in the date of the decree or the omission to give it in an application for execution is not a material irregularity and will not affect the validity of the application.<sup>2</sup> It can be amended even after the period of limitation for execution has expired and the amendment so made will relate back to the date of the application.<sup>3</sup>

Where a decree was, by mistake, dated 16th February 1929 instead of 11th February and the decree-holder was misled thereby and applied for execution on the 15th February 1932, it was held that the decree ought to be regarded as having been passed on the 16th February 1929 on the principle *actus curie neminem gravabit* — an act of the Court shall prejudice no man.<sup>4</sup>

See also the undermentioned case.<sup>5</sup>

**7. Whether any appeal has been preferred from the decree—Clause (d).** — It has been already mentioned in Note 5 to Section 38 that where an appeal is preferred against a decree and the decree is modified, reversed, or confirmed, it is the decree of the Appellate Court that is capable of execution. This clause requires that the application should state any modifications or reversals, etc., which the decree of the Appellate Court may have introduced in the decree of the lower Court.<sup>1</sup>

An omission to mention the particulars required by this clause does not render the application one not "in accordance with law."<sup>2</sup>

**8. Payment or other adjustment—Clause (e).** — The applicant for execution is bound to mention in the application any payment or adjustment made between the parties after decree.<sup>1</sup> Where a portion of the decretal amount has been deposited in Court with notice to the decree-holder, the latter must mention such fact in his application and can execute the decree only for the balance.<sup>2</sup> The non-mention of an *uncertified* payment out of Court in an application for execution does not, according to the High Court of Madras,<sup>3</sup> render it an application not "in accordance with law" within the meaning of Article 182 of the Limitation Act, 1908. The Judicial Commissioner's Court of Nagpur<sup>4</sup> has held that where the decree-holder deliberately omits to mention a certified adjustment, the application is not one "in accordance with law."

**5.** ('03) 26 Mad 101 (103).

**Note 6**

1. ('98) 25 Cal 109 (110, 111).
- ('09) 8 Ind Cas 391 (392) (Cal).
- ('97) 1 Cal W N 93 (94).
2. ('98) 20 All 478 (480).
- ('98) 1893 All W N 112 (112).
- ('75) 1 All 212 (215) (F B).
- ('31) AIR 1981 Sind 160 (160) : 25 Sind L R 528.
- ('36) AIR 1936 All 17 (18).
3. ('98) 1893 All W N 112 (112).
- ('98) 20 All 478 (480).
4. ('33) AIR 1933 Cal 239 (240).
5. ('35) AIR 1935 Mad 118 (118). (Decree-holder applying for execution before date mentioned in decree — Judgment-debtor filing counter only subsequent to such date — Court has discretion

to condono such irregularity if no prejudice is caused to opposite side.)

**Note 7**

1. ('88) 10 All 389 (392) : (1888) All W N 51 (52).
2. ('33) AIR 1933 Mad 872 (874).

**Note 8**

1. ('78) 2 Mad 216 (218).
- ('86) 10 Bom 288 (298). (Intentional omission to make such statement amounts to an offence under Sec. 193, Penal Code.)
- ('21) AIR 1921 Pat 185 (186) : 6 Pat L Jour 337.
- ('26) AIR 1926 Nag 164 (166).
2. ('33) AIR 1933 Pat 89 (89, 90) : 11 Pat 796.
3. ('19) AIR 1919 Mad 256 (256).
- [See also ('34) AIR 1934 Cal 465 (466). (AIR 1919 Mad 256, Followed.)]
4. ('24) AIR 1924 Nag 185 (187).

**9. Previous applications and their results.** — An omission to specify all the previous applications with their dates and their results is not a material defect such as would vitiate the application and render it one not "in accordance with law" within Article 182 of the Limitation Act.<sup>1</sup>

**O. 21 R. 11**  
**Notes 9-11**

**10. Amount due upon the decree — Clause (g).** — A Court will be justified in declining to act on an execution petition when the decree-holder does not state the amount due upon the decree.<sup>1</sup> Where a decree awards interest and the application for execution specifies the interest from the date of the decree to the date of the application, execution may be ordered for *future* interest also up to the date of sale, even though it is not specifically included in the application.<sup>2</sup>

See also the undermentioned cases.<sup>3</sup>

**10a. Amount of costs awarded — Clause (h).** — The omission to mention the particulars mentioned in this clause is not a material omission and will not vitiate the application for execution.<sup>1</sup>

**11. Against whom execution is to issue — Clause (i).** — An application for execution must state the name of the person against whom execution is sought.<sup>1</sup> Where an application is made against a dead person, it cannot be acted upon, but it will be a step-in-aid of execution within the meaning of Article 182 of the Limitation Act, if it has been made *bona fide* in ignorance of the death.<sup>2</sup> Similarly, where in an application for execution the guardian *ad litem* of a minor defendant is described by mistake as the judgment-debtor, the application will give a fresh starting point for limitation.<sup>3</sup> But where a minor judgment-debtor is not represented at all by a guardian, the application is not one in accordance with law and is of no effect.<sup>4</sup> A decree for

#### Note 9

1. ('26) AIR 1926 Cal 1146 (1148).
- ('24) AIR 1924 Cal 398 (398).
- ('01) 23 All 162 (163).
- ('91) 1891 All W N 154 (155).
- ('28) AIR 1928 Mad 440 (442, 444).
- ('98) 16 Mad 142 (143).
- ('92) 1892 All W N 114 (115).

As to the period of limitation for an application for execution, see Articles 182 and 183 of the Limitation Act.

[But see ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156. (Would be not in accordance with law where it is necessary to determine whether application is barred or not.)]

#### Note 10

1. ('21) AIR 1921 Nag 90 (91).
- ('22) 65 Ind Cas 120 (120) (Pat). (Such an application is not a step-in-aid.)
- ('90) 1890 All W N 93 (93). (Decree-holder deliberately omitted to correct error in calculation of interest — Petition struck off for non-prosecution is not an application in accordance with law.)
- [See ('89) AIR 1939 Rang 345 (346). (Particulars of interest etc., due are not necessary — They may be furnished later on when required.)]
- [See also ('07) 31 Bom 244 (249).]
- [But see ('88) AIR 1938 Mad 872 (874).]
2. ('82) AIR 1932 Cal 555 (557).
3. ('85) AIR 1935 Pat 400 (401). (It is not incumbent upon a decree-holder in an application for

execution to describe the nature of the tenure or to do so necessarily according to the Record of Rights.)

- ('32) AIR 1932 Cal 858 (863) : 59 Cal 1450. (The decretal amount due from the principal debtors sought to be realised from the surety and the costs of an application against the surety himself may both be included in one tabular statement in the execution against the surety.)

#### Note 10a

1. ('28) AIR 1928 Mad 440 (441).
- ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156.

#### Note 11

1. ('72) 18 Suth W R 55 (56).
2. ('94) 17 Mad 76 (77).
- ('08) 35 Cal 1047 (1049).
- ('97) 19 All 337 (339). (Such application made with knowledge of death will not save limitation.)
- [But see ('34) AIR 1934 All 463 (464) : 56 All 463.]
- For execution against legal representative of a deceased judgment-debtor, see S. 50, Notes 12, 13 and 14.

Also see S. 52 Notes 4 to 6 and 8 and the following case:

- ('92) 1892 All W N 241 (242). (Application against wrong legal representative — Step-in-aid of execution.)
3. ('18) AIR 1918 All 289 (289).
- ('88) 12 Bom 427 (430).
4. ('11) 12 Ind Cas 628 (629) (All).

**O. 21 R. 11** costs passed against a minor represented by his father as guardian (or next friend)  
**Notes 11-13** cannot be executed against the *father*.<sup>5</sup>

**12. Mode in which the assistance of the Court is required — Clause (j). —**

An execution application which does not specify the manner in which the assistance of the Court is required is not an application in accordance with law.<sup>1</sup> So also is an application asking for a relief which the Court cannot grant inasmuch as the Court is asked to do something which it is not competent to do.<sup>2</sup>

The words "otherwise, as the nature of the relief granted may require" in clause (j) show that the modes of execution mentioned above are not *exhaustive*.<sup>3</sup> But where the decree-holder prays for a particular mode of execution, he cannot ask the Court to give a different mode of execution upon that application.<sup>4</sup>

This rule should be read with Section 51 *ante* and O. 40 R. 1, *infra*; and an order for the appointment of a receiver by way of execution of a decree must be deemed to be made under O. 40 R. 1 and must satisfy the requirements thereof.<sup>5</sup>

Where the property sought to be attached is inalienable under the law, the Court has no power to attach it; the reason is that attachment will be futile in such a case.<sup>6</sup>

**13. Certified copy of decree to be filed — Sub-rule (3). —**

It is not imperative that an application for execution should, in all cases, be accompanied by a copy of the decree.<sup>1</sup> The Court can order the execution to proceed without a copy of the decree

('18) AIR 1918 Pat 69 (69): 4 Pat L Jour 35.  
 (But where a guardian is proposed though without an application, it is a step-in-aid.)  
 [See *however* ('86) AIR 1936 Nag 77 (78).  
 (Decree against minor represented by guardian — Death of guardian subsequently—Execution taken out in ignorance of such death — Held that the application was a step-in aid of execution and could save limitation.)]

5. ('35) AIR 1935 All 359 (360).

**Note 12**

1. ('95) 19 Bom 34 (35).  
 ('11) 11 Ind Cas 696 (696) (Cal). (Unless the defect is remedied the application must be dismissed.)  
 ('68) 9 Suth W R 390 (391).  
 ('75) 7 N W P H C R 79 (79).  
 ('29) AIR 1929 Nag 148 (150): 25 Nag L R 94.  
 ('32) AIR 1932 Lah 534 (534): 14 Lah 6. (It was held on the facts that the mode of execution was sufficiently described, and that therefore it was a step-in-aid of execution.)  
 [See also ('91) 18 Cal 462 (465). (But where it refers to previous application, in which mode of execution is mentioned, it is in accordance with law.)]  
 [But see ('88) 1888 Pun Re No. 28. (Such an application received by Court without objection is in accordance with law.)]

2. ('05) 27 All 619 (621).

('90) 12 All 64 (65).

('82) 4 All 34 (35).

('18) AIR 1918 Bom 286 (240): 42 Bom 420.

('10) 5 Ind Cas 601 (602): 34 Bom 189.

('89) 18 Bom 287 (289).

('09) 2 Ind Cas 941 (942) (Cal).

('82) 8 Cal 174 (177).

('10) 5 Ind Cas 480 (482) (Cal).

('05) 1 Nag L R 61 (63, 64).

('31) AIR 1931 Sind 160 (161): 25 Sind L R 528.  
 (May be in accordance with law if there is a *bona fide* belief about competency.)

('14) AIR 1914 Mad 663 (664). (Do. — In such a case the application can be amended.)

('12) 17 Ind Cas 210 (212): 87 Bom 42.

[But see ('05) 26 Bom 283 (287).]

3. ('13) 18 Ind Cas 691 (695) (Mad). (Case under old Code.)

('20) AIR 1920 Lah 117 (118). (Temporary alienation.)

[See also ('89) AIR 1939 Oudh 116 (118): 14 Luck 538. (It is proper for the Court to order execution of a decree for the payment of money by means of appointment of a receiver when it is just and convenient from the point of view, both of the decree-holder as well as judgment-debtor.)]

4. ('99) 1899 Pun Re No. 21, p. 121.

('11) 9 Ind Cas 240 (241) (Oudh).

[But see ('06) 33 Cal 806 (808).]

5. ('32) AIR 1932 Cal 189 (192): 59 Cal 205.

[See also ('38) AIR 1938 Nag 266 (267). (Jahagir unattachable—Still receiver can be appointed on suitable allowance to judgment-debtor.)]

6. ('35) AIR 1935 Nag 138 (135): 31 Nag L R 289.  
 (Case under S. 16 of the C. P. Land Alienation Act)

**Note 13**

1. ('07) 81 Bom 162 (164).

('30) AIR 1930 Cal 804 (805, 806): 57 Cal 996.  
 (Especially when it is the Court which passed the decree or when the decree is voluminous.)

('71) 16 Suth W R 25 (25).

('69) 11 Suth W R 28 (29).



being filed.<sup>3</sup> An application not accompanied by a copy of the decree cannot be said to be one not in accordance with law for the purposes of limitation.<sup>3</sup> It will be in accordance with law even if it is dismissed for non-compliance with an order of the Court requiring a copy of the decree to be produced.<sup>4</sup>

**O. 21 R. 11**  
**Notes 13-15**

**14. Concurrent applications for execution.** — See Note 10 to Section 38.

**15. Amendment of application.** — See Notes to Rule 17 *infra*.

**Application for attachment of moveable property not in judgment-debtor's possession.**

**R. 12.** [S. 236.] Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

**O. 21 R. 12**

[1877, S. 236; 1859, S. 214. See Ss. 2 (13) and 60.]

### Synopsis

#### 1. Scope of the Rule. | 2. Failure to annex inventory — Effect of.

**1. Scope of the Rule.**—This rule applies to moveables in the possession of third parties. When a third party has some moveables belonging to himself and others belonging to the judgment-debtor, an inventory is obviously necessary before an attachment can be made.<sup>1</sup> But, where a decree is passed under Section 52 of the Code against the legal representatives of a deceased debtor and the moveable property attached is in their possession, the rule has no application.<sup>2</sup> The reason is that the legal representatives themselves are the judgment-debtors and therefore the property sought to be attached cannot be said to be property belonging to, but not in the possession of, the judgment-debtor. No inventory is necessary where the property sought to be attached is in the possession of the judgment-debtor himself.<sup>3</sup>

**2. Failure to annex inventory—Effect of.**—Where a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same as required by this rule,

('68) 10 Suth W R 144 (145).

('68) 9 Suth W R 362 (362).

(1865) 4 Suth W R Misc 15 (16). (Original decree may not be filed.)

('10) 5 Ind Cas 660 (662) (Cal).

('69) 11 Suth W R 271 (272).

2. ('10) 11 Cal L Jour 248 (247). (Decree burnt or destroyed.)

3. ('05) 28 Mad 557 (559).

('69) 11 Suth W R 28 (29).

('18) AIR 1918 All 242 (248) : 40 All 209.

[See also ('28) AIR 1928 Mad 440 (441, 448).]

4. ('16) AIR 1918 All 242 (248) : 40 All 209.

('18) AIR 1918 Pat 547 (548).

#### Order 21 Rule 12 — Note 1

1. ('80) AIR 1930 Bom 65 (66). (Execution against legal representatives under S. 50 of the Code—Inventory not necessary.)

('93) 15 All 84 (86).

('81) 7 Cal 556 (559).

('11) 9 Ind Cas 729 (729) (Mad). (Inaccurate description—Wrong date—No prejudice—Sale valid—S. 236 requires only a reasonably accurate description.)

('69) 11 Suth W R 8 (16) (FB).

2. ('27) AIR 1927 Bom 52 (52) : 50 Bom 730.

[See also ('92) 1892 All W N 55 (56) : 14 All 193. (Facts not clear.)]

3. ('98) AIR 1938 Cal 235 (235).

- O. 21 R. 12** the application is not one in accordance with law within the meaning of Article 182 of  
**Note 2** the Limitation Act, and cannot save limitation.<sup>1</sup>

**O. 21 R. 13**

Application for attachment of immoveable property to contain certain particulars.

**R. 13.** [S. 237.] Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot —

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and
- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

[1877, Ss. 237, 238; 1859, S. 213.]

#### Local Amendment

#### RANGOON

The following shall be *substituted* for Rule 13:

"R. 13. (1) When application is made, for execution of a decree relating to immovable property included within the cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *kwin* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immovable property, must also be furnished so far as they are not given in the plan. In the case of other immovable property, a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied:—

1. If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *kwin* number, latest holding number (if different kinds of holdings, *e.g.*, rice land and garden holdings are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding), year of *kwin* map from which the holding number is taken and revenue last assessed upon the land, must be given.

2. In the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified.

#### Note 2

1. ('15) AIR 1915 All 320 (321) : 37 All 527.

('92) 1892 All W N 47 (47).

('92) 1892 All W N 70 (71). (Though the execution application expressly stated that it was filed to save limitation.)

[See ('88) AIR 1988 Pat 75 (75). (In this case, it was held that it was not right to hold an application not in accordance with law merely because it did not contain an inventory of the property sought to be attached without considering whether such property was in the possession of the judgment-debtor or not.)

3. In the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map, the rent or revenue last assessed on the land, must be given.

4. In the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block name or number, the number of the building in the street or if it has no number, the lot number must be given.

5. In the case of immovable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given.

6. The purpose to which land or buildings are put, the material and age of buildings, all incumbrances and municipal taxes should be stated.

7. The judgment-debtor's share or interest in the property should be specified.  
(2) The cost of the certified extract should be reckoned in the costs of the application."

### Synopsis

#### 1. Legislative changes. | 2. Specification of property.

**1. Legislative changes.** — This rule corresponds to the first paragraph of Section 237 of the old Code, except that the words "and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers" have been newly added in clause (a).

The second paragraph of Section 237 requiring the list of properties to be verified has been omitted from this rule and reproduced in sub-rule (3) of Rule 66 of this Order.<sup>1</sup>

**2. Specification of property.** — The rule applies only to execution of money decrees, and not to decrees made upon a charge or a mortgage.<sup>1</sup>

The object of requiring the boundaries and numbers to be specified is to easily *identify* the property.<sup>2</sup> Clause (b) imposes a duty on the decree-holder to specify the judgment-debtor's share or interest, to the best of his belief.<sup>3</sup> Thus, where the share is undivided it should be so specified.<sup>4</sup>

An application which does not contain the particulars required by this rule cannot be treated as an application in accordance with law within the meaning of Article 182 of the Limitation Act, unless the defects are remedied by amendment under Rule 17.<sup>5</sup> See also Notes to Rule 17, *infra*.

#### Order 21 Rule 13 — Note 1

1. For cases under the old Code which required verification, see ('06) 28 All 244 (245). ('99) 22 All 55 (64).

#### Note 2

1. ('16) AIR 1916 Pat 373 (373).
2. ('69) 11 Suth W R 175 (176). ('69) 12 Suth W R 488 (488). ('72) 18 Suth W R 411 (411). ('71) 16 Suth W R 149 (149). ('86) 12 Cal 161 (164). ('14) AIR 1914 Oudh 280 (281); 17 Oudh Cas 256. (Description conflicting—Court should ascertain by evidence.) ('12) 14 Ind Cas 588 (589) (Mad). (Do.)

3. ('88) 12 Bom 678 (682).

- ('76) 1 Bom 601 (605).
  - ('31) AIR 1931 Nag 116 (117); 27 Nag L R 318.
  - ('20) AIR 1920 Cal 354 (356); 47 Cal 446.
  - ('27) AIR 1927 Mad 1142 (1142).
  - ('84) 7 Mad 107 (109).

[See ('38) AIR 1938 Rang 493 (494). (Specification as half share belonging to judgment-debtors held sufficient although there was no specification as to the share of each judgment-debtor individually.)]

4. ('92) 14 All 190 (192).
5. ('81) AIR 1981 Bom 128 (128). ('92) 1892 All W N 55 (56); 14 All 193. ('90) 1890 All W N 22 (22). ('92) 1892 All W N 3 (3).

**O. 21 R. 13**  
**Note 2**

This rule applies to proceedings under the Chota Nagpur Tenancy Act, 1908, Section 210, as amended by Act VI of 1920, Section 50.

**O. 21 R. 14**

**R. 14.** [S. 238.] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

Power to require certified extract from Collector's register in certain cases.

[1877, Ss. 237, 238; 1859, S. 213.]

### Synopsis

1. Legislative changes.

2. Applicability of the Rule.

3. Application for time to produce certified extracts is a step-in-aid of execution.

**1. Legislative changes.** — Section 238 of the old Code corresponding to this rule provided that "the application *shall* be accompanied by an authenticated extract from "the register of such office."<sup>1</sup> The present rule leaves it to the *option of the Court* to require the applicant to produce a certified extract.

**2. Applicability of the Rule.** — Where an application for sale is made in pursuance of a mortgage decree, a preliminary attachment of the mortgaged properties is not necessary, and therefore this rule does not apply to such a case; and a Court cannot dismiss the application for failure to produce the certified extract.<sup>1</sup> This rule applies to the proceedings under the Chota Nagpur Tenancy Act, 1908, Section 210, as amended by Act VI of 1920, Section 50.

**3. Application for time to produce certified extracts is a step-in-aid of execution.**—An application by a decree-holder for time to produce the certified copies or extracts required by this rule is a step-in-aid of execution.<sup>1</sup>

**O. 21 R. 15**

**R. 15.** [S. 231.] (1) Where a decree has been passed jointly<sup>3</sup> in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary,<sup>5</sup> apply for the execution

Application for execution by joint decree-holder.

('98) 15 All 84 (86).

('16) AIR 1916 Lah 316 (316).

#### Order 21 Rule 14 — Note 1

1. ('69) 11 Suth W R 175 (176).

('69) 12 Suth W R 488 (489).

#### Note 2

1. ('18) AIR 1918 Oudh 418 (418).

('87) AIR 1937 Oudh 288 (284) : 18 Luck 162.

#### Note 3

1. ('12) 17 Ind Cas 969 (969) : 37 Bom 817.

('10) 5 Ind Cas 579 (581) (Cal). (Application returned for amendment is a step in aid.)

('16) AIR 1916 Mad 510 (510). (Even application not re-presented is a step-in-aid.)

of the whole decree<sup>4</sup> for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

**O. 21 R. 15**  
**Notes 1-2**

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

[1877, Ss. 230, 231; 1859, S. 207.]

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. "Where a decree has been passed jointly."</li> <li>4. "Any one or more of such persons may apply for the execution of the whole decree."</li> <li>5. Application by one of several decree-holders for execution in respect of his share of the decree.</li> </ol> | <ol style="list-style-type: none"> <li>6. Unless the decree imposes a condition to the contrary.</li> <li>7. Execution against one of the joint judgment-debtors — Limitation. See Article 182 of the Limitation Act.</li> <li>8. Payment by judgment-debtor out of Court to one of several decree-holders.</li> <li>9. Defective application under the Rule, if can be amended.</li> <li>10. Appeal.</li> <li>11. Limitation.</li> </ol> |
|---|---|

### Other Topics (miscellaneous)

Court can make such order for protecting interests of other decree-holders. See Note 2.  
"For the benefit of them all." See Notes 4 and 9.  
Issue of notice before execution—Whether necessary. See Note 4.

Objection to execution—Whether can be taken in second appeal. See Note 2.  
"Where any of them has died." See Note 4.  
"Where the Court sees sufficient cause." See Note 4.

#### 1. Legislative changes. —

1. The words "or his or their representatives" in Section 231 of the old Code, after the words "one or more of such persons" have been omitted as unnecessary in view of the provisions of Section 146, *ante*.
2. The words "unless the decree imposes any condition to the contrary" are new. See Note 6.

**2. Scope of the Rule.** — There are two rules of general application governing the execution of joint decrees in favour of several persons —

(1) One of the decree-holders alone cannot apply for execution of *his share* only of the decree, leaving the other decree-holders to take out execution for their shares.<sup>1</sup>

(2) One of the decree-holders alone cannot execute the *whole* decree so as to bind the other decree-holders by the result of such execution.

The first rule is based on the principle that the *judgment-debtor* should not be harassed by a number of applications for execution. As observed by Sir Barnes Peacock, C. J., in *Haro Shankar Sandyal v. Tarak Chandra Buttacharjee*, 11 *Suth. W. R.* 488 at page 490 :

"Suppose there was a decree for a *lac* of rupees, it could not be contended that the decree-holder could assign it to a *lac* of assignees, so as to give to each of them power to take out execution for one rupee, his portion of it. Otherwise, there might be a *lac* of executions under the decree, a *lac* of seizures and a *lac* of sales under each one of which there can be no doubt that the judgment-debtor would suffer loss. If this were allowed, the judgment-debtor must necessarily be ruined."

**O. 21 R. 15**  
**Notes 2-3**

The second rule is based on the principle that the interests of the other decree-holders should not be jeopardised, and also on the principle that all persons representing a *single and indivisible* right must be parties before the right can be adjudicated upon. See Note 7 to O. 1 R. 1.

This rule is an exception to the second of the two rules abovementioned, in that it provides that one of several joint decree-holders can execute, under certain circumstances, the *whole* decree. In order, however, to prevent the interests of the other decree-holders from being jeopardised, the Court is given power, and is indeed bound, to make such order as is necessary to safeguard such interests.<sup>2</sup>

**3. "Where a decree has been passed jointly."** — A decree directing the defendant to pay a certain sum of money to several persons *specifying their shares* therein is not a joint decree, even though the amount is made payable as an entire sum.<sup>1</sup> The High Court of Patna has, however, in the undermentioned case,<sup>2</sup> expressed an *obiter dictum* that a decree does not cease to be a joint decree merely because the shares of the decree-holders in the decretal amount have been determined by the decree. According to the High Courts of Lahore and Madras, where a suit is filed in the name of a firm, the decree passed in the suit in favour of the firm must be held to be a decree passed jointly in favour of all the partners, since a firm name is only a compendious method of writing the names of all the partners.<sup>3</sup> But the Judicial Commissioner's Court of Sind has held that unless a declaration of the names of all the partners has been made under O. 30 R. 2, the decree in favour of the firm cannot be said to be a joint decree.<sup>4</sup>

This rule can apply only where a decree has been *passed jointly* in favour of more persons than one.<sup>5</sup> Where a portion of a decree is transferred to another, either by assignment in writing or by operation of law, the transferee is in the position of a joint decree-holder and the Court has got the *inherent* power to grant him relief in

- ('72) 4 N W P H C R 90 (92).
- ('70) 2 N W P H C R 413 (413).
- ('91) 15 Bom 242 (244).
- ('69) 11 Suth W R 488 (490).
- ('69) 11 Suth W R 241 (242).
- ('75) 23 Suth W R 842 (843).
- ('72) 17 Suth W R 19 (20).
- ('67) 7 Suth W R 10 (11).
- ('66) 6 Suth W R Misc 64 (65).
- ('75) 24 Suth W R 11 (12).
- ('95) 18 Mad 464 (465).
- ('19) AIR 1919 Pat 286 (287, 288) : 4 Pat L Jour 575.
- ('26) AIR 1926 Oudh 605 (605) : 2 Luck 259. (Such application is not one in accordance with law so as to save limitation.)
- ('97-01) 2 Upp Bur Rul 247.
- [See also ('80) 7 Cal L Rep 117 (118). (Objection cannot be taken for the first time in second appeal.)]
- [But see ('69) 11 Suth W R 848 (844). (S. 207 of the Code of 1859 did not contain the words "the whole decree.")]
- 2. ('05) 1 Nag L R 24 (30).
- ('67) 2 Agra 183 (185, 186).
- ('18) AIR 1918 Cal 153 (154).
- ('75) 23 Suth W R 282 (282).
- ('74) 22 Suth W R 204 (204).
- ('73) 19 Suth W R 302 (302).
- ('71) 15 Suth W R 159 (159).

- ('68) 1 Beng L R A C 28 (29).
- ('22) AIR 1922 Pat 611 (612).
- ('19) AIR 1919 Pat 286 (287, 288) : 4 Pat L Jour 575.
- ('25) AIR 1925 Pat 591 (592).
- [See ('33) AIR 1933 Pat 609 (611). (Heirs of deceased decree-holder themselves parties to execution application—There is no question of any order having to be made under sub-rule (2).)]

**Note 3**

- 1. ('70) 13 Suth W R 244 (245).
- ('92) 2 Mad L Jour 14 (15). (Suit on a mortgage-decree for a moiety in favour of plaintiff and for another moiety in favour of defendant.)
- [See also ('22) AIR 1922 Mad 456 (457). (Partition decrees.)]
- ('25) AIR 1925 Mad 1265 (1266). (Do.)]
- 2. ('32) AIR 1932 Pat 261 (265) : 11 Pat 445.
- 3. ('31) AIR 1931 Lah 507 (508).
- ('32) AIR 1932 Lah 596 (597) : 13 Lah 546. (Some of the partners can therefore execute for the benefit of all.)
- ('34) AIR 1934 Mad 380 (381) : 57 Mad 696.
- 4. ('28) AIR 1928 Sind 37 (38).
- 5. ('34) AIR 1934 Pat 627 (628). (One of the several legal representatives of a deceased decree-holder applying for execution — This rule does not apply.)

execution by applying general principles of law analogous to this rule.<sup>6</sup> It has been held that where a decree has been passed awarding separate amounts to several persons, they can all make a single application for execution.<sup>7</sup>

See also the undermentioned case.<sup>8</sup>

**O. 21 R. 15**  
**Notes 3-4**

**4. "Any one or more of such persons may apply for the execution of the whole decree."** — As has been seen in Note 2 above, this rule makes an exception to the general rule that all decree-holders must join in an application to execute the joint decree, and permits one or more of several joint decree-holders to apply for execution of the whole decree,<sup>1</sup> unless the decree imposes a condition to the contrary.<sup>2</sup> But it does not confer an unconditional right on one of the decree-holders to execute the decree. It is within the discretion of the Court to allow such execution and the Court will act only if it sees sufficient cause for allowing such a course to be taken.<sup>3</sup> It may allow other decree-holders to intervene in a pending execution, if it is not being properly conducted.<sup>4</sup> It is also in the discretion of the Court whether or not notice should be given to the other decree-holders or to the judgment-debtor before making an order for

[See however ('29) AIR 1929 Pat 232 (232, 233). ('31) AIR 1931 Lah 5 (6). (Where it is assumed that O. 21 R. 15 applies to the legal representatives of a deceased decree-holder.)]

6. ('21) AIR 1921 Mad 599 (601, 605) : 44 Mad 919 (FB).

('27) AIR 1927 Bom 123 (124) : 51 Bom 148. (Petition for execution presented by one of the surviving coparceners of deceased decree-holder.)

('75) 24 Suth W R 245 (246).

('10) 5 Ind Cas 120 (120) (Mad).

('91) 14 Mad 252 (254). (Overruling 13 Mad 347 on review.)

('19) AIR 1919 Lah 429 (430) : 1917 Pun Re No. 15.

('74) 22 Suth W R 354 (354). (One decree passed in favour of B—B transferring his decree in favour of three persons — One of such persons executing the decree.)

[See also ('11) 11 Ind Cas 700 (701) : 34 All 72.

('83) 1883 All W N 262 (263). (Decree in favour of two — Assignment of his share by one of them—Assignee can apply for execution of whole decree for benefit of both the decree-holders.)

('35) 39 Cal W N 961 (966). (One of two joint owners of a decree, though such decree was passed in favour of one single decree-holder, can execute the decree, if the other joint owner refuses to join the applicant in executing it.)]

7. ('35) AIR 1935 All 402 (403).

8. ('39) AIR 1939 Lah 302 (302). (Partition suit by father against two sons — One of the sons remaining absent — Decree in favour of father for one-third share — Possession of remaining two-third share cannot be given to son remaining present as partition decree cannot be regarded as passed jointly in favour of the two sons.)

#### Notes 4

1. ('80) 3 Mad 79 (81).

('73) 5 N W P H C R 16 (17).

('66) 5 Suth W R Misc 58 (58).

('20) AIR 1920 Pat 672 (678).

('37-01) 2 Upp Bur Rul 247.

('07) 10 Oudh Cas 378 (381).

('29) AIR 1929 All 953 (957) : 51 All 998. (Deposit of pre-emption money is proceeding in execution and O. 21, R. 15 applies—Per Boys, J.; Sulaiman J., *contra*.)

('18) AIR 1918 Mad 56 (56). (One decree-holder dying—Surviving decree-holders may execute for benefit of all including that of legal representatives of deceased.)

('68) 10 Suth W R 95 (96). (Joint judgment for damages obtained by several persons — Some of them dying— Execution may be carried by survivors under S. 207.)

('37) AIR 1937 Pat 253 (256).

('36) AIR 1936 Cal 571 (572). (All that he is required to do is to state to the Court the fact of death of his co-decree-holder and the names of his legal representatives.)

[See also ('06) 10 Cal W N 1000 (1002).

('32) AIR 1932 Pat 359 (360) : 12 Pat 42. (Decree-holders members of joint Hindu family—Death of one leaving other as sole survivor—Survivor can apply for execution to Court executing decree—Non-mention of death of coparcener is not sufficient to reject application if Court knows in subsequent proceedings the fact of death—Case is governed not by R. 16 but by this rule.)

2. ('16) AIR 1916 Cal 577 (579).

3. ('80) 7 Cal L Rep 537 (538).

('74) 22 Suth W R 77 (78).

('74) 21 Suth W R 31 (32).

('11) 12 Ind Cas 562 (564) : 36 Mad 357.

('22) AIR 1922 Pat 597 (597) : 1 Pat 609. (But the fact that application is not allowed will not make it one not in accordance with law.)

('97-01) 2 Upp Bur Rul 247.

[See ('33) AIR 1933 Mad 157 (158) : 56 Mad 816. (Execution application by one of joint decree-holders—Objection by other decree-holders that application is a fraud—Court can disallow execution.)]

[See also ('35) AIR 1935 Nag 25 (27) : 31 Nag L R 271.]

4. ('21) AIR 1921 Mad 599 (601) : 44 Mad 919 (FB). (Similarly in the case of part transferee of a decree.)

**Q. 21 R. 18**  
**Nota 4**

execution under this rule.<sup>5</sup> Where one of several decree-holders applies for execution and the others do not object to execution being granted to him, it is not for the judgment-debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree-holders.<sup>6</sup>

When one of several joint decree-holders executes a decree, he executes the decree *prima facie* for the benefit of all, unless there is a direction by the Court or in the decree itself which permits execution for the benefit of the executing creditor alone.<sup>7</sup> Therefore, where one decree-holder executes a joint decree and realizes the amount due under it, the realization is made on behalf of, and for the benefit of, all the joint decree-holders and they are entitled to recover their respective shares from him by a separate suit.<sup>8</sup>

The High Court of Lahore has held in the undermentioned cases<sup>9</sup> that it need not be stated in the body of the application that it is being made for the benefit of all the decree-holders, and that when the application is for execution of the entire decree, it should be assumed that the person applying is attempting to execute it on behalf of all the decree-holders. But the High Court of Patna has held that such an application is invalid and must be disallowed.<sup>10</sup>

The omission on the part of the decree-holder to state in his application the names of all the persons who are interested in the decree is not such a defect as would invalidate the execution proceedings.<sup>11</sup>

Where an application for execution is made by two persons the execution proceedings do not terminate automatically on the death of one of them. The surviving

5. ('06) 33 Cal 806 (810). (Notice is not necessary where the decree grants injunction—21 Suth W R 31, Distinguished.)

('33) AIR 1933 Lah 655 (656) : 14 Lah 212. (AIR 1931 Lah 600, Followed.)

('26) AIR 1926 Cal 811 (812).

('31) AIR 1931 Lah 600 (601).

('74) 21 Suth W R 31 (32). (Notice is obviously desirable in the case of decrees for money—See observations on this case in 33 Cal 806.)

[See also ('80) 7 Cal L Rep 537 (538). (But ordinarily it should bear the other decree-holders.)]

6. ('98) 8 Mad L Jour 91 (91).

('33) AIR 1933 Lah 655 (656) : 14 Lah 212.

('20) AIR 1920 Nag 40 (41).

('84) AIR 1984 Pesh 76 (77). (Decree in favour of joint Hindu firm—Execution application by one member.)

('31) AIR 1931 Lah 600 (601).

('33) AIR 1933 Lah 655 (656) : 14 Lah 212 : 38 Pun L R 549 (550).

('26) AIR 1926 Mad 1198 (1199). (Objection taken only in appeal was disallowed.)

[See also ('35) AIR 1935 Nag 25 (28) : 31 Nag L R 271. (Joint decree—Two out of four applying—Third admitting payment—Fourth taking no interest in proceedings—Court is justified in allowing execution to applicants.)]

('39) AIR 1939 Mad 278 (280) : ILR (1939) Mad 338. (Judgment-debtor cannot object to arrangement between decree-holders permitting one of them to apply for execution—Judgment-debtor can only apply for the protection of his own interests.)]

7. ('28) AIR 1928 Mad 800 (801).

('71) 16 Suth W R 29 (30).

('35) AIR 1935 Lah 484 (486) : 17 Lah 115. (Decree in favour of two brothers—Execution application signed by one alone—Purchase made by him in his name—Other brother is entitled to share.)

8. ('15) AIR 1915 PC 81 (82) : 37 All 545 : 42 Ind App 177 (PC).

('11) 11 Ind Cas 517 (518) : 33 All 563. (Affirmed on appeal by Privy Council in AIR 1915 PC 81.)

('24) AIR 1924 All 813 (814).

('28) AIR 1928 Mad 800 (802, 803).

9. ('30) AIR 1930 Lah 608 (604).

('33) AIR 1933 Lah 655 (656) : 14 Lah 212. (AIR 1919 Pat 286, Not approved.)

('32) AIR 1932 Lah 596 (597) : 13 Lah 546. (Decree in favour of dissolved firm—Such decree is in favour jointly of its partners.)

10. ('19) AIR 1919 Pat 286 (287, 288) : 4 Pat L Jour 575. (Application was not allowed to be amended.)

('38) AIR 1938 Pat 457 (460) : 17 Pat 223. (Application for execution alleged to have been on behalf of applicant and another person holding interest in portion of decree—It must be stated that application is also for benefit of other person—If not, application cannot be regarded as having been on his behalf.)

11. ('26) AIR 1926 Cal 811 (812).

('31) AIR 1931 Lah 600 (601).

('33) AIR 1933 Lah 655 (656) : 38 Pun L R 549 (550) : 14 Lah 212.

('32) AIR 1932 Pat 859 (860) : 12 Pat 42. (Omission to mention the death of coparcener—Co-decree-holder will not entail a rejection of the petition.)



decree-holder can continue the application for the benefit of himself and the legal representatives of his co-decree-holder.<sup>12</sup>

**O. 21 R. 15**  
**Notes 4-8**

**5. Application by one of several decree-holders for execution in respect of his share of the decree.** — It has been seen in Note 2 above that it is not open to one of several joint decree-holders to apply for execution in respect of *his share* only of the decree, and that the rule is based on the principle that the judgment-debtor should not be harassed by a multiplicity of applications by different decree-holders. Where, therefore, there is no possibility of the judgment-debtor being harassed by different applications, the bar against one of the decree-holders applying for execution will not apply. Thus, where some of the joint decree-holders apply for execution with regard to a certain portion only of the decree giving up the rest and the other decree-holders, being made parties, do not object to such a giving up by the applicants, the execution asked for may be allowed and the other decree-holders cannot subsequently apply for execution of the balance of the decree.<sup>1</sup> Similarly, where one of the joint decree-holders intimates to the Court satisfaction of his share in the decree, this rule does not bar an application by the others for execution for the balance remaining due under the decree.<sup>3</sup> So also, where *A* and *B* jointly obtain a decree for money or for possession of immovable property against *C*, and *C* as judgment-debtor either purchases his share in the decree or inherits such share from *A*, the result would be the extinguishment of the decree *pro tanto* and *B* can, therefore, execute the decree in respect of his share.<sup>3</sup>

**6. Unless the decree imposes a condition to the contrary.** — This rule is not applicable to the case of joint decree-holders where the execution of a joint decree is made dependent upon all the decree-holders joining in the application.<sup>1</sup>

**7. Execution against one of the joint judgment-debtors — Limitation.** — See Article 182 of the Limitation Act.

**8. Payment by judgment-debtor out of Court to one of several decree-holders.** — One of several joint decree-holders cannot, as a general rule, give a valid discharge of the entire decree without the concurrence of others. A payment, therefore, to one of several decree-holders out of Court is valid only to the extent of the *share* of that decree-holder,<sup>1</sup> unless it can be proved that the decree-holder who

[See also ('89) AIR 1939 Mad 278 (280) : ILR (1939) Mad 888. (One of several decree-holders applying for execution of decree — Omission to state expressly that applicant is only one of decree-holders does not invalidate application — Court can allow application to be amended to bring it into compliance with O. 21 R. 15.)]

12. ('86) AIR 1936 Cal 571 (572).

[See also ('85) AIR 1935 All 402 (404). (One of several applicants for execution can be allowed to withdraw if he desires; when he withdraws, the application continues naturally in the name of the remaining applicants.)]

#### Note 5

1. ('28) AIR 1928 Cal 559 (560) : 56 Cal 12. (Subsequent application for balance cannot be filed.) ('34) AIR 1934 Cal 465 (467). (Rule does not apply where joint decree has been satisfied in part before application for execution — Notice given to other joint decree-holders — No objection to

execution — Application for share is not illegal.) [See ('34) AIR 1934 Pesh 40 (42). (The above proposition will not apply where the other decree-holders do not undertake not to execute.)]

2. ('69) 12 Suth W R 970 (371).

[See also ('34) AIR 1934 Cal 465 (467).]

3. ('88) 10 All 570 (574). (Decree for possession of immovable property.)

('88) 5 All 27 (34). (Decree for money.)

('83) 9 Cal 482 (494) : 10 Ind App 4 (P C). (Affirming on appeal, 6 Cal 594.)

('94) 1894 All W N 15 (16).

('10) 7 Ind Cas 474 (474) : 1910 Pun Re No. 61.

[See also ('86) 1886 All W N 125 (126).]

#### Note 6

1. ('88) 6 All 69 (70).

#### Note 8

1. (1865) 3 Cal L Rep 513 (514).

('85) AIR 1935 Nag 25 (27) : 31 Nag L R 271.

('69) 11 Suth W R 262 (268).

**O. 21 R. 15**  
**Note 8**

granted the discharge was an agent of the other decree-holders, or otherwise had legal authority to bind them by his acts.<sup>2</sup> On the same principle one of two or more joint decree-holders is not competent, without being authorized by the other or others, to certify a payment made to him under O. 21 R. 2 so as to operate as a satisfaction of the entire decree, and the others are not debarred from executing the decree as to their shares.<sup>3</sup> The reason is that "when one of two or more joint decree-holders takes it upon himself to certify satisfaction of the whole decree, it is clear that no provision can be made by the Court for safeguarding the interests of the other decree-holder or decree-holders; and that if a Court was bound to recognize such an adjustment out of Court, the remaining decree-holders might be driven to another suit to recover money for which a decree had already been passed in their favour."<sup>4</sup>

Where the joint decree-holders are *partners* or members of a *Hindu coparcenary*, a payment to one of them or a certificate by him under O. 21 R. 2 cannot, according to the High Court of Madras,<sup>5</sup> be treated as satisfaction of the decree *even in part*. This view is based on the ground that a decree debt in favour of a firm or of a coparcenary is only one asset out of the numerous other assets and that one of the decree-holders cannot legally claim any definite share in the particular decree debt. The same High Court has also held that the fact that the decree-holder receiving payment is a partner or is the managing member of the joint family is not enough to clothe him with authority to act as the agent of the other decree-holders in receiving such payment.<sup>6</sup> The High Courts of Allahabad<sup>7</sup> and Patna<sup>8</sup> and the Judicial Commissioner's Court of Oudh<sup>9</sup> have, on the other hand, held that a *karta* of a joint Hindu family has legal authority to act on behalf of the family and that a payment to, or a certificate by him will bind the other decree-holders. It has been held by the High Court of Lahore<sup>10</sup> and the Court of the Judicial Commissioner of Sind<sup>11</sup> that one

('30) AIR 1930 Lah 814 (815). (Shares can be ascertained in execution.)

('92) 15 Mad 343 (345).

('05) 1 Nag L R 24 (30).

[See ('06) 28 All 252 (255). (But payment to one of several executors who have jointly obtained a decree is not valid at all.)]

Note.—The Calcutta High Court has held that a judgment-debtor could not pay to a joint decree-holder as *his share* any amount: see ('28) AIR 1928 Cal 759 (760).

See also ('35) AIR 1935 Oudh 313 (316) : 11 Luck 116. (Joint decree in favour of several mortgagees — One of them cannot give valid discharge.)]

2. ('29) AIR 1929 Lah 462 (463).

('15) AIR 1915 Lah 155 (155). (Discharge given by managing member of joint Hindu family is binding on the other members.)

[See also ('35) AIR 1935 Nag 25 (27) : 31 Nag L R 271.]

3. ('04) 26 All 334 (336).

('35) AIR 1935 Nag 25 (28) : 31 Nag L R 271.

('23) AIR 1923 All 494 (495) : 45 All 401.

('04) 26 All 818 (820).

('66) 1 Agra Misc App 16 (17).

('73) 5 N W P H O R 16 (17). (One of the joint decree-holders forgoing right to execute the decree — Others are not bound by the compromise.)

('98) 1898 Bom P J 47.

('30) AIR 1930 Cal 78 (79). (Extent of shares can

be ascertained in execution.)

('88) 9 Cal 831 (837). (Do.)

('79) 4 Cal L Rep 70 (72).

('35) 62 Cal L Jour 560 (562).

('06) 1906 Pun Re No. 34, p. 124.

('25) AIR 1925 Pat 822 (823). (But may certify as to his share.)

[See also ('19) AIR 1919 Mad 123 (126). (Where payment is in fact made to all, certificate by one only will bind all.)]

[But see ('74) 22 Suth W R 77 (78). (Certification of satisfaction of the whole decree by some of the joint decree-holders is binding on all the decree-holders unless fraud is proved.)]

4. ('04) 26 All 334 (336).

5. ('17) AIR 1917 Mad 988 (989).

('34) AIR 1934 Mad 330 (333) : 57 Mad 696.

('25) AIR 1925 Mad 230 (232, 233).

[But see ('18) 21 Ind Cas 177 (178) (Mad). (There was no joint decree within the meaning of this rule but as regards the decree of the joint family the discharge of the decree given by the manager of the family is valid.)]

6. ('17) AIR 1917 Mad 988 (989).

('34) AIR 1934 Mad 330 (333) : 57 Mad 696.

7. ('18) 19 Ind Cas 645 (646) : 35 All 380.

8. ('27) AIR 1927 Pat 329 (330).

9. ('18) 20 Ind Cas 457 (458) : 16 Oudh Cas 146.

[See also ('08) 11 Oudh Cas 246 (247).]

10. ('27) AIR 1927 Lah 885 (887).

11. ('26) AIR 1926 Sind 167 (169).

partner is the *agent* of the others and that where a decree is obtained in the name of a firm, one of the partners can receive the entire money due under the decree and certify the payment.

**O. 21 R. 15**  
**Notes 8-11**

Although a payment to one of two joint decree-holders of the whole decree amount does not, even when certified, absolve the judgment-debtor from liability to the other decree-holder, such decree-holder is not bound to proceed against the judgment-debtor in execution, but may sue to recover his share from the other decree-holder.<sup>12</sup>

See also Note 8 to Order 21 Rule 1, *ante*.

**9. Defective application under the Rule, if can be amended.** — It has been held by the High Court of Patna in the undermentioned case<sup>1</sup> that where in an application for execution of a decree by one of several joint decree-holders, it is not stated that the application is for the benefit of all the decree-holders, the application is invalid and cannot be allowed to be amended. It proceeds upon the view that the requirements of this rule go to the root of the execution of the decree and that while Rule 17 of this Order empowers the Court to allow a defect in the requirements of Rules 11 to 14 to be amended, it does not include this rule. But the High Court of Allahabad<sup>2</sup> has taken a contrary view that there is nothing in Rule 17 which deprives the Court of its powers to allow amendments in relation to matters required to be mentioned by this rule. The Calcutta High Court also holds a similar view.<sup>3</sup>

**10. Appeal.** — The question whether an appeal lies from an order passed under this rule depends upon the consideration whether the question decided is one within Section 47 of the Code. Thus, an order allowing or refusing execution in favour of one of the decree-holders when an objection is raised by the judgment-debtor is one falling under Section 47 and, therefore, appealable as a decree.<sup>1</sup> But no appeal will lie against an order refusing to allow execution in favour of one joint decree-holder on the objection of another joint decree-holder<sup>2</sup> or against an order protecting the interests of the non-applying decree-holder.<sup>3</sup>

**11. Limitation.** — An application for execution by one of several joint decree-holders is an application in accordance with law and will afford a fresh starting point of limitation under Article 182 of the Limitation Act.<sup>1</sup> It has been held by the High Courts of Calcutta, Bombay and Madras that although this rule does not allow one of such decree-holders to apply for partial execution of a joint decree, yet such an

12. ('06) 29 Mad 189 (189).

('28) AIR 1928 Mad 800 (808). (Plaintiff is entitled to interest from date of plaint and not from the date of receipt of such amount by defendant.)

**Note 9**

1. ('19) AIR 1919 Pat 286 (288) : 4 Pat L Jour 575.

2. ('80) AIR 1930 All 188 (191).

[See also ('67) 7 Suth W R 535 (536).

('39) AIR 1939 Mad 278 (280) : I L R (1939) Mad 398. (Defective application not stating expressly that applicant is only one of the decree-holders can be allowed to be amended.)]

3. ('35) 89 Cal W N 1144 (1145).

**Note 10**

1. ('94) 17 Mad 394 (394).

('07) 2 Mad L Tim 307 (309).

('98) 1898 Pun Re No. 28, p. 86.

2. ('99) 28 Bom 623 (625).

('72) 17 Suth W R 136 (136).

('72) 17 Suth W R 415 (415).

('24) AIR 1924 Mad 518 (519). (But if the Court purports to pass an order under S. 47 of C. P. C. an appeal lies.)

3. ('80) 5 Cal 592 (598).

**Note 11**

1. ('26) AIR 1926 Pat 160 (161).

('22) AIR 1922 Pat 597 (597) : 1 Pat 609. (Application though defective saves limitation.)

('34) AIR 1934 Bom 216 (218, 219) : 58 Bom 428.

('79) 4 Cal 605 (606).

('34) AIR 1934 Bom 216 (218, 219) : 58 Bom 428.

('74) 22 Suth W R 468 (468).

('69) 11 Suth W R 421 (421).

('67) 8 Suth W R 100 (101).

('66) 6 Suth W R Misc 59 (59).

(1864) 1 Suth W R Misc 1 (2).

[See also ('89) 13 Cal L Rep 18 (22).]

**O. 21 R. 15  
Note 11**

application may keep alive the right to execute the decree.<sup>2</sup> But the High Court of Allahabad and Judicial Commissioner's Court of Oudh have taken the contrary view that such an application is not one in accordance with law and, therefore, will not save limitation.<sup>3</sup>

Where there is a decree in favour of two or more joint decree-holders and one of them is a minor, can the minor decree-holder apply to execute the decree on behalf of *all*, more than three years after the last starting point of limitation but within three years of his attaining majority? There is a conflict of opinion on this question. It has been held by the High Courts of Allahabad,<sup>4</sup> Bombay,<sup>5</sup> Calcutta<sup>6</sup> and Lahore<sup>7</sup> that the ex-minor decree-holder can apply to execute the *whole* decree, even though the other decree-holders would be barred by limitation. But the High Court of Madras<sup>8</sup> has held that the decree cannot be executed as a joint decree. See Section 7 of the Limitation Act.

**O. 21 R. 16**

**Application for execution by transferee of decree.**

**R. 16.** [S. 232.] Where a decree or, if a decree has been passed jointly<sup>7</sup> in favour of two or more persons, the interest of any decree-holder in the decree is transferred<sup>3</sup> by assignment in writing<sup>4</sup> or by operation of law,<sup>5</sup> the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed<sup>11</sup> in the same manner and subject to the same conditions<sup>21</sup> as if the application were made by such decree-holder :

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice<sup>14</sup> of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections<sup>15</sup> (if any) to its execution :

Provided also that, where a decree for the payment of

2. ('28) AIR 1928 Cal 861 (862).

('91) 15 Bom 242 (244).

('99) 26 Cal 888 (890).

('76) 25 Suth W R 70 (70).

('71) 16 Suth W R 267 (268).

('71) 16 Suth W R 29 (30).

('71) 15 Suth W R 449 (450).

('77) 8 Mad 79 (81).

('66) 6 Suth W R Misc 76 (77).

3. ('75) 1 All 231 (234).

('81) 4 All 72 (74).

('26) AIR 1926 Oudh 605 (605) : 2 Luck 259.

[See also ('34) AIR 1934 Pesh 40 (42). (Where some out of several decree-holders apply for execution on their own behalf and during the pendency of such application the others also apply but the latter application is not competent, the two applications cannot be considered to supplement each other in order to extend limitation.)]

[See however ('85) 7 All 282 (283). (If not objected to by judgment-debtor, subsequent application will not be barred.)]

4. (1900) 22 All 199 (204). (Overruling 1884 All W N 58.)

5. ('96) 20 Bom 383 (385).

('04) 6 Bom L R 647 (648).

6. ('01) 28 Cal 465 (468).

('08) 7 Cal L Jour 308 (309). (Joint and several decree.)

('87) 14 Cal 50 (54, 55).

7. ('81) AIR 1931 Lah 5 (6). (Original decree-holder deceased — Application for execution of the whole decree by one of his sons who was a minor after attaining majority.)

8. ('02) 25 Mad 481 (485) (FB). (The ex-minor decree-holder can execute the decree *qua* his interest.)

('90) 13 Mad 286 (241).

[See also ('05) 28 Mad 479 (485).]

money<sup>17</sup> against two or more persons has been transferred to one of them,<sup>18</sup> it shall not be executed against the others. **O. 21 R. 16**

[1877, S. 232; 1859, S. 208.]

### Local Amendments

#### CALCUTTA

In the first proviso *cancel* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words :

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections."

#### LAHORE

In the first proviso *omit* the words "and the judgment-debtor;" and for the word "their" *substitute* the word "his."

#### NAGPUR

After the words, "which passed it," *insert* the words "or to any Court to which it has been sent for execution."

#### N.-W.F.P.

For the first proviso, *substitute* the following proviso :

"Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and unless an affidavit by the transferor admitting the transfer is presented with the application, the decree shall not be executed, until the Court has heard his objections (if any) to its execution."

#### PATNA

Add the words "or to the Court to which the decree has been sent for execution, as the case may be" after the words "to the Court which passed it;"

Delete the words "and the judgment-debtor" from the first proviso, and in the said proviso after the word "transferor," *insert* the words "unless an affidavit of the transferor admitting the transfer is filed with the application," and *substitute* the word "his" for the word "their" and the word "objection" for the word "objections".

#### RANGOON

For the first proviso, *substitute* the following, namely :

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution."

### Synopsis

1. Legislative changes.
2. Decree.
3. Where a decree has been transferred:
  4. Transfer by assignment in writing.
  5. Transfer by operation of law.
  6. Benamidar.
  7. Part transfer of a decree.
8. Pledge of decree.
9. Assignment of rent decrees under the Tenancy Acts.
10. Transfer, when takes effect.
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13. Award.
14. Notice to transferor and judgment-debtor.
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16. Transfer of decree for payment of money against two or more persons to one of them.
17. "Decree for the payment of money."
18. Attachment of decree by co-judgment-debtor.
19. Application for substitution by transferee.
20. Transfer of decree against company in liquidation.
21. Equities enforceable against the original decree-holder.
22. Appeal.
23. Suit by assignee for declaration of right or for refund of price.

*Other Topics (miscellaneous)*

Application by transferee—Whether a step-in-aid of execution. See Note 19.

Application by a transferee from the original transferee. See Note 12.

Assignment of decree pending execution. See Note 19.

Death of decree-holder — Legal representative must apply for fresh execution. See Note 19.

"Decree-holder," meaning of. See Note 3.

"May be executed" — Discretion of Court. See Note 11.

Principle of rule. See Note 3.

Person entitled to assignment of decree — Whether can apply before assignment. See Note 4.

Registration of assignment — Whether necessary. See Note 4.

"Subject to the same conditions." See Note 21.

"The interest of any decree-holder." See Note 3.

"The transferee may apply for execution." See Note 11.

Transferee of maintenance decree—Whether can apply. See Note 3.

Transfer of property dealt with by decree — Whether transfer of decree. See Note 3.

**1. Legislative changes. —**

1. The words "or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree," are new. See Note 7, *infra*.

2. The words "if that Court thinks fit" which occurred in the old Section 232 before the words "the decree may be executed in the same manner . . . ." have been omitted. See Note 11, *infra*.

3. The words "decree for money" in the second proviso have been changed into "a decree for the payment of money . . . ." See Note 17 *infra*.

**2. Decree.** — The provisions of this rule in the first paragraph as well as in the first proviso are not restricted to *money* decrees, but apply to mortgage decrees also. As to the applicability of the second proviso, see Note 17, *infra*.

**3. Where a decree has been transferred.** — The principle of this rule is that no one can execute a decree except the decree-holder or a person to whom the decree has been *transferred* by assignment in writing or by operation of law.<sup>1</sup> A third person cannot, therefore, apply for execution of a decree unless there is a transfer to him of the decree by the original decree-holder.<sup>2</sup> Where on the death of *A*, the plaintiff in a suit, his widow *B* continues the proceedings as his legal representative and obtains a decree, *C* claiming to be the real heir of *A* cannot apply to execute the decree inasmuch as there is no *transfer* of the decree by *B* in his favour.<sup>3</sup> The rule is, however, intended primarily for those cases where the applicant for execution does not *appear as decree-holder in the decree* and he applies for execution on the basis of a transfer of the decree;<sup>4</sup> it does not, therefore, apply where the applicant is one whose name is already in the decree as one of two persons in whose favour the decree has been passed and who claims on the death of the other decree-holder to execute the decree as the surviving decree-holder.<sup>5</sup>

**Order 21 Rule 16 — Note 3**

1. ('22) AIR 1922 All 98 (99).
2. ('87) AIR 1937 Nag 30 (30): I L R (1937) Nag 82. (*A* advancing money to *B* to be lent by latter to *C*—*C* executing mortgage in favour of *B* and *B* obtaining decree on mortgage—*A* has no interest

in the mortgage decree and he cannot execute it.)

3. ('77) 2 Cal 827 (884): 4 Ind App 66 (PC).
4. ('77) 2 Cal 827 (884): 4 Ind App 66 (PC).
5. ('88) AIR 1938 Pat 462 (464): 17 Pat 206.
6. ('82) 18 Pat L Tim 579 (580, 581).

A transfer in writing of the *property* dealt with by the decree is not a transfer of the decree itself and the transferee cannot apply under this rule.<sup>6</sup> It has, however, been held by the High Court of Rangoon<sup>7</sup> that it is a matter of construction of the deed of transfer whether the decree also was intended to be transferred by the transfer of the property, and the words of the rule relating to the transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment. The assignee of a decree to be subsequently passed cannot apply for execution under this rule.<sup>8</sup> Thus, a person who obtains a transfer, pending suit, of the property forming the subject-matter of the suit is not entitled to execute the decree subsequently passed unless his name has been substituted in place of his vendor under O. 22 R. 10.<sup>9</sup> Similarly, the assignee of a preliminary decree who has not taken steps to be impleaded in the suit cannot apply to execute the final decree in the suit.<sup>10</sup>

The High Court of Bombay has, however, held in the undermentioned case<sup>11</sup> that the effect of the transfer was, in equity, to vest in the transferee, the interest in the decree which was afterwards obtained and that the decree must be taken to have been transferred by *operation of law*. The High Court of Rangoon<sup>12</sup> has dissented from the above reasoning of the High Court of Bombay and has held that the words "by operation of law" cannot be invoked so as to make an assignment in writing, an assignment by operation of law.

When a decree is assigned, what is really transferred is not the decree alone, but the interest of the decree-holder in the decree as may be finally determined. Therefore, an assignment of the decree of the trial Court carries with it the right to execute the decree passed in appeal.<sup>13</sup>

It has been held by the High Court of Calcutta in the undermentioned case<sup>14</sup> that the transferee of a decree for future maintenance is entitled to apply for execution in respect of the amounts that fall due from time to time and that Section 6 of the Transfer of Property Act will not apply when the cause of action has merged in the decree. But the High Court of Madras<sup>15</sup> has held that only that portion of the maintenance decree which related to the arrears of maintenance already accrued due can legally be transferred.

**4. Transfer by assignment in writing.** — An assignee of a decree under an *oral* transfer has no *locus standi* to apply for execution under this rule.<sup>1</sup> In order to

[See also ('38) AIR 1938 Pat 462 (464) : 17 Pat 206. (Where a preliminary decree for mesne profits is assigned pending an inquiry into the mesne profits, and the assignee is substituted and gets a final decree passed, an application by him to execute that final decree is not governed by Order 21 Rule 16 or the provisos thereto.)]

6. ('27) AIR 1927 Mad 240 (241).
- ('08) 80 All 28 (30).
- ('85) 7 All 107 (110). (Purchaser from pre-emptor decree-holder.)
- ('22) AIR 1922 All 98 (99). (Transfer after decree but pending appeal.)
- ('24) AIR 1924 Bom 426 (427).
- ('20) AIR 1920 Lah 324 (325).
- ('08) 82 Bom 181 (184).
7. ('80) AIR 1980 Rang 808 (811, 812).
8. ('07) 17 Mad L Jour 891 (892).
- ('16) AIR 1916 Mad 1202 (1202). (17 Mad L Jour 312, Followed.)
- ('24) AIR 1924 Cal 661 (665) : 51 Cal 703.

- ('26) AIR 1926 Bom 406 (406, 407).
  - ('27) AIR 1927 Sind 78 (83) : 22 Sind L R 1.
  9. ('24) AIR 1924 Cal 661 (665) : 51 Cal 703. (Dissenting from AIR 1921 Cal 74.)
  - ('32) AIR 1932 Cal 439 (439) : 59 Cal 297.
  - ('22) AIR 1922 Pat 563 (564). (Section 146 cannot be invoked as it is subject to this rule.)
  10. ('26) AIR 1926 Mad 1129 (1129).
  - ('17) AIR 1917 Mad 844 (845). (The applicant may, however, be directed to amend the petition as one under Order 22 Rule 10.)
  11. ('87) 11 Bom 506 (512).
  12. ('30) AIR 1930 Rang 308 (311).
  13. ('18) AIR 1918 Mad 279 (280).
  - [See also ('97) 7 Mad L Jour 227 (228, 229). (And a satisfaction entered on the decree, made subsequent to the assignment is binding on him.)]
  14. ('10) 6 Ind Cas 826 (829) : 38 Cal 13.
  15. ('09) 3 Ind Cas 444 (444, 445) : 33 Mad 80.
- Note 4**
1. ('91) 15 Bom 307 (309).

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**Notes 4-5**

enable a transferee to apply, the transfer must be effected by an instrument *in writing*.<sup>2</sup> A mere contract for sale of a decree without an assignment in writing in favour of the purchaser is not enough.<sup>3</sup> The High Court of Patna<sup>4</sup> has held that a release of his rights by a decree-holder in favour of another does not operate as an assignment. But the High Court of Allahabad<sup>5</sup> has held that a release may operate as an assignment of the decree.

It has been held by the High Courts of Allahabad, Calcutta and Lahore that a decree for sale of immovable property is itself not immovable property and, therefore, an assignment of such a decree does not require to be registered.<sup>6</sup> But the High Court of Bombay has taken a contrary view.<sup>7</sup> In any view a *personal* decree against a defendant is transferable without registration even though the decree may be a mortgage decree as against the other defendants.<sup>8</sup>

The rule does not require any particular form of writing.<sup>9</sup> In the under-mentioned case,<sup>10</sup> an order of the Court acting on behalf of the decree-holders and directing the sale of the decree by auction to the highest bidder, was held sufficient to constitute an assignment in writing for the purposes of this rule. But, the assignment of certain funds recoverable under a decree is not an assignment of the *decree*.<sup>11</sup>

**5. Transfer by operation of law.** — Ordinarily transferees by operation of law would include the following persons<sup>1</sup> :

- (1) In the case of a deceased decree-holder, his legal representatives.
- (2) In the case of an insolvent debtor the Official Assignee or Official Receiver.
- (3) The purchaser of a decree at a court-sale.

(86) 9 Bom 179 (181).

(24) AIR 1924 Cal 661 (662) : 51 Cal 703.

(12) 16 Ind Cas 807 (807) (Mad).

(12) 18 Ind Cas 78 (79) (Mad).

2. ('16) AIR 1916 PC 147 (147) : 43 Cal 990 : 43 Ind App 108 (PC).

(34) AIR 1934 Lah 328 (329). (A mere receipt acknowledging payment of money therefor is not enough.)

(84) 1884 All W N 39 (39). (In life-time of father, son not competent to apply in the absence of assignment in writing.)

(39) AIR 1939 Bom 84 (87). (But an agreement to transfer a decree need not be in writing.)

[See ('25) AIR 1925 Oudh 417 (417, 418) : 29 Oudh Cas 98. (Assets of decree-holder bank transferred to another.)]

3. ('16) AIR 1916 P C 147 (148) : 43 Cal 990 : 43 Ind App 108 (PC).

(25) AIR 1925 Bom 472 (472). (Similarly, a person entitled to obtain an assignment of a decree under another decree cannot apply.)

4. ('27) AIR 1927 Pat 170 (171).

5. ('33) AIR 1933 All 188 (189).

6. ('13) 21 Ind Cas 462 (463) : 35 All 524.

(91) 13 All 89 (91, 92).

(96) 23 Cal 450 (453, 454).

(08) 12 Cal W N 625 (627).

(28) AIR 1928 Lah 70 (71).

[But see ('83) 9 Cal 839 (842). (Entitled to execute it only as a money decree.)]

7. ('75) 1 Bom 267 (268).

8. ('28) AIR 1928 Mad 142 (142).

9. ('86) AIR 1936 Mad 543 (545).

(89) AIR 1939 Bom 221 (225) : ILR (1939) Bom

271. (Decree obtained by sons—In suit by father against sons for declaration of his title to decree, joint application signed by both parties stating that sons had no objection to surrender decree to father and requesting Court to pass a decree for father declaring his title to that decree—Writing held amounted to assignment of decree.)

10. ('36) AIR 1936 Mad 543 (545). Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient.)

11. ('37) AIR 1937 Cal 570 (572).

**Note 5**

1. ('24) AIR 1924 Cal 661 (662, 663) : 51 Cal 703.

(38) AIR 1938 Bom 367 (368) : 57 Bom 518.

(34) AIR 1934 Mad 471 (472).

(77) 2 Cal 327 (334) : 4 Ind App 66 (PC).

(08) 81 Mad 77 (79). (Legal representative.)

(12) 13 Ind Cas 824 (826). (Purchaser of decree in court-sale.)

(1900) 4 Cal W N 785 (787). (Decree in favour of insolvent transferred to surety on annulment of adjudication.)

(36) AIR 1936 Mad 543 (543). (The words "operation of law" apply to cases where the decree has been transferred from one to another by way of succession or where there is bankruptcy or any similar event which has the effect in law of bringing about such a transfer.)

[See ('30) AIR 1930 Cal 614 (615) : 57 Cal 1187. (Legal representative.)]

[See also ('39) AIR 1939 Bom 221 (224) : ILR (1939) Bom 271. (The transfers "by operation of law" are obviously intended to be confined to testamentary and intestate succession, forfeiture, insolvency and the like.)]



The following are also some of the instances of transfer by operation of law :

(1) *A* obtains a decree against *X*. *B*, his son, sues *A* for partition and obtains a decree for 1/5th share of the decree obtained by *A*. *B* is entitled to apply for execution as transferee by operation of law.<sup>2</sup>

(2) *A*, a trustee, obtained a decree for rent against certain tenants. *A* filed another suit and obtained therein a declaration that the trust was incapable of being executed. It was held that thereafter the original owner of the properties could apply to execute the decree for rent without actual assignment.<sup>3</sup>

(3) Where, on the revocation of a probate of a will, the minor son of the testator succeeds to the estate, he is entitled to execute the decree obtained by the executrix.<sup>4</sup>

(4) A mortgagee who has obtained a final decree for foreclosure against the mortgagor who in turn has obtained a decree for possession of the immovable properties comprised in the mortgage, is an assignee by operation of law.<sup>5</sup>

(5) Where a mortgage is foreclosed and a pre-emptor obtains a decree for pre-emption of the same properties, he is a transferee of the foreclosure decree.<sup>6</sup>

(6) A holder of a certificate of administration granted under Section 3 of the Bombay Regulation VIII of 1827 is a transferee by operation of law.<sup>7</sup>

For other instances, see the undermentioned cases.<sup>8</sup>

The words 'operation of law' cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos*.<sup>9</sup> If a decree obtained by a member of a joint Hindu family is allotted to another member at a family partition, the latter is not a transferee by operation of law and, therefore, must get an assignment in writing from the decree-holder to enable him to apply under this rule.<sup>10</sup> The High Court of Lahore has held in the undermentioned case<sup>11</sup> that where three brothers obtained a joint decree in their favour and at a family partition the decree was allotted to the share of one of the brothers, he could apply under this rule to execute the whole decree and that Rule 15 *ante* would not apply to such a case. A person does not become a transferee by operation of law from a decree-holder by merely obtaining another decree against him.<sup>12</sup> Thus, where *R*, the widow of *G*, obtained a decree in respect of a debt due to the estate of *G* and in a separate suit against *R*, *D* obtained a declaration that he was adopted to *G*, and that he was entitled to his estate, it was held that *D* was not an assignee by operation of law and was not therefore entitled to

2. ('91) 14 Mad 252 (254). (Reversing 13 Mad 347.)  
[See also ('02) 12 Mad L Jour 348 (349). (Person becoming entitled under a decree to execute another decree.)

('69) 1 N W P H C R 31 (34).]

3. ('24) AIR 1924 Pat 348 (345).

4. ('89) 16 Cal 347 (349).

[See also ('09) 1 Ind Cas 57 (58) (Cal). (Minor beneficiary attaining majority—Authority of executor terminated—Beneficiary is a transferee.)]

5. ('05) 1 Nag L R 49 (51).

6. ('27) AIR 1927 Ondh 858 (859) : 2 Luck 710.

7. ('87) 11 Bom 868 (370).

8. ('85) AIR 1985 Bom 298 (302) : 59 Bom 417. (Decree obtained by Hindu widow as representing husband's estate—Widow's conversion and remarriage—Widow ceases to represent husband's estate—Husband's next heir is transferee of decree by operation of law.)

('38) AIR 1938 All 256 (258) : ILR (1938) All 425. (*A*, manager of joint family, missing and lost for a number of years—His eldest son as manager is entitled to apply for execution of decree passed in favour of joint family.)

(40) A I R 1940 Mad 89 (90) : 50 Mad L W 605 (606). (Hindu father, sole decree-holder—Decree devolving on sons on father's death—Sons are transferees of the decree by operation of law—They are not holders of the decree who can apply for execution without recognition by the Court which passed the decree.)

9. ('86) AIR 1986 Mad 548 (544).

10. ('12) 16 Ind Cas 807 (807) (Mad).

(11) 9 Ind Cas 349 (349) (Bom).

('85) 1885 Bom P J 195 (195).

11. ('88) AIR 1988 Lah 432 (432, 433).

12. ('26) AIR 1926 Pat 320 (320) : 5 Pat 511. (*A* obtaining decree under S. 69, B. T. Act against tenant regarding land *X*—*B* obtaining

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execute the decree obtained by *R*.<sup>13</sup> The only course open to *D* in such a case is either to apply in execution of his own decree for the appointment of a receiver of *R*'s decree or to follow the procedure laid down in Rule 53, *infra*, if the decree in his favour gives him the right to proceed in accordance with that rule.<sup>14</sup> Similarly, it has been held that a person in whose favour a decree has been passed declaring his title to a certain decree previously passed is not a transferee of the decree by operation of law.<sup>15</sup>

The Official Liquidator of a company is merely an agent of the Court for the purposes of the liquidation of the company; he is not a *transferee* of any decree that may have been passed in favour of the company.<sup>16</sup>

**6. Benamidar.** — *A* obtains a decree against *B* and transfers it to *C* *benami* for *D*. It has been held by the High Court of Calcutta<sup>1</sup> that *D* is the person entitled to execute the decree, that *C*, not being the *real* transferee, cannot apply under this rule, and that a mere application by him for execution cannot be held to be one in "accordance with law" for the purposes of limitation, but that it will be one in "accordance with law" if, with the permission of the Court, *he is allowed to execute the decree*.<sup>2</sup> On the other hand, the High Courts of Madras,<sup>3</sup> Lahore<sup>4</sup> and Patna<sup>5</sup> and the Judicial Commissioner's Court of Sind<sup>6</sup> have held that the "transferee" referred to in this rule is the transferee *named as such* in the transfer, and that the real owner is not entitled to apply. The High Courts of Allahabad<sup>7</sup> and the Chief Court of Lower Burma<sup>8</sup> have also held that the *benamidar* is entitled to apply, without deciding whether the *real* owner can or cannot do so. The Calcutta High Court also has held in a recent case, a similar view.<sup>9</sup>

Where the transferee of a decree dies and thereupon his heirs and a person alleging that the transferee was only a *benamidar* for him apply separately to execute the decree, the Court has got power under Section 47, sub-section (3) to enquire who is the representative of the deceased and the question of *benami* can be gone into in execution proceedings.<sup>10</sup>

Where the decree itself is obtained by a *benamidar*, the Chief Court of Oudh<sup>11</sup>

decree against *A* in respect of the same land—*B* is not transferee of *A*'s decree.)

(34) AIR 1934 Mad 471 (472). (Decree declaring that assignment of another decree is *benami* for plaintiff—Declaratory decree does not operate as assignment in writing or by operation of law—He must have obtained a decree for compulsory assignment under Order 21 Rule 84.)

13. (33) AIR 1933 Bom 367 (368) : 57 Bom 513. [See also (34) AIR 1984 Mad 471 (472).]

14. (33) AIR 1933 Bom 367 (368) : 57 Bom 513.

15. (39) AIR 1939 Bom 221 (225) : ILR (1939) Bom 271. (Nor does the decree *ipso facto* constitute an assignment. At best, it creates a right to obtain an assignment of the decree—A person who obtains a right to obtain an assignment of a decree or the monies recoverable thereunder is not a transferee "by operation of law.")

[See also (37) AIR 1937 Oudh 471 (473) : 13 Luck 549. (Decree for *A* against *B—C* subsequently obtaining decree against *A* and declaration that he was entitled to part of decretal amount recoverable by *A* from *B—C* held was not transferee by operation of law.)]

16. (36) AIR 1936 Lah 152 (153).

**Note 6**

1. (89) 16 Cal 355 (368).

(88) 9 Cal 633 (634).

(79) 5 Cal L Rep 253 (256).

2. (98) 20 Cal 888 (395, 396).

(75) 19 Suth W R 255 (260).

3. (25) AIR 1925 Mad 701 (702) : 48 Mad 553. (Dissenting from 21 Mad 388.)

(34) AIR 1934 Mad 471 (471).

(18) AIR 1918 Mad 74 (75).

(35) AIR 1935 Mad 140 (141).

(39) AIR 1939 Mad 210 (214) : ILR (1939) Mad 1004.

[See also (07) 6 Mad L Jour 31 (32).]

4. (27) AIR 1927 Lah 110 (110) : 8 Lah 35.

5. (38) AIR 1938 Pat 457 (459) : 17 Pat 223.

(The mere fact that the real assignee gets a decree in a suit declaring that he is the real owner of the decree or the real assignee cannot entitle him to apply in execution or make his application one in accordance with law.)

6. (30) AIR 1930 Sind 1 (2).

7. (15) AIR 1915 All 264 (265) : 37 All 414.

8. (20) AIR 1920 Low Bur 118 (120) : 10 Low Bur Rul 280.

9. (35) 168 Ind Cas 618 (619) (Cal).

10. (27) AIR 1927 Mad 908 (905, 907) : 51 Mad 219.

11. (31) AIR 1931 Oudh 69 (69).

has held that the *benamidar* has the right to execute the decree. The High Court of Calcutta<sup>12</sup> is, on the other hand, of opinion that he cannot so apply and that his application will not, therefore, be one in accordance with law.

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**Notes 6-9**

**7. Part transfer of a decree.** — Under Section 232 of the old Code it was held that the transferee of the interest of any one of several joint decree-holders in the decree could apply to execute the decree.<sup>1</sup> This principle has been given effect to in the present Code by adding in this rule the words "or if a decree has been passed jointly.....in the decree" (see Note 1 *supra*). Similarly, there is nothing in this rule or elsewhere which prohibits the transferee of a *portion* of the decree from applying under this rule.<sup>2</sup> The only qualification in such a case is that the transferee is in the position of a *joint decree-holder* and can execute the decree only subject to general provisions of law analogous to Rule 15 *supra*.<sup>3</sup> But the High Court of Bombay has, in the undermentioned case,<sup>4</sup> taken the contrary view that a transferee of a part of a decree is not entitled to execute his part of the decree, nor even the whole decree, since he cannot be regarded as a joint decree-holder. See also Notes to O. 21 R. 15.

**8. Pledge of decree.** — The transfer of a decree by way of a mortgage is an "assignment in writing" of a fractional interest in the decree and the mortgagee is, therefore, entitled to apply under this rule.<sup>1</sup>

**9. Assignment of rent decrees under the Tenancy Acts.** — Section 148, clause (o) of the Bengal Tenancy Act (VIII of 1885) provides that, notwithstanding anything contained in Section 232, Civil Procedure Code (of 1882), an application for the execution of a decree for arrears of rent shall not be made by an assignee of the decree, unless the landlord's interest in the land has become vested in him.<sup>1</sup> The

[See also ('23) AIR 1923 Mad 317 (317). (While benamidar's application was pending, real owner impleaded as a party.)]

12. ('14) 25 Ind Cas 555 (556) (Cal).

[See also ('28) AIR 1928 Cal 835 (836). (Real owner can apply.)]

#### Note 7

1. ('96) 19 Mad 306 (307).

('87) 11 Bom 153 (153).

('86) 1886 Bom P J 287 (287).

[But see ('75) 24 Suth W R 11 (12). (Dissented from in 17 Cal 341.)]

2. ('90) 17 Cal 341 (343).

('26) AIR 1926 All 346 (348) : 48 All 432.

('28) AIR 1928 Lah 70 (71). (Dissenting from AIR 1919 Lah 429).

('21) AIR 1921 Mad 599 (601) : 44 Mad 919. (Assignee of a portion of a decree allowed to continue pending execution.)

('09) 8 Ind Cas 444 (444) : 33 Mad 80.

('18) 35 All 204 (206). (But the transferee is not entitled to apply for execution of a part of the decree.)

[See also ('80) 5 Cal 592 (593).

('28) AIR 1928 Mad 718 (716) (FB). (Partial transfer of a decree is valid.)

('33) AIR 1933 Lah 473 (473). (Decree in favour of several persons — Assignment of decree by one of them — Assignment passes only interest of assignor decree-holder.)

[But see ('20) AIR 1920 Lah 324 (325). (This rule does not contemplate a transfer of a part

of a decree.)

('19) AIR 1919 Lah 429 (429) : 1917 Pun Re No. 15. (Dissented from in AIR 1928 Lah 70.)

('22) AIR 1922 All 101 (102). (Dissented from in AIR 1926 All 346.)]

3. ('21) AIR 1921 Mad 599 (601) : 44 Mad 919.

('19) AIR 1919 Mad 123 (126).

('13) 19 Ind Cas 304 (304) : 35 All 204. (Transferee cannot apply for execution of the portion transferred only.)

('74) 24 Suth W R 245 (246). (Must execute the whole decree.)

('73) 20 Suth W R 51 (51). (Court should protect the interest of others.)

4. ('34) AIR 1934 Bom 59 (62) : 58 Bom 226.

#### Note 8

1. ('26) AIR 1926 All 346 (348) : 48 All 432. (AIR 1922 All 101, Dissented from.)

('29) AIR 1929 Cal 676 (679) : 57 Cal 549.

('09) 1 Ind Cas 535 (538) : 34 Mad 442.

#### Note 9

1. ('31) 54 Cal L Jour 596 (597, 600). (Cannot be executed even as a simple money decree.)

('13) 18 Ind Cas 689 (690) : 40 Cal 462. (Landlord's interest defined.)

('14) AIR 1914 P O 111 (114) : 41 Cal 926 : 41 Ind App 91 (P C). (The relationship of landlord and tenant must exist.)

('99) 26 Cal 176 (178).

('97) 1 Cal W N 188 (184).

('97) 1 Cal W N 694 (694).

('02) 6 Cal W N 91 (91).

**O. 21 R. 16**  
**Notes 9-11**

word "assignee" in that Section refers only to purchasers for consideration and does not include a person in whom the legal estate is vested by an act of the owner, as for instance, a trustee, who has no independent interest in the property.<sup>2</sup> It has been held in the undermentioned case<sup>3</sup> that a Court executing a rent decree cannot refuse execution when the assignment had been recognised by the Court before the Tenancy Act came into force.

A provision similar to that in Section 148 of the Bengal Tenancy Act has been made also by Section 198 (k) of the Orissa Tenancy Act (II of 1913). By Schedule II, List II of the Agra Tenancy Act (III of 1926) it is provided that no application for the execution of a decree shall be made by an assignee of the decree unless the assignor's interest in the land to which it relates has become and is vested in such assignee.

**10. Transfer, when takes effect.** — The transfer of a decree made by an instrument in writing takes effect from the date of such instrument, irrespective of its recognition by the Court on an application made to it under this rule.<sup>1</sup>

*Illustrations*

1. A brought certain properties to sale in execution of a decree obtained by him against F. Pending execution proceedings, A assigned his decree to D. . . Subsequently two days before sale, A reported that the decree had been satisfied by payment. D intervened and objected to the record of satisfaction being made. It was held that if his transfer was true, he was a representative of A and the matter must be enquired into: *Dwar Buksh v. Fatik Jali*, I. L. R. 26 Calcutta 250.

2. M had obtained a money decree against H. R in execution of a decree obtained by him against M applied under O. 21 R. 53 and recovered the amount due under M's decree. Thereupon O, claiming under an assignment of the decree in writing from M prior to R's attachment, sued R for the recovery of the money drawn by him. It was held that O's title to the decree was complete on the date of the assignment and therefore prevailed as against R's attachment: *Co-operative Town Bank of Padigan v. Raman Chettiar*, I. L. R. 5 Rangoon 595 : A. I. R. 1928 Rangoon 25 (26). [Reversing A. I. R. 1927 Rangoon 55.]

**11. Rights of the transferee.** — Section 232 of the old Code contained the words "and if that Court thinks fit, the decree may be executed." It was, therefore, held that the executing Court had a discretion to allow or to refuse an application made by the transferee.<sup>1</sup> Under the present Code, those words have been omitted and the transferee's right to execution does not depend upon the discretion of the Court.<sup>3</sup>

[See ('09) 3 Ind Cas 324 (329) (Cal). (A case where landlord's interest vested by operation of law.)]

2. ('99) 26 Cal 750 (757).

3. ('87) 14 Cal 380 (381, 382).

**Note 10**

1. ('87) 9 All 46 (51).

('94) 16 All 483 (492).

('99) 26 Cal 250 (253).

('09) 3 Ind Cas 998 (999) : 38 Mad 62.

('09) 1 Ind Cas 353 (353) (Mad). (An attachment after date of assignment does not prevent recognition of the transferee as such.)

('07) 2 Mad L Tim 98 (93).

('28) AIR 1928 Rang 25 (26) : 5 Rang 595. (Reversing AIR 1927 Rang 55 on Letters Patent appeal.)

('28) AIR 1928 Sind 71 (78) : 26 Sind L R 153. (Assignee can prefer a claim against attachment after transfer.)

[See also ('82) AIR 1982 Sind 164 (164) : 20 Sind L R 158.

('28) AIR 1928 Mad 478 (478) : 51 Mad 681. (Auction sale of decree in favour of company by liquidator — Deed of transfer after dissolution — Held valid.)]

[But see ('80) 5 Cal 869 (870, 871).]

**Note 11**

1. ('91) 15 Bom 307 (309).

('85) 9 Bom 179 (181).

('93) 20 Cal 888 (395).

('88) 15 Cal 446 (448, 449).

('71) 15 Suth W R 283 (283).

('70) 13 Suth W R 224 (225).

('70) 13 Suth W R 207 (207).

('68) 10 Suth W R 354 (355).

('67) 8 Suth W R 202 (202).

('96) 19 Mad 806 (807).

('85) 8 Mad 455 (468).

('89) 2 C P L R 45 (46). (And the Appellate Court will not interfere unless it is shown that the discretion is improperly exercised.)

2. ('10) 6 Ind Cas 826 (828) : 38 Cal 18.

Where a transfor is recognized by the Court on an application under this rule, the transferee is entitled to execute the decree as if the application were made by the original decree-holder.<sup>3</sup> The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his rights to execute the decree, provided the assignment is not a sham transaction.<sup>4</sup>

**O. 21 R. 16**  
**Note 11**

It has already been mentioned in Notes to O. 21 R. 10 *ante* that the person appearing on the face of the decree as the decree-holder is the person entitled to execution. Therefore, where the transferee of a decree does not apply under this rule for execution, the executing Court is bound to allow execution at the instance of the transferor, even after the date of the transfer, till the transfer is recognized by the Court.<sup>5</sup>

The assignee of a decree can transfer it to another although the name of such assignee has not been substituted on the record.<sup>6</sup>

As to the right of the transferee to apply for execution, where the decree has been attached by the holder of a decree against the transferor, see Notes to O. 21 R. 53, *infra*.

Where an *ex parte* decree was assigned and the assignee did not take any step under this rule and thereafter on an application made by the defendant as against the original decree-holder alone the *ex parte* decree was set aside, it was held that the transferee could not proceed with the execution until he got an order cancelling the order setting aside the *ex parte* decree.<sup>7</sup>

See also Note 9 to O. 21 R. 2.

('82) AIR 1982 Cal 439 (440) : 59 Cal 297.

('84) AIR 1984 Lah 648 (651) : 16 Lah 63.

('87) AIR 1987 Bom 365 (367) : I L R (1987) Bom 691.

3. ('67) 7 Suth W R 205 (205).

('84) AIR 1984 All 209 (211) : 56 All 694. (Judgment-debtor cannot set up an uncertified payment as against transferee also.)

('87) 11 Bom 153 (158).

('94) 16 All 133 (135). (Entitled to the benefit of attachment effected before transfer.)

('18) 18 Ind Cas 691 (694) (Mad). (Do.)

[See also ('72) 4 N W P H C R 90 (92). (Assignee's name should be brought on record as a party.)]

4. ('28) AIR 1928 Mad 458 (459).

('19) AIR 1919 Mad 123 (125).

5. ('17) AIR 1917 Mad 691 (692).

('33) AIR 1933 Lah 638 (639) : 14 Lah 744. (Decree handed over to trustee by decree-holder — No legal application by trustee under O. 21, R. 16 — Joint application by decree-holder and trustee — Decree-holder can be allowed to execute decree.)

('84) AIR 1984 Pesh 40 (48).

('88) AIR 1988 Sind 119 (120).

('15) AIR 1915 Mad 914 (915). (Injunction decree in respect of easement — Decree-holder transferring dominant tenement — Decree-holder allowed to execute after transfer.)

('91) 18 Cal 639 (641).

('69) 11 Suth W R 271 (271).

('31) AIR 1931 Lah 116 (117).

('24) AIR 1924 Lah 615 (616). (Pre-emption decree.)

('13) 18 Ind Cas 97 (98) : 16 Oudh Cas 70.

('21) AIR 1921 Low Bur 37 (39) : 11 Low Bur Rul 163.

('37) AIR 1937 Mad 605 (606).

('85) AIR 1985 Nag 230 (233, 234) : 31 Nag L R Sup 111. (Whether substitution of transferee's name is accomplished by an order of the Court passed upon a separate application made by the transferee under O. 22 R. 10 or upon an application by him for execution of the decree under O. 21 R. 16, C. P. C., is immaterial.)

('39) AIR 1939 Cal 482 (483).

('35) AIR 1935 Mad 383 (384). (Execution Court should regard only person in whose favour decree is drawn as entitled to execute it — Decree satisfied — Transferee of decree-holder cannot execute it subsequently.)

('39) AIR 1939 Rang 245 (246) : 1939 Rang L R 152. (There is no authority for the proposition that from the date of assignment of his decree the assignor decree-holder is precluded from executing the decree.)

('35) AIR 1935 All 1001 (1001).

[See also ('35) AIR 1935 Bom 331 (332). (A dakhast regularly filed by the decree-holder cannot come to an end because, pending execution, the judgment-creditor has assigned his interest in favour of another person.)]

6. ('86) 9 All 46 (51).

('17) AIR 1917 Mad 853 (854).

7. ('16) AIR 1916 Cal 323 (324.).

**O. 21 R. 16**  
**Notes 12-13**

**12. Application for execution must be made to the Court which passed the decree.** — An application by the transferee of a decree under this rule can be entertained only by the Court which passed the decree; the Court to which the decree has been transferred has no jurisdiction to entertain the same.<sup>1</sup> The reason is, as stated in *Sheo Narain Singh v. Hurbans Lall*, (1870) 14 W. R. 65 (66), that :

"It would lead to the greatest difficulties, if in one Court one party was recognised as being the holder of, and having the control over, a decree, and at the same time in another Court another party was recognised as being in that position."

Where, however, an application under this rule is made to the transferee Court and it recognises the transfer, it is only an irregularity which may be waived by acquiescence and if the judgment-debtor has, as a matter of fact, waived it, he cannot subsequently turn round and question the jurisdiction of the executing Court.<sup>3</sup>

As to whether a transferee can *continue* the execution proceedings initiated by the original decree-holder without a fresh application, see Note 19 *infra*.

Where a decree is passed in favour of a company which afterwards goes into liquidation, the Official Liquidator is not a *transferee* of the decree and hence, he can apply for the execution of the decree to the Court to which the decree has been transferred for execution.<sup>3</sup>

See also the undermentioned case.<sup>4</sup>

**13. Award.** — *A* having obtained an award against *B* and filed it in Court, assigned the same to *C*. *C* applied to execute it under Section 15, Arbitration Act (IX of 1899) which provides that the *award* on being filed in Court, shall be enforceable as a decree. It was held that *C* could execute it and that the Court in which the award

**Note 12**

1. (1900) 27 Cal 488 (491). (If entertained by transferee Court, the order is without jurisdiction and can be set aside in appeal — It is not cured by S. 99. Application is by transferee from the original transferee.)

('34) AIR 1934 Lah 648 (650) : 16 Lah 63. (Section 42 is subject to this rule.)

('03) 25 All 443 (445). (Application for rateable distribution to the transferee Court is bad.)

('79) 2 All 288 (288).

('72) 9 Bom H O R 46 (49).

('02) 29 Cal 285 (286). (Notice under this rule must also be issued by the executing Court.)

('70) 14 Suth W R 65 (66).

('31) AIR 1931 Lah 499 (499, 500).

('81) AIR 1931 Lah 690 (690, 691). (Transferee Court can entertain the objection that R. 16 has not been complied with before transfer.)

('18) AIR 1918 Lah 211 (213) : 1918 Pun Re No. 92. (Sections 200 and 201, Companies Act of 1913, are subject to Order 21 Rule 16.)

('07) 17 Mad L Jour 300 (301). (But it may be waived.)

('03) 26 Mad 258 (259).

('20) AIR 1920 Nag 174 (175).

('32) AIR 1932 Pat 168 (169) : 11 Pat 94.

('78) 2 All 288 (288).

('87) AIR 1987 Bom 865 (869) : 1 L R (1987) Bom 691. (Notice cannot be issued by Court to which decree is sent for execution.)

('85) 39 Cal W N 961 (965).

('87) AIR 1987 Oudh 111 (112) : 12 Luck 755. (Decree transferred to another Court for execu-

tion — Objection to execution by transferee of decree cannot be entertained by the transferee Court.)

('87) AIR 1937 Cal 31 (34).

[See also ('33) AIR 1933 Mad 110 (111, 112).

(Decree assigned after transfer to another Court — Application under R. 16 can be entertained by original Court before certificate of non-satisfaction is received — The original Court need not stay its hand.)]

2. ('34) AIR 1934 Lah 648 (651) : 16 Lah 63. (27 Cal 488 held to be not good law so far as it held that the order was without jurisdiction in view of the decision in the analogous case AIR.1928 P C 162 arising under Section 50.)

('07) 17 Mad L Jour 300 (301).

3. ('86) AIR 1986 Lah 152 (153).

4. ('40) AIR 1940 Mad 88 (40) : (1939) 2 Mad L Jour 596 (600). (A Civil Court to which an award made by a Registrar of Co-operative Societies under the Madras Co-operative Societies Act of 1932 has been transmitted for execution has jurisdiction to recognise an assignment of the award under O. 21 R. 16, C. P. Code. Under the rules framed under the Act, the award is transferred to the Court to be enforced as if it was a final decree passed by such Court — Though Registrar is himself a Court for certain purposes, in the absence of any rules in the matter, the executing Court must be presumed to be empowered to recognize the transfer — In any case, where assignment was recognized after due notice to judgment-debtor it is only an irregularity.)

was filed must be deemed to be the Court which passed the decree for the purposes of this rule.<sup>1</sup>

**O. 21 R. 16**  
**Notes 13-14**

**14. Notice to transferor and judgment-debtor.** — The provisions of this rule as to notice are imperative; the giving of notice of the application, to the assignor and to the judgment-debtor, is an indispensable condition of jurisdiction and the failure to give it renders all the proceedings in execution void as against them.<sup>1</sup> It has, however, been held that if the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection so far as the execution proceedings are concerned, non-compliance with the technical requirements of this rule will not render an execution sale a nullity.<sup>2</sup> Under the amendment of this rule by the Lahore High Court, notice to the *judgment-debtor* is not necessary.<sup>3</sup>

Where the assignee applied under this rule for notices to the assignor and the judgment-debtor and also for *attachment* of a certain property, and the notice as well as the warrant of attachment were issued together, it was held that the attachment was illegal inasmuch as the objections of the judgment-debtor were not heard at that time.<sup>4</sup> Where, in an application under this rule by the assignee of a mortgage decree, notice is given only to the mortgagor and not to the subsequent mortgagee who was also a judgment-debtor under the decree, the latter will not be bound by such execution and the auction-purchaser will acquire only the rights of the mortgagor, but not those of the subsequent mortgagee.<sup>5</sup>

The notice that is to be given under this rule is of the *application* for execution and not of the *assignment*.<sup>6</sup> But a written notice is not always necessary; if the judgment-debtor is present in Court at the time the order on the application is made, and has thus notice of the application, the fact that no written notice was given will not vitiate the proceedings.<sup>7</sup>

#### Note 13

1. ('24) AIR 1924 Cal 117 (118).  
[See also ('39) AIR 1939 Cal 482 (483, 484). (The holder of an award is entitled to execute the award, although he may have transferred his rights under it to a transferee unless and until such transferee comes to the Court and applies under O. 21 R. 16.)]

#### Note 14

1. ('27) AIR 1927 Cal 781 (782) : 54 Cal 624. (Want of notice to the transferor.)
- ('10) 6 Ind Cas 262 (263) (Cal). (Do.)
- ('21) AIR 1921 Lah 143 (144) : 2 Lah 290. (Want of notice to judgment-debtor.)
- ('20) AIR 1920 Lah 251 (253).
- ('31) AIR 1931 Mad 192 (193). (Want of notice to one of the judgment-debtors.)
- ('21) AIR 1921 Pat 76 (77) : 5 Pat L Jour 390. (The fact that a notice purporting to be under S. 158B (2), Bengal Tenancy Act, (1885), has been shown to the assignor will not dispense with the necessity of complying with the rule.)
- ('17) AIR 1917 Lah 195 (196). (Want of notice to judgment-debtor.)
- ('37) AIR 1937 Bom 365 (367) : ILR (1937) Bom 691.
- ('88) AIR 1988 Cal 734 (736). (The non-service of such notice makes the sale held in execution of that decree void *ab initio*, although the purchaser is not the decree-holder himself but an absolute stranger.)

[See ('33) AIR 1933 Lah 432 (433). (Though failure to give notice will affect the validity of the proceedings, it does not warrant dismissal of application.)]

('84) AIR 1934 Pat 9 (10). (Execution application by assignee—Notice sent to assignor and judgment-debtor under O. 21 R. 22 but not under R. 16—Assignment not impugned by judgment-debtor — Assignee can proceed with execution without first proving assignment.)]

[See however ('87) 9 All 46 (49). (Judgment-debtor cannot object on the ground of want of notice to the transferor.)]

2. ('39) AIR 1939 Cal 419 (421). (Notice to which reference is made in O. 21 R. 16 is merely for the benefit of the transferors and the judgment-debtors.)

3. ('37) AIR 1937 Lah 465 (467) : I L R (1937) Lah 162.

4. ('11) 12 Ind Cas 547 (547) : 36 Bom 58.

5. ('30) AIR 1930 All 627 (627, 628) : 52 All 898. (Reversing AIR 1929 All 437.)

6. ('24) AIR 1924 Pat 576 (578, 580) : 3 Pat 596.

('21) AIR 1921 Pat 180 (182) : 6 Pat L Jour 358.  
[See also ('38) AIR 1938 Pat 658 (663) : 13 Pat 86. (Court can issue notice under Rr. 16 and 22 simultaneously.)]

7. ('24) AIR 1924 Pat 576 (580) : 3 Pat 596.  
[See also ('88) AIR 1988 Pat 130 (131).]



**O. 21 R. 16**  
**Notes 14-18**

The object of issuing notice under this rule is to determine once for all and in the presence of all the parties the validity of the instrument of transfer. It is therefore not necessary that notice must be issued on *every* subsequent application by the transferee under this rule.<sup>8</sup>

Where the Court which passed the decree substitutes the name of the alleged transferee of the decree on the record and transfers the decree to another Court for execution, the latter Court must presume that the Court passing the decree has complied with the provisions of this rule.<sup>9</sup>

If the judgment-debtor is dead when the assignee applies for execution, the notice required by this rule may be served on his legal representatives.<sup>10</sup> If the original decree-holder becomes insolvent, the Official Receiver will be entitled to notice.<sup>11</sup>

In the case of a transfer by operation of law, it is not necessary that the notice referred to in the first proviso to this rule should be given.<sup>12</sup>

**15. Objections to be heard.** — After the service of the notice mentioned in the first proviso to this rule, the Court is bound to hear the objections, if any, of the transferor and of the judgment-debtor.<sup>1</sup> As has been already mentioned in Note 11, it is not a valid objection that the assignment is not supported by consideration.<sup>2</sup> Nor can the judgment-debtor raise the plea that the *decree* is not valid.<sup>3</sup> As to the right of the judgment-debtor to plead an uncertified payment or adjustment, see Note 23 to O. 21 R. 2.

*A* held a decree against *B* and *B* had a decree against *A*. *A* attached in execution of his decree the decree which *B* had against him. Thereafter, *B* assigned the decree to *C*. *C* applied under this rule. It was held that *A* could take objection to the execution of the decree on the ground that under Section 64 *ante*, the assignment of the decree to *C* was void.<sup>4</sup>

An assignment of a decree is not valid as against the judgment-debtor until the debtor has had notice of the assignment and, therefore, any payment made to the original decree-holder before notice is valid as against the transferee.<sup>5</sup>

The failure of the judgment-debtor to object to the validity of the assignment when an application under this rule is made will preclude him, under general principles of *res judicata*, from raising such objection at a subsequent stage of the proceedings.<sup>6</sup>

8. ('27) AIR 1927 Cal 694 (696).

('34) AIR 1984 Rang 101 (108).

[See also ('80) 1980 Mad W N 166 (168).]

9. ('36) AIR 1936 Sind 191 (198) : 30 Sind L R 249.

10. ('87) 11 Bom 727 (730).

('07) 30 Mad 541 (543).

11. ('28) AIR 1928 Mad 360 (361).

[See also ('18) AIR 1918 Mad 1262 (1262).]

12. ('84) AIR 1934 Pat 627 (628).

('88) AIR 1988 All 256 (257) : I L R (1988) All 425.

[See also ('87) AIR 1987 Pat 607 (608).]

**Note 15**

1. ('31) AIR 1931 Lah 545 (546).

('14) AIR 1914 Mad 86 (87).

('88) AIR 1988 Mad 78 (79). (Application for execution by transferee of decree — Opposition by judgment-debtor that transfer was sham — Court must decide validity of transfer before making order — Order of Court thereafter is decree under S. 47 — Separate suit to declare transfer invalid is barred by S. 47.)

[See also ('22) AIR 1922 Lah 896 (897).]

2. ('18) 20 Ind Cas 685 (689) (Cal).

('82) AIR 1932 Mad 827 (827, 828).

('15) AIR 1915 Mad 1188 (1140). (In the absence of fraud.)

('12) 17 Ind Cas 617 (618) (Mad).

[See also ('25) AIR 1925 Pat 449 (449) : 4 Pat 120. (Question when title passes where part consideration is unpaid, depends upon the intention of the parties.)]

3. ('91) 15 Bom 307 (308).

('16) AIR 1916 Low Bur 36 (86).

4. ('87) AIR 1987 All 68 (64).

5. ('24) AIR 1924 Pat 118 (119) : 2 Pat 754.

6. ('25) AIR 1925 All 117 (118) : 47 All 86.

('16) AIR 1916 All 219 (219) : 88 All 289.

('14) AIR 1914 All 929 (890).

('18) 21 Ind Cas 462 (468) : 85 All 524.

('87) 10 Bom 74 (77).

('08) 12 Cal W N 625 (627).

('87) AIR 1987 Cal 4(6). (Substitution of assignee's name after notice to judgment-debtor — Judg-



As to objections to the executability of the decree under similar circumstances, see Note 23 to Section 11 *ante*, and also the undermentioned cases.<sup>7</sup>

**O. 21 R. 16**  
**Notes 15-16**

**16. Transfer of decree for payment of money against two or more persons to one of them.**—It is a general principle of law that when one of the persons jointly liable under a decree unites in himself the two opposite characters of creditor and joint debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree.<sup>1</sup> The second proviso to this rule is based on this general principle, and provides that, in such a case, the transferee cannot enforce the decree by execution against his co-debtors.<sup>2</sup> On the same principle, where a decree has been passed jointly in favour of two or more persons and the interest of one of such decree-holders devolves upon a judgment-debtor, the decree is extinguished *pro tanto*.<sup>3</sup> When the alleged transferee of a decree for money is found to be the *benamidar* of one of the judgment-debtors, the Court is bound, under the second proviso to this rule, to refuse to allow the assignee to execute the decree against the other judgment-debtors.<sup>4</sup> But it has been held that where the judgment-debtor did not raise the objection when notice was issued to him under the first proviso to this rule, he cannot subsequently raise the objection.<sup>5</sup> But an agreement between the decree-holder and some of the judgment-debtors that the decree-holder should execute the decree against the other judgment-debtors and pay the amount realized to them in consideration of the fact that they have paid the

ment-debtor not contesting assignment—Judgment-debtor and executing Court cannot question validity of assignment.)

[See also ('20) AIR 1920 Pat 146 (147) : 5 Pat L Jour 639. (Objection as to want of proper notice under this rule not taken in first execution—Objection not allowed in an application for setting aside sale under O. 21 R. 90.)

('25) AIR 1925 All 206 (208).

('40) AIR 1940 Mad 98(40) : (1939) 2 Mad L Jour 596 (600). (Failure to take objection on ground that assignment of decree could only be recognised by Court passing decree—Objection held cured in the circumstances of case.)]

7. ('25) AIR 1925 All 662 (662, 663). (Objection that decree is nullity is barred by *res judicata*.)

('32) AIR 1932 Pat 168 (169) : 11 Pat 94. (Transferee put on record by Court passing decree—Decree transferred to Court of another district—Objection as to transferee's right to execution cannot be taken in transferee Court.)

('39) AIR 1939 Pat 411 (412) : 18 Pat 318. (In execution proceedings, it is not open to the judgment-debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree, unless there has been a valid assignment or devolution by process of law.)

('38) AIR 1938 Cal 919 (922) : 60 Cal 1181. (Application by assignee for substitution in place of decree-holder—Judgment-debtor not objecting to such application is not debarred from questioning assignee's right to execute decree by reason of bar imposed by S. 148 (a), Ben. Ten. Act.)

#### Note 16

1. ('88) 5 All 27 (88).

[See ('32) AIR 1932 All 704 (708) : 54 All 448.

(This principle will not apply to a converse case where decree-holder acquires a share in the estate of one of the judgment-debtors.)]

2. ('68) 9 Suth W R 230 (234).

('26) AIR 1926 Mad 1141 (1142). (Transfer of personal decrees brought about by death is not excluded from the operation of Proviso 2.)

('15) AIR 1915 Mad 799 (800).

3. ('76) 25 Suth W R 343 (343).

('89) 5 All 27 (34).

('94) 1894 All W N 15 (16).

('67) 7 Suth W R 136 (136).

4. ('22) AIR 1922 Mad 510 (510).

('17) AIR 1917 Mad 590 (591) : 40 Mad 296.

('17) AIR 1917 Mad 889 (889).

('20) AIR 1920 Lah 431 (432, 433).

('24) AIR 1924 Nag 41 (42) : 19 Nag L R 151.

[See ('29) AIR 1929 All 792 (792). (Transfer of decree to relative of judgment-debtor does not amount to transfer to judgment-debtor.)]

[See also ('12) 12 Ind Cas 657 (660) : 35 Mad 659. (Objection that the assignee is the benamidar for judgment-debtor should be decided.)

('31) AIR 1931 Lah 545 (546). (Do.)

('26) AIR 1926 Lah 666 (667). (Do.)

('89) 2 C P L R 45 (47). (Assignee benamidar for judgment-debtor—His right to execute decree doubted.)]

5. ('37) AIR 1937 Oudh 111 (112) : 12 Luck 755.

[See ('38) AIR 1938 Oudh 106 (106). (Objection not barred if judgment-debtor was not aware when notice was issued to him, that assignee of decree was benamidar for one of the judgment-debtors.)]

[See however ('89) AIR 1989 Rang 245 (247) : 1939 Rang L R 162.]

**O. 21 R. 16**  
**Notes 16-17**

amount in advance, does not fall under the prohibition in this rule.<sup>6</sup>

This proviso does not make the assignment of a decree in favour of one of several judgment-debtors invalid in law; it only provides that the transferee is not entitled to enforce his rights by execution.<sup>7</sup> His remedy is, therefore, to sue his co-judgment-debtors for contribution having regard to the proportion in which they were bound *inter se* to satisfy the decree.<sup>8</sup>

The words "decree for the payment of money against two or more persons" mean a decree against two or more persons *jointly*.

*Illustration*

A decree directed that *N* should pay Rs. 90 and Rs. 11-5-3 as costs, and *A* should pay Rs. 30 with Rs. 3-12-4 as costs. *A* afterwards took an assignment of the decree in writing and applied to execute it against *N* to the extent of Rs. 90 and costs. It was held that the decree for money so far as it related to Rs 90 and costs was not a decree against several persons, but against one person *N*, and therefore *A* could execute it.<sup>9</sup>

The second proviso to this rule does not apply to the converse case of the decree-holder acquiring a share in the estate of one of the judgment-debtors. The decree-holder is, however, bound to give credit for a *proportionate* amount of the decree.<sup>10</sup>

The proviso applies whether the transfer of the decree is by act of parties or by operation of law.<sup>11</sup>

It has been held by the Rangoon High Court that where a decree for the payment of money has been passed against two or more persons and one of them dies, his legal representative does not become a "judgment-debtor" and the transfer of the decree to him is not a transfer to which proviso 2 applies.<sup>12</sup>

**17. "Decree for the payment of money."** — The second proviso to this rule does not apply to decrees other than *money* decrees.<sup>1</sup> Thus, it does not apply to mortgage decrees for sale and therefore, an assignment of a mortgage decree in favour of one of the judgment-debtors does not extinguish the decree.<sup>2</sup> But, in such cases, the decretal amount that can be recovered from the other judgment-debtors will be reduced proportionately.<sup>3</sup>

The expression "decree for money" in Section 232 of the old Code (corresponding to this rule) was interpreted by the High Courts of Bombay and Calcutta to mean a personal decree for the payment of money. Thus, a decree against a legal

6. ('27) AIR 1927 Mad 322 (326).

[See also ('09) 2 Ind Cas 88 (88) (All).]

7. ('12) 17 Ind Cas 823 (827) (Mad).

8. ('08) 32 Bom 195 (197).

('74) 6 N W P H O R 1 (2).

('89) 1889 Bom P J 262 (268).

('18) 20 Ind Cas 569 (570) (Cal).

9. ('08) 82 Bom 195 (197).

10. ('88) AIR 1938 Mad 814 (815) : I L R (1939) Mad 73. (Following AIR 1932 All 704 and AIR 1927 Mad 987 and dissenting from AIR 1926 Mad 1141.)

('85) AIR 1935 Oudh 449 (450) : 11 Luck 409.

11. ('88) AIR 1938 Mad 814 (814) : I L R (1939) Mad 73.

12. ('89) AIR 1939 Rang 82 (84) : 1938 Rang L R 699.

**Note 17**

1. ('88) 18 Cal L Rep 272 (274).  
(12) 17 Ind Cas 823 (827) (Mad).

('38) AIR 1938 Pat 462 (468) : 17 Pat 206.

2. ('11) 12 Ind Cas 70 (72) (Cal).

'18) AIR 1918 Cal 602 (604).

'26) AIR 1926 Mad 623 (623, 624) : 49 Mad 508.

(Until a personal decree is given it cannot be called a money decree.)

('24) AIR 1924 Mad 901 (901) : 47 Mad 948.

('89) AIR 1939 Cal 425 (426). (Person acquiring the interest of one of the judgment-debtors and subsequently getting a transfer of the decree can execute against the other judgment-debtors.)

('87) AIR 1937 Sind 112 (113) : 81 Sind L R 47.

('37) 1937 Mad W N 384 (385).

('20) AIR 1920 All 129 (131) : 42 All 544.

('89) AIR 1939 Cal 425 (426). (Assignee of mortgage decree having previously acquired the interest of one of the judgment-debtors can execute.)

3. ('20) AIR 1920 All 129 (131) : 42 All 544. (Person acquiring a portion of the mortgaged property subsequently becoming a transferee of

representative for payment of money out of the assets of the deceased,<sup>4</sup> or a decree against a purchaser of the equity of redemption in a mortgage suit,<sup>5</sup> was held not to come within that Section. The High Court of Allahabad<sup>6</sup> has in the undermentioned case held that the substitution of the expression "for the payment of money" for the words "for money" in the proviso is intended to emphasise the fact that the proviso is confined to cases of personal decrees. On the other hand, the Judicial Commissioner's Court of Nagpur<sup>7</sup> has held that this is an unduly narrow interpretation of the rule and that it is immaterial whether the assignee decree-holder is one against whom a personal money decree has been passed or one who has been directed to pay the decretal debt out of the assets in his hands.

For meaning of "decree for payment of money," see Note 6 to Section 73 *ante*.

**18. Attachment of decree by co-judgment-debtor.** — One *S* obtained a decree against *A*, *B*, *C* and *D*. *A* obtained decree against *S* and attached the decree of *S* and applied under O. 21 R. 53 for execution of *S*'s decree against his co-judgment-debtors *B*, *C* and *D*. It was held that *A*, by attaching *S*'s decree, did not become an assignee thereof, that the prohibition in this rule did not therefore apply to such a case and that *A* was entitled to execute the decree.<sup>1</sup>

**19. Application for substitution by transferee.** — A transferee from a decree-holder can only apply under this rule to *execute* the decree; an application merely for recognising him as transferee is legally incompetent and must be rejected.<sup>1</sup> It is not also necessary for the validity of the proceedings that the substitution of the name of the transferee is actually made.<sup>2</sup> All that is necessary is that the transferee should merely file his application for execution of the decree setting out either in it or in an affidavit filed in support thereof that he is such a transferee; thereupon the Court orders the application for execution to proceed or rejects it.<sup>3</sup> But, although a separate application by the transferee of a decree merely for substitution in place of the original decree-holder is not formally required under the Code, the prayer for such substitution is necessarily implied in an application by him for execution of the decree under O. 21 R. 16 and the substitution of his name is, in practice, generally

the mortgage decree cannot recover the whole of the mortgage money from the other portion of the mortgaged property, although his right to execute the decree is not totally extinguished.)

(37) 1937 Mad W N 384 (385.)

4. ('07) 31 Bom 308 (312, 313).

5. ('85) 11 Cal 393 (396).

6. ('32) AIR 1932 All 704 (707) : 54 All 448.

7. ('24) AIR 1924 Nag 41 (41) : 19 Nag L R 151.

#### Note 18

1. ('09) 2 Ind Cas 626 (627) (All).

#### Note 19

1. ('13) 21 Ind Cas 609 (609) (Mad). (An amendment of such application by adding a prayer for execution will not be allowed in appeal.)

(33) AIR 1933 Mad 797 (797, 798). (Application by assignee to be recognized as decree-holder and for transmission of decree for execution is a petition for execution.)

(35) AIR 1935 Sind 26 (26).

(38) AIR 1938 Sind 841 (842) : 27 Sind L R 814.

(Such an application is not one in accordance with law.)

(12) 14 Ind Cas 704 (705) (Mad).

(04) 14 Mad L Jour 393 (393).

(27) AIR 1927 All 165 (167) : 49 All 509 (F B).

(26) AIR 1926 Cal 957 (958).

(28) AIR 1928 Oudh 30 (31) : 3 Luck 126.

(37) AIR 1937 Bom 365 (367) : I L R (1937) Bom 691. (Application by transferee of decree merely to be brought on record is not an application in accordance with law as it is not an application in execution.)

[See also ('02) 29 Cal 235 (236). (Application to transmit to another Court treated as an application under this rule.)]

2. ('09) 3 Ind Cas 324 (326) (Cal).

(09) 1 Ind Cas 168 (174) : 36 Cal 543.

[See also ('73) 19 Suth W R 255 (260).]

3. ('25) AIR 1925 Mad 701 (702) : 48 Mad 553.

(38) AIR 1938 Bom 309 (310).

[See however ('37) AIR 1937 Bom 365 (368) : I L R (1937) Bom 691. (Transferee must first apply for execution to Court passing decree praying for notice — After notice is made absolute, he must apply for execution under O. 21 R. 11.)]

**O. 21 R. 16**  
**Notes 17-19**

**O. 21 R. 16  
Note 19**

made before the execution is proceeded with.<sup>4</sup>

Where, during the pendency of execution proceedings, the decree-holder dies or transfers the decree by an assignment in writing, can the transferee apply under this rule to continue the execution proceedings? It has been held by the High Courts of Bombay, Calcutta, Madras and Patna and the Judicial Commissioner's Courts of Sind and Peshawar that it is open to the transferee either to apply for continuing the proceedings in execution or to make a fresh application.<sup>5</sup> The reason is that a pending execution application does not abate by reason of the death or devolution of any interest of the decree-holder and, therefore, the transferee can apply by virtue of Section 146 and this rule. Similarly, where the decree-holder dies while his application is pending in a Court to which the decree has been transferred for execution, his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on the record, or may apply to the executing Court for continuing the proceedings, subsequently producing from the Court which passed the decree the necessary order under this rule.<sup>6</sup> According to the High Court of Allahabad,<sup>7</sup> however, the transferee must apply, whenever he does apply, for *fresh execution*, even when the application by his predecessor is pending.

Though an application by the transferee *merely* for substitution of his name is not competent, still it is a step-in-aid of execution within the meaning of Article 182 of the Limitation Act so as to give a fresh starting point of time.<sup>8</sup> In cases governed by Article 183 of the Limitation Act, the order of the Court allowing the transferee to execute the decree after recognition of his transfer will operate as a revivor and be a fresh starting point of limitation.<sup>9</sup> The mere issue of a notice under this rule without a decision of the Court that the decree is executable will not, however, operate as a revivor.<sup>10</sup>

See also the undermentioned cases<sup>11</sup> holding that an application under this rule is an application in accordance with law within the meaning of Article 182 of the Limitation Act.

4. ('35) AIR 1935 Nag 230 (233) : 31 Nag L.R. Sup 111.

5. ('31) AIR 1931 Bom 428 (423).

('30) AIR 1930 Cal 614 (616) : 57 Cal 1137.

('26) AIR 1926 Cal 957 (958). (An order for substitution only cannot be said to continue the execution application.)

('09) 3 Ind Cas 324 (326) (Cal).

('99) 26 Cal 250 (253).

('32) AIR 1932 Mad 73 (80) : 55 Mad 352 (F.B). (Overruling AIR 1927 Mad 184 and approving AIR 1931 Mad 303.)

('21) AIR 1921 Pat 180 (182) : 6 Pat L. Jour 358.

('24) AIR 1924 Pat 576 (578) : 3 Pat 596.

('30) AIR 1930 Sind 283 (284) : 24 Sind L.R. 195.

('37) AIR 1937 Pesh 18 (19).

('35) AIR 1935 Pat 117 (118) : 13 Pat 777.

6. ('30) AIR 1930 Cal 614 (615, 616) : 57 Cal 1137. [See also ('08) 11 Oudh Cas 112 (113).

('86) AIR 1936 Pesh 17 (18). (Death of original decree-holder during pendency of execution proceedings—Heirs can continue execution without producing succession certificate.)]

7. ('27) AIR 1927 All 165 (167) : 49 All 509 (F.B). [See also ('81) 3 All 759 (765).]

[But see ('28) AIR 1928 All 299 (300) : 50 All 621. (Decided without referring to the Full

Bench ruling in AIR 1927 All 165.)]

8. ('07) 29 All 301 (302).

('33) AIR 1933 Rang 55 (56).

('28) AIR 1928 All 299 (300) : 50 All 621.

('08) 31 Mad 234 (235).

('07) 17 Mad L. Jour 475 (475).

('07) 30 Mad 541 (543).

('80) 5 Bom 246 (248).

('35) AIR 1935 Nag 230 (233) : 31 Nag L.R. Sup 111.

('38) AIR 1938 Bom 309 (311). (Although such application is dismissed for non-payment of process-fees and for failure to serve notices on the judgment-debtors.)

[But see ('84) AIR 1934 Pat 662 (663). (Application under O. 21 R. 16, O. P. C., 1908, is not a step-in-aid.)]

('33) AIR 1933 Sind 341 (343) : 27 Sind L.R. 314.)]

9. ('29) AIR 1929 Mad 252 (256) : 52 Mad 590.

[But see ('86) AIR 1936 Pat 398 (399) : 15 Pat 102.]

10. ('08) 30 Cal 979 (982).

('25) AIR 1925 Cal 23 (25). (As to the meaning of the term 'revivor', see AIR 1916 Cal 488.)

('36) AIR 1936 Pat 398 (399) : 15 Pat 102.

11. ('90) 1890 All W.N. 245 (246). (Petition con-

**20. Transfer of decree against company in liquidation.** — An application by a transferee of a decree, obtained against a limited company which has since gone into liquidation, for substitution of his name as decree-holder must, in spite of the provisions of Section 171 of the Companies Act, be made to the execution Court and not to the Court in which the winding up proceedings are pending.<sup>1</sup>

**O. 21 R. 16**  
**Notes 20-22**

**21. Equities enforceable against the original decree-holder.** — See Notes to Section 49. As to whether the prohibition under O. 34 R. 14 applies to the assignee of a decree, see Note 4 to Section 49 and O. 34 R. 14 and also the undermentioned case.<sup>1</sup>

**22. Appeal.** — An order allowing or dismissing an application by a transferee from a decree-holder made under this rule is appealable as a decree.<sup>1</sup> The reason is that, as mentioned already in Note 24 to Section 47, the transferee is a representative of the decree-holder and, therefore, a decision on a question whether any person is a representative or not of a party is one within the scope of Section 47, sub-section (3). Sub-section (3) to Section 47 was first introduced in Section 244 of the old Code by the Amending Act, VII of 1888, and the undermentioned decisions<sup>2</sup> prior to that Act holding that no appeal lay in such a case are no longer good law.

taining an unnecessary prayer for attachment of properties covered by a mortgage decree but not followed by an inventory.)

('07) 2 Mad L Tim 339 (340).

('09) 1 Ind Cas 57 (59, 60) (Cal). (Decree transferred for execution on application by executor—Beneficiary under will applying to transferee Court for execution without any authority from transferor Court—Application is in accordance with law when authority is subsequently obtained.)

('11) 9 Ind Cas 349 (350) (Bom). (Even though the instrument of transfer is not obtained.)

('96) 20 Bom 76 (78). (Even though succession certificate is not obtained.)

('95) 19 Bom 261 (268).

('93) 20 Cal 755 (757). (Even though no succession certificate is obtained.)

('08) 81 Mad 77 (79). (Even though the legal representative's name is not brought on the record.)

('94) 1894 Pun Re No. 27, p. 74. (Even though no succession certificate is obtained.)

('99) 1899 All W N 16 (16).

('80) 5 Cal L Rep 253 (256).

#### Note 20

1. ('19) AIR 1919 All 337 (337) : 41 All 432.

#### Note 21

1. ('01) 14 C P L R 35 (36). (Assignee cannot bring to sale the equity of redemption.)

#### Note 22

1. ('09) 25 All 443 (445).

('94) 16 All 483 (492).

('04) 1 All L Jour 61 (63). (He cannot, in a separate suit brought by him, in appeal ask the High Court for the first time to treat it as an execution application.)

('91) 1891 All W N 87 (88).

('87) 9 All 46 (48).

('78) 2 All 91 (92).

('87) 11 Bom 506 (512).

('72) 9 Bom H O R 49 (52).

('28) AIR 1928 Cal 885 (886).

('16) AIR 1916 Cal 471 (472). (Genuineness of purchase between assignee and attaching creditor of the decree.)

(1900) 27 Cal 670 (672, 673).

('99) 26 Cal 250 (252, 253).

('07) 11 Cal W N 239 (241). (Question between executor of decree-holder and judgment-debtor is one under S. 244 about his right to execute.)

('86) 12 Cal 610 (611).

('85) 11 Cal 393 (395).

('17) AIR 1917 Mad 605 (605, 606). (The subsequent dismissal does not take away the right of the judgment-debtor to appeal.)

('15) AIR 1915 Mad 1138 (1140).

('02) 25 Mad 883 (885).

('01) 25 Mad 545 (546).

('06) 16 Mad L Jour 27 (28).

('98) 21 Mad 388 (390). (Real transferee applying for execution of decree — Question determining whether he is real transferee is one falling under Section 47.)

('02) 15 C P L R 69 (72).

('91) 4 C P L R 132 (133).

('37) AIR 1937 All 63 (64).

('39) AIR 1939 Rang 376 (377). (But revision is incompetent.)

[See ('85) 11 Cal 150 (152). (Person adversely claiming against decree-holder is not a representative of the decree-holder.)]

[But see ('98) 20 All 539 (542).

('96) 1896 Pun Re No. 78, page 245.

('33) AIR 1933 Lah 473 (473). (Order recognizing transfer — Appeal by non-assigning co-decree-holder held to be not competent.)

('35) AIR 1935 Lah 609 (611). (Reversing on Letters Patent Appeal, A I R 1934 Lah 328 — Validity of assignment questioned by judgment-debtor — Assignment upheld by Court — Held that as judgment-debtor had no interest in the issue involved, he had no right of appeal.)]

2. ('85) 7 All 457 (459).

('89) 12 Mad 511 (511).

**O. 21 R. 16**  
**Note 23**

**23. Suit by assignee for declaration of right or for refund of price.—**

Section 47, sub-section (3) provides that a question as to whether any person is, or is not the representative of a party *shall*, for the purposes of Section 47, be determined by the Court, *i. e.*, the Court executing the decree. The provision in Section 244 of the old Code corresponding to this sub-section was introduced in that Section by the Amending Act, VII of 1888 and ran as follows :

"If a question arises as to who is the representative of a party for the purposes of this Section, the Court may either stay execution of decree until the question has been determined by a *separate suit*, or itself determine the question by an order under this Section."

It was held in cases arising before the date of the amendment that a question as to the validity of the transfer of a decree entitling the transferee to execute the decree was not one within S. 244 and that a suit raising such question was not barred.<sup>1</sup> In one class of cases arising *after* the date of the said amendment it was held that where an application by the transferee under S. 232 of the old Code (O. 21 R. 16) was rejected, the transferee could not be considered to be the representative of the decree-holder and that the question of the validity of the transfer not being thus "*between the parties or their representatives*" was not one within S. 244 and could be agitated in a separate suit by the transferee.<sup>2</sup> In a second class of cases it was held that the above amendment left two courses open to the Court, namely, of either determining the question in execution itself or of referring the parties to a separate suit, and that a mere dismissal of an application under S. 232 did not bar a suit by the transferee for declaration of his right.<sup>3</sup> In a third class of cases it was held that the bar of suit in respect of questions falling within the first sentence of S. 244 could not be reasonably extended to cases falling under the amendment, and a suit was, therefore, not barred.<sup>4</sup>

In view of the present sub-rule (3) it is now clear that a suit raising such a question for the purposes of execution is barred.<sup>5</sup> The High Court of Lahore<sup>6</sup> has, however, taken a contrary view relying on *Bommanapati Veerappa v. Chintakunta Srinivasa*, I. L. R. 26 Madras 264, a decision under the old Code. It is submitted that the decision cannot be accepted as correct. But, where the dispute as to the validity of the assignment of the decree is one purely between the decree-holder and the person claiming to be the assignee, the question being purely one between a party and his own representative, does not fall under Section 47 and a separate suit to agitate the question is not barred.<sup>7</sup> See Notes 5 and 27 to Section 47.

Where a transfer of a decree is not recognized by the executing Court, the transferee is entitled to sue the assignor for refund of the money received by him for the assignment.<sup>8</sup> But the assignee is not entitled to treat the assignment in his favour

(78) 3 Cal 371 (373). (Case under the Code of 1859.)

(71) 15 Suth W R 283 (283). (Do.)

(73) 20 Suth W R 305 (307). (Do.)

[See also ('70) 18 Suth W R 224 (226). (Do.)]

**Note 23**

1. ('91) 14 Mad 478 (479).

('86) 12 Cal 105 (107).

[See also ('85) 7 All 457 (459). (Proceeds on the view that as transferee was not recognized he was not a party and therefore a suit lies—Though reasoning is not correct, the conclusion is correct.)]

2. ('98) 20 All 539 (543). (Following 7 All 457.) (1900) 3 Oudh Cas 32 (37).

('05) 28 Mad 64 (65, 66).

[See also ('98) 25 Cal 49 (52). (Dispute arising

between two parties each of whom claims to be representative of the decree-holder.)]

3. [See ('06) 1896 All W N 201 (202).]

4. ('08) 26 Mad 264 (265).

[See also ('98) 21 Mad 353 (356).]

5. ('15) AIR 1915 Mad 799 (799, 800).

('38) AIR 1938 Mad 78 (80).

[See also ('06) 28 All 613 (613).]

6. ('29) AIR 1929 Lah 51 (52).

7. ('37) AIR 1937 Lah 465 (467); I L R (1937) Lah 162. (It may be noted also that under the amendment of Rule 16 by the Lahore High Court the judgment-debtor is not a necessary party to the proceedings for the recognition of the transfer of a decree.)

8. ('93) 16 Mad 825 (826).

('97) 20 Mad 157 (158).

as ineffectual and to maintain a suit, unless he has taken steps to have his transfer recognized. Thus where, after a transfer was effected the decree was attached at the instance of a third person, and the assignee's application for execution was dismissed wrongly on the ground that the decree had been attached, and thereupon the assignee filed a suit for refund of the purchase money, it was held that it was his duty to have the attachment removed by presenting a claim to the attaching Court on the strength of his assignment and that, unless such a claim was presented and rejected, he could not succeed in the suit.<sup>9</sup>

**O. 21 R. 16**  
**Note 23**

**R. 17.** [S. 245.] (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

**O. 21 R. 17**

**Procedure on receiving application for execution of decree.**

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

#### **Local Amendments**

##### **ALLAHABAD**

*Between* the words "been complied with" and "the Court may" *insert* the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court."

##### **CALCUTTA**

In sub-rule (1), *cancel* the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" and *substitute* therefor the following :

"the Court shall allow the defect to be remedied then and there or within a

**O.21 R.17** time to be fixed by it. If the defect is not remedied within the time fixed, the Court may reject the application."

#### LAHORE

For the words "and, if they have not been . . . to be fixed by it" in sub-rule (1) *substitute* the following words:

"and, if they have not been complied with, the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application."

#### MADRAS

(1). For the words "or may allow . . . fixed by it" in sub-rule (1), *substitute* the words "if the defect is not remedied within a time to be fixed by it."

(2). *Add* the following proviso at the end of the rule:

"Provided that where an execution application is returned on account of inaccuracy in the particulars required under Rule 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount."

#### NAGPUR

In sub-rule (1) for the words "and, if they have not been complied with . . . within a time to be fixed by it," *substitute* the words "and, if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."

#### ODDH

In sub-rule (1), *delete* the last sentence beginning with the words "and, if they . . . ." and ending with the words "to be fixed by it," and *substitute* the following sentence in lieu thereof:

"and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied; and, in case the decree holder fails to remedy the defect within such time, the Court may reject the application."

#### PATNA

In sub-rule (1) *substitute* the following for the words "the Court may reject the application, etc.," to the end of the sub-rule:

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it, and, if the decree-holder fails to remedy the defect within such time, the Court may reject the application."

#### RANGOON

In sub-rule (1) for the words "the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it" the following shall be *substituted* namely:

"the Court may reject the application if the defect is not remedied within a time to be fixed by it."

### Synopsis

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|--|---|
| 1. Legislative changes.  | 6. Execution of declaratory decree.                 |
| 2. Procedure on receiving an application for execution.              | 7. Execution of rent decree under the Tenancy Acts. |
| 3. Amendment and limitation.   | 8. Execution of maintenance decree.                 |
| 4. Non-compliance with the order of amendment within the time fixed. | 9. Value of property attached.                      |
| 5. Procedure on admission of application.                            | 10. Appeal.   |



*Other Topics (miscellaneous)***O. 21 R. 17  
Notes 1-3**

Amendment not made — How far application in accordance with law. See Note 4.

Sale of more properties than sufficient — Court, whether can set aside the sale. See Note 9.

Scope of the Rule. See Notes 2 and 3.

Sub-rule (2). See Note 3.

**1. Legislative changes. —**

1. The words "may allow it to be amended" have been replaced by the words "may allow the defect to be remedied." The object is to make the rule clear and comprehensive so as to include cases of *defects* such as omission to file a copy of the decree.

2. Sub-rule (2) is new. See Note 3, *infra*.

**2. Procedure on receiving an application for execution. —** Sub-rule (1) prescribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the Court to ascertain whether such of the requirements of Rules 11 to 14 as are applicable have been complied with or not. If they are not complied with, the Court can either reject the application at once or allow the defect to be remedied then and there or within a time fixed.<sup>1</sup> If it does neither, it cannot, after the period of limitation for execution has expired, reject the application without giving the decree-holder an opportunity to amend the application.<sup>2</sup> Under this rule the executing Court has got a discretion to allow the necessary amendments.<sup>3</sup>

**3. Amendment and limitation. —** This rule contemplates the amendment of defects in the execution application before *admission and registration*. But supposing the Court overlooks the defects and registers the application, can they be subsequently amended during the pendency of the application? The answer to this depends upon the question whether the decree is or is not barred by limitation on the date of the amendment. If there is no bar of limitation, the amendment can, according to the Patna High Court, be allowed.<sup>1</sup> The reason is that a substantive fresh application can be entertained on that date, and that there is nothing which prevents the Court from treating the amended application as a fresh application for execution.<sup>2</sup> A Full Bench of the Calcutta High Court has, on the other hand, held in *Asgar Ali v. Troilokyanath*, I. L. R. 17 Calcutta 631 (F. B.), that "Section 245 by implication excludes the power of the Court to amend after admission and registration." It was held by the Patna High Court in *Ram Sumran v. Ram Bahadur*, AIR 1923 Patna 224, that the said observations should be understood only as referring to the particular case before the Full Bench where the decree was *barred* on the date when the defect (*viz.*, omission to file a list of property) was sought to be amended. The decision in *Asgar Ali's* case

**Order 21 Rule 17 — Note 2**

1. ('20) AIR 1920 Lah 122 (122).
- ('33) AIR 1933 Oudh 75 (75, 76). (Application for rateable distribution merely is not application for execution—It must be amended under O. 21, R. 17 to proceed in execution.)
- ('24) AIR 1924 Mad 367 (367).
- ('26) AIR 1926 Mad 260 (260).
- ('24) AIR 1924 Pat 28 (24) : 2 Pat 809.
- ('22) AIR 1922 Pat 409 (410, 411) : 1 Pat 149.
- ('85) 1885 All W N 304 (304).
- ('32) AIR 1932 Cal 766 (767, 768) : 59 Cal 1266.
- ('66) 6 Suth W R Misc 15 (16).
- ('19) AIR 1919 Lah 95 (96).
- [See ('88) AIR 1988 Lah 515 (520).]

2. ('84) 10 Cal 541 (543, 544).

('66) 6 Suth W R Misc 15 (16).

3. ('33) AIR 1933 P C 68 (70) : 60 Ind App 83 : 60 Cal 662 (PC). (Appellate Court thinking discretion was rightly exercised — Privy Council refused to interfere.)

**Note 3**

1. ('23) AIR 1923 Pat 224 (225) : 2 Pat 328.
- ('32) AIR 1932 Pat 306 (307) : 11 Pat 508.
- ('13) 18 Ind Cas 526 (526, 527) : 1912 Pun Re No. 118.
2. ('23) AIR 1923 Pat 224 (225) : 2 Pat 328.
- ('29) AIR 1929 Pat 407 (409) : 8 Pat 462.
- ('32) AIR 1932 Pat 306 (307) : 11 Pat 508 (513).
- ('19) AIR 1919 Cal 261 (262).

**O. 21 R. 17**  
**Note 3**

was distinguished by the Calcutta High Court itself in a recent decision<sup>3</sup> in which it was held that even after an execution application is registered, the Court has jurisdiction to allow an amendment of the application, provided the period of limitation for the application for execution has not expired.

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, there is a conflict of opinion as to whether or not an amendment can be allowed. On the one hand, the High Court of Calcutta<sup>4</sup> holds that no amendment is permissible on the ground that the Court is not empowered under the rule to allow such an amendment. The Sind Judicial Commissioner's Court<sup>5</sup> also has held that an application for execution cannot be allowed to be amended after the period of limitation for the application has expired. On the other hand, the High Court of Madras<sup>6</sup> holds that the Court can allow such an amendment under sub-rule (1) and that such amendment relates back to the date of the application. The reasoning of the Madras High Court is that the law casts a duty upon the Court to notice the defects in the application before admission and if the Court had done its duty properly, the defects could have been remedied within time, and that the decree-holder should not be made to suffer for the failure of the Court to do its duty. The High Courts of Allahabad,<sup>7</sup> Lahore<sup>8</sup> and Patna<sup>9</sup> and the Judicial Commissioner's Court of Peshawar<sup>10</sup> have also allowed the defects to be amended, though the decree had become barred on the date of the amendment. The Bombay High Court<sup>11</sup> has also held that the Court has power to allow an application for execution to be amended even after the expiry of the period of limitation for such application.

Sub-rule (1) refers only to the requirements of Rules 11 to 14. Consequently the rule does not apply where the defect in the execution application is one which has no

**3. ('35) AIR 1935 Cal 614 (617).**

[See also ('35) 39 Cal W N 1144 (1145) (The Court has always got the power to make an order allowing the amendment of an execution petition in the interests of justice. Its power is not limited by O. 21 R. 17, C. P. C.)]

**4. ('90) 17 Cal 631 (635 to 641) (FB). (Overruling 14 Cal 124.)**

('14) AIR 1914 Cal 359 (360).

('25) AIR 1925 Cal 1048 (1050). (Following 17 Cal 631 (FB).)

('86) 12 Cal 161 (165).

[But see ('18) AIR 1918 Cal 73 (74). (Where the original application was one in accordance with law, and a supplementary list of properties was allowed to be filed. Distinguishing 17 Cal 631.)]

**5. ('35) AIR 1935 Sind 26 (26).**

[See also ('39) AIR 1939 Sind 272 (273). (It cannot be said that because the duty is cast upon the Court under O. 21 R. 17 to see whether the requirements of Rules 11 to 14 are complied with, the decree-holder is therefore protected from the ordinary consequences which follow when his request to the Court for its assistance is barred by time.)]

**6. ('24) AIR 1924 Mad 867 (868). (Following 17 Mad 67.)**

('35) AIR 1935 Mad 161 (163). (Execution application filed *bona fide* against wrong legal representative within time—Amendment allowed but after 12 years' time—Amendment takes effect

from date of original presentation.)

('28) AIR 1928 Mad 24 (25). (Following A I R 1924 Mad 367.)

[See also ('15) AIR 1915 Mad 337 (337). (Court has wide powers of amendment under S. 153 and under such powers, execution application was allowed to be amended by adding a prayer for attachment.)]

[See however ('26) AIR 1926 Mad 260 (260). (The petitioner is not entitled to insist for amendment as of right.)

('11) 9 Ind Cas 760 (760) (Mad). (Amendment cannot be allowed to the prejudice of the judgment-debtor by inserting a prayer for attachment after the decree is barred.)

('14) AIR 1914 Mad 663 (664).]

[But see ('18) 21 Ind Cas 609 (609) (Mad). (Amendment of application for execution application by adding prayer for execution refused to be allowed at appellate stage—17 Cal 631 (F B), Followed.)]

**7. ('93) 1893 All W N 112 (113).**

('98) 20 All 478 (480).

**8. ('20) AIR 1920 Lah 122 (122).**

('05) 1905 Pun Re No. 27, page 108.

**9. ('32) AIR 1932 Pat 222 (223, 224): 11 Pat 546.**

**10. ('34) AIR 1934 Pesh 40 (42).**

**11. ('37) AIR 1937 Bom 865 (870): I L R (1937) Bom 691.**

('38) AIR 1938 Bom 405 (408): I L R (1938) Bom 708. (Application for execution by attachment—Particulars of property to be attached not speci-

reference to Rules 11 to 14.<sup>12</sup> The Court can, however, amend such defects under its general powers.<sup>13</sup> As to whether a defect by reason of non-compliance with O. 21 R. 15 can be amended under this rule, see Rule 15, *ante*.

**O. 21 R. 17**  
**Notes 3-4**

*Effect of amendment.* — In the absence of any provision under the old Code corresponding to sub-rule (2), there was a conflict of opinion as to whether an amendment took effect only from the date of the *amendment* or from the date of the *application*, and whether the original application which was defective could be considered as being in accordance with law within the meaning of Article 179, clause 4 of the Limitation Act of 1877 (Article 182, clause 5 of the present Limitation Act of 1908) so as to operate as a fresh starting point of limitation.<sup>14</sup> Under sub-rule (2) of this rule it is now clear, that the application, though defective, when presented should be deemed to be in accordance with law when the defect is subsequently amended and the amendment dates back to the original date of the application.<sup>15</sup> The effect of the sub-rule is to preclude the judgment-debtor from raising any objection at a later stage on the ground that the application was not in accordance with law at the time it was presented.<sup>16</sup> If, however, the Court without giving an opportunity to amend *rejects* the application, the rejected application cannot be considered to be in accordance with law.<sup>17</sup> Similarly, where the subsequent application is not one for *amendment* of the original application but is really an independent application for execution asking for a relief not included in the original application, sub-rule (2) cannot apply and the subsequent application cannot be deemed as presented on the date of the original application.<sup>18</sup>

As to whether an application returned for amendment and not re-presented is one in accordance with law, see Note 4 below.

#### 4. Non-compliance with the order of amendment within the time fixed.

— Sub-rule (1) empowers the Court to fix a time for the amendment of the execution application. If the party fails to amend within the time fixed or such further time as the Court may extend, the proper course is to reject the application.<sup>1</sup> If, notwithstanding the decree-holder's failure to amend the defect within the time fixed, the Court does not reject the application, it is not precluded from allowing a fresh application for amendment at a subsequent stage.<sup>2</sup>

If the Court returns an application for amendment of the defects, and the

fixed—Application to amend by giving particulars after limitation can be allowed.)

12. [See ('33) AIR 1933 Oudh 288 (289). (Execution application filed within time illegally returned by Court for correction — Application filed after some months is not fresh, but same application.)]

13. ('32) AIR 1932 Cal 766 (768) : 59 Cal 1266.

[See ('35) AIR 1935 Sind 26 (26). (Application by assignee merely asking for assignee to be brought on record without prayer for execution—*Held*, application should not be amended so as to defeat the law of limitation.)]

14. ('03) 26 Mad 101 (103). (No.)

('96) 23 Cal 217 (222 to 226). (No.)

('84) 10 Cal 541 (543, 544). (Yes.)

('83) 5 All 576 (577). (Yes.)

15. ('10) 7 Ind Cas 19 (21) (Cal).

('19) AIR 1919 Mad 220 (221, 222).

('30) AIR 1930 Oudh 65 (66, 67) : 5 Luck 458.

('37) AIR 1937 Bom 365(370):ILR (1937) Bom 691.

16. ('28) AIR 1928 Mad 440 (443).

('30) AIR 1930 Cal 353 (355).

17. ('18) AIR 1918 Cal 245 (246).

('23) AIR 1923 Nag 236 (237).

('21) AIR 1921 Nag 28(28, 29, 30):17 Nag LR 179.

('83) 1883 Pun Re No. 23.

18. ('38) AIR 1938 Cal 162 (163). (Application for execution by arrest of judgment-debtor and sale of holding if necessary—Subsequent application asking for attachment of moveables is not one for amendment of previous application.)

#### Note 4

1. ('90) 17 Cal 631 (635) (FB).

('84) 10 Cal 541 (544).

('96) 23 Cal 217 (224).

('16) AIR 1916 Cal 356 (357). (Court can extend time under S. 148.)

('21) AIR 1921 Nag 28 (29) : 17 Nag L R 179.

2. ('84) 10 Cal 541 (544).

**O. 21 R. 17**  
**Notes 4-6**

decree-holder does not re-present it within the time fixed, the question arises whether such an application can be treated as one in accordance with law within the meaning of Article 182, clause 5 of the Limitation Act so as to operate as a fresh starting point of limitation for execution. The answer to this question depends upon another question, namely, whether the defect for the amendment of which the application was returned was a *material* defect, without the amendment of which further proceedings could not be taken, or was only a *formal* defect.<sup>3</sup> In the latter case the application will be one in accordance with law,<sup>4</sup> while in the former case it will not.<sup>5</sup>

Where the application is returned not for any defect in Rules 11 to 14 but for some other defect, it has been held by the Allahabad and the Patna High Courts that the application will be one in accordance with law.<sup>6</sup>

**5. Procedure on admission of application.** — Sub-rule (4) prescribes the procedure to be followed after admission of the application. If it is not in any way defective the Court is bound to order execution according to the nature of the application.<sup>1</sup> Thus, if the decree-holder prays for the arrest of the judgment-debtor, the Court cannot refuse the same and direct him to proceed against the property in the first instance.<sup>2</sup> No enquiry as to whether the property sought to be proceeded against belongs to the judgment-debtor is contemplated under the rule before execution can be ordered.<sup>3</sup>

**6. Execution of declaratory decree.** — See Note 33 to Section 47 and Note 5 to Section 38, and the undermentioned cases.<sup>1</sup>

- (‘83) 12 Cal L Rep 279 (280).  
 (‘82) 8 Cal 479 (481).  
 3. (‘93) 16 Mad 142 (143).  
 (‘94) 17 Mad 76 (77).  
 (‘89) 6 Mad 250 (251).  
 (‘14) AIR 1914 Mad 632 (633).  
 (‘16) AIR 1916 Mad 958 (958).  
 (‘98) 25 Cal 594 (597, 598) (FB). (Explaining 23 Cal 217.)  
 (‘96) 23 Cal 217 (222, 223, 228).  
 (‘10) 8 Ind Cas 833 (834) (Cal).  
 [See also (‘15) AIR 1915 Mad 1042 (1043). (Decisions under the present Code.)  
 (‘10) 5 Ind Cas 579 (580) (Cal).]  
 4. (‘18) AIR 1918 All 242 (243): 40 All 209. (Omission to file a copy of decree.)  
 (‘39) AIR 1938 Mad 568 (569). (Application against legal representative of judgment-debtor — No express prayer for adding the legal representative.)  
 (‘34) AIR 1934 Nag 117 (118, 119). (Execution application — Rejection as being incorrect does not amount to finding that it is not in accordance with law and such application saves time.)  
 (‘18) AIR 1918 Low Bur 103 (104).  
 (‘08) 81 Mad 68 (70). (Omission to mention if an appeal has been filed against decree.)  
 (‘09) 1 Ind Cas 240 (242): 5 Nag L R 8. (Omission to specify the Court which passed the decree.)  
 (‘26) AIR 1926 Cal 1077 (1081, 1082): 53 Cal 664. (Incorrect calculation of interest and costs.)  
 (‘22) AIR 1922 Pat 409 (411): 1 Pat 149. (Incorrect calculation of interest.)  
 (‘95) 1895 All W N 18 (18). (Overstating the amount due under the decree.)  
 (‘01) 18 Cal 462 (465). (Property not specified but reference given to prior application.)

- (‘18) AIR 1918 Pat 41 (51): 4 Pat L Jour 213.  
 (‘17) AIR 1917 Mad 886 (886). (O. 21 R. 17, C. P. Code was not intended to affect the construction put upon the words “applying in accordance with law” occurring in Art. 182 of the Limitation Act by judicial decisions in dealing with formal defects in execution applications.)  
 (‘28) AIR 1928 Mad 440 (441, 443). (Do.)  
 5. (‘90) 17 Cal 681 (687) (FB). (List of property not filed.)  
 (‘31) 135 Ind Cas 15 (15) (Mad). (Party not signing and verifying application.)  
 (‘20) AIR 1920 Pat 615 (616). (Decree-holder failing to comply with a conditional order of Court.)  
 (‘22) 65 Ind Cas 120 (120) (Pat). (Amount of the decree and costs not shown — Held material defect.)  
 6. (‘32) AIR 1932 All 484 (484).  
 (‘24) AIR 1924 Pat 23 (24): 2 Pat 809.

**Note 5**

1. (‘26) AIR 1926 Lah 110 (110): 6 Lah 548.  
 (‘67) 8 Suth W R 282 (284).  
 (‘96) 18 All 482 (486).  
 2. (‘82) 8 Cal 297 (299). (The word ‘granted’ is equivalent to ‘admitted’.)  
 3. (‘69) 12 Suth W R 829 (830).  
 (‘35) AIR 1935 Lah 114 (114). (Court declining to attach property on ground that it is mutated in name of some person other than the judgment-debtor — Court has no power to do so where the third person does not take any objection.)

**Note 6**

1. (‘85) 9 Bom 108 (110). (Declaratory decree cannot be executed.)  
 (‘94) 21 Cal 784 (789): 21 Ind App 89 (PC). (Do.)

**7. Execution of rent decrees under the Tenancy Acts.** — A landlord who obtains a decree for arrears of rent of an under-tenure is not restricted by the provisions of the Bengal Tenancy Act to execute the decree in the first instance by sale of the under-tenure. He is at liberty to execute it in the ordinary manner against the person or property of his judgment-debtor.<sup>1</sup> Section 163 of the Bengal Tenancy Act, VIII of 1885, and Section 217 of the Bihar and Orissa Tenancy Act, II of 1913, prescribe that the Court shall, on the admission of the application for execution, order the issue simultaneously of the order of attachment and the proclamation for sale.

**8. Execution of maintenance decree.** — A decree declaring a person's right to maintenance at a certain rate and also directing the payment of such maintenance by future instalments is not a mere declaratory decree and can be executed as each instalment falls due.<sup>1</sup>

Where a decree awarding future maintenance also charges certain property for the due payment thereof, the decree-holder can, if there is default, apply for an order for the sale of the property or file a fresh suit to enforce the charge.<sup>2</sup> The High Court of Calcutta<sup>3</sup> has held that, to avoid the difficulty of a further suit, the Court can provide in the decree for maintenance for the appointment of a receiver with directions to take possession of the property in case of default and sell the same and pay the maintenance from out of the sale proceeds.

**9. Value of property attached.** — Under the proviso to the rule the Court should call upon the decree-holder to specify the approximate value of the property to be attached, to see that the value of the property to be attached corresponded as nearly as may be with the amount due under the decree.<sup>1</sup> But, if more property than is necessary is attached and sold and a purchaser buys the same without notice of the fact that the amount realized by sale of the other plots was more than sufficient to satisfy the decree, the sale in his favour cannot be set aside.<sup>2</sup>

**10. Appeal.** — An appeal lies against an order returning an execution application on the ground that the decree-holder is not entitled to calculate the amount due to him on the basis adopted in the petition, and directing him to amend the same.<sup>1</sup> But an order allowing the decree-holder to withdraw the execution proceedings does not determine anything under Section 47 and is not appealable.<sup>2</sup>

#### Note 7

1. ('88) 15 Cal 492 (494, 496).
- ('90) 17 Cal 301 (303).
- ('99) 26 Cal 103 (108).
- ('04) 8 Cal W N 575 (577).

#### Note 8

1. ('92) 19 Cal 189 (146) (FB).
- ('88) 12 Bom 65 (67).
- ('87) 9 All 33 (34).
- ('94) 16 All 179 (181).
- ('87) 10 Mad 288 (288) (FB). (The decree can be executed against the legal representative of the judgment-debtor.)
- ('07) 30 Mad 824 (826). (Do.)
2. ('97) 2 Cal W N 83 (83).
- [See however ('95) 22 Cal 903 (908).]

3. ('99) 26 Cal 441 (448).

#### Note 9

1. ('29) AIR 1929 Nag 305 (306, 308).
- ('98) 20 All 412 (418) : 25 Ind App 146 (PC).
- [See ('85) AIR 1935 Pat 143 (144). (Execution of money decree—Decree-holder attaching whole of judgment-debtor's land — Judgment-debtor objecting — Court finding that property was worth more and ordering sale of only part of the property does not act without jurisdiction.)]
- [See also ('92) 16 Bom 91 (114).]
2. ('19) AIR 1919 Cal 1095 (1096).

#### Note 10

1. ('14) AIR 1914 Mad 532 (533) : 18 Ind Cas 607 (607) : 37 Mad 314.
2. ('13) 19 Ind Cas 904 (905) (Cal).

O. 21 R. 18

**R. 18.** [S. 246.] (1) Where applications are made<sup>8</sup> to a Court for the execution of cross-decrees<sup>9</sup> in separate suits<sup>4</sup> for the payment of two sums of money<sup>3</sup> passed between the same parties<sup>5</sup> and capable of execution at the same time<sup>7</sup> by such Court, then —

Execution in case of cross-decrees.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum<sup>9</sup> and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees<sup>10</sup> and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless —

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

#### *Illustrations*

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(b) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F*, singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint-decree as a cross-decree under this rule.

[1877, Ss. 233, 243, 246; 1859, S. 209. See S. 49 and O. 21, Rr. 19, 20 and 29.]

## Synopsis

**O. 21 R. 18**  
**Notes 1-2**

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and applicability of the Rule.</li> <li>3. Cross-decrees for the payment of two sums of money.</li> <li>4. Cross-decrees in separate suits.</li> <li>5. "Between the same parties."</li> <li>6. Same character in both suits necessary.</li> </ol> | <ol style="list-style-type: none"> <li>7. Decrees must be capable of execution at the same time.</li> <li>8. Decrees must be in the same Court for execution.</li> <li>9. Execution can be had only of the decree for the larger sum.</li> <li>10. Assignment of the decree.</li> <li>11. Sub-rule (4).</li> </ol> |
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### Other Topics (miscellaneous)

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| <p>Applicability only after application for execution. See Note 8.</p> <p>Applicability to an adjudication under S. 144. See Note 4.</p> <p>Barred decrees. See Note 7.</p> <p>Benami decree-holders. See Note 5.</p> <p>Claims of holder of decree for smaller sum. See Note 9.</p> <p>Claims pending in a suit. See Note 2.</p> <p>Claims under decrees pending, or liable to, appeal. See Notes 7 and 10.</p> <p>Counter-claims. See Note 4.</p> | <p>Court to which application is made. See Note 8.</p> <p>Cross-claims. See Note 4.</p> <p>Cross-decrees in respect of mesne-profits. See Note 8.</p> <p>Decrees of different Courts. See Note 8.</p> <p>Essential conditions for set-off. See Note 2.</p> <p>Execution for smaller sum not invalid. See Note 9.</p> <p>Inapplicability to private awards. See Note 4.</p> <p>Mortgage-decrees. See Note 8.</p> <p>Set-off by order of Court. See Note 8.</p> |
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#### 1. Legislative changes. —

1. The words "where applications are made to a Court for the execution of cross-decrees in separate suits" in sub-rule (1) are new.
2. Sub-rule (4) is new.
3. Illustration (d) is new.

**2. Scope and applicability of the Rule. —** This rule provides that cross-decrees for the payment of money shall be set-off against each other. In order that this rule may apply the following conditions must be satisfied —

- (1) The decrees must be for the payment of *definite sums of money*. (Note 3.)
- (2) They must have been passed in *separate suits*.<sup>1</sup> (Note 4.)
- (3) The decree-holder in one must be the judgment-debtor in the other.
- (4) The parties must fill the *same character* in both suits. (Note 6.)
- (5) Both decrees must be capable of execution<sup>2</sup> and must be so *at the same time and by the same Court*. (Notes 7 and 8.)
- (6) Applications should have been made to the Court for execution of both decrees. (Note 8.)

If the above conditions are satisfied the set-off should be worked out as follows —

- (1) If the amounts under the two decrees are equal, then the two decrees shall satisfy each other and full satisfaction shall be entered upon both.
- (2) If the amounts under the two decrees are not equal, then full satisfaction shall be entered upon the decree for the smaller amount, and part satisfaction upon the decree for the larger amount; and execution shall be allowed only under the latter decree and for so much only as remains due after the set-off. (Note 9.)

A right to set-off under this rule cannot be defeated by an assignment of either decree (Note 10) or by its attachment by the other decree-holder,<sup>3</sup> or by a

#### Order 21 Rule 18 — Note 2

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| <ol style="list-style-type: none"> <li>1. ('68) 9 Suth W R 590 (591).</li> </ol> | <ol style="list-style-type: none"> <li>2. ('71) 16 Suth W R 308 (309).</li> <li>3. ('29) AIR 1929 All 502 (502).</li> </ol> |
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**O. 21 R. 3**  
**Notes 1-2**

**1. Sale of property situate in more than one jurisdiction.** — As has been seen in Note 8 to Section 17, *ante*, it is a general principle of law that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situate *entirely* outside the local limits of its jurisdiction. This rule is an exception to that general rule.<sup>1</sup> Even before this provision was enacted in this Code, it was held by the Calcutta High Court<sup>2</sup> that where property attached in execution of a decree forms one estate and is situate within the territorial jurisdiction of two or more Courts, any one of such Courts has jurisdiction to sell the *entire* estate. See also Note 6 to Section 38 *ante*.

**2. Change of territorial jurisdiction.** — See Section 37.

**O. 21 R. 4**

Transfer to Court of  
Small Causes.

**R. 4.** [S. 223, para. 5.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras *or Bombay*, such Court may send to the Court of Small Causes in Calcutta, Madras *or Bombay*, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

[1877, S. 223, para. 5.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Bombay or Rangoon."

### Synopsis

1. Scope of the Rule.

2. "As if it had been passed by itself."

3. Decrees of foreign Court. See Note 1.

4. Jurisdiction of Court of Small Causes to question validity of order of transfer.

**1. Scope of the Rule.** — This rule is not restricted in its application to decrees of British Indian Courts; it applies equally to decrees of such foreign Courts as come within Section 44.<sup>1</sup> See also Order 51 Rule 1, *infra*.

**2. "As if it had been passed by itself."** — The Court of Small Causes in Calcutta, Madras or Bombay, in executing a decree of another Court transferred to it under this rule, has the same powers as it possesses in regard to execution of its own

#### Order 21 Rule 3 — Note 1

1. ('23) AIR 1923 Cal 619 (621).

2. ('86) 12 Cal 307 (312).

('82) 8 Cal 708 (705).

('73) 19 Suth W R 434 (436).

('75) 28 Suth W R 154 (155).

('88) 12 Cal L Rep 404 (406).

('77) 2 Cal L Rep 894 (896).

[But see ('75) 28 Suth W R 233 (234).]

#### Order 21 Rule 4 — Note 1

1. ('18) AIR 1918 Mad 645 (646).



decrees.<sup>1</sup> See also Section 42.

**3. Decrees of foreign Court.** — See Note 1 above.

**O. 21 R. 4**  
**Notes 2-4**

**4. Jurisdiction of Court of Small Causes to question validity of order of transfer.**—The Court of Small Causes to which a decree is sent for execution under this rule has no jurisdiction to question the correctness or validity of the order of transfer.<sup>1</sup>

**R. 5.** [S. 223, para. 6.] Where the Court to which a decree is to be sent for execution is situate

**O. 21 R. 5**

**Mode of transfer.**

within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

[1877, S. 223.]

#### Local Amendments

##### ALLAHABAD

*For* the word "district," where it occurs *after* the words "same" and "different" *read* "Province."

##### LAHORE

In the last sentence after the words "the District Court" and before the words "of the district" *insert* the words "or the Court of any Judge having jurisdiction in the place where the decree is to be executed to whom power to receive complaints has been delegated by the District Judge."

##### OUDH

*For* the word "district" where it occurs *after* the words "same" and "different" *read* "Province."

##### RANGOON

*Add* the following proviso:

"Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree, such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings."

### Synopsis

**1. Scope of the Rule.**

**2. Power of Court to which decree is sent for execution.** See Ss. 51 and 42.

**3. Transfer of local jurisdiction.** See Section 37.

**1. Scope of the Rule.** — Where two Courts are in the *same district*, one Court may transmit a decree for execution to the other Court direct *without the*

#### Note 2

1. ('07) 84 Cal 828 (827). (Trying a question of title in respect of tiled huts in execution.)

#### Note 4

1. ('86) 165 Ind Cas 625 (626) (Cal). (It is the function of the transferring Court to decide whether the transfer can or cannot be made.)

**O. 21 R. 5** *intervention of the District Court.*<sup>1</sup>  
**Notes 1-3**

But where the Court to which the decree is to be sent is situate in a *different* district, it should be sent to the *District Court* of the district in which the decree is to be executed. Where this procedure is not followed and the decree is sent direct to the Court subordinate to the District Court in another district, that Court cannot execute the decree.<sup>2</sup> It should not, however, dismiss the application, but should send the papers back to the Judge who sent them for adopting the correct procedure.<sup>3</sup> In the undermentioned cases<sup>4</sup> it was held that the failure to send the decree through the District Court is a mere irregularity which can be waived.

The High Court of Madras<sup>5</sup> has framed a rule — Rule 161A of the Civil Rules of Practice — under which the transferee Court is to return the papers to the transmitting Court, if no steps are taken by the decree-holder within six months from the date of transfer. This rule is one of convenience made with the object of inducing decree-holder to take early steps to execute the decree; and a violation thereof does not render the proceedings taken after six months *void ab initio*.

See also the undermentioned case<sup>6</sup> as to the practice in Sind Courts.

**2. Power of Court to which decree is sent for execution.** — See Sections 51 and 42, *ante*.

**3. Transfer of local jurisdiction.** — See Section 37, *ante*.

**O. 21 R. 6**

**Procedure where Court desires that its own decree shall be executed by another Court.**

**R. 6. [S. 224.]** The Court sending a decree for execution shall send —

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

[1877, S. 224; 1859, S. 286.]

**Order 21 Rule 5 — Note 1**

1. ('02) 15 Mad 345 (347).
2. ('86) AIR 1936 Cal 571 (572). (Decree transferred without express request by decree-holder — Acquiescence by decree-holder — Jurisdiction of transferee Court to execute not affected.)
3. ('95) 22 Cal 764 (766).
4. ('88) AIR 1938 Lah 839 (840, 841). (There is an inherent lack of jurisdiction to execute the decree—Even assuming such jurisdiction, it cannot send decree to another Subordinate Court for execution.)
5. ('14) AIR 1914 Cal 786 (786).

6. ('19) AIR 1919 Pat 324 (324) : 4 Pat L Jour 49. (It is open to the parties at any stage to question the jurisdiction of the Subordinate Judge to execute it.)
7. ('14) AIR 1914 Cal 786 (786).
8. ('86) AIR 1936 Lah 765 (765).
9. ('37) AIR 1937 Lah 174 (176).
10. ('86) AIR 1936 Lah 891 (894).
11. ('15) AIR 1915 Mad 920 (920) : 39 Mad 485.
12. ('88) AIR 1938 Sind 343 (344) : 27 Sind L R 812. (Practice in Sind is to hand over the decree and papers to the judgment-creditor on his applying for same unless he is a person not fit to be trusted with such papers.)

**Local Amendments****O. 21 R. 6**  
**Note 1****ALLAHABAD**

Rule 6 shall be re-numbered as 6 (1) and *add* the following sub-rule (2):

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

**N.-W.F.P.**

*Read* Rule 6 as Rule 6 (1) and *add* the following sub-rule (2):

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints in a sealed cover to be taken to the Court to which they are to be sent."

**ODDH**

To Rule 6, *add* the following as sub-rule (2) and re-number 6 as 6 (1):

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

**PATNA**

*Insert* the following words after the word "decree" in clause (a):

"and a copy of the suit register relating to the suit in which the decree was passed and a memorandum showing the costs allowed to the decree-holder subsequent to the passing of the decree."

**RANGOON**

To Rule 6, *add* the following proviso:

"Provided that where a transfer is effected under the proviso to Rule 5 it shall not be necessary to send the above documents."

**Synopsis**

- |  |                                |
|--|--------------------------------|
| 1. Scope of the Rule.                          | 4. Copy of any order.          |
| 2. Certificate, effect of not sending.         | 5. Small Cause Courts.         |
| 3. Presumption as to compliance with the Rule. | 5a. Notice to judgment-debtor. |
|  | 6. Appeal.                     |

**1. Scope of the Rule.** — The documents required to be transmitted by the Court sending the decree for execution to another Court are —

- (1) a copy of the decree,
- (2) a certificate as required by clause (b), and
- (3) a copy of any order for execution that may have been passed.<sup>1</sup>

As to the form of certificate of non-satisfaction, see Appendix E, Form No. 4.

Where a Court, upon an application for transfer of the decree for execution to another Court, places a wrong construction on the decree and mentions in the certificate that a particular amount is due, the statement is *ultra vires* and the judgment-debtor need not have it amended by the transferor Court.<sup>2</sup> In sending the certificate of non-satisfaction, the Court which passed the decree is not called upon to consider whether the decree is still capable of execution; that is a question for determination by the transferee Court when a proper application for execution is presented to it.<sup>3</sup>

When once an order is made sending a decree to another Court for execution, that by itself is sufficient to entitle the decree-holder to apply to the Court to which

**O. 21 R. 6**  
**Notes 1-5a**

the decree is sent for execution.<sup>4</sup> Where an application for execution has already been made to the Court which passed the decree, a fresh application for execution need not be made to the Court to which the decree is transferred for execution.<sup>5</sup> See also the undermentioned case.<sup>6</sup>

**2. Certificate, effect of not sending.** — The omission to send the certificate as required by clause (b) of this rule is a mere irregularity and does not affect the jurisdiction of the Court to which the decree is transferred for execution to entertain the application for execution.<sup>1</sup> Nor is it a ground for an application under O. 21 R. 90 to set aside a sale.<sup>2</sup> Similarly, it has been held that a mere mistake in the certificate of non-satisfaction as to the number of the suit or the names of the judgment-debtors will not affect the jurisdiction of the execution Court to proceed with the execution.<sup>3</sup>

**3. Presumption as to compliance with the Rule.** — Where the validity of an attachment effected by the transferee Court is attacked on the ground that no copy of the decree was sent by the Court which passed the decree, it lies upon the judgment-debtor to prove that it was not transmitted, the maxim applicable being *omnia præsumentur rite esse acta* — all things are presumed to have been rightly and duly performed.<sup>1</sup> Where a decree was passed by a Judge in the capacity of a Small Cause Judge and an application for execution of the decree was filed before the same Judge acting on the original side, it was held that even though there was no formal order of transfer, the provisions of this rule were sufficiently complied with.<sup>2</sup>

**4. Copy of any order.** — The words "copy of any order for the execution of the decree" in clause (c) mean a copy of any *subsisting* order and not a copy of an order for execution in the previous execution application.<sup>1</sup>

**5. Small Cause Courts.** — This rule applies to proceedings in the Small Cause Courts in the mofussil and if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree, it may be sent to another Court.<sup>1</sup>

**5a. Notice to judgment-debtor.** — Where the application for transmission of the decree for execution to another Court is made when the decree is already under execution in the Court which passed it, notice should be given to the judgment-debtor and the transfer should not be ordered unless there is sufficient cause to order simultaneous execution.<sup>1</sup> See also Note 17 to Section 39 *ante*.

4. ('10) 8 Ind Cas 852 (853) : 35 Mad 588. (For rateable distribution.)

[But see ('28) AIR 1928 Mad 496 (497) (*Obiter*).]

5. ('36) AIR 1936 Cal 267 (269).

6. ('36) AIR 1936 Lah 369 (369). (Order transferring decree of High Court to another Court for execution may be signed by the Registrar and need not be signed by the Judge.)

**Note 2**

1. ('31) AIR 1931 Cal 649 (649).

2. ('97) 20 Mad 10 (12).

3. ('38) AIR 1938 Pat 518 (514).

[See also ('36) AIR 1936 Lah 765 (765). (Certificate wrongly addressed to the Subordinate Judge instead of to the District Judge — Defect held cured in the circumstances of the case.)

('36) AIR 1936 Cal 571 (572). (Irregularity in manner of transfer does not prevent the transferee Court from having seisin of the execution.)]

**Note 3**

1. ('72) 17 Suth W R 289 (291).

2. ('27) AIR 1927 Cal 782 (783). (Appeal would lie from an order in execution.)

'28) AIR 1928 Rang 15 (16) : 5 Rang 618. (Transfer is not invalid.)

**Note 4**

1. ('89) 13 Bom 371 (373).

**Note 5**

1. ('68) 9 Suth W R 175 (177).

**Note 5a**

1. ('39) AIR 1939 Bom 268 (260) : 41 Bom L R 481 (483). (A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order, but an order which amounts to the grant of a certificate and allows simultaneous execution proceedings to go on in more than one Court is not a mere ministerial order. Such an order is a judicial order.)

('35) AIR 1935 Cal 268 (270).

**6. Appeal.** — An order directing or refusing the issue of a certificate is appealable.<sup>1</sup>

**O. 21 R. 6  
Note 6**

**R. 7.** [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

**O. 21 R. 7**

Court receiving copies of decree, etc., to file same without proof.

[1877, S. 225; 1859, S. 286.]

### *Synopsis*

**1. Legislative changes.**

**2. Without any further proof.**

**3. Jurisdiction of the Court which passed the decree.** See Section 42, Note 1.

**4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.**

**5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction.** See Section 88, Note 7.

**1. Legislative changes.** — The words "or of the jurisdiction of the Court which passed it" which occurred in the old Section have now been omitted. See Note 4.

**2. Without any further proof.** — As soon as a copy of the decree which is sent for execution to another Court is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court.<sup>1</sup>

**3. Jurisdiction of the Court which passed the decree.** — See Section 42, Note 1.

**4. Executing Court, whether can question the jurisdiction of the Court which passed the decree.** — Section 225 of the old Code contained the words "or of the jurisdiction of the Court which passed it." There was a conflict of decisions as to whether the transferee Court can go into the question of the jurisdiction of the Court which passed the decree, if it sees any reason to do so.<sup>1</sup> The said words have now been omitted and it has been held that the transferee Court has no power under the present Code to question the jurisdiction of the Court which passed the decree under execution.<sup>2</sup> But it has been held that where the decree was passed against a *dead* person, it is a nullity and objection to the decree on this ground can be taken

#### **Note 6**

1. ('74) 6 N W P H O R 78 (76).

[See also ('89) AIR 1989 Bom 258 (260): 41 Bom L R 481 (488). (Order which amounts to a grant of a certificate and allows simultaneous execution is a judicial order and is appealable.)]

#### **Order 21 Rule 7 — Note 2**

1. ('68) 10 Suth W R 46 (50) (FB).

#### **Note 4**

1. ('89) 11 All 814 (818).

('95) 17 All 478 (482).

('04) 28 Bom 878 (882).

('91) 15 Bom 216 (219). (A case of foreign judgment.)

('86) 10 Bom 65 (68).

('82) 7 Bom 481 (483).

2. ('14) AIR 1914 Bom 27 (27): 38 Bom 194.

('20) AIR 1920 Mad 1019 (1028): 43 Mad 675.

('82) AIR 1982 Lah 289 (290): 13 Lah 25.

('26) AIR 1926 Oudh 985 (988): 29 Oudh Cas 26.

('81) AIR 1981 Pat 27 (29, 30): 9 Pat 829.

('96) 9 O P L R 186 (187).

('28) AIR 1928 Mad 212 (214).

('19) AIR 1919 Lah 294 (295): 1919 Pun Re No. 22.

('81) AIR 1981 Rang 252 (259): 9 Rang 480 (Fb).

(Overruling AIR 1980 Rang 387.)

('16) AIR 1916 Upp Bur 1 (2): 2 Upp Bur Rul 119.

('82) AIR 1982 Lah 601 (602).

('87) AIR 1987 Bom 19 (22).

**O. 21 R. 7**  
**Notes 4-5**

in the transferee Court.<sup>3</sup> In the undermentioned case<sup>4</sup> it was held that the transferee Court is not debarred from taking cognizance of objections as to jurisdiction of which the Court which transferred the decree could take cognizance. See also Note 1 to Section 42, *ante*.

This rule dispensing with the further proof of jurisdiction than the certificate of the transmitting Court, applies only to the decrees of *British Indian Courts* and not to foreign decrees transmitted to British Indian Courts for execution under Section 44; the reason is that Section 44 "does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely allows the procedure by which such a judgment can have effect given to it in British India." Notwithstanding the Section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. The Court executing the decree is, therefore, not precluded from ascertaining whether a foreign Court had jurisdiction merely because that Court has itself decided an issue upon that point in its own favour.<sup>5</sup>

**5. Whether a transferee Court can execute a decree in excess of its pecuniary jurisdiction.** — See Section 38, Note 7, *ante*.

**O. 21 R. 8**

**R. 8.** [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent.

[1877, S. 226; 1859, S. 287.]

**Local Amendment****RANGOON**

For the words "of competent jurisdiction" substitute the words "whose pecuniary jurisdiction is not less than the amount of the decree."

**Synopsis****1. Scope of the Rule. | 2. "Competent jurisdiction."**

**1. Scope of the Rule.** — The District Court to which a decree is sent for execution under this rule has a right to entrust the execution of the decree to a Court subordinate to it.<sup>1</sup> An order of a District Court transferring a decree for execution,

[See ('33) AIR 1933 Cal 267 (268).]

[See however ('33) AIR 1933 Nag 211 (212, 218.) (Executing Court can refuse execution if decree is passed without jurisdiction—But want of jurisdiction must be patent or capable of being gathered without necessity of enquiry into facts.)]

3. ('35) AIR 1935 Lah 439 (439) : 17 Lah 32. (Affirming on Letter Patent Appeal A I R 1934 Lah 117).

4. ('34) AIR 1934 Lah 652 (657). (The change in the wording of the rule has this effect, viz., that the transferee Court cannot, *suo motu*, call for proof of jurisdiction of the Court which passed the decree. But the rule does not deal with the

power of the Court to take cognizance of objection as to want of jurisdiction when raised by the judgment-debtor.)

5. ('16) AIR 1916 Bom 307 (308) : 40 Bom 551. ('31) 15 Bom 216 (219).

('15) AIR 1915 Mad 486 (488) : 39 Mad 24 (FB). (Reversing 20 Ind Cas 704.)

('31) AIR 1931 All 689 (691) : 53 All 747. (S. 44 cannot override S. 18.)

('35) AIR 1935 Lah 551 (551).

**Order 21 Rule 8 — Note 1**

1. ('81) 8 Ind App 165 (171) (P C).

[See ('33) AIR 1933 Lah 839 (841). (But a Court subordinate to the District Court has no power to transfer execution to another Court.)]

signed by the sheristadar "by order" of the District Judge, is a valid endorsement complying with the provisions of this rule and is not vitiated by the absence of the signature of the Judge.<sup>2</sup>

**O. 21 R. 8**  
**Notes 1-2**

Where an Assistant Judge is invested with all the powers of a District Judge within any part of the district of such Judge, he is the "District Court" in such part for the purposes of this rule.<sup>3</sup>

**2. "Competent jurisdiction."** — There is a conflict of opinion as to the meaning of the expression "Court of competent jurisdiction." It was held by the Madras High Court in the undermentioned case<sup>1</sup> that the expression refers to *territorial* competence and therefore if the attached property is transferred from the jurisdiction of the transferee Court to some other Court, the sale by the transferee Court after the transfer of the property from its jurisdiction, is not valid even though the Court had jurisdiction over such property at the time of the transfer. But in a recent case<sup>2</sup> the same High Court has held that the expression means "competent to sell in execution."

**R. 9. [S. 227.]** Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

**O. 21 R. 9**

Execution by High  
Court of decree trans-  
ferred by other Court.

[1877, S. 227.]

### *Synopsis*

1. Scope.
2. Ordinary original civil jurisdiction, meaning of.
3. Limitation.

**1. Scope.** — It has been held in a very early case of the Calcutta High Court<sup>1</sup> that the functions of the High Court, in respect of the execution of a decree of another Court, are limited to effecting execution and to the matters arising out of the proceedings in execution, and that the question whether or not the applicant had a right to obtain execution, must be judged by the Court in which the record was.

Where a decree is transferred under this rule to the High Court for execution, the High Court cannot make the decree payable in instalments.<sup>2</sup> The reason is that though the decree could be executed as if it was passed by itself, still the High Court is not the Court which passed the decree, which Court alone can act under O. 20 R. 11, *ante*.

**2. Ordinary original civil jurisdiction, meaning of.** — See Notes to Clause 12 of the Letters Patent of Calcutta, Bombay and Madras High Courts.

**3. Limitation.** — The period of limitation applicable to the execution of a decree transmitted by one Court to another for execution depends upon the character

2. ('96) 23 Cal 480 (482).  
(10) 5 Ind Cas 155 (155) (Mad).  
3. ('70) 7 Bom H C R A C 87 (40).  
**Note 2**  
1. ('18) AIR 1918 Mad 17 (17).

2. ('84) AIR 1934 Mad 578 (574, 575).

#### **Order 21 Rule 9 — Note 1**

1. ('71) 6 Beng L R App 66 (66).  
2. ('84) AIR 1934 Rang 197 (198).

**O. 21 R. 9**  
**Note 3**

of the Court *which passed the decree* and not on the character of the Court *executing it*.<sup>1</sup> The *manner* of execution mentioned in this rule refers to the procedure under which the execution is to be had, and has no reference to the law of limitation; it simply applies the High Court machinery to the execution of the decree.<sup>2</sup> Thus, where a decree passed by the Calcutta Small Cause Court was transferred to the High Court at Calcutta for execution, it was held that the period of limitation applicable to the decree was Article 182 of the Limitation Act and that it was not governed by the law of limitation relating to decrees of the High Court.<sup>3</sup>

**APPLICATION FOR EXECUTION****O. 21 R. 10**

**R. 10.** [S. 230, Para. 1.] Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

[1877, Ss. 230, 231; 1859, S. 207.]

**Local Amendments****LAHORE**

*Add the following proviso :*

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent, the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under Section 39."

**RANGOON**

*Add the following :*

"at the time of presenting the application for execution or at the time of admission thereof the holder of a decree may, if he wishes, deposit in Court the fees requisite for all necessary proceedings in the execution."

**Synopsis**

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Successive applications for execution.</li> <li>2. Who may apply for execution.</li> <li>3. What decrees may be executed.</li> <li>4. Court by which decree may be executed.<br/>See Section 38.</li> <li>5. "Court which passed the decree." See Section 37.</li> </ol> | <ol style="list-style-type: none"> <li>6. Court to which the decree is sent for execution.</li> <li>6a. Time of presentation of application for execution.</li> <li>7. Executing Court cannot go behind the decree. See Note 8 to Section 38.</li> <li>8. Application for execution.</li> <li>9. Dismissal of application for default.</li> </ol> |
|--|---|

**Other Topics (miscellaneous)**

Application by representatives of deceased decree-holder—Succession certificate, if necessary. See Note 2.  
Maintenance decree—Execution of. See Note 3.

**Note 3**

1. ('90) 17 Cal 491 (497).
- ('11) 11 Ind Cas 685 (687) : 86 Mad 108.
- ('08) 81 Mad 24 (27).

('11) 11 Ind Cas 216 (216) (Cal). (So assumed.)

2. ('97) 24 Cal 478 (491).

3. ('90) 17 Cal 491 (496).



**1. Successive applications for execution.** — The Code does not bar a succession of applications for execution.<sup>1</sup> Thus, where an application for execution is withdrawn by the decree-holder without leave to apply again having been granted by the Court, a second application is not barred; Section 141 cannot be invoked so as to apply O. 23 R. 1, since that Section does not apply to execution proceedings.<sup>2</sup> Similarly, O. 2 R. 2 does not apply to proceedings in execution,<sup>3</sup> and when a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, there is nothing which prevents separate and successive applications for execution as regards each of them.<sup>4</sup>

A decree in a suit for money, for principal and interest, is a single money decree and it is not permissible to levy execution thereof piecemeal. The rule is that a party having a right to execute a decree for money presently payable must enforce the whole decree at the same time and if enforcement is sought for a lesser sum, he must be taken to waive his right to levy execution for the balance.<sup>5</sup> According to the Judicial Commissioner's Court of Nagpur, where an application for execution of part of a decree is made, the judgment-debtor is bound to raise an objection at once and if he fails to do so, the piecemeal execution will not be invalid and a subsequent application is not barred inasmuch as O. 2 R. 2 does not apply to applications in execution.<sup>6</sup>

A subsequent application for execution in respect of reliefs *different* from those claimed in a prior application cannot be said to be one in continuation of the prior application.<sup>7</sup>

**2. Who may apply for execution.** — It is only the decree-holder whose name is on the record that is entitled to apply for execution of the decree.<sup>1</sup> A defendant in a partition suit in which a decree has been passed is in the position of a decree-holder, and will be entitled to apply for execution.<sup>2</sup> In the case of decrees in *representative suits*, a person not on the record, but who was represented in the suit by the decree-holder on record, can apply to be brought on the record and to execute the decree.<sup>3</sup> Similarly, the representatives of a deceased decree-holder can apply to be brought on the record and to execute the decree.<sup>4</sup>

Where an application was made by the guardian *ad litem* of a minor after the latter had attained majority, but the latter ratified the application subsequently, it was held that the ratification rendered the application valid from the date of the ratification.<sup>5</sup>

#### Order 21 Rule 10 — Note 1

1. ('11) 11 Ind Cas 385 (386) (Cal).
2. ('94) 17 All 106 (111, 112) : 22 Ind App 44 (P.O.). (Overruling 10 All 71.)
3. ('91) 18 Cal 685 (689).
4. ('88) AIR 1988 Bom 864 (865) : 57 Bom 468.
5. ('91) 18 Cal 515 (517).
6. ('97) 19 All 98 (100). (Possession and mesne profits.)
7. ('75) 7 N W P H C R 95 (97). (Do.)
8. ('88) 12 Bom 98 (100). (Do.)
9. ('09) 4 Ind Cas 408 (409) (Cal).
10. [But see ('99) 26 Cal 888 (890). (Following 15 Bom 242.)
11. ('91) 15 Bom 242 (244). (Though not in accordance with law, yet it is a step-in-aid.)]
12. ('88) AIR 1988 Bom 864 (865, 866) : 57 Bom 468.
13. ('82) AIR 1982 Nag 89 (90) : 28 Nag L R 77.
14. ('88) AIR 1988 Lah 8 (4) : 15 Lah 208.

#### Note 2

1. ('17) AIR 1917 Oudh 182 (185). (Stranger not a party to the suit, cannot apply.)
2. ('75) 24 Suth W R 10 (11). (Do.)
3. ('91) 18 Cal 689 (641).
4. ('69) 11 Suth W R 271 (272).
5. See also S. 2 sub-s. (3), note 2.
6. ('23) AIR 1923 Bom 23 (23) : 46 Bom 937.
7. ('28) AIR 1928 Mad 473 (473).
8. [See also ('76) 1 All 510 (511). (Decree in favour of a firm in the name of agent—Another agent applying — Proceedings though irregular, not invalid.)
9. ('87) AIR 1987 Pat 607 (608). (Father of joint Hindu family obtaining decree in respect of debt due to joint family after partition — Sons are interested in decree and can apply for execution.)]
10. ('70) 14 Suth W R 162 (162).
11. ('81) AIR 1981 Lah 600 (601).

**O. 21 R. 10**  
**Notes 2-6**

Where a decree grants a relief to a person named in the decree, it has been held that such person so named can enforce the decree notwithstanding the fact that he is not party to the *suit*.<sup>6</sup>

As to the necessity for the production of succession certificate along with the application for execution where the decree-holder is dead, see the undermentioned cases.<sup>7</sup>

It has been held that an insolvent is not debarred from making an application for execution of a decree which he has obtained before his adjudication.<sup>8</sup>

*Fresh vakalatnama, if necessary for execution proceedings.* — Proceedings in execution are proceedings in continuation of the suit, and therefore a fresh authority is not required for a pleader to appear, act and plead on behalf of the decree-holder in execution proceedings, if he was authorized by a *vakalatnama* in the suit itself.<sup>9</sup> But an application for execution filed by a *vakil* who has no *vakalat* from the decree-holder at all is not one in accordance with law.<sup>10</sup>

Where an agent is authorized to apply for execution of a decree, he is also entitled to *appeal* against an order refusing to execute the decree.<sup>11</sup>

*Joint application for execution.* — Persons entitled to separate amounts under a decree may join in one application. Where, in such a case, one of them subsequently withdraws from the application, it may continue in the name of the other persons.<sup>12</sup>

**3. What decrees may be executed.** — See Section 38, Note 5 and Section 47, Note 33 and the undermentioned cases.<sup>1</sup>

**4. Court by which decree may be executed.** — See Section 38.

**5. "Court which passed the decree."** — See Section 37.

**6. Court to which the decree is sent for execution.** — Where a decree is transferred to another Court for execution under Section 39 and the records are not sent back to the transferor Court, an application made to the Court which passed the decree is not an application made to the *proper* Court within the meaning of Article 182,

6. ('82) AIR 1932 Bom 878 (379).

('82) AIR 1932 Mad 193 (194). (Decree-holder need not be a party to the decree.)

7. ('97) 18 All 34 (35). (Succession certificate necessary — But may be produced during pendency of proceedings — It is not a condition precedent.)

('02) 24 All 138 (142). (Do.)

('92) 19 Cal 482 (485). (Do.)

('94) 16 All 26 (28). (Application without certificate will save limitation.)

('11) 9 Ind Cas 800 (801) (All). (Do.)

('96) 20 Bom 76 (78). (Do.)

('93) 20 Cal 755 (757). (Do.)

('92) 16 Bom 349 (350). (Where claim is by survivorship, certificate is not necessary — But where claiming as heir certificate is necessary.)

('99) 22 Mad 380 (381). (Claim by survivorship — Certificate not necessary.)

('93) 20 Cal 103 (105). (Decree in favour of mohunt — Application by his successor — Certificate not necessary.)

('35) AIR 1935 Nag 1 (2) : 31 Nag L R 126. (Application according to O. 21 Rr. 11 to 14 —

Absence of succession certificate does not make application as one not in accordance with law.)

8. ('39) AIR 1939 Mad 196 (198).

9. ('12) 13 Ind Cas 365 (369) (Cal).

('25) AIR 1925 Pat 692 (693).

('25) AIR 1925 Pat 369 (372) : 4 Pat 378.

('85) 7 All 564 (565). (An application by pleader after client's death is invalid.)

10. ('35) AIR 1935 Mad 786 (789).

[See also ('87) AIR 1937 Mad 760 (762).]

11. ('36) AIR 1936 Lah 508 (508). (Agent competent to execute decree — Agent can remove objections to execution in both appellate and execution Courts.)

12. ('35) AIR 1935 All 402 (403, 404). (Decree in favour of number of persons awarding separate costs.)

**Note 3**

1. ('70) 2 N W P H C R 303 (304). (Declaratory decrees cannot be executed.)

('02) 26 Bom 707 (710). (But future maintenance awarded by decree must be enforced in execution.)

('92) 19 Cal 139 (146). (Do.)

clause 5 of the Limitation Act.<sup>1</sup> See also Section 42 Note 3. A transfer made in an irregular manner is not null and void and if the irregularity is not objected to, an application made to the transferee Court is in order.<sup>2</sup> Where a decree is transferred to another Court for execution, the mere fact that the transfer is made on the ground that the judgment-debtor has immovable property within the jurisdiction of such Court does not deprive such Court of the power to entertain an application for the arrest of the judgment-debtor.<sup>3</sup>

Where an order has been made by the Court which passed a decree for transfer to another Court, the decree-holder is entitled to apply for execution to the transferee Court, even before the copy of the decree has been received by the latter from the former Court.<sup>4</sup> The reason is that the order of transfer is a judicial order and therefore takes effect from the date on which it was passed.

**6a. Time of presentation of application for execution.** — It is in the discretion of the Judge or officer appointed in that behalf to accept an application for execution beyond office hours.<sup>1</sup>

**7. Executing Court cannot go behind the decree.** — See Note 8 to Section 38.

**8. Application for execution.** — It has been already seen in Note 5 to Section 38, *ante*, that where a decree is reversed, modified or affirmed in appeal, the only decree capable of execution is the appellate decree. Therefore, if a decree of a lower Court is confirmed on appeal while execution proceedings are pending, a fresh application for execution is necessary.<sup>1</sup>

When a decree follows an attachment before judgment, O. 38 R. 11 does not exempt the plaintiff from making an application as required by this rule.<sup>2</sup>

An application under Section 39 for transfer of a decree is not an application for execution;<sup>3</sup> but is only an application to take some step-in-aid of execution.<sup>4</sup> It is necessary, however, even for this purpose that the application for transfer should have been made to the Court *having jurisdiction* in the matter.<sup>5</sup>

(25) AIR 1925 Mad 80 (84). (Satisfied decree cannot be executed.)

(94) 19 Bom 546 (549). (Do.)

#### Note 6

1. ('16) AIR 1916 P C 16 (18) : 39 Mad 640 : 43 Ind App 238 (PC). (Affirming AIR 1914 Mad 435 on appeal.)

('34) AIR 1934 Lah 728 (730) : 16 Lah 80. (The original Court has no power to execute until the decree is re-transferred.)

('31) AIR 1931 Lah 14 (14).

('25) AIR 1925 Lah 233 (235).

('23) AIR 1923 Pat 384 (384) : 2 Pat 247.

('22) AIR 1922 Bom 359 (360) : 47 Bom 56.

[See also ('86) 1886 All W N 81 (31).]

2. ('87) 1887 Bom P J 328 (328) Reprint, Page 479 (479).

3. ('38) AIR 1938 Mad 27 (28, 29).

4. ('38) AIR 1938 Mad 627 (627, 628) : 56 Mad 692. (Following 35 Mad 588 and dissenting from AIR 1928 Mad 496.)

#### Note 6a

1. ('38) AIR 1938 Nag 46 (47) : ILR (1938) Nag 451.

#### Note 8

1. ('30) AIR 1930 Bom 225 (227). (A prayer for

continuation of application is a defect curable by Section 99.)

2. ('10) 7 Ind Cas 856 (857) : 34 Mad 25.

('88) 12 Bom 400 (406).

('08) 33 Cal 639 (643).

('29) AIR 1929 Nag 148 (150) : 25 Nag L R 94.

3. ('26) AIR 1926 All 473 (474).

('82) AIR 1932 Pat 309 (311) : 11 Pat 785. (Even though in the form of an execution application.)

('22) AIR 1922 Cal 3 (4).

('35) AIR 1935 Lah 508 (510) : 17 Lah 13. (Reversing on Letters Patent Appeal, AIR 1930 Lah 18 — Application for execution subsequently made to the transferee Court is not one in continuation of the prior application for transfer.)

4. ('26) AIR 1926 All 473 (474).

('39) AIR 1939 Oudh 131 (131, 132).

('33) AIR 1933 Sind 78 (80) : 27 Sind L R 109.

('32) AIR 1932 Pat 309 (310) : 11 Pat 785. (But an application for transfer to a Court which has no jurisdiction to execute is not a step-in-aid.)

('37) AIR 1937 Bom 365 (368) : I L R (1937) Bom 691.

5. ('32) AIR 1932 Pat 309 (311) : 11 Pat 785.

**O. 21 R. 10**  
**Notes 8-9**

Where a decree-holder makes an application praying for a relief *not granted by the decree*, it is not an application which will save limitation under Article 182 of the Limitation Act.<sup>6</sup> But an application which is merely incorrect in some respects would be one furthering execution.<sup>7</sup>

Where a decree is transferred for execution to another Court, it is the application for execution that initiates the proceedings in execution. The receipt of the decree on transfer is a mere ministerial act.<sup>8</sup>

**9. Dismissal of application for default.**— A Court has inherent power to dismiss an application for execution when the applicant fails, through his own laches, to put the Court in a position to proceed with the application.<sup>1</sup> But such dismissal does not bar a fresh application for execution.<sup>2</sup>

As to whether a Court has power to restore to the file an application dismissed for default, see Notes to Order 9 Rule 9.

**Local Amendment****RANGOON**

Add the following as Rule 10A.

**O. 21 R. 10A**  
**(Rangoon)**

"10A. If no application is made by the decree-holder within six months of the date of the receipt of the papers the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by Section 41."

**O. 21 R. 11**

**R. 11.** [Ss. 256, 235.] (1) Where a decree is for the

**Oral application.**

payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution<sup>3</sup> thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

**Written application.**

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified<sup>4</sup> by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—

(a) the number of the suit;

6. ('89) 13 Bom 237 (239, 240).

('01) 1901 Pun Ra No. 98, p. 330.

7. ('88) 12 Bom 427 (430).

('83) 6 Mad 250 (251).

8. ('38) AIR 1938 Rang 385 (386) : 1938 Rang L R 355. (Decree of British Indian Court transferred for execution to Court in Burma—Separation of Burma from British India taking place in the interval between the receipt of the decree by the Burman Court and the application for execution to that Court by the decree-holder—Decree must be treated as a foreign decree in the

Burman Court for purposes of execution and Burman Court could not execute it.)

**Note 9**

1. ('93) 15 All 84 (95) (F B).

('38) AIR 1938 Mad 418 (422) : 56 Mad 490 (F B).

2. ('93) 15 All 84 (101) (F B).

('95) 18 Mad 131 (133).

[But see ('82) 1882 All W N 97 (97). (Under Code of 1877 when decree-holder did not use due diligence, subsequent application could not be granted. Not law under this Code.)

('79) 2 All 384 (386). (Do.)]

- (b) the names of the parties ;
- (c) the date of the decree;<sup>6</sup>
- (d) whether any appeal has been preferred from the decree;<sup>7</sup>
- (e) whether any, and (if any) what, payment or other adjustment<sup>8</sup> of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;<sup>9</sup>
- (g) the amount with interest (if any) due upon the decree,<sup>10</sup> or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution<sup>11</sup> of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required,<sup>12</sup> whether —
  - (i) by the delivery of any property specifically decreed ;
  - (ii) by the attachment and sale, or by the sale without attachment, of any property ;
  - (iii) by the arrest and detention in prison of any person ;
  - (iv) by the appointment of a receiver ;
  - (v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.<sup>13</sup>

[1877, Ss. 235, 256 ; 1861, S. 13 ; 1859, S. 212. See Ss. 38, and 51 and 135 and O. 40 R. 1.]

#### Local Amendments

##### ALLAHABAD

(1). For clause (f) of sub-rule (2), *substitute* the following :

"(f) The date of the last application, if any," and,

(2). *Add* the following proviso to sub-rule (2) :

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application."

**O. 21 R. 11 MADRAS**

(1). In sub-rule (2) *between* clauses (f) and (g), *insert* the following new clause:  
 “(ff) whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer.”

(2). *Add* the following to sub-rule (2) (j) :

“In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of Rule 53 of this Order, there shall not be included any other relief mentioned in this clause.”

(3). *Add* the following proviso at the end of sub-rule (2) :

“Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

**NAGPUR**

*After* sub-clause (v) of clause (j) of sub-rule (2), *insert* the following proviso :

“Provided that, when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

**OUDH**

*For* clause (f) of sub-rule (2), *substitute* the following :

“(f) the date of the last application, if any.”

**PATNA**

(1). *Add* the following as sub-rule (1A) :

“(1A) Where an order has been made under Section 39 for the transfer of a decree for the payment of money for execution to a Court, within the local limits of the jurisdiction of which the judgment-debtor resides, such Court may, on the production by the decree-holder of a certified copy of the decree and an affidavit of non-satisfaction, forthwith order immediate execution of the decree by the arrest of the judgment-debtor.”

(2). *Substitute* the words and figures “sub-rules (1) and (1A)” *for* the word and figure “sub-rule (1)” in sub-rule (2).

**SIND**

*Add* the following as clause (ff) to sub-rule (2) :

“(ff) Whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transfer.”

*Synopsis*

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>2a. Applicability of the Rule to execution of decrees under other Acts.</li> <li>2b. “Decree for payment of money.”</li> <li>3. Immediate execution — Sub-rule (1) — Privilege from arrest.</li> <li>4. Verification of application.</li> <li>5. Who may apply for execution. See Notes to O. 21 R. 10.</li> <li>6. Date of the decree to be given—Clause (c).</li> <li>7. Whether any appeal has been preferred from the decree—Clause (d).</li> </ol> | <ol style="list-style-type: none"> <li>8. Payment or other adjustment—Clause (e).</li> <li>9. Previous applications and their results.</li> <li>10. Amount due upon the decree—Clause (g).</li> <li>10a. Amount of costs awarded — Clause (h).</li> <li>11. Against whom execution is to issue — Clause (i).</li> <li>12. Mode in which the assistance of the Court is required — Clause (j).</li> <li>13. Certified copy of decree to be filed — Sub-rule (3).</li> <li>14. Concurrent applications for execution. See Note 10 to Section 38.</li> <li>15. Amendment of application. See Notes to Rule 17.</li> </ol> |
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*Other Topics (miscellaneous)*

Application "in accordance with law" or not. See Notes 2, 8, 9, 11 and 13.	Decree burnt or destroyed. See Note 13.
Breach of sub-rule (2) and defects in applications. See Note 2.	Limitation. See Note 9.
Date of decree to be taken as that of judgment. See Note 6.	Mistake in date of decree. See Note 6.
Death of judgment-debtor. See Note 11.	Omission to specify costs — Clause (h). See Note 10.
	Wrong name of the judgment-debtor. See Note 2.
	Wrong number of the suit—Clause (a). See Note 2.

**O. 21 R. 11  
Notes 1-2**

**1. Legislative changes.** — Sub-rule (1) corresponds to Section 256 of the old Code and sub-rule (2) to Section 235. Sub-rule (3) is new and empowers the Court executing the decree to call upon the decree-holder to produce a certified copy of the decree.<sup>1</sup>

The following are the points of difference between sub-rule (1) and Section 256 —

- (1) Section 256 provided for immediate execution only where the amount decreed did not exceed the sum of one thousand rupees. This rule fixes no such limit.
- (2) Under Section 256 the Court could order immediate execution only by the *issue of a warrant*. Under this rule the order may be made even prior to the preparation of a warrant.
- (3) Under this rule execution cannot issue against the *moveable property* of the judgment-debtor as was possible under the old Code.
- (4) Under the old Code execution could be ordered if the judgment-debtor was "within the local limits of the jurisdiction of the Court." Under this rule it can be ordered only if he is within the *precincts of the Court*.

The following are the important alterations in sub-rule (2) —

- (1) The words "together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed" in clause (g) are new.
- (2) The words "and sale, or by the sale without attachment" in clause (j), sub-clause (ii) are new.
- (3) Sub-clause (iv), clause (j) is new.

**2. Scope of the Rule.** — An application for execution should be in *writing* except in the case dealt with under sub-rule (1), when it may be *oral*. Sub-rule (2) says what particulars a written application for execution shall contain. But every omission to comply with the said requirements is not necessarily such a defect as will vitiate the execution proceedings.<sup>1</sup> Informalities of an immaterial character will not vitiate the proceedings.<sup>2</sup> Thus, the omission to mention the amount of costs<sup>3</sup> or giving a wrong

**Order 21 Rule 11 — Note 1**

1. ('32) AIR 1932 All 85 (88) : 53 All 391.

**Note 2**

1. ('26) AIR 1926 Cal 1146 (1147, 1148).
- ('38) AIR 1938 Rang 87 (88, 89). (Omission to mention the form of notice to be served on the judgment-debtor is not a defect which would make the application not in accordance with law.)
- ('24) AIR 1924 Cal 398 (398).
- ('28) AIR 1928 Mad 129 (181). (Per Devadoss, J. — Jackson, J., Contra — Decision of Devadoss, J. upheld in AIR 1929 Mad 703.)
- ('88) 6 Mad 250 (251).
- ('14) AIR 1914 Mad 632 (638).
- ('11) 1 Ind Cas 240 (243) : 5 Nag L R 8.
- ('29) AIR 1929 Mad 703 (704) : 52 Mad 760 (F B).
1. ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156.

('34) AIR 1934 Lah 58 (59). (Mortgage decree—Property described in plaint and decree — Application for execution need not be in form prescribed under R. 11 — Court should sell the property after getting necessary particulars from decree-holder.)

('38) AIR 1938 Sind 78 (80, 81) : 27 Sind L R 109. (In accordance with law means fulfilling requirements of law—Minor errors, non-availability of relief or intention of applicant merely to extend limitation are immaterial.)

[See also ('36) AIR 1936 All 17 (18). (Minor defects in an application for execution, for instance, the omission to mention the number of the suit or the date of the decree etc., do not by themselves render the application defective or one not in accordance with law.)]

3. ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156.

**O. 21 R. 11**  
**Notes 2-2a**

suit number,<sup>4</sup> or making a mistake in the name of the judgment-debtor,<sup>5</sup> or omitting to state the names of all the persons interested in the decree,<sup>6</sup> or wrongly calculating the pleader's fee,<sup>7</sup> or the failure to draw up the petition in a tabular form,<sup>8</sup> is only an irregularity of an immaterial character which will not vitiate the proceeding. Where, however, the omissions relate to *material* particulars, the application cannot be considered to be one in accordance with law and cannot save limitation.<sup>9</sup> Whether an omission is material or not will depend upon the particular facts of each case.<sup>10</sup>

Where an application for execution complies with the requirements of O. 21, Rules 11 to 14, it is in accordance with law. Although in the absence of a succession certificate the decree-holder may not be entitled to realize the fruits of his decree, yet, the want of a succession certificate will not make the application for execution itself one not in accordance with law.<sup>11</sup> See also Note 2 to Order 21 Rule 10.

Where an application for execution is made, which is not in proper form or is otherwise defective, it is the duty of the Court to dispose of the application either by giving the decree-holder an opportunity to amend his application or by rejecting it.<sup>12</sup>

This rule prescribes the form for an application for *execution*. There is no particular form in which an application for the *transfer* of a decree for execution to another Court should be 'made. Such application need not contain the particulars mentioned in this rule. Where the application gives sufficient particulars of the decree sought to be transferred to indicate with precision the decree which the Court is to transfer, the application is one in accordance with law.<sup>13</sup>

**2a. Applicability of the Rule to execution of decrees under other Acts.—**

Under the Oudh Rent Act, XXII of 1886 (Section 146), the Orissa Tenancy Act, II of 1913 [Section 198 (j)] and the Madras Estates Land Act, I of 1908 [Section 192 (g)], the Court may order immediate execution, on the oral application of the decree-holder, as enacted in sub-rule (1) of this rule.

In applications for execution of decrees relating to immovable property under the Chota Nagpur Tenancy Act, VI of 1908, Section 210 (3) (b), as amended by Act VI of 1920, [Section 50 (1)], the application shall be accompanied by a certified copy of the decree, as provided in sub-rule (3) of this rule.

4. ('98) 25 Cal 594 (597, 601) (F B).  
(84) 10 Cal 541 (544).

5. ('80) AIR 1930 Mad 172 (173).

6. ('32) 139 Ind Cas 151 (152) (Lah).

7. ('81) AIR 1931 Lah 600 (601).

7. ('18) AIR 1918 Mad 1090 (1092) : 40 Mad 949.

8. ('21) AIR 1921 Low Bur 37 (39) : 11 Low Bur Rul 163.

9. ('81) AIR 1931 All 722 (723). (Incorrect entries in columns 2, 6 and 8.)

(26) AIR 1926 Pat 533 (534). (Flagrantly defective application.)

(74) 21 Suth W R 309 (310).

(68) 10 Suth W R 428 (428).

10. ('26) AIR 1926 Cal 1146 (1148).

(24) AIR 1924 Cal 398 (398).

(34) AIR 1934 Bom 307 (310) : 59 Bom 1. (In accordance with law means that application though defective in some particular is one upon which execution can lawfully be ordered.)

(34) AIR 1934 Cal 465 (466). (Application for execution not mentioning moneys realised by attachment of decrees obtained by judgment-debtor—Omission does not vitiate application.)

11. ('85) AIR 1935 Nag 1 (2) : 31 Nag L R 126.

12. ('84) AIR 1934 All 481 (489) : 56 All 791 (F B). (Defective application — If no order is passed by Court it should be deemed to be pending.)

(20) AIR 1920 Lah 122 (122).

[See ('87) AIR 1937 Sind 108 (110) : 31 Sind L R 14. (Application presented by son of decree-holder on latter's behalf—No mention in application that son was acquainted with facts of case—Court returning application for amendment as not being made by proper person—Application held rightly returned as not being proper under O. 21 R. 11 (2)—Application cannot be said to be pending in Court when it is not filed after amendment.)]

13. ('87) AIR 1937 All 397 (399).



As to what particulars are necessary, when an application is made under sub-rule (2) of this rule, to execute a decree against the immovable properties of the judgment-debtor, under the Bengal Tenancy Act, VIII of 1885, and the Orissa Tenancy Act, II of 1913, see Sections 162 and 216 of those Acts respectively.

See also the undermentioned case.<sup>1</sup>

**2b. "Decree for payment of money."** — A decree, to come within the description of a decree for the payment of money, need not state the exact amount due. A decree under which the amount due has to be ascertained subsequently may be a decree for the payment of money.<sup>1</sup>

See also Note 6 to Section 73 *ante*.

**3. Immediate execution — Sub-rule (1) — Privilege from arrest.** — S. 135 *ante* deals with exemptions from arrest. But sub-section (3) thereof provides that "nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for *immediate execution* . . ."<sup>1</sup>

**4. Verification of application.** — The application for execution should be signed and verified by (a) the applicant, or (b) some other person acquainted with the facts of the case. Where there are *several* applicants it is not necessary that *all* of them should verify the application, even though some of them are not acquainted with the facts of the case.<sup>1</sup> Where an application for execution is verified by a person other than the decree-holder, all that is necessary is that the Court should be satisfied that he is acquainted with the facts of the case.<sup>2</sup>

Although this rule permits the signing and verification of an application for execution by some person other than the decree-holder, the application itself must be that of the decree-holder or his recognized agent or pleader.<sup>3</sup>

An application not signed and verified as required by this rule is a defective application which ought to be rejected.<sup>4</sup> Where the period of twelve years from the date

#### Note 2a

1. ('39) AIR 1939 Bom 367 (369). (Consent order in proceedings under the Guardians and Wards Act, for payment of schooling and maintenance expenses of minors by their father was held not to be a decree for the payment of money in favour of the wife and could not be executed as such.)

#### Note 2b

1. (39) AIR 1939 Bom 367 (368). (In the circumstances of this case, however, it was held that the decree was not one for payment of money as the amount under the terms of the decree might be paid to certain third parties also—Case relating to consent order in proceedings under the Guardians and Wards Act.)

#### Note 3

1. ('68) 9 Suth WR 549 (551). (Case under Small Cause Courts Act, S. 19 of Act XI of 1865.)

#### Note 4

1. ('24) AIR 1924 Pat 23 (25) : 2 Pat 809.  
2. ('24) AIR 1924 Cal 811 (811).  
(29) AIR 1929 Bom 196 (196). (Verification by pleader.)  
(30) AIR 1920 Lah 122 (122). (Verification by decree-holder's son is sufficient.)  
(25) AIR 1925 Pat 692 (693). (Do.)  
(04) 26 All 154 (155). (Verification by attorney.)

('30) AIR 1930 Lah 603 (604). (Application by next friend of decree-holder after his attaining majority — If *bona fide*, will not be dismissed.)

('36) AIR 1936 All 17 (18). (Application signed and verified by person purporting to be mukhtar-i-am of decree-holder — Mukhtarname not produced — Opportunity to satisfy Court that application was signed and verified in accordance with law not availed of—Rejection is proper.)

('34) AIR 1934 Nag 224 (225). (Signing and verification by pleader who represented the client in the case out of which the execution proceedings arise is sufficient.)

[See ('37) AIR 1937 Sind 108 (110) : 31 Sind L R 14. (Application presented by son on father's behalf — Son not acquainted with facts — Return of application for amendment held proper.)]

[But see ('05) 28 Mad 396 (398). (Application by next friend after majority held to be not in accordance with law.)]

3. ('37) AIR 1937 Mad 760 (761).

4. [See ('36) AIR 1936 All 17 (18). (Application signed and verified on behalf of decree-holder by person purporting to be mukhtar-i-am of decree-holder — Mukhtarname not filed — Court not satisfied that he was authorized to sign—Rejection of application is proper.)]

**O. 21 R. 11  
Notes 4-8**

of a decree expired when the Court was closed and the decree-holder presented an unverified petition for execution on the re-opening day, it was held by the High Court of Madras<sup>6</sup> that the petition ought to be rejected and not to be allowed to be amended.

**5. Who may apply for execution.** — See Notes to Order 21 Rule 10.

**6. Date of the decree to be given—Clause (c).** — The date of the decree is the date on which the judgment was pronounced.<sup>1</sup> See also Notes to O. 20 R. 7. An error in the date of the decree or the omission to give it in an application for execution is not a material irregularity and will not affect the validity of the application.<sup>2</sup> It can be amended even after the period of limitation for execution has expired and the amendment so made will relate back to the date of the application.<sup>3</sup>

Where a decree was, by mistake, dated 16th February 1929 instead of 11th February and the decree-holder was misled thereby and applied for execution on the 15th February 1932, it was held that the decree ought to be regarded as having been passed on the 16th February 1929 on the principle *actus curiæ neminem gravabit* — an act of the Court shall prejudice no man.<sup>4</sup>

See also the undermentioned case.<sup>5</sup>

**7. Whether any appeal has been preferred from the decree—Clause (d).** — It has been already mentioned in Note 5 to Section 38 that where an appeal is preferred against a decree and the decree is modified, reversed, or confirmed, it is the decree of the Appellate Court that is capable of execution. This clause requires that the application should state any modifications or reversals, etc., which the decree of the Appellate Court may have introduced in the decree of the lower Court.<sup>1</sup>

An omission to mention the particulars required by this clause does not render the application one not "in accordance with law."<sup>2</sup>

**8. Payment or other adjustment—Clause (e).** — The applicant for execution is bound to mention in the application any payment or adjustment made between the parties after decree.<sup>1</sup> Where a portion of the decretal amount has been deposited in Court with notice to the decree-holder, the latter must mention such fact in his application and can execute the decree only for the balance.<sup>3</sup> The non-mention of an *uncertified* payment out of Court in an application for execution does not, according to the High Court of Madras,<sup>3</sup> render it an application not "in accordance with law" within the meaning of Article 182 of the Limitation Act, 1908. The Judicial Commissioner's Court of Nagpur<sup>4</sup> has held that where the decree-holder deliberately omits to mention a certified adjustment, the application is not one "in accordance with law."

**5.** ('08) 26 Mad 101 (103).

**Note 6**

1. ('98) 25 Cal 109 (110, 111).
- ('09) 8 Ind Cas 391 (392) (Cal).
- ('97) 1 Cal W N 93 (94).
2. ('98) 20 All 478 (480).
- ('98) 1893 All W N 112 (112).
- ('75) 1 All 212 (215) (F B).
- ('81) AIR 1981 Sind 160 (160) : 25 Sind L R 528.
- ('86) AIR 1986 All 17 (18).
3. ('98) 1893 All W N 112 (112).
- ('98) 20 All 478 (480).
4. ('88) AIR 1988 Cal 289 (240).
5. ('35) AIR 1935 Mad 118 (118). (Decree-holder applying for execution before date mentioned in decree — Judgment-debtor filing counter only subsequent to such date — Court has discretion

to condone such irregularity if no prejudice is caused to opposite side.)

**Note 7**

1. ('88) 10 All 389 (392); (1888) All W N 51 (52).
2. ('83) AIR 1983 Mad 872 (874).

**Note 8**

1. ('78) 2 Mad 216 (218).
- ('86) 10 Bom 288 (298). (Intentional omission to make such statement amounts to an offence under Sec. 193, Penal Code.)
- ('21) AIR 1921 Pat 135 (136) : 6 Pat L Jour 837.
- ('26) AIR 1926 Nag 164 (166).
2. ('83) AIR 1983 Pat 89 (89, 90) : 11 Pat 796.
3. ('19) AIR 1919 Mad 256 (256).
- [See also ('84) AIR 1984 Cal 465 (466). (AIR 1919 Mad 256, Followed.)]
4. ('24) AIR 1924 Nag 135 (137).

**9. Previous applications and their results.** — An omission to specify all the previous applications with their dates and their results is not a material defect such as would vitiate the application and render it one not "in accordance with law" within Article 182 of the Limitation Act.<sup>1</sup>

**O. 21 R. 11**  
**Notes 9-11**

**10. Amount due upon the decree — Clause (g).** — A Court will be justified in declining to act on an execution petition when the decree-holder does not state the amount due upon the decree.<sup>1</sup> Where a decree awards interest and the application for execution specifies the interest from the date of the decree to the date of the application, execution may be ordered for *future* interest also up to the date of sale, even though it is not specifically included in the application.<sup>2</sup>

See also the undermentioned cases.<sup>3</sup>

**10a. Amount of costs awarded — Clause (h).** — The omission to mention the particulars mentioned in this clause is not a material omission and will not vitiate the application for execution.<sup>1</sup>

**11. Against whom execution is to issue — Clause (i).** — An application for execution must state the name of the person against whom execution is sought.<sup>1</sup> Where an application is made against a dead person, it cannot be acted upon, but it will be a step-in-aid of execution within the meaning of Article 182 of the Limitation Act, if it has been made *bona fide* in ignorance of the death.<sup>2</sup> Similarly, where in an application for execution the guardian *ad litem* of a minor defendant is described by mistake as the judgment-debtor, the application will give a fresh starting point for limitation.<sup>3</sup> But where a minor judgment-debtor is not represented at all by a guardian, the application is not one in accordance with law and is of no effect.<sup>4</sup> A decree for

#### Note 9

1. ('26) AIR 1926 Cal 1146 (1148).
- ('24) AIR 1924 Cal 398 (398).
- ('01) 23 All 162 (163).
- ('91) 1891 All W N 154 (155).
- ('28) AIR 1928 Mad 440 (442, 444).
- ('93) 16 Mad 142 (143).
- ('92) 1892 All W N 114 (115).

As to the period of limitation for an application for execution, see Articles 182 and 183 of the Limitation Act.

[But see ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156. (Would be not in accordance with law where it is necessary to determine whether application is barred or not.)]

#### Note 10

1. ('21) AIR 1921 Nag 90 (91).
- ('22) 65 Ind Cas 120 (120) (Pat). (Such an application is not a step-in-aid.)
- ('90) 1890 All W N 98 (98). (Decree-holder deliberately omitted to correct error in calculation of interest—Petition struck off for non-prosecution is not an application in accordance with law.)
- [See ('39) AIR 1939 Rang 345 (346). (Particulars of interest etc., due are not necessary—They may be furnished later on when required.)]
- [See also ('07) 81 Bom 244 (249).]
- [But see ('38) AIR 1938 Mad 872 (874).]
2. ('32) AIR 1932 Cal 555 (557).
3. ('85) AIR 1985 Pat 400 (401). (It is not incumbent upon a decree-holder in an application for

execution to describe the nature of the tenure or to do so necessarily according to the Record of Rights.)

4. ('82) AIR 1932 Cal 858 (863) : 59 Cal 1450. (The decretal amount due from the principal debtors sought to be realised from the surety and the costs of an application against the surety himself may both be included in one tabular statement in the execution against the surety.)

#### Note 10a

1. ('28) AIR 1928 Mad 440 (441).
- ('22) AIR 1922 Sind 29 (30) : 15 Sind L R 156.

#### Note 11

1. ('72) 18 Suth W R 55 (56).
2. ('94) 17 Mad 76 (77).
- ('08) 35 Cal 1047 (1049).
- ('97) 19 All 337 (339). (Such application made with knowledge of death will not save limitation.)
- [But see ('34) AIR 1934 All 463 (464) : 56 All 463.]
- For execution against legal representative of a deceased judgment-debtor, see S. 50, Notes 12, 13 and 14.

Also see S. 52 Notes 4 to 6 and 8 and the following case:

1. ('92) 1892 All W N 241 (242). (Application against wrong legal representative — Step-in-aid of execution.)
2. ('18) AIR 1918 All 289 (289).
- ('88) 12 Bom 427 (430).
4. ('11) 12 Ind Cas 628 (629) (All).

**O. 21 R. 11** costs passed against a minor represented by his father as guardian (or next friend)  
**Notes 11-13** cannot be executed against the *father*.<sup>5</sup>

**12. Mode in which the assistance of the Court is required — Clause (j).** — An execution application which does not specify the manner in which the assistance of the Court is required is not an application in accordance with law.<sup>1</sup> So also is an application asking for a relief which the Court cannot grant inasmuch as the Court is asked to do something which it is not competent to do.<sup>2</sup>

The words "otherwise, as the nature of the relief granted may require" in clause (j) show that the modes of execution mentioned above are not *exhaustive*.<sup>3</sup> But where the decree-holder prays for a particular mode of execution, he cannot ask the Court to give a different mode of execution upon that application.<sup>4</sup>

This rule should be read with Section 51 *ante* and O. 40 R. 1, *infra*; and an order for the appointment of a receiver by way of execution of a decree must be deemed to be made under O. 40 R. 1 and must satisfy the requirements thereof.<sup>5</sup>

Where the property sought to be attached is inalienable under the law, the Court has no power to attach it; the reason is that attachment will be futile in such a case.<sup>6</sup>

**13. Certified copy of decree to be filed — Sub-rule (3).** — It is not imperative that an application for execution should, in all cases, be accompanied by a copy of the decree.<sup>1</sup> The Court can order the execution to proceed without a copy of the decree

('18) AIR 1918 Pat 69 (69): 4 Pat L Jour 35.  
 (But where a guardian is proposed though without an application, it is a step-in-aid.)

[See **however** ('86) AIR 1986 Nag 77 (78).  
 (Decree against minor represented by guardian — Death of guardian subsequently — Execution taken out in ignorance of such death — Held that the application was a step-in aid of execution and could save limitation.)]

5. ('35) AIR 1935 All 359 (360).

#### Note 12

1. ('95) 19 Bom 34 (35).

('11) 11 Ind Cas 696 (696) (Cal). (Unless the defect is remedied the application must be dismissed.)

('68) 9 Suth W R 390 (391).

('75) 7 N W P H C R 79 (79).

('29) AIR 1929 Nag 148 (150): 25 Nag L R 94.

('82) AIR 1982 Lah 534 (534): 14 Lah 6. (It was held on the facts that the mode of execution was sufficiently described, and that therefore it was a step-in-aid of execution.)

[See **also** ('91) 18 Cal 462 (465). (But where it refers to previous application, in which mode of execution is mentioned, it is in accordance with law.)]

[But see ('83) 1883 Pun Re No. 28. (Such an application received by Court without objection is in accordance with law.)]

2. ('05) 27 All 619 (621).

('90) 12 All 64 (65).

('82) 4 All 34 (35).

('18) AIR 1918 Bom 236 (240): 42 Bom 420.

('10) 5 Ind Cas 601 (602): 34 Bom 189.

('89) 18 Bom 237 (239).

('09) 2 Ind Cas 941 (942) (Cal).

('82) 8 Cal 174 (177).

('10) 5 Ind Cas 480 (482) (Cal).

('05) 1 Nag L R 61 (63, 64).

('31) AIR 1931 Sind 160 (161): 25 Sind L R 528.  
 (May be in accordance with law if there is a *bona fide* belief about competency.)

('14) AIR 1914 Mad 663 (664). (Do. — In such a case the application can be amended.)

('12) 17 Ind Cas 210 (212): 37 Bom 42.

[But see ('05) 26 Bom 233 (237).]

3. ('18) 18 Ind Cas 691 (695) (Mad). (Case under old Code.)

('20) AIR 1920 Lah 117 (118). (Temporary alienation.)

[See **also** ('39) AIR 1939 Oudh 116 (118): 14 Luck 588. (It is proper for the Court to order execution of a decree for the payment of money by means of appointment of a receiver when it is just and convenient from the point of view, both of the decree-holder as well as judgment-debtor.)]

4. ('99) 1899 Pun Re No. 21, p. 121.

('11) 9 Ind Cas 240 (241) (Oudh).

[But see ('06) 33 Cal 306 (308).]

5. ('82) AIR 1982 Cal 199 (192): 59 Cal 205.

[See **also** ('38) AIR 1938 Nag 266 (267). (Jahagir unattachable—Still receiver can be appointed on suitable allowance to judgment-debtor.)]

6. ('35) AIR 1935 Nag 198 (195): 31 Nag L R 239.  
 (Case under S. 16 of the C. P. Land Alienation Act)

#### Note 13

1. ('07) 31 Bom 162 (164).

('30) AIR 1930 Cal 304 (305, 306): 57 Cal 996.  
 (Especially when it is the Court which passed the decree or when the decree is voluminous.)

('71) 16 Suth W R 25 (25).

('69) 11 Suth W R 23 (23).

being filed.<sup>2</sup> An application not accompanied by a copy of the decree cannot be said to be one not in accordance with law for the purposes of limitation.<sup>3</sup> It will be in accordance with law even if it is dismissed for non-compliance with an order of the Court requiring a copy of the decree to be produced.<sup>4</sup>

**O. 21 R. 11**  
**Notes 13-15**

**14. Concurrent applications for execution.** — See Note 10 to Section 38.

**15. Amendment of application.** — See Notes to Rule 17 *infra*.

**R. 12.** [S. 236.] Where an application is made for the attachment of any moveable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

**O. 21 R. 12**

**Application for attachment of moveable property not in judgment-debtor's possession.**

[1877, S. 236; 1859, S. 214. See Ss. 2 (13) and 60.]

### Synopsis

#### 1. Scope of the Rule. | 2. Failure to annex inventory — Effect of.

**1. Scope of the Rule.**—This rule applies to moveables in the possession of third parties. When a third party has some moveables belonging to himself and others belonging to the judgment-debtor, an inventory is obviously necessary before an attachment can be made.<sup>1</sup> But, where a decree is passed under Section 52 of the Code against the legal representatives of a deceased debtor and the moveable property attached is in their possession, the rule has no application.<sup>2</sup> The reason is that the legal representatives themselves are the judgment-debtors and therefore the property sought to be attached cannot be said to be property belonging to, but not in the possession of, the judgment-debtor. No inventory is necessary where the property sought to be attached is in the possession of the judgment-debtor himself.<sup>3</sup>

**2. Failure to annex inventory—Effect of.**—Where a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same as required by this rule,

('68) 10 Suth W R 144 (145).

('68) 9 Suth W R 362 (362).

(1865) 4 Suth W R Misc 15 (16). (Original decree may not be filed.)

('10) 5 Ind Cas 660 (662) (Cal).

('69) 11 Suth W R 271 (272).

2. ('10) 11 Cal L Jour 248 (247). (Decree burnt or destroyed.)

3. ('05) 28 Mad 557 (559).

('69) 11 Suth W R 28 (29).

('18) AIR 1918 All 242 (248) : 40 All 209.

[See also ('28) AIR 1928 Mad 440 (441, 448).]

4. ('18) AIR 1918 All 242 (248) : 40 All 209.

('18) AIR 1918 Pat 547 (548).

#### Order 21 Rule 12 — Note 1

1. ('30) AIR 1930 Bom 65 (66). (Execution against legal representatives under S. 50 of the Code—Inventory not necessary.)

('93) 15 All 84 (86).

('81) 7 Cal 556 (559).

('11) 9 Ind Cas 729 (729) (Mad). (Inaccurate description—Wrong date—No prejudice—Sale valid—S. 236 requires only a reasonably accurate description.)

('69) 11 Suth W R 8 (16) (FB).

2. ('27) AIR 1927 Bom 52 (52) : 50 Bom 730.

[See also ('92) 1892 All W N 55 (56) : 14 All 193. (Facts not clear.)]

3. ('86) AIR 1988 Cal 235 (235).

- O. 21 R. 12** the application is not one in accordance with law within the meaning of Article 182 of  
**Note 2** the Limitation Act, and cannot save limitation.<sup>1</sup>

**O. 21 R. 13**

Application for attachment of immoveable property to contain certain particulars.

**R. 13.** [S. 237.] Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot —

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and
- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

[1877, Ss. 237, 238; 1859, S. 213.]

#### Local Amendment

#### RANGOON

The following shall be *substituted* for Rule 13:

"R. 13. (1) When application is made, for execution of a decree relating to immovable property included within the cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *kwin* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immovable property, must also be furnished so far as they are not given in the plan. In the case of other immovable property, a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied:—

1. If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *kwin* number, latest holding number (if different kinds of holdings, *e.g.*, rice land and garden holdings are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding), year of *kwin* map from which the holding number is taken and revenue last assessed upon the land, must be given.

2. In the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified.

#### Note 2

1. ('15) AIR 1915 All 820 (321) : 37 All 527.

('92) 1892 All W N 47 (47).

('92) 1892 All W N 70 (71). (Though the execution application expressly stated that it was filed to save limitation.)

[See ('88) AIR 1938 Pat 75 (75). (In this case, it was held that it was not right to hold an application not in accordance with law merely because it did not contain an inventory of the property sought to be attached without considering whether such property was in the possession of the judgment-debtor or not.)

3. In the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map, the rent or revenue last assessed on the land, must be given.

4. In the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block name or number, the number of the building in the street or if it has no number, the lot number must be given.

5. In the case of immovable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given.

6. The purpose to which land or buildings are put, the material and age of buildings, all incumbrances and municipal taxes should be stated.

7. The judgment-debtor's share or interest in the property should be specified.  
(2) The cost of the certified extract should be reckoned in the costs of the application."

**O. 21 R. 13**  
**Notes 1-2**

### *Synopsis*

#### 1. Legislative changes. | 2. Specification of property.

**1. Legislative changes.** — This rule corresponds to the first paragraph of Section 237 of the old Code, except that the words "and in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers" have been newly added in clause (a).

The second paragraph of Section 237 requiring the list of properties to be verified has been omitted from this rule and reproduced in sub-rule (3) of Rule 66 of this Order.<sup>1</sup>

**2. Specification of property.** — The rule applies only to execution of money decrees, and not to decrees made upon a charge or a mortgage.<sup>1</sup>

The object of requiring the boundaries and numbers to be specified is to easily *identify* the property.<sup>2</sup> Clause (b) imposes a duty on the decree-holder to specify the judgment-debtor's share or interest, to the best of his belief.<sup>3</sup> Thus, where the share is undivided it should be so specified.<sup>4</sup>

An application which does not contain the particulars required by this rule cannot be treated as an application in accordance with law within the meaning of Article 182 of the Limitation Act, unless the defects are remedied by amendment under Rule 17.<sup>5</sup> See also Notes to Rule 17, *infra*.

#### Order 21 Rule 13 — Note 1

1. For cases under the old Code which required verification, see ('06) 28 All 244 (245). ('99) 22 All 55 (64).

#### Note 2

1. ('16) AIR 1916 Pat 878 (873).
2. ('69) 11 Suth W R 175 (176).
- ('69) 12 Suth W R 488 (488).
- ('72) 18 Suth W R 411 (411).
- ('71) 16 Suth W R 149 (149).
- ('86) 12 Cal 161 (164).
- ('14) AIR 1914 Oudh 280 (281); 17 Oudh Cas 256. (Description conflicting—Court should ascertain by evidence.)
- ('12) 14 Ind Cas 588 (589) (Mad). (Do.)

3. ('88) 12 Bom 678 (682).

- ('76) 1 Bom 601 (605).
- ('31) AIR 1931 Nag 116 (117) : 27 Nag L R 318.
- ('20) AIR 1920 Cal 354 (356) : 47 Cal 446.
- ('27) AIR 1927 Mad 1142 (1142).
- ('84) 7 Mad 107 (109).

[See ('38) AIR 1938 Rang 433 (434). (Specification as half share belonging to judgment-debtors held sufficient although there was no specification as to the share of each judgment-debtor individually.)]

4. ('92) 14 All 190 (192).
5. ('81) AIR 1931 Bom 128 (128).
- ('92) 1892 All W N 55 (56) : 14 All 193.
- ('90) 1890 All W N 22 (22).
- ('92) 1892 All W N 3 (3).

**O. 21 R. 13**  
**Note 2**

This rule applies to proceedings under the Chota Nagpur Tenancy Act, 1908, Section 210, as amended by Act VI of 1920, Section 50.

**O. 21 R. 14**

**R. 14.** [S. 238.] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

Power to require certified extract from Collector's register in certain cases.

[1877, Ss. 237, 238; 1859, S. 213.]

### Synopsis

1. Legislative changes.

2. Applicability of the Rule.

3. Application for time to produce certified extracts is a step-in-aid of execution.

**1. Legislative changes.** — Section 238 of the old Code corresponding to this rule provided that "the application *shall* be accompanied by an authenticated extract from "the register of such office."<sup>1</sup> The present rule leaves it to the *option of the Court* to require the applicant to produce a certified extract.

**2. Applicability of the Rule.** — Where an application for sale is made in pursuance of a mortgage decree, a preliminary attachment of the mortgaged properties is not necessary, and therefore this rule does not apply to such a case; and a Court cannot dismiss the application for failure to produce the certified extract.<sup>1</sup> This rule applies to the proceedings under the Chota Nagpur Tenancy Act, 1908, Section 210, as amended by Act VI of 1920, Section 50.

**3. Application for time to produce certified extracts is a step-in-aid of execution.** — An application by a decree-holder for time to produce the certified copies or extracts required by this rule is a step-in-aid of execution.<sup>1</sup>

**O. 21 R. 15**

**R. 15.** [S. 231.] (1) Where a decree has been passed jointly<sup>3</sup> in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary,<sup>5</sup> apply for the execution

Application for execution by joint decree-holder.

('98) 15 All 84 (86).

('16) AIR 1916 Lah 816 (816).

#### Order 21 Rule 14 — Note 1

1. ('69) 11 Suth W R 175 (176).

('69) 12 Suth W R 488 (489).

#### Note 2

1. ('18) AIR 1918 Oudh 418 (418).

('37) AIR 1937 Oudh 288 (284) : 18 Luck 162.

#### Note 3

1. ('12) 17 Ind Cas 969 (969) : 37 Bom 317.

('10) 5 Ind Cas 579 (581) (Cal). (Application returned for amendment is a step in aid.)

('16) AIR 1916 Mad 510 (510). (Even application not re-presented is a step-in-aid.)



of the whole decree<sup>4</sup> for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

**O. 21 R. 15**  
**Notes 1-2**

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

[1877, Ss. 230, 231; 1859, S. 207.]

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. "Where a decree has been passed jointly."</li> <li>4. "Any one or more of such persons may apply for the execution of the whole decree."</li> <li>5. Application by one of several decree-holders for execution in respect of his share of the decree.</li> </ol> | <ol style="list-style-type: none"> <li>6. Unless the decree imposes a condition to the contrary.</li> <li>7. Execution against one of the joint judgment-debtors — Limitation. See Article 182 of the Limitation Act.</li> <li>8. Payment by judgment-debtor out of Court to one of several decree-holders.</li> <li>9. Defective application under the Rule, if can be amended.</li> <li>10. Appeal.</li> <li>11. Limitation.</li> </ol> |
|---|---|

### Other Topics (miscellaneous)

Court can make such order for protecting interests of other decree-holders. See Note 2.

"For the benefit of them all." See Notes 4 and 9.  
Issue of notice before execution—Whether necessary. See Note 4.

Objection to execution—Whether can be taken in second appeal. See Note 2.

"Where any of them has died." See Note 4.

"Where the Court sees sufficient cause." See Note 4.

#### 1. Legislative changes. —

1. The words "or his or their representatives" in Section 231 of the old Code, after the words "one or more of such persons" have been omitted as unnecessary in view of the provisions of Section 146, *ante*.
2. The words "unless the decree imposes any condition to the contrary" are new. See Note 6.

**2. Scope of the Rule. —** There are two rules of general application governing the execution of joint decrees in favour of several persons —

(1) One of the decree-holders alone cannot apply for execution of *his share* only of the decree, leaving the other decree-holders to take out execution for their shares.<sup>1</sup>

(2) One of the decree-holders alone cannot execute the *whole* decree so as to bind the other decree-holders by the result of such execution.

The first rule is based on the principle that the *judgment-debtor* should not be harassed by a number of applications for execution. As observed by Sir Barnes Peacock, C. J., in *Haro Shankar Sandyal v. Tarak Ohandra Buttacharjee*, 11 *Suth. W. R.* 488 at page 490 :

"Suppose there was a decree for a *lac* of rupees, it could not be contended that the decree-holder could assign it to a *lac* of assignees, so as to give to each of them power to take out execution for one rupee, his portion of it. Otherwise, there might be a *lac* of executions under the decree, a *lac* of seizures and a *lac* of sales under each one of which there can be no doubt that the judgment-debtor would suffer loss. If this were allowed, the judgment-debtor must necessarily be ruined."

**O.21 R.15**  
**Notes 2-3**

The second rule is based on the principle that the interests of the other decree-holders should not be jeopardised, and also on the principle that all persons representing a *single and indivisible* right must be parties before the right can be adjudicated upon. See Note 7 to O. 1 R. 1.

This rule is an exception to the second of the two rules abovementioned, in that it provides that one of several joint decree-holders can execute, under certain circumstances, the *whole* decree. In order, however, to prevent the interests of the other decree-holders from being jeopardised, the Court is given power, and is indeed bound, to make such order as is necessary to safeguard such interests.<sup>3</sup>

**3. "Where a decree has been passed jointly."** — A decree directing the defendant to pay a certain sum of money to several persons *specifying their shares* therein is not a joint decree, even though the amount is made payable as an entire sum.<sup>1</sup> The High Court of Patna has, however, in the undermentioned case,<sup>2</sup> expressed an *obiter dictum* that a decree does not cease to be a joint decree merely because the shares of the decree-holders in the decretal amount have been determined by the decree. According to the High Courts of Lahore and Madras, where a suit is filed in the name of a firm, the decree passed in the suit in favour of the firm must be held to be a decree passed jointly in favour of all the partners, since a firm name is only a compendious method of writing the names of all the partners.<sup>3</sup> But the Judicial Commissioner's Court of Sind has held that unless a declaration of the names of all the partners has been made under O. 30 R. 2, the decree in favour of the firm cannot be said to be a joint decree.<sup>4</sup>

This rule can apply only where a decree has been *passed jointly* in favour of more persons than one.<sup>5</sup> Where a portion of a decree is transferred to another, either by assignment in writing or by operation of law, the transferee is in the position of a joint decree-holder and the Court has got the *inherent* power to grant him relief in

('72) 4 N W P H C R 90 (92).

('70) 2 N W P H C R 413 (413).

('91) 15 Bom 242 (244).

('69) 11 Suth W R 488 (490).

('69) 11 Suth W R 241 (242).

('75) 23 Suth W R 342 (343).

('72) 17 Suth W R 19 (20).

('67) 7 Suth W R 10 (11).

('66) 6 Suth W R Misc 64 (65).

('75) 24 Suth W R 11 (12).

('95) 18 Mad 464 (465).

('19) AIR 1919 Pat 286 (287, 288) : 4 Pat L Jour 575.

('26) AIR 1926 Oudh 605 (605) : 2 Luck 259. (Such application is not one in accordance with law so as to save limitation.)

('97-01) 2 Upp Bur Rul 247.

[See also ('80) 7 Cal L Rep 117 (118). (Objection cannot be taken for the first time in second appeal.)]

[But see ('69) 11 Suth W R 343 (344). (S. 207 of the Code of 1959 did not contain the words "the whole decree.")]

2. ('06) 1 Nag L R 24 (30).

('67) 2 Agra 183 (185, 186).

('18) AIR 1918 Cal 153 (154).

('75) 23 Suth W R 282 (282).

('74) 22 Suth W R 204 (204).

('78) 19 Suth W R 302 (302).

('71) 15 Suth W R 159 (159).

('68) 1 Beng L R A C 28 (29).

('22) AIR 1922 Pat 611 (612).

('19) AIR 1919 Pat 286 (287, 288) : 4 Pat L Jour 575.

('25) AIR 1925 Pat 591 (592).

[See ('33) AIR 1933 Pat 609 (611). (Heirs of deceased decree-holder themselves parties to execution application—There is no question of any order having to be made under sub-rule (2).)]

**Note 3**

1. ('70) 13 Suth W R 244 (245).

('92) 2 Mad L Jour 14 (15). (Suit on a mortgage-decree for a moiety in favour of plaintiff and for another moiety in favour of defendant.)

[See also ('22) AIR 1922 Mad 456 (457). (Partition decree.)]

('25) AIR 1925 Mad 1265 (1266). (Do.)]

2. ('32) AIR 1932 Pat 261 (265) : 11 Pat 445.

3. ('81) AIR 1981 Lah 507 (508).

('32) AIR 1932 Lah 596 (597) : 13 Lah 546. (Some of the partners can therefore execute for the benefit of all.)

('34) AIR 1934 Mad 380 (381) : 57 Mad 696.

4. ('28) AIR 1928 Sind 37 (38).

5. ('34) AIR 1934 Pat 627 (628). (One of the several legal representatives of a deceased decree-holder applying for execution — This rule does not apply.)

execution by applying general principles of law analogous to this rule.<sup>6</sup> It has been held that where a decree has been passed awarding separate amounts to several persons, they can all make a single application for execution.<sup>7</sup>

See also the undermentioned case.<sup>8</sup>

**4. "Any one or more of such persons may apply for the execution of the whole decree."** — As has been seen in Note 2 above, this rule makes an exception to the general rule that all decree-holders must join in an application to execute the joint decree, and permits one or more of several joint decree-holders to apply for execution of the whole decree,<sup>1</sup> unless the decree imposes a condition to the contrary.<sup>2</sup> But it does not confer an unconditional right on one of the decree-holders to execute the decree. It is within the discretion of the Court to allow such execution and the Court will act only if it sees sufficient cause for allowing such a course to be taken.<sup>3</sup> It may allow other decree-holders to intervene in a pending execution, if it is not being properly conducted.<sup>4</sup> It is also in the discretion of the Court whether or not notice should be given to the other decree-holders or to the judgment-debtor before making an order for

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**Notes 3-4**

[See however ('29) AIR 1929 Pat 232 (232, 233). ('31) AIR 1931 Lah 5 (6). (Where it is assumed that O. 21 R. 15 applies to the legal representatives of a deceased decree-holder.)]

6. ('21) AIR 1921 Mad 599 (601, 605) : 44 Mad 919 (FB).

('27) AIR 1927 Bom 123 (124) : 51 Bom 143. (Petition for execution presented by one of the surviving coparceners of deceased decree-holder.)

('75) 24 Suth W R 245 (246).

('10) 5 Ind Cas 120 (120) (Mad).

('91) 14 Mad 252 (254). (Overruling 13 Mad 347 on review.)

('19) AIR 1919 Lah 429 (430) : 1917 Pun Re No. 15.

('74) 22 Suth W R 354 (354). (One decree passed in favour of B—B transferring his decree in favour of three persons — One of such persons executing the decree.)

[See also ('11) 11 Ind Cas 700 (701) : 34 All 72.

('83) 1883 All W N 262 (263). (Decree in favour of two — Assignment of his share by one of them—Assignee can apply for execution of whole decree for benefit of both the decree-holders.)

('35) 39 Cal W N 961 (966). (One of two joint owners of a decree, though such decree was passed in favour of one single decree-holder, can execute the decree, if the other joint owner refuses to join the applicant in executing it.)]

7. ('35) AIR 1935 All 402 (403).

8. ('39) AIR 1939 Lah 802 (802). (Partition suit by father against two sons — One of the sons remaining absent — Decree in favour of father for one-third share — Possession of remaining two-third share cannot be given to son remaining present as partition decree cannot be regarded as passed jointly in favour of the two sons.)

#### Notes 4

1. ('80) 3 Mad 79 (81).

('78) 5 N W P H O R 16 (17).

('66) 5 Suth W R Misc 58 (58).

('20) AIR 1920 Pat 672 (673).

('97-01) 2 Upp Bur Rul 247.

('07) 10 Oudh Cas 378 (381).

('29) AIR 1929 All 953 (957) : 51 All 998. (Deposit of pre-emption money is proceeding in execution and O. 21, R. 15 applies—Per Boys, J.; Sulaiman J., *contra*.)

('18) AIR 1918 Mad 56 (56). (One decree-holder dying—Surviving decree-holders may execute for benefit of all including that of legal representatives of deceased.)

('68) 10 Suth W R 95 (96). (Joint judgment for damages obtained by several persons — Some of them dying— Execution may be carried by survivors under S. 207.)

('37) AIR 1937 Pat 253 (256).

('36) AIR 1936 Cal 571 (572). (All that he is required to do is to state to the Court the fact of death of his co-decree-holder and the names of his legal representatives.)

[See also ('06) 10 Cal W N 1000 (1002).

('32) AIR 1932 Pat 359 (360) : 12 Pat 42. (Decree-holders members of joint Hindu family—Death of one leaving other as sole survivor—Survivor can apply for execution to Court executing decree—Non-mention of death of coparcener is not sufficient to reject application if Court knows in subsequent proceedings the fact of death—Case is governed not by R. 16 but by this rule.)

2. ('16) AIR 1916 Cal 577 (579).

3. ('80) 7 Cal L Rep 537 (538).

('74) 22 Suth W R 77 (78).

('74) 21 Suth W R 31 (32).

('11) 12 Ind Cas 562 (564) : 36 Mad 357.

('22) AIR 1922 Pat 597 (597) : 1 Pat 609. (But the fact that application is not allowed will not make it one not in accordance with law.)

('97-01) 2 Upp Bur Rul 247.

[See ('33) AIR 1933 Mad 157 (158) : 56 Mad 316. (Execution application by one of joint decree-holders—Objection by other decree-holders that application is a fraud—Court can disallow execution.)]

[See also ('35) AIR 1935 Nag 25 (27) : 31 Nag L R 271.]

4. ('21) AIR 1921 Mad 599 (601) : 44 Mad 919 (FB). (Similarly in the case of part transferee of a decree.)

**Q. 21 R. 18**  
**Nota 5**

execution under this rule.<sup>5</sup> Where one of several decree-holders applies for execution and the others do not object to execution being granted to him, it is not for the judgment-debtor to say that sufficient steps have not been taken to safeguard the interests of the other decree-holders.<sup>6</sup>

When one of several joint decree-holders executes a decree, he executes the decree *prima facie* for the benefit of all, unless there is a direction by the Court or in the decree itself which permits execution for the benefit of the executing creditor alone.<sup>7</sup> Therefore, where one decree-holder executes a joint decree and realizes the amount due under it, the realization is made on behalf of, and for the benefit of, all the joint decree-holders and they are entitled to recover their respective shares from him by a separate suit.<sup>8</sup>

The High Court of Lahore has held in the undermentioned cases<sup>9</sup> that it need not be stated in the body of the application that it is being made for the benefit of all the decree-holders, and that when the application is for execution of the entire decree, it should be assumed that the person applying is attempting to execute it on behalf of all the decree-holders. But the High Court of Patna has held that such an application is invalid and must be disallowed.<sup>10</sup>

The omission on the part of the decree-holder to state in his application the names of all the persons who are interested in the decree is not such a defect as would invalidate the execution proceedings.<sup>11</sup>

Where an application for execution is made by two persons the execution proceedings do not terminate automatically on the death of one of them. The surviving

5. ('06) 33 Cal 306 (310). (Notice is not necessary where the decree grants injunction—21 Suth W R 31, Distinguished.)

('93) AIR 1933 Lah 655 (656) : 14 Lah 212. (AIR 1931 Lah 600, Followed.)

('26) AIR 1926 Cal 811 (812).

('31) AIR 1931 Lah 600 (601).

('74) 21 Suth W R 31 (32). (Notice is obviously desirable in the case of decree for money—See observations on this case in 33 Cal 306.)

[See also ('80) 7 Cal L Rep 537 (538). (But ordinarily it should hear the other decree-holders.)]

6. ('98) 8 Mad L Jour 91 (91).

('33) AIR 1933 Lah 655 (656) : 14 Lah 212.

('20) AIR 1920 Nag 40 (41).

('84) AIR 1934 Pesh 76 (77). (Decree in favour of joint Hindu firm—Execution application by one member.)

('31) AIR 1931 Lah 600 (601).

('33) AIR 1933 Lah 655 (656) : 14 Lah 212 : 33 Pun L R 549 (550).

('26) AIR 1926 Mad 1198 (1199). (Objection taken only in appeal was disallowed.)

[See also ('35) AIR 1935 Nag 25 (28) : 31 Nag L R 271. (Joint decree—Two out of four applying—Third admitting payment—Fourth taking no interest in proceedings—Court is justified in allowing execution to applicants.)

('39) AIR 1939 Mad 278 (280) : ILR (1939) Mad 388. (Judgment-debtor cannot object to arrangement between decree-holders permitting one of them to apply for execution—Judgment-debtor can only apply for the protection of his own interests.)]

7. ('28) AIR 1928 Mad 800 (801).

('71) 16 Suth W R 29 (30).

('35) AIR 1935 Lah 484 (486) : 17 Lah 115. (Decree in favour of two brothers—Execution application signed by one alone—Purchase made by him in his name—Other brother is entitled to share.)

8. ('15) AIR 1915 PC 81 (82) : 37 All 545 : 42 Ind App 177 (PC).

('11) 11 Ind Cas 517 (518) : 33 All 563. (Affirmed on appeal by Privy Council in AIR 1915 PC 81.)

('24) AIR 1924 All 813 (814).

('28) AIR 1928 Mad 800 (802, 803).

9. ('30) AIR 1930 Lah 608 (604).

('33) AIR 1933 Lah 655 (656) : 14 Lah 212. (AIR 1919 Pat 286, Not approved.)

('32) AIR 1932 Lah 596 (597) : 13 Lah 546. (Decree in favour of dissolved firm—Such decree is in favour jointly of its partners.)

10. ('19) AIR 1919 Pat 286 (287, 288) : 4 Pat L Jour 575. (Application was not allowed to be amended.)

('38) AIR 1938 Pat 457 (460) : 17 Pat 223. (Application for execution alleged to have been on behalf of applicant and another person holding interest in portion of decree—It must be stated that application is also for benefit of other person—If not, application cannot be regarded as having been on his behalf.)

11. ('26) AIR 1926 Cal 811 (812).

('31) AIR 1931 Lah 600 (601).

('33) AIR 1933 Lah 655 (656) : 33 Pun L R 549 (550) : 14 Lah 212.

('32) AIR 1932 Pat 359 (360) : 12 Pat 42. (Omission to mention the death of coparcener—Co-decree-holder will not entail a rejection of the petition.)

decree-holder can continue the application for the benefit of himself and the legal representatives of his co-decree-holder.<sup>12</sup>

**O. 21 R. 16**  
**Notes 4-8**

**5. Application by one of several decree-holders for execution in respect of his share of the decree.** — It has been seen in Note 2 above that it is not open to one of several joint decree-holders to apply for execution in respect of *his share* only of the decree, and that the rule is based on the principle that the judgment-debtor should not be harassed by a multiplicity of applications by different decree-holders. Where, therefore, there is no possibility of the judgment-debtor being harassed by different applications, the bar against one of the decree-holders applying for execution will not apply. Thus, where some of the joint decree-holders apply for execution with regard to a certain portion only of the decree giving up the rest and the other decree-holders, being made parties, do not object to such a giving up by the applicants, the execution asked for may be allowed and the other decree-holders cannot subsequently apply for execution of the balance of the decree.<sup>1</sup> Similarly, where one of the joint decree-holders intimates to the Court satisfaction of his share in the decree, this rule does not bar an application by the others for execution for the balance remaining due under the decree.<sup>2</sup> So also, where *A* and *B* jointly obtain a decree for money or for possession of immovable property against *C*, and *C* as judgment-debtor either purchases his share in the decree or inherits such share from *A*, the result would be the extinguishment of the decree *pro tanto* and *B* can, therefore, execute the decree in respect of his share.<sup>3</sup>

**6. Unless the decree imposes a condition to the contrary.** — This rule is not applicable to the case of joint decree-holders where the execution of a joint decree is made dependent upon all the decree-holders joining in the application.<sup>1</sup>

**7. Execution against one of the joint judgment-debtors — Limitation.** — See Article 182 of the Limitation Act.

**8. Payment by judgment-debtor out of Court to one of several decree-holders.** — One of several joint decree-holders cannot, as a general rule, give a valid discharge of the entire decree without the concurrence of others. A payment, therefore, to one of several decree-holders out of Court is valid only to the extent of the *share* of that decree-holder,<sup>1</sup> unless it can be proved that the decree-holder who

[See also ('89) AIR 1939 Mad 278 (280) : ILR (1939) Mad 338. (One of several decree-holders applying for execution of decree — Omission to state expressly that applicant is only one of decree-holders does not invalidate application — Court can allow application to be amended to bring it into compliance with O. 21 R. 15.)]

12. ('86) AIR 1936 Cal 571 (572).

[See also ('85) AIR 1935 All 402 (404). (One of several applicants for execution can be allowed to withdraw if he desires; when he withdraws, the application continues naturally in the name of the remaining applicants.)]

#### Notes 5

1. ('28) AIR 1928 Cal 559 (560) : 56 Cal 12. (Subsequent application for balance cannot be filed.) ('34) AIR 1934 Cal 465 (467). (Rule does not apply where joint decree has been satisfied in part before application for execution — Notice given to other joint decree-holders — No objection to

execution — Application for share is not illegal.)

[See ('34) AIR 1934 Pesh 40 (42). (The above proposition will not apply where the other decree-holders do not undertake not to execute.)]

2. ('69) 12 Suth W R 370 (371).

[See also ('34) AIR 1934 Cal 465 (467).]

3. ('88) 10 All 570 (574). (Decree for possession of immovable property.)

('88) 5 All 27 (34). (Decree for money.)

('88) 9 Cal 482 (494) : 10 Ind App 4 (PC). (Affirming on appeal, 6 Cal 594.)

('94) 1894 All W N 15 (16).

('10) 7 Ind Cas 474 (474) : 1910 Pun Re No. 61.

[See also ('86) 1886 All W N 125 (126).]

#### Notes 6

1. ('88) 6 All 69 (70).

#### Notes 8

1. (1865) 3 Cal L Rep 513 (514).

('86) AIR 1935 Nag 26 (27) : 81 Nag L R 271.

('69) 11 Suth W R 262 (268).

**O. 21 R. 18**  
**Note 8**

granted the discharge was an agent of the other decree-holders, or otherwise had legal authority to bind them by his acts.<sup>2</sup> On the same principle one of two or more joint decree-holders is not competent, without being authorized by the other or others, to certify a payment made to him under O. 21 R. 2 so as to operate as a satisfaction of the entire decree, and the others are not debarred from executing the decree as to their shares.<sup>3</sup> The reason is that "when one of two or more joint decree-holders takes it upon himself to certify satisfaction of the whole decree, it is clear that no provision can be made by the Court for safeguarding the interests of the other decree-holder or decree-holders; and that if a Court was bound to recognize such an adjustment out of Court, the remaining decree-holders might be driven to another suit to recover money for which a decree had already been passed in their favour."<sup>4</sup>

Where the joint decree-holders are *partners* or members of a *Hindu coparcenary*, a payment to one of them or a certificate by him under O. 21 R. 2 cannot, according to the High Court of Madras,<sup>5</sup> be treated as satisfaction of the decree *even in part*. This view is based on the ground that a decree debt in favour of a firm or of a coparcenary is only one asset out of the numerous other assets and that one of the decree-holders cannot legally claim any definite share in the particular decree debt. The same High Court has also held that the fact that the decree-holder receiving payment is a partner or is the managing member of the joint family is not enough to clothe him with authority to act as the agent of the other decree-holders in receiving such payment.<sup>6</sup> The High Courts of Allahabad<sup>7</sup> and Patna<sup>8</sup> and the Judicial Commissioner's Court of Oudh<sup>9</sup> have, on the other hand, held that a *karta* of a joint Hindu family has legal authority to act on behalf of the family and that a payment to, or a certificate by him will bind the other decree-holders. It has been held by the High Court of Lahore<sup>10</sup> and the Court of the Judicial Commissioner of Sind<sup>11</sup> that one

('30) AIR 1980 Lah 814 (815). (Shares can be ascertained in execution.)

('92) 15 Mad 343 (345).

('05) 1 Nag L R 24 (30).

[See ('06) 28 All 252 (255). (But payment to one of several executors who have jointly obtained a decree is not valid at all.)]

Note.—The Calcutta High Court has held that a judgment-debtor could not pay to a joint decree-holder as *his share* any amount: see ('28) AIR 1928 Cal 759 (760).

See also ('35) AIR 1935 Oudh 813 (816) : 11 Luck 116. (Joint decree in favour of several mortgagees — One of them cannot give valid discharge.)]

2. ('29) AIR 1929 Lah 462 (463).

('15) AIR 1915 Lah 155 (155). (Discharge given by managing member of joint Hindu family is binding on the other members.)

[See also ('35) AIR 1935 Nag 25 (27) : 31 Nag L R 271.]

3. ('04) 26 All 394 (396).

('35) AIR 1935 Nag 25 (28) : 31 Nag L R 271.

('23) AIR 1923 All 494 (495) : 45 All 401.

('04) 26 All 818 (820).

('66) 1 Agra Misc App 16 (17).

('73) 5 N W P H O R 16 (17). (One of the joint decree-holders forgoing right to execute the decree — Others are not bound by the compromise.)

('98) 1898 Bom P J 47.

('30) AIR 1980 Cal 78 (79). (Extent of shares can

be ascertained in execution.)

('83) 9 Cal 881 (837). (Do.)

('79) 4 Cal L Rep 70 (72).

('35) 62 Cal L Jour 560 (562).

('06) 1906 Pun Re No. 34, p. 124.

('25) AIR 1925 Pat 822 (823). (But may certify as to his share.)

[See also ('19) AIR 1919 Mad 123 (126). (Where payment is in fact made to all, certificate by one only will bind all.)]

[But see ('74) 22 Suth W R 77 (78). (Certification of satisfaction of the whole decree by some of the joint decree-holders is binding on all the decree-holders unless fraud is proved.)]

4. ('04) 26 All 384 (386).

5. ('17) AIR 1917 Mad 988 (989).

('34) AIR 1934 Mad 380 (383) : 57 Mad 696.

('25) AIR 1925 Mad 230 (232, 233).

[But see ('18) 21 Ind Cas 177 (178) (Mad). (There was no joint decree within the meaning of this rule but as regards the decree of the joint family the discharge of the decree given by the manager of the family is valid.)]

6. ('17) AIR 1917 Mad 988 (989).

('34) AIR 1934 Mad 380 (383) : 57 Mad 696.

7. ('18) 19 Ind Cas 645 (646) : 35 All 380.

8. ('27) AIR 1927 Pat 329 (330).

9. ('18) 20 Ind Cas 457 (458) : 16 Oudh Cas 146. [See also ('08) 11 Oudh Cas 246 (247).]

10. ('27) AIR 1927 Lah 385 (387).

11. ('26) AIR 1926 Sind 167 (169).

partner is the *agent* of the others and that where a decree is obtained in the name of a firm, one of the partners can receive the entire money due under the decree and certify the payment.

**O. 21 R. 15**  
**Notes 8-11**

Although a payment to one of two joint decree-holders of the whole decree amount does not, even when certified, absolve the judgment-debtor from liability to the other decree-holder, such decree-holder is not bound to proceed against the judgment-debtor in execution, but may sue to recover his share from the other decree-holder.<sup>12</sup>

See also Note 8 to Order 21 Rule 1, *ante*.

**9. Defective application under the Rule, if can be amended.** — It has been held by the High Court of Patna in the undermentioned case<sup>1</sup> that where in an application for execution of a decree by one of several joint decree-holders, it is not stated that the application is for the benefit of all the decree-holders, the application is invalid and cannot be allowed to be amended. It proceeds upon the view that the requirements of this rule go to the root of the execution of the decree and that while Rule 17 of this Order empowers the Court to allow a defect in the requirements of Rules 11 to 14 to be amended, it does not include this rule. But the High Court of Allahabad<sup>2</sup> has taken a contrary view that there is nothing in Rule 17 which deprives the Court of its powers to allow amendments in relation to matters required to be mentioned by this rule. The Calcutta High Court also holds a similar view.<sup>3</sup>

**10. Appeal.** — The question whether an appeal lies from an order passed under this rule depends upon the consideration whether the question decided is one within Section 47 of the Code. Thus, an order allowing or refusing execution in favour of one of the decree-holders when an objection is raised by the judgment-debtor is one falling under Section 47 and, therefore, appealable as a decree.<sup>1</sup> But no appeal will lie against an order refusing to allow execution in favour of one joint decree-holder on the objection of another joint decree-holder<sup>2</sup> or against an order protecting the interests of the non-applying decree-holder.<sup>3</sup>

**11. Limitation.** — An application for execution by one of several joint decree-holders is an application in accordance with law and will afford a fresh starting point of limitation under Article 182 of the Limitation Act.<sup>1</sup> It has been held by the High Courts of Calcutta, Bombay and Madras that although this rule does not allow one of such decree-holders to apply for partial execution of a joint decree, yet such an

12. ('06) 29 Mad 188 (188).

('28) AIR 1928 Mad 800 (808). (Plaintiff is entitled to interest from date of plaint and not from the date of receipt of such amount by defendant.)

**Note 9**

1. ('19) AIR 1919 Pat 286 (288) : 4 Pat L Jour 575.

2. ('80) AIR 1930 All 188 (191).

[See also ('67) 7 Suth W R 535 (536).

('39) AIR 1939 Mad 278 (280) : I L R (1939) Mad 338. (Defective application not stating expressly that applicant is only one of the decree-holders can be allowed to be amended.)]

3. ('85) 89 Cal W N 1144 (1145).

**Note 10**

1. ('94) 17 Mad 394 (394).

('07) 2 Mad L Tim 307 (309).

('98) 1898 Pun Re No. 28, p. 86.

2. ('99) 28 Bom 628 (625).

('72) 17 Suth W R 136 (136).

('72) 17 Suth W R 415 (415).

('24) AIR 1924 Mad 518 (519). (But if the Court purports to pass an order under S. 47 of C. P. C. an appeal lies.)

3. ('80) 5 Cal 592 (598).

**Note 11**

1. ('26) AIR 1926 Pat 160 (161).

('22) AIR 1922 Pat 597 (597) : 1 Pat 609. (Application though defective saves limitation.)

('34) AIR 1934 Bom 216 (218, 219) : 58 Bom 428.

('79) 4 Cal 605 (606).

('34) AIR 1934 Bom 216 (218, 219) : 58 Bom 428.

('74) 22 Suth W R 468 (468).

('69) 11 Suth W R 421 (421).

('67) 8 Suth W R 100 (101).

('66) 6 Suth W R Misc 59 (59).

(1864) 1 Suth W R Misc 1 (2).

[See also ('83) 13 Cal L Rep 18 (22).]



**O. 21 R. 15  
Note 11**

application may keep alive the right to execute the decree.<sup>2</sup> But the High Court of Allahabad and Judicial Commissioner's Court of Oudh have taken the contrary view that such an application is not one in accordance with law and, therefore, will not save limitation.<sup>3</sup>

Where there is a decree in favour of two or more joint decree-holders and one of them is a minor, can the minor decree-holder apply to execute the decree on behalf of *all*, more than three years after the last starting point of limitation but within three years of his attaining majority? There is a conflict of opinion on this question. It has been held by the High Courts of Allahabad,<sup>4</sup> Bombay,<sup>5</sup> Calcutta<sup>6</sup> and Lahore<sup>7</sup> that the ex-minor decree-holder can apply to execute the *whole* decree, even though the other decree-holders would be barred by limitation. But the High Court of Madras<sup>8</sup> has held that the decree cannot be executed as a joint decree. See Section 7 of the Limitation Act.

**O. 21 R. 16**

**R. 16.** [S. 232.] Where a decree or, if a decree has been passed jointly<sup>7</sup> in favour of two or more persons, the interest of any decree-holder in the decree is transferred<sup>3</sup> by assignment in writing<sup>4</sup> or by operation of law,<sup>5</sup> the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed<sup>11</sup> in the same manner and subject to the same conditions<sup>21</sup> as if the application were made by such decree-holder :

**Application for execution by transferee of decree.**

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice<sup>14</sup> of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections<sup>15</sup> (if any) to its execution :

Provided also that, where a decree for the payment of

2. ('28) AIR 1928 Cal 861 (862).

('91) 15 Bom 242 (244).

('99) 26 Cal 888 (890).

('76) 25 Suth W R 70 (70).

('71) 16 Suth W R 267 (268).

('71) 16 Suth W R 29 (30).

('71) 15 Suth W R 449 (450).

('77) 8 Mad 79 (81).

('66) 6 Suth W R Misc 76 (77).

3. ('75) 1 All 231 (234).

('81) 4 All 72 (74).

('26) AIR 1926 Oudh 605 (605) : 2 Luck 259.

[See also ('34) AIR 1934 Pesh 40 (42). (Where some out of several decree-holders apply for execution on their own behalf and during the pendency of such application the others also apply but the latter application is not competent, the two applications cannot be considered to supplement each other in order to extend limitation.)]

[See however ('85) 7 All 282 (283). (If not objected to by judgment-debtor, subsequent application will not be barred.)]

4. (1900) 22 All 199 (204). (Overruling 1884 All W N 58.)

5. ('96) 20 Bom 388 (385).

('04) 6 Bom L R 647 (648).

6. ('01) 28 Cal 465 (468).

('08) 7 Cal L Jour 308 (309). (Joint and several decree.)

('87) 14 Cal 50 (54, 55).

7. ('81) AIR 1931 Lah 5 (6). (Original decree-holder deceased — Application for execution of the whole decree by one of his sons who was a minor after attaining majority.)

8. ('02) 25 Mad 431 (435) (FB). (The ex-minor decree-holder can execute the decree *qua* his interest.)

('90) 18 Mad 286 (241).

[See also ('05) 28 Mad 479 (485).]



money<sup>17</sup> against two or more persons has been transferred to one of them,<sup>18</sup> it shall not be executed against the others. **O. 21 R. 16**

[1877, S. 232; 1859, S. 208.]

### Local Amendments

#### CALCUTTA

In the first proviso *cancel* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words :

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections."

#### LAHORE

In the first proviso *omit* the words "and the judgment-debtor;" and for the word "their" *substitute* the word "his."

#### NAGPUR

After the words, "which passed it," *insert* the words "or to any Court to which it has been sent for execution."

#### N.-W.F.P.

For the first proviso, *substitute* the following proviso :

"Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and unless an affidavit by the transferor admitting the transfer is presented with the application, the decree shall not be executed, until the Court has heard his objections (if any) to its execution."

#### PATNA

*Add* the words "or to the Court to which the decree has been sent for execution, as the case may be" after the words "to the Court which passed it;"

*Delete* the words "and the judgment-debtor" from the first proviso, and in the said proviso after the word "transferor," *insert* the words "unless an affidavit of the transferor admitting the transfer is filed with the application," and *substitute* the word "his" for the word "their" and the word "objection" for the word "objections".

#### RANGOON

For the first proviso, *substitute* the following, namely :

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor; and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution."

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Decree.</li> <li>3. Where a decree has been transferred:</li> <li>4. Transfer by assignment in writing.</li> <li>5. Transfer by operation of law.</li> <li>6. Benamidar.</li> <li>7. Part transfer of a decree.</li> </ol> | <ol style="list-style-type: none"> <li>8. Pledge of decree.</li> <li>9. Assignment of rent decrees under the Tenancy Acts.</li> <li>10. Transfer, when takes effect.</li> <li>11. Rights of the transferee.</li> <li>12. Application for execution must be made to the Court which passed the decree.</li> </ol> |
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**O. 21 R. 16  
Notes 1-3**

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| <p>13. Award.</p> <p>14. Notice to transferor and judgment-debtor.</p> <p>15. Objections to be heard.</p> <p>16. Transfer of decree for payment of money against two or more persons to one of them.</p> <p>17. "Decree for the payment of money."</p> <p>18. Attachment of decree by co-judgment-debtor.</p> | <p>19. Application for substitution by transferee.</p> <p>20. Transfer of decree against company in liquidation.</p> <p>21. Equities enforceable against the original decree-holder.</p> <p>22. Appeal.</p> <p>23. Suit by assignee for declaration of right or for refund of price.</p> |
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*Other Topics (miscellaneous)*

Application by transferee—Whether a step-in-aid of execution. See Note 19.

Application by a transferee from the original transferee. See Note 12.

Assignment of decree pending execution. See Note 19.

Death of decree-holder — Legal representative must apply for fresh execution. See Note 19.

"Decree-holder," meaning of. See Note 3.

"May be executed" — Discretion of Court. See Note 11.

Principle of rule. See Note 3.

Person entitled to assignment of decree — Whether can apply before assignment. See Note 4.

Registration of assignment — Whether necessary. See Note 4.

"Subject to the same conditions." See Note 21.

"The interest of any decree-holder." See Note 3.

"The transferee may apply for execution." See Note 11.

Transferee of maintenance decree—Whether can apply. See Note 3.

Transfer of property dealt with by decree — Whether transfer of decree. See Note 3.

**1. Legislative changes. —**

- The words "or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree," are new. See Note 7, *infra*.
- The words "if that Court thinks fit" which occurred in the old Section 232 before the words "the decree may be executed in the same manner . . . ." have been omitted. See Note 11, *infra*.
- The words "decree for money" in the second proviso have been changed into "a decree for the payment of money . . . ." See Note 17 *infra*.

**2. Decree. —** The provisions of this rule in the first paragraph as well as in the first proviso are not restricted to *money* decrees, but apply to mortgage decrees also. As to the applicability of the second proviso, see Note 17, *infra*.

**3. Where a decree has been transferred. —** The principle of this rule is that no one can execute a decree except the decree-holder or a person to whom the decree has been *transferred* by assignment in writing or by operation of law.<sup>1</sup> A third person cannot, therefore, apply for execution of a decree unless there is a transfer to him of the decree by the original decree-holder.<sup>2</sup> Where on the death of *A*, the plaintiff in a suit, his widow *B* continues the proceedings as his legal representative and obtains a decree, *C* claiming to be the real heir of *A* cannot apply to execute the decree inasmuch as there is no *transfer* of the decree by *B* in his favour.<sup>3</sup> The rule is, however, intended primarily for those cases where the applicant for execution does not *appear as decree-holder in the decree* and he applies for execution on the basis of a transfer of the decree;<sup>4</sup> it does not, therefore, apply where the applicant is one whose name is already in the decree as one of two persons in whose favour the decree has been passed and who claims on the death of the other decree-holder to execute the decree as the surviving decree-holder.<sup>5</sup>

**Order 21 Rule 16 — Note 3**

- (1922) AIR 1922 All 98 (99).
- (1937) AIR 1937 Nag 30 (30) : I L R (1937) Nag 82. (*A* advancing money to *B* to be lent by latter to *C*—*C* executing mortgage in favour of *B* and *B* obtaining decree on mortgage—*A* has no interest

in the mortgage decree and he cannot execute it.)

- (1977) 2 Cal 827 (884) : 4 Ind App 66 (PC).
- (1977) 2 Cal 827 (884) : 4 Ind App 66 (PC).
- (1988) AIR 1988 Pat 462 (464) : 17 Pat 306.
- (1982) 13 Pat L Tim 579 (580, 581).

A transfer in writing of the *property* dealt with by the decree is not a transfer of the decree itself and the transferee cannot apply under this rule.<sup>6</sup> It has, however, been held by the High Court of Rangoon<sup>7</sup> that it is a matter of construction of the deed of transfer whether the decree also was intended to be transferred by the transfer of the property, and the words of the rule relating to the transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment. The assignee of a decree to be subsequently passed cannot apply for execution under this rule.<sup>8</sup> Thus, a person who obtains a transfer, pending suit, of the property forming the subject-matter of the suit is not entitled to execute the decree subsequently passed unless his name has been substituted in place of his vendor under O. 22 R. 10.<sup>9</sup> Similarly, the assignee of a preliminary decree who has not taken steps to be impleaded in the suit cannot apply to execute the final decree in the suit.<sup>10</sup>

The High Court of Bombay has, however, held in the undermentioned case<sup>11</sup> that the effect of the transfer was, in equity, to vest in the transferee, the interest in the decree which was afterwards obtained and that the decree must be taken to have been transferred by *operation of law*. The High Court of Rangoon<sup>12</sup> has dissented from the above reasoning of the High Court of Bombay and has held that the words "by operation of law" cannot be invoked so as to make an assignment in writing, an assignment by operation of law.

When a decree is assigned, what is really transferred is not the decree alone, but the interest of the decree-holder in the decree as may be finally determined. Therefore, an assignment of the decree of the trial Court carries with it the right to execute the decree passed in appeal.<sup>13</sup>

It has been held by the High Court of Calcutta in the undermentioned case<sup>14</sup> that the transferee of a decree for future maintenance is entitled to apply for execution in respect of the amounts that fall due from time to time and that Section 6 of the Transfer of Property Act will not apply when the cause of action has merged in the decree. But the High Court of Madras<sup>15</sup> has held that only that portion of the maintenance decree which related to the arrears of maintenance already accrued due can legally be transferred.

**4. Transfer by assignment in writing.** — An assignee of a decree under an oral transfer has no *locus standi* to apply for execution under this rule.<sup>1</sup> In order to

[See also ('88) AIR 1988 Pat 462 (464) : 17 Pat 206. (Where a preliminary decree for mesne profits is assigned pending an inquiry into the mesne profits, and the assignee is substituted and gets a final decree passed, an application by him to execute that final decree is not governed by Order 21 Rule 16 or the provisos thereto.)]

6. ('27) AIR 1927 Mad 240 (241).

('08) 80 All 28 (30).

('85) 7 All 107 (110). (Purchaser from pre-emptor decree-holder.)

('22) AIR 1922 All 98 (99). (Transfer after decree but pending appeal.)

('24) AIR 1924 Bom 426 (427).

('20) AIR 1920 Lah 324 (325).

('08) 82 Bom 181 (184).

7. ('30) AIR 1930 Rang 308 (311, 312).

8. ('07) 17 Mad L Jour 391 (392).

('16) AIR 1916 Mad 1202 (1202). (17 Mad L Jour 312, Followed.)

('24) AIR 1924 Cal 661 (665) : 51 Cal 708.

('26) AIR 1926 Bom 406 (406, 407).

('27) AIR 1927 Sind 78 (83) : 22 Sind L R 1.

9. ('24) AIR 1924 Cal 661 (665) : 51 Cal 708.

(Dissenting from AIR 1921 Cal 74.)

('32) AIR 1932 Cal 489 (489) : 59 Cal 297.

('22) AIR 1922 Pat 568 (564). (Section 146 cannot be invoked as it is subject to this rule.)

10. ('26) AIR 1926 Mad 1129 (1129).

('17) AIR 1917 Mad 844 (845). (The applicant may, however, be directed to amend the petition as one under Order 22 Rule 10.)

11. ('87) 11 Bom 506 (512).

12. ('80) AIR 1930 Rang 308 (311).

13. ('18) AIR 1918 Mad 279 (280).

[See also ('97) 7 Mad L Jour 227 (228, 229).

(And a satisfaction entered on the decree, made subsequent to the assignment is binding on him.)]

14. ('10) 6 Ind Cas 826 (829) : 38 Cal 18.

15. ('09) 3 Ind Cas 444 (444, 445) : 39 Mad 80.

**Note 4**

1. ('91) 15 Bom 307 (309).

**O. 21 R. 16**  
**Notes 4-8**

enable a transferee to apply, the transfer must be effected by an instrument *in writing*.<sup>2</sup> A mere *contract* for sale of a decree without an assignment in writing in favour of the purchaser is not enough.<sup>3</sup> The High Court of Patna<sup>4</sup> has held that a release of his rights by a decree-holder in favour of another does not operate as an assignment. But the High Court of Allahabad<sup>5</sup> has held that a release may operate as an assignment of the decree.

It has been held by the High Courts of Allahabad, Calcutta and Lahore that a decree for sale of immovable property is itself not immovable property and, therefore, an assignment of such a decree does not require to be registered.<sup>6</sup> But the High Court of Bombay has taken a contrary view.<sup>7</sup> In any view a *personal* decree against a defendant is transferable without registration even though the decree may be a mortgage decree as against the other defendants.<sup>8</sup>

The rule does not require any particular form of writing.<sup>9</sup> In the under-mentioned case,<sup>10</sup> an order of the Court acting on behalf of the decree-holders and directing the sale of the decree by auction to the highest bidder, was held sufficient to constitute an assignment in writing for the purposes of this rule. But, the assignment of certain funds recoverable under a decree is not an assignment of the *decree*.<sup>11</sup>

**8. Transfer by operation of law.** — Ordinarily transferees by operation of law would include the following persons<sup>1</sup> :

- (1) In the case of a deceased decree-holder, his legal representatives.
- (2) In the case of an insolvent debtor the Official Assignee or Official Receiver.
- (3) The purchaser of a decree at a court-sale.

(86) 9 Bom 179 (181).

(24) AIR 1924 Cal 661 (662) : 51 Cal 703.

(12) 16 Ind Cas 807 (807) (Mad).

(12) 18 Ind Cas 78 (79) (Mad).

2. ('16) AIR 1916 PC 147 (147) : 48 Cal 990 : 48 Ind App 108 (PC).

(34) AIR 1934 Lah 328 (329). (A mere receipt acknowledging payment of money therefor is not enough.)

(84) 1884 All W N 39 (39). (In life-time of father, son not competent to apply in the absence of assignment in writing.)

(39) AIR 1939 Bom 84 (87). (But an agreement to transfer a decree need not be in writing.)

[See ('25) AIR 1925 Oudh 417 (417, 418) : 29 Oudh Cas 98. (Assets of decree-holder bank transferred to another.)]

3. ('16) AIR 1916 PC 147 (148) : 48 Cal 990 : 48 Ind App 108 (PC).

(25) AIR 1925 Bom 472 (472). (Similarly, a person entitled to obtain an assignment of a decree under another decree cannot apply.)

4. ('27) AIR 1927 Pat 170 (171).

5. ('33) AIR 1933 All 188 (189).

6. ('13) 21 Ind Cas 462 (463) : 35 All 524.

(91) 13 All 89 (91, 92).

(96) 23 Cal 450 (453, 454).

(08) 12 Cal W N 625 (627).

(28) AIR 1928 Lah 70 (71).

[But see ('83) 9 Cal 839 (842). (Entitled to execute it only as a money decree.)]

7. ('75) 1 Bom 267 (268).

8. ('28) AIR 1928 Mad 142 (142).

9. ('86) AIR 1936 Mad 543 (545).

(89) AIR 1939 Bom 221 (225) : ILR (1939) Bom

271. (Decree obtained by sons—In suit by father against sons for declaration of his title to decree, joint application signed by both parties stating that sons had no objection to surrender decree to father and requesting Court to pass a decree for father declaring his title to that decree—Writing held amounted to assignment of decree.)

10. ('96) AIR 1936 Mad 543 (545). Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient.)

11. ('37) AIR 1937 Cal 570 (572).

**Note 5**

1. ('24) AIR 1924 Cal 661 (662, 663) : 51 Cal 703.

(38) AIR 1938 Bom 867 (868) : 57 Bom 518.

(34) AIR 1934 Mad 471 (472).

(77) 2 Cal 827 (834) : 4 Ind App 66 (PC).

(08) 81 Mad 77 (79). (Legal representative.)

(12) 18 Ind Cas 824 (826). (Purchaser of decree in court-sale.)

(1900) 4 Cal W N 785 (787). (Decree in favour of insolvent transferred to surety on annulment of adjudication.)

(86) AIR 1936 Mad 543 (543). (The words "operation of law" apply to cases where the decree has been transferred from one to another by way of succession or where there is bankruptcy or any similar event which has the effect in law of bringing about such a transfer.)

[See ('30) AIR 1930 Cal 614 (615) : 57 Cal 1137. (Legal representative.)]

[See also ('39) AIR 1939 Bom 221 (224) : I L R (1939) Bom 271. (The transfers "by operation of law" are obviously intended to be confined to testamentary and intestate succession, forfeiture, insolvency and the like.)]

The following are also some of the instances of transfer by operation of law :

**O. 21 R. 16**  
**Note 5**

(1) *A* obtains a decree against *X*. *B*, his son, sues *A* for partition and obtains a decree for 1/5th share of the decree obtained by *A*. *B* is entitled to apply for execution as transferee by operation of law.<sup>2</sup>

(2) *A*, a trustee, obtained a decree for rent against certain tenants. *A* filed another suit and obtained therein a declaration that the trust was incapable of being executed. It was held that thereafter the original owner of the properties could apply to execute the decree for rent without actual assignment.<sup>3</sup>

(3) Where, on the revocation of a probate of a will, the minor son of the testator succeeds to the estate, he is entitled to execute the decree obtained by the executrix.<sup>4</sup>

(4) A mortgagee who has obtained a final decree for foreclosure against the mortgagor who in turn has obtained a decree for possession of the immovable properties comprised in the mortgage, is an assignee by operation of law.<sup>5</sup>

(5) Where a mortgage is foreclosed and a pre-emptor obtains a decree for pre-emption of the same properties, he is a transferee of the foreclosure decree.<sup>6</sup>

(6) A holder of a certificate of administration granted under Section 3 of the Bombay Regulation VIII of 1827 is a transferee by operation of law.<sup>7</sup>

For other instances, see the undermentioned cases.<sup>8</sup>

The words 'operation of law' cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos*.<sup>9</sup> If a decree obtained by a member of a joint Hindu family is allotted to another member at a family partition, the latter is not a transferee by operation of law and, therefore, must get an assignment in writing from the decree-holder to enable him to apply under this rule.<sup>10</sup> The High Court of Lahore has held in the undermentioned case<sup>11</sup> that where three brothers obtained a joint decree in their favour and at a family partition the decree was allotted to the share of one of the brothers, he could apply under this rule to execute the whole decree and that Rule 15 *ante* would not apply to such a case. A person does not become a transferee by operation of law from a decree-holder by merely obtaining another decree against him.<sup>12</sup> Thus, where *R*, the widow of *G*, obtained a decree in respect of a debt due to the estate of *G* and in a separate suit against *R*, *D* obtained a declaration that he was adopted to *G*, and that he was entitled to his estate, it was held that *D* was not an assignee by operation of law and was not therefore entitled to

2. ('91) 14 Mad 252 (254). (Reversing 13 Mad 347.)  
[See also ('02) 12 Mad L Jour 348 (349). (Person becoming entitled under a decree to execute another decree.)

('69) 1 N W P H C R 31 (34).]

3. ('24) AIR 1924 Pat 343 (345).

4. ('89) 16 Cal 347 (349).

[See also ('09) 1 Ind Cas 57 (58) (Cal). (Minor beneficiary attaining majority—Authority of executor terminated—Beneficiary is a transferee.)]

5. ('05) 1 Nag L R 49 (51).

6. ('27) AIR 1927 Oudh 358 (359) : 2 Luck 710.

7. ('87) 11 Bom 368 (370).

8. ('85) AIR 1985 Bom 298 (302) : 59 Bom 417. (Decree obtained by Hindu widow as representing husband's estate—Widow's conversion and re-marriage—Widow ceases to represent husband's estate—Husband's next heir is transferee of decree by operation of law.)

('38) AIR 1938 All 256 (258); ILR (1938) All 425. (*A*, manager of joint family, missing and lost for a number of years—His eldest son as manager is entitled to apply for execution of decree passed in favour of joint family.)

('40) A I R 1940 Mad 89 (90) : 50 Mad L W 605 (606). (Hindu father, sole decree-holder—Decree devolving on sons on father's death—Sons are transferees of the decree by operation of law—They are not holders of the decree who can apply for execution without recognition by the Court which passed the decree.)

9. ('86) AIR 1986 Mad 543 (544).

10. ('12) 16 Ind Cas 807 (807) (Mad).

('11) 9 Ind Cas 849 (849) (Bom).

('85) 1885 Bom P J 195 (195).

11. ('88) AIR 1938 Lah 432 (432, 433).

12. ('26) AIR 1926 Pat 320 (320) : 5 Pat 511. (*A* obtaining decree under S. 69, B. T. Act against tenant regarding land *X*—*B* obtaining

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**Notes 5-6**

execute the decree obtained by *R*.<sup>13</sup> The only course open to *D* in such a case is either to apply in execution of his own decree for the appointment of a receiver of *R*'s decree or to follow the procedure laid down in Rule 53, *infra*, if the decree in his favour gives him the right to proceed in accordance with that rule.<sup>14</sup> Similarly, it has been held that a person in whose favour a decree has been passed declaring his title to a certain decree previously passed is not a transferee of the decree by operation of law.<sup>15</sup>

The Official Liquidator of a company is merely an agent of the Court for the purposes of the liquidation of the company; he is not a transferee of any decree that may have been passed in favour of the company.<sup>16</sup>

**6. Benamidar.** — *A* obtains a decree against *B* and transfers it to *C* *benami* for *D*. It has been held by the High Court of Calcutta<sup>1</sup> that *D* is the person entitled to execute the decree, that *C*, not being the *real* transferee, cannot apply under this rule, and that a mere application by him for execution cannot be held to be one in "accordance with law" for the purposes of limitation, but that it will be one in "accordance with law" if, with the permission of the Court, *he is allowed to execute the decree*.<sup>2</sup> On the other hand, the High Courts of Madras,<sup>3</sup> Lahore<sup>4</sup> and Patna<sup>5</sup> and the Judicial Commissioner's Court of Sind<sup>6</sup> have held that the "transferee" referred to in this rule is the transferee *named as such* in the transfer, and that the real owner is not entitled to apply. The High Courts of Allahabad<sup>7</sup> and the Chief Court of Lower Burma<sup>8</sup> have also held that the *benamidar* is entitled to apply, without deciding whether the *real* owner can or cannot do so. The Calcutta High Court also has held in a recent case,<sup>9</sup> a similar view.<sup>9</sup>

Where the transferee of a decree dies and thereupon his heirs and a person alleging that the transferee was only a *benamidar* for him apply separately to execute the decree, the Court has got power under Section 47, sub-section (3) to enquire who is the representative of the deceased and the question of *benami* can be gone into in execution proceedings.<sup>10</sup>

Where the decree itself is obtained by a *benamidar*, the Chief Court of Oudh<sup>11</sup>

decree against *A* in respect of the same land—*B* is not transferee of *A*'s decree.)

(34) AIR 1984 Mad 471 (472). (Decree declaring that assignment of another decree is benami for plaintiff—Declaratory decree does not operate as assignment in writing or by operation of law—He must have obtained a decree for compulsory assignment under Order 21 Rule 34.)

13. ('33) AIR 1933 Bom 367 (368) : 57 Bom 518. [See also ('34) AIR 1984 Mad 471 (472).]

14. ('33) AIR 1933 Bom 367 (368) : 57 Bom 518.

15. ('39) AIR 1939 Bom 221 (225); ILR (1939) Bom 271. (Nor does the decree *ipso facto* constitute an assignment. At best, it creates a right to obtain an assignment of the decree—A person who obtains a right to obtain an assignment of a decree or the monies recoverable thereunder is not a transferee "by operation of law.")

[See also ('37) AIR 1937 Oudh 471 (479); 13 Luck 549. (Decree for *A* against *B*—*C* subsequently obtaining decree against *A* and declaration that he was entitled to part of decretal amount recoverable by *A* from *B*—*C* held was not transferee by operation of law.)]

16. ('86) AIR 1936 Lah 152 (158).

**Note 6**

1. ('89) 16 Cal 355 (368).

(89) 9 Cal 633 (634).

(79) 5 Cal L Rep 258 (256).

2. ('98) 20 Cal 388 (395, 396).

(75) 19 Suth W R 255 (260).

3. ('25) AIR 1925 Mad 701 (702) : 48 Mad 553. (Dissenting from 21 Mad 388.)

(34) AIR 1984 Mad 471 (471).

(18) AIR 1918 Mad 74 (75).

(35) AIR 1985 Mad 140 (141).

(39) AIR 1989 Mad 210 (214) : ILR (1989) Mad 1004.

[See also ('07) 6 Mad L Jour 31 (32).]

4. ('27) AIR 1927 Lah 110 (110) : 8 Lah 35.

5. ('38) AIR 1938 Pat 457 (459) : 17 Pat 228.

(The mere fact that the real assignee gets a decree in a suit declaring that he is the real owner of the decree or the real assignee cannot entitle him to apply in execution or make his application one in accordance with law.)

6. ('30) AIR 1930 Sind 1 (2).

7. ('15) AIR 1915 All 264 (265) : 37 All 414.

8. ('20) AIR 1920 Low Bur 118 (120) : 10 Low Bur Rul 280.

9. ('35) 168 Ind Cas 618 (619) (Cal).

10. ('27) AIR 1927 Mad 908 (905, 907) : 51 Mad 219.

11. ('31) AIR 1931 Oudh 69 (69).

has held that the *benamidar* has the right to execute the decree. The High Court of Calcutta<sup>12</sup> is, on the other hand, of opinion that he cannot so apply and that his application will not, therefore, be one in accordance with law.

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**Notes 6-9**

**7. Part transfer of a decree.** — Under Section 232 of the old Code it was held that the transferee of the interest of any one of several joint decree-holders in the decree could apply to execute the decree.<sup>1</sup> This principle has been given effect to in the present Code by adding in this rule the words "or if a decree has been passed jointly.....in the decree" (see Note 1 *supra*). Similarly, there is nothing in this rule or elsewhere which prohibits the transferee of a *portion* of the decree from applying under this rule.<sup>2</sup> The only qualification in such a case is that the transferee is in the position of a *joint decree-holder* and can execute the decree only subject to general provisions of law analogous to Rule 15 *supra*.<sup>3</sup> But the High Court of Bombay has, in the undermentioned case,<sup>4</sup> taken the contrary view that a transferee of a part of a decree is not entitled to execute his part of the decree, nor even the whole decree, since he cannot be regarded as a joint decree-holder. See also Notes to O. 21 R. 15.

**8. Pledge of decree.** — The transfer of a decree by way of a mortgage is an "assignment in writing" of a fractional interest in the decree and the mortgagee is, therefore, entitled to apply under this rule.<sup>1</sup>

**9. Assignment of rent decrees under the Tenancy Acts.** — Section 148, clause (o) of the Bengal Tenancy Act (VIII of 1885) provides that, notwithstanding anything contained in Section 232, Civil Procedure Code (of 1882), an application for the execution of a decree for arrears of rent shall not be made by an assignee of the decree, unless the landlord's interest in the land has become vested in him.<sup>1</sup> The

[See also ('28) AIR 1923 Mad 317 (317). (While benamidar's application was pending, real owner impleaded as a party.)]

12. ('14) 25 Ind Cas 555 (556) (Cal).

[See also ('28) AIR 1928 Cal 835 (836). (Real owner can apply.)]

#### Note 7

1. ('96) 19 Mad 306 (307).

('87) 11 Bom 153 (158).

('86) 1886 Bom P J 287 (287).

[But see ('75) 24 Suth W R 11 (12). (Dissented from in 17 Cal 341.)]

2. ('90) 17 Cal 341 (343).

('26) AIR 1926 All 346 (348) : 48 All 432.

('28) AIR 1928 Lah 70 (71). (Dissenting from AIR 1919 Lah 429).

('21) AIR 1921 Mad 599 (601) : 44 Mad 919. (Assignee of a portion of a decree allowed to continue pending execution.)

('09) 8 Ind Cas 444 (444) : 38 Mad 80.

('18) 85 All 204 (206). (But the transferee is not entitled to apply for execution of a part of the decree.)

[See also ('80) 5 Cal 592 (593).

('28) AIR 1928 Mad 713 (716) (FB). (Partial transfer of a decree is valid.)

('88) AIR 1938 Lah 473 (473). (Decree in favour of several persons — Assignment of decree by one of them — Assignment passes only interest of assignor decree-holder.)

[But see ('30) AIR 1930 Lah 824 (825). (This rule does not contemplate a transfer of a part

of a decree.)

('19) AIR 1919 Lah 429 (429) : 1917 Pun Re No. 15. (Dissented from in AIR 1928 Lah 70.)

('22) AIR 1922 All 101 (102). (Dissented from in AIR 1926 All 346.)]

3. ('21) AIR 1921 Mad 599 (601) : 44 Mad 919.

('19) AIR 1919 Mad 123 (126).

('18) 19 Ind Cas 304 (304) : 35 All 204. (Transferee cannot apply for execution of the portion transferred only.)

('74) 24 Suth W R 245 (246). (Must execute the whole decree.)

('73) 20 Suth W R 51 (51). (Court should protect the interest of others.)

4. ('34) AIR 1934 Bom 59 (62) : 58 Bom 226.

#### Note 8

1. ('26) AIR 1926 All 346 (348) : 48 All 432. (AIR 1922 All 101, Dissented from.)

('29) AIR 1929 Cal 676 (679) : 57 Cal 549.

('09) 1 Ind Cas 535 (538) : 34 Mad 442.

#### Note 9

1. ('81) 54 Cal L Jour 596 (597, 600). (Cannot be executed even as a simple money decree.)

('18) 18 Ind Cas 689 (690) : 40 Cal 462. (Landlord's interest defined.)

('14) AIR 1914 P O 111 (114) : 41 Cal 926 : 41 Ind App 91 (P C). (The relationship of landlord and tenant must exist.)

('99) 26 Cal 176 (178).

('97) 1 Cal W N 183 (184).

('97) 1 Cal W N 694 (694).

('02) 6 Cal W N 91 (91).



**O. 21 R. 16**  
**Notes 9-11**

word "assignee" in that Section refers only to purchasers for consideration and does not include a person in whom the legal estate is vested by an act of the owner, as for instance, a trustee, who has no independent interest in the property.<sup>2</sup> It has been held in the undermentioned case<sup>3</sup> that a Court executing a rent decree cannot refuse execution when the assignment had been recognised by the Court before the Tenancy Act came into force.

A provision similar to that in Section 148 of the Bengal Tenancy Act has been made also by Section 198 (k) of the Orissa Tenancy Act (II of 1913). By Schedule II, List II of the Agra Tenancy Act (III of 1926) it is provided that no application for the execution of a decree shall be made by an assignee of the decree unless the assignor's interest in the land to which it relates has become and is vested in such assignee.

**10. Transfer, when takes effect.** — The transfer of a decree made by an instrument in writing takes effect from the date of such instrument, irrespective of its recognition by the Court on an application made to it under this rule.<sup>1</sup>

*Illustrations*

1. A brought certain properties to sale in execution of a decree obtained by him against F. Pending execution proceedings, A assigned his decree to D... Subsequently two days before sale, A reported that the decree had been satisfied by payment. D intervened and objected to the record of satisfaction being made. It was held that if his transfer was true, he was a representative of A and the matter must be enquired into: *Dwar Buksh v. Fatik Jali*, I. L. R. 26 Calcutta 250.

2. M had obtained a money decree against H. R in execution of a decree obtained by him against M applied under O. 21 R. 53 and recovered the amount due under M's decree. Thereupon C, claiming under an assignment of the decree in writing from M prior to R's attachment, sued R for the recovery of the money drawn by him. It was held that C's title to the decree was complete on the date of the assignment and therefore prevailed as against R's attachment: *Co-operative Town Bank of Padigan v. Raman Chettiar*, I. L. R. 5 Rangoon 595 : A. I. R. 1928 Rangoon 25 (26). [Reversing A. I. R. 1927 Rangoon 55.]

**11. Rights of the transferee.** — Section 232 of the old Code contained the words "and if that Court thinks fit, the decree may be executed." It was, therefore, held that the executing Court had a discretion to allow or to refuse an application made by the transferee.<sup>1</sup> Under the present Code, those words have been omitted and the transferee's right to execution does not depend upon the discretion of the Court.<sup>2</sup>

[See ('09) 3 Ind Cas 924 (329) (Cal). (A case where landlord's interest vested by operation of law.)]

2. ('99) 26 Cal 750 (757).

3. ('87) 14 Cal 380 (381, 382).

**Note 10**

1. ('87) 9 All 46 (51).

('94) 16 All 483 (492).

('99) 26 Cal 250 (253).

('09) 8 Ind Cas 938 (939) : 88 Mad 62.

('09) 1 Ind Cas 353 (353) (Mad). (An attachment after date of assignment does not prevent recognition of the transferee as such.)

('07) 2 Mad L Tim 98 (93).

('28) AIR 1928 Rang 25 (26); 5 Rang 595. (Reversing AIR 1927 Rang 55 on Letters Patent appeal.)

('28) AIR 1928 Sind 71 (73) : 26 Sind L R 153. (Assignee can prefer a claim against attachment after transfer.)

[See also ('32) AIR 1932 Sind 164 (164) : 26 Sind L R 158.

('28) AIR 1928 Mad 478 (478) : 51 Mad 681. (Auction sale of decree in favour of company by liquidator—Deed of transfer after dissolution—Held valid.)]

[But see ('80) 5 Cal 869 (870, 871).]

**Note 11**

1. ('91) 15 Bom 307 (309).

('85) 9 Bom 179 (181).

('98) 20 Cal 888 (395).

('88) 15 Cal 446 (448, 449).

('71) 15 Suth W R 283 (288).

('70) 13 Suth W R 224 (225).

('70) 13 Suth W R 207 (207).

('68) 10 Suth W R 854 (855).

('67) 8 Suth W R 202 (202).

('96) 19 Mad 806 (807).

('85) 8 Mad 455 (468).

('89) 2 C P L R 45 (46). (And the Appellate Court will not interfere unless it is shown that the discretion is improperly exercised.)

2. ('10) 6 Ind Cas 826 (828) : 38 Cal 18.



Where a transfer is recognized by the Court on an application under this rule, the transferee is entitled to execute the decree as if the application were made by the original decree-holder.<sup>3</sup> The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his rights to execute the decree, provided the assignment is not a sham transaction.<sup>4</sup>

**O. 21 R. 16**  
**Note 11**

It has already been mentioned in Notes to O. 21 R. 10 *ante* that the person appearing on the face of the decree as the decree-holder is the person entitled to execution. Therefore, where the transferee of a decree does not apply under this rule for execution, the executing Court is bound to allow execution at the instance of the transferor, even after the date of the transfer, till the transfer is recognized by the Court.<sup>5</sup>

The assignee of a decree can transfer it to another although the name of such assignee has not been substituted on the record.<sup>6</sup>

As to the right of the transferee to apply for execution, where the decree has been attached by the holder of a decree against the transferor, see Notes to O. 21 R. 53, *infra*.

Where an *ex parte* decree was assigned and the assignee did not take any step under this rule and thereafter on an application made by the defendant as against the original decree-holder alone the *ex parte* decree was set aside, it was held that the transferee could not proceed with the execution until he got an order cancelling the order setting aside the *ex parte* decree.<sup>7</sup>

See also Note 9 to O. 21 R. 2.

('32) AIR 1982 Cal 499 (440) : 59 Cal 297.

('34) AIR 1934 Lah 648 (651) : 16 Lah 68.

('37) AIR 1937 Bom 365 (367) : I L R (1937) Bom 691.

3. ('67) 7 Suth W R 205 (205).

('34) AIR 1934 All 209 (211) : 56 All 694. (Judgment-debtor cannot set up an uncertified payment as against transferee also.)

('87) 11 Bom 153 (158).

('94) 16 All 133 (135). (Entitled to the benefit of attachment effected before transfer.)

('18) 18 Ind Cas 691 (694) (Mad). (Do.)

[See also ('72) 4 N W P H C R 90 (92). (Assignee's name should be brought on record as a party.)]

4. ('28) AIR 1928 Mad 458 (459).

('19) AIR 1919 Mad 123 (125).

5. ('17) AIR 1917 Mad 691 (692).

('83) AIR 1933 Lah 688 (689) : 14 Lah 744. (Decree handed over to trustee by decree-holder—No legal application by trustee under O. 21, R. 16—Joint application by decree-holder and trustee—Decree-holder can be allowed to execute decree.)

('84) AIR 1984 Pesh 40 (48).

('88) AIR 1988 Sind 119 (120).

('15) AIR 1915 Mad 914 (915). (Injunction decree in respect of easement—Decree-holder transferring dominant tenement—Decree-holder allowed to execute after transfer.)

('91) 18 Cal 689 (641).

('69) 11 Suth W R 271 (271).

('81) AIR 1981 Lah 116 (117).

('24) AIR 1924 Lah 615 (616). (Pre-emption decree.)

('13) 18 Ind Cas 97 (98) : 16 Oudh Cas 70.

('21) AIR 1921 Low Bur 37 (39) : 11 Low Bur Rul 168.

('37) AIR 1937 Mad 605 (606).

('85) AIR 1935 Nag 230 (233, 234) : 31 Nag L R Sup 111. (Whether substitution of transferee's name is accomplished by an order of the Court passed upon a separate application made by the transferee under O. 22 R. 10 or upon an application by him for execution of the decree under O. 21 R. 16, C. P. C., is immaterial.)

('39) AIR 1939 Cal 482 (488).

('85) AIR 1935 Mad 383 (384). (Execution Court should regard only person in whose favour decree is drawn as entitled to execute it—Decree satisfied—Transferee of decree-holder cannot execute it subsequently.)

('39) AIR 1939 Rang 245 (246) : 1939 Rang L R 152. (There is no authority for the proposition that from the date of assignment of his decree the assignor decree-holder is precluded from executing the decree.)

('35) AIR 1935 All 1001 (1001).

[See also ('35) AIR 1935 Bom 331 (332). (A dakhast regularly filed by the decree-holder cannot come to an end because, pending execution, the judgment-creditor has assigned his interest in favour of another person.)]

6. ('86) 9 All 46 (51).

('17) AIR 1917 Mad 853 (854).

7. ('16) AIR 1916 Cal 323 (324.).

**O. 21 R. 16**  
**Notes 12-18**

**12. Application for execution must be made to the Court which passed the decree.** — An application by the transferee of a decree under this rule can be entertained only by the Court which passed the decree; the Court to which the decree has been transferred has no jurisdiction to entertain the same.<sup>1</sup> The reason is, as stated in *Sheo Narain Singh v. Hurbans Lall*, (1870) 14 W. R. 65 (66), that :

"It would lead to the greatest difficulties, if in one Court one party was recognised as being the holder of, and having the control over, a decree, and at the same time in another Court another party was recognised as being in that position."

Where, however, an application under this rule is made to the transferee Court and it recognises the transfer, it is only an irregularity which may be waived by acquiescence and if the judgment-debtor has, as a matter of fact, waived it, he cannot subsequently turn round and question the jurisdiction of the executing Court.<sup>2</sup>

As to whether a transferee can *continue* the execution proceedings initiated by the original decree-holder without a fresh application, see Note 19 *infra*.

Where a decree is passed in favour of a company which afterwards goes into liquidation, the Official Liquidator is not a *transferee* of the decree and hence, he can apply for the execution of the decree to the Court to which the decree has been transferred for execution.<sup>3</sup>

See also the undermentioned case.<sup>4</sup>

**13. Award.** — *A* having obtained an award against *B* and filed it in Court, assigned the same to *C*. *C* applied to execute it under Section 15, Arbitration Act (IX of 1899) which provides that the *award* on being filed in Court, shall be enforceable as a decree. It was held that *C* could execute it and that the Court in which the award

**Note 12**

1. (1900) 27 Cal 488 (491). (If entertained by transferee Court, the order is without jurisdiction and can be set aside in appeal — It is not cured by S. 99. Application is by transferee from the original transferee.)

('84) AIR 1984 Lah 648 (650) : 16 Lah 68. (Section 42 is subject to this rule.)

('08) 25 All 443 (445). (Application for rateable distribution to the transferee Court is bad.)

('79) 2 All 288 (288).

('72) 9 Bom H O R 46 (49).

('02) 29 Cal 235 (236). (Notice under this rule must also be issued by the executing Court.)

('70) 14 Suth W R 65 (66).

('81) AIR 1981 Lah 499 (499, 500).

('81) AIR 1981 Lah 690 (690, 691). (Transferee Court can entertain the objection that R. 16 has not been complied with before transfer.)

('18) AIR 1918 Lah 211 (213) : 1918 Pun Re No. 92. (Sections 200 and 201, Companies Act of 1913, are subject to Order 21 Rule 16.)

('07) 17 Mad L Jour 300 (301). (But it may be waived.)

('08) 26 Mad 258 (259).

('20) AIR 1920 Nag 174 (175).

('82) AIR 1982 Pat 168 (169) : 11 Pat 94.

('78) 2 All 288 (288).

('87) AIR 1987 Bom 865 (869) : I L R (1987) Bom 691. (Notice cannot be issued by Court to which decree is sent for execution.)

('85) 39 Cal W N 961 (965).

('87) AIR 1987 Oudh 111 (112) : 12 Luck 755. (Decree transferred to another Court for execu-

tion — Objection to execution by transferee of decree cannot be entertained by the transferee Court.)

('87) AIR 1987 Cal 81 (84).

[See also ('83) AIR 1983 Mad 110 (111, 112).

(Decree assigned after transfer to another Court — Application under R. 16 can be entertained by original Court before certificate of non-satisfaction is received — The original Court need not stay its hand.)]

2. ('84) AIR 1984 Lah 648 (651) : 16 Lah 68. (27 Cal 488 held to be not good law so far as it held that the order was without jurisdiction in view of the decision in the analogous case AIR 1928 P C 162 arising under Section 50.)

('07) 17 Mad L Jour 300 (301).

3. ('86) AIR 1986 Lah 152 (153).

4. ('40) AIR 1940 Mad 38 (40) : (1939) 2 Mad L Jour 596 (600). (A Civil Court to which an award made by a Registrar of Co-operative Societies under the Madras Co-operative Societies Act of 1932 has been transmitted for execution has jurisdiction to recognise an assignment of the award under O. 21 R. 16, O. P. Code. Under the rules framed under the Act, the award is transferred to the Court to be enforced as if it was a final decree passed by such Court — Though Registrar is himself a Court for certain purposes, in the absence of any rules in the matter, the executing Court must be presumed to be empowered to recognize the transfer — In any case, where assignment was recognized after due notice to judgment-debtor it is only an irregularity.)

was filed must be deemed to be the Court which passed the decree for the purposes of this rule.<sup>1</sup>

**O. 21 R. 16**  
**Notes 13-14**

**14. Notice to transferor and judgment-debtor.**—The provisions of this rule as to notice are imperative; the giving of notice of the application, to the assignor and to the judgment-debtor, is an indispensable condition of jurisdiction and the failure to give it renders all the proceedings in execution void as against them.<sup>1</sup> It has, however, been held that if the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection so far as the execution proceedings are concerned, non-compliance with the technical requirements of this rule will not render an execution sale a nullity.<sup>2</sup> Under the amendment of this rule by the Lahore High Court, notice to the *judgment-debtor* is not necessary.<sup>3</sup>

Where the assignee applied under this rule for notices to the assignor and the judgment-debtor and also for *attachment* of a certain property, and the notice as well as the warrant of attachment were issued together, it was held that the attachment was illegal inasmuch as the objections of the judgment-debtor were not heard at that time.<sup>4</sup> Where, in an application under this rule by the assignee of a mortgage decree, notice is given only to the mortgagor and not to the subsequent mortgagee who was also a judgment-debtor under the decree, the latter will not be bound by such execution and the auction-purchaser will acquire only the rights of the mortgagor, but not those of the subsequent mortgagee.<sup>5</sup>

The notice that is to be given under this rule is of the *application* for execution and not of the *assignment*.<sup>6</sup> But a written notice is not always necessary; if the judgment-debtor is present in Court at the time the order on the application is made, and has thus notice of the application, the fact that no written notice was given will not vitiate the proceedings.<sup>7</sup>

#### Note 13

1. ('24) AIR 1924 Cal 117 (118).  
[See also ('39) AIR 1939 Cal 482 (483, 484). (The holder of an award is entitled to execute the award, although he may have transferred his rights under it to a transferee unless and until such transferee comes to the Court and applies under O. 21 R. 16.)]

#### Note 14

1. ('27) AIR 1927 Cal 781 (782) : 54 Cal 624.  
(Want of notice to the transferor.)  
(10) 6 Ind Cas 262 (263) (Cal). (Do.)  
(21) AIR 1921 Lah 143 (144) : 2 Lah 230. (Want of notice to judgment-debtor.)  
(20) AIR 1920 Lah 251 (253).  
(31) AIR 1981 Mad 192 (198). (Want of notice to one of the judgment-debtors.)  
(21) AIR 1921 Pat 76 (77) : 5 Pat L Jour 890. (The fact that a notice purporting to be under S. 158B (2), Bengal Tenancy Act, (1885), has been shown to the assignor will not dispense with the necessity of complying with the rule.)  
(17) AIR 1917 Lah 195 (196). (Want of notice to judgment-debtor.)  
(37) AIR 1937 Bom 365 (367) : ILR (1937) Bom 691.  
(38) AIR 1938 Cal 734 (736). (The non-service of such notice makes the sale held in execution of that decree void *ab initio*, although the purchaser is not the decree-holder himself but an absolute stranger.)

[See ('33) AIR 1933 Lah 432 (433). (Though failure to give notice will affect the validity of the proceedings, it does not warrant dismissal of application.)]

(84) AIR 1934 Pat 9 (10). (Execution application by assignee—Notice sent to assignor and judgment-debtor under O. 21 R. 22 but not under R. 16—Assignment not impugned by judgment-debtor—Assignee can proceed with execution without first proving assignment.)]

[See however ('87) 9 All 46 (49). (Judgment-debtor cannot object on the ground of want of notice to the transferor.)]

2. ('39) AIR 1939 Cal 419 (421). (Notice to which reference is made in O. 21 R. 16 is merely for the benefit of the transferors and the judgment-debtors.)

3. ('37) AIR 1937 Lah 465 (467) : I L R (1937) Lah 162.

4. ('11) 12 Ind Cas 547 (547) : 36 Bom 58.

5. ('30) AIR 1930 All 627 (627, 628) : 52 All 898. (Reversing AIR 1929 All 437.)

6. ('24) AIR 1924 Pat 576 (578, 580) : 3 Pat 596.  
(21) AIR 1921 Pat 180 (182) : 6 Pat L Jour 358.  
[See also ('33) AIR 1933 Pat 658 (663) : 13 Pat 86. (Court can issue notice under Rr. 16 and 22 simultaneously.)]

7. ('24) AIR 1924 Pat 576 (580) : 3 Pat 596.  
[See also ('33) AIR 1933 Pat 130 (131).]

**O. 21 R. 16**  
**Notes 14-16**

The object of issuing notice under this rule is to determine once for all and in the presence of all the parties the validity of the instrument of transfer. It is therefore not necessary that notice must be issued on *every* subsequent application by the transferee under this rule.<sup>8</sup>

Where the Court which passed the decree substitutes the name of the alleged transferee of the decree on the record and transfers the decree to another Court for execution, the latter Court must presume that the Court passing the decree has complied with the provisions of this rule.<sup>9</sup>

If the judgment-debtor is dead when the assignee applies for execution, the notice required by this rule may be served on his legal representatives.<sup>10</sup> If the original decree-holder becomes insolvent, the Official Receiver will be entitled to notice.<sup>11</sup>

In the case of a transfer by operation of law, it is not necessary that the notice referred to in the first proviso to this rule should be given.<sup>12</sup>

**15. Objections to be heard.** — After the service of the notice mentioned in the first proviso to this rule, the Court is bound to hear the objections, if any, of the transferor and of the judgment-debtor.<sup>1</sup> As has been already mentioned in Note 11, it is not a valid objection that the assignment is not supported by consideration.<sup>2</sup> Nor can the judgment-debtor raise the plea that the *decree* is not valid.<sup>3</sup> As to the right of the judgment-debtor to plead an uncertified payment or adjustment, see Note 23 to O. 21 R. 2.

*A* held a decree against *B* and *B* had a decree against *A*. *A* attached in execution of his decree the decree which *B* had against him. Thereafter, *B* assigned the decree to *C*. *C* applied under this rule. It was held that *A* could take objection to the execution of the decree on the ground that under Section 64 *ante*, the assignment of the decree to *C* was void.<sup>4</sup>

An assignment of a decree is not valid as against the judgment-debtor until the debtor has had notice of the assignment and, therefore, any payment made to the original decree-holder before notice is valid as against the transferee.<sup>5</sup>

The failure of the judgment-debtor to object to the validity of the assignment when an application under this rule is made will preclude him, under general principles of *res judicata*, from raising such objection at a subsequent stage of the proceedings.<sup>6</sup>

8. ('27) AIR 1927 Cal 694 (696).

('34) AIR 1934 Rang 101 (103).

[See also ('30) 1930 Mad W N 166 (168).]

9. ('36) AIR 1936 Sind 191 (198) : 80 Sind L R 249.

10. ('87) 11 Bom 727 (730).

('07) 30 Mad 541 (543).

11. ('28) AIR 1928 Mad 360 (361).

[See also ('18) AIR 1918 Mad 1262 (1262).]

12. ('34) AIR 1934 Pat 627 (628).

('88) AIR 1938 All 256 (257) : I L R (1938) All 425.

[See also ('37) AIR 1937 Pat 607 (608).]

**Note 15**

1. ('31) AIR 1931 Lah 545 (546).

('14) AIR 1914 Mad 86 (87).

('88) AIR 1938 Mad 78 (79). (Application for execution by transferees of decree — Opposition by judgment-debtor that transfer was sham — Court must decide validity of transfer before making order — Order of Court thereafter is decree under S. 47 — Separate suit to declare transfer invalid is barred by S. 47.)

[See also ('22) AIR 1922 Lah 396 (397).]

2. ('13) 20 Ind Cas 685 (689) (Cal).

('32) AIR 1932 Mad 827 (827, 828).

('15) AIR 1915 Mad 1138 (1140). (In the absence of fraud.)

('12) 17 Ind Cas 617 (618) (Mad).

[See also ('25) AIR 1925 Pat 449 (449) : 4 Pat 120. (Question when title passes where part consideration is unpaid, depends upon the intention of the parties.)]

3. ('91) 15 Bom 307 (308).

('16) AIR 1916 Low Bur 36 (36).

4. ('87) AIR 1937 All 68 (64).

5. ('24) AIR 1924 Pat 118 (119) : 2 Pat 754.

6. ('25) AIR 1925 All 117 (118) : 47 All 86.

('16) AIR 1916 All 219 (219) : 38 All 289.

('14) AIR 1914 All 329 (330).

('13) 21 Ind Cas 462 (463) : 35 All 524.

('87) 10 Bom 74 (77).

('08) 12 Cal W N 625 (627).

('37) AIR 1937 Cal 4(6). (Substitution of assignee's name after notice to judgment-debtor — Judg-

As to objections to the executability of the decree under similar circumstances, see Note 23 to Section 11 *ante*, and also the undermentioned cases.<sup>7</sup>

**O. 21 R. 16**  
**Notes 15-16**

**16. Transfer of decree for payment of money against two or more persons to one of them.** — It is a general principle of law that when one of the persons jointly liable under a decree unites in himself the two opposite characters of creditor and joint debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree.<sup>1</sup> The second proviso to this rule is based on this general principle, and provides that, in such a case, the transferee cannot enforce the decree by execution against his co-debtors.<sup>2</sup> On the same principle, where a decree has been passed jointly in favour of two or more persons and the interest of one of such decree-holders devolves upon a judgment-debtor, the decree is extinguished *pro tanto*.<sup>3</sup> When the alleged transferee of a decree for money is found to be the *benamidar* of one of the judgment-debtors, the Court is bound, under the second proviso to this rule, to refuse to allow the assignee to execute the decree against the other judgment-debtors.<sup>4</sup> But it has been held that where the judgment-debtor did not raise the objection when notice was issued to him under the first proviso to this rule, he cannot subsequently raise the objection.<sup>5</sup> But an agreement between the decree-holder and some of the judgment-debtors that the decree-holder should execute the decree against the other judgment-debtors and pay the amount realized to them in consideration of the fact that they have paid the

ment-debtor not contesting assignment—Judgment-debtor and executing Court cannot question validity of assignment.)

[See also ('20) AIR 1920 Pat 146 (147) : 5 Pat L Jour 639. (Objection as to want of proper notice under this rule not taken in first execution—Objection not allowed in an application for setting aside sale under O. 21 R. 90.)

('25) AIR 1925 All 206 (208).

('40) AIR 1940 Mad 88(40) : (1939) 2 Mad L Jour 596 (600). (Failure to take objection on ground that assignment of decree could only be recognised by Court passing decree—Objection held cured in the circumstances of case.)]

7. ('25) AIR 1925 All 662 (662, 663). (Objection that decree is nullity is barred by *res judicata*.)

('82) AIR 1932 Pat 168 (169) : 11 Pat 94. (Transferee put on record by Court passing decree—Decree transferred to Court of another district—Objection as to transferee's right to execution cannot be taken in transferee Court.)

('39) AIR 1939 Pat 411 (412) : 18 Pat 318. (In execution proceedings, it is not open to the judgment-debtor to assert that the real holder of the decree is any person other than the person named as decree-holder in the decree, unless there has been a valid assignment or devolution by process of law.)

('83) AIR 1983 Cal 919 (922) : 60 Cal 1181. (Application by assignee for substitution in place of decree-holder—Judgment-debtor not objecting to such application is not barred from questioning assignee's right to execute decree by reason of bar imposed by S. 148 (o), Ben. Ten. Act.)

#### NOTE 16

1. ('88) 5 All 27 (33).

[See ('32) AIR 1932 All 704 (708) : 54 All 448.

(This principle will not apply to a converse case where decree-holder acquires a share in the estate of one of the judgment-debtors.)]

2. ('68) 9 Suth W R 230 (234).

('26) AIR 1926 Mad 1141 (1142). (Transfer of personal decrees brought about by death is not excluded from the operation of Proviso 2.)

('15) AIR 1915 Mad 799 (800).

3. ('76) 25 Suth W R 343 (343).

('83) 5 All 27 (34).

('94) 1894 All W N 15 (16).

('67) 7 Suth W R 136 (136).

4. ('22) AIR 1922 Mad 510 (510).

('17) AIR 1917 Mad 590 (591) : 40 Mad 296.

('17) AIR 1917 Mad 889 (889).

('20) AIR 1920 Lah 431 (432, 433).

('24) AIR 1924 Nag 41 (42) : 19 Nag L R 151.

[See ('29) AIR 1929 All 792 (792). (Transfer of decree to relative of judgment-debtor does not amount to transfer to judgment-debtor.)]

[See also ('12) 12 Ind Cas 657 (660) : 35 Mad 659. (Objection that the assignee is the *benamidar* for judgment-debtor should be decided.)

('81) AIR 1931 Lah 545 (546). (Do.)

('26) AIR 1926 Lah 666 (667). (Do.)

('89) 2 O P L R 45 (47). (Assignee *benamidar* for judgment-debtor—His right to execute decree doubted.)]

5. ('87) AIR 1937 Oudh 111 (112) : 12 Luck 755.

[See (38) AIR 1938 Oudh 106 (106). (Objection not barred if judgment-debtor was not aware when notice was issued to him, that assignee of decree was *benamidar* for one of the judgment-debtors.)]

[See however ('39) AIR 1939 Rang 245 (247) : 1939 Rang L R 152.]

**O. 21 R. 16**  
**Notes 16-17**

amount in advance, does not fall under the prohibition in this rule.<sup>6</sup>

This proviso does not make the assignment of a decree in favour of one of several judgment-debtors invalid in law; it only provides that the transferee is not entitled to enforce his rights by execution.<sup>7</sup> His remedy is, therefore, to sue his co-judgment-debtors for contribution having regard to the proportion in which they were bound *inter se* to satisfy the decree.<sup>8</sup>

The words "decree for the payment of money against two or more persons" mean a decree against two or more persons *jointly*.

*Illustration*

A decree directed that *N* should pay Rs. 90 and Rs. 11-5-3 as costs, and *A* should pay Rs. 90 with Rs. 3-12-4 as costs. *A* afterwards took an assignment of the decree in writing and applied to execute it against *N* to the extent of Rs. 90 and costs. It was held that the decree for money so far as it related to Rs 90 and costs was not a decree against several persons, but against one person *N*, and therefore *A* could execute it.<sup>9</sup>

The second proviso to this rule does not apply to the converse case of the decree-holder acquiring a share in the estate of one of the judgment-debtors. The decree-holder is, however, bound to give credit for a *proportionate* amount of the decree.<sup>10</sup>

The proviso applies whether the transfer of the decree is by act of parties or by operation of law.<sup>11</sup>

It has been held by the Rangoon High Court that where a decree for the payment of money has been passed against two or more persons and one of them dies, his legal representative does not become a "judgment-debtor" and the transfer of the decree to him is not a transfer to which proviso 2 applies.<sup>12</sup>

**17. "Decree for the payment of money."**—The second proviso to this rule does not apply to decrees other than *money* decrees.<sup>1</sup> Thus, it does not apply to mortgage decrees for sale and therefore, an assignment of a mortgage decree in favour of one of the judgment-debtors does not extinguish the decree.<sup>2</sup> But, in such cases, the decretal amount that can be recovered from the other judgment-debtors will be reduced proportionately.<sup>3</sup>

The expression "decree for money" in Section 232 of the old Code (corresponding to this rule) was interpreted by the High Courts of Bombay and Calcutta to mean a personal decree for the payment of money. Thus, a decree against a legal

6. ('27) AIR 1927 Mad 322 (326).

[See also ('09) 2 Ind Cas 88 (88) (All).]

7. ('12) 17 Ind Cas 323 (327) (Mad).

8. ('08) 32 Bom 195 (197).

('74) 6 N W P H O R 1 (2).

('89) 1889 Bom P J 262 (268).

('13) 20 Ind Cas 569 (570) (Cal).

9. ('08) 32 Bom 195 (197).

10. ('38) AIR 1938 Mad 814 (815) : I L R (1939) Mad 78. (Following AIR 1932 All 704 and AIR 1927 Mad 937 and dissenting from AIR 1926 Mad 1141.)

('36) AIR 1935 Oudh 449 (450) : 11 Luck 409.

11. ('88) AIR 1938 Mad 814 (814) : I L R (1939) Mad 78.

12. ('89) AIR 1939 Rang 82 (84) : 1938 Rang L R 699.

**Note 17**

1. ('88) 18 Cal L Rep 272 (274).  
(12) 17 Ind Cas 323 (327) (Mad).

('38) AIR 1938 Pat 462 (463) : 17 Pat 206.

2. ('11) 12 Ind Cas 70 (72) (Cal).

('18) AIR 1918 Cal 602 (604).

('26) AIR 1926 Mad 623 (623, 624) : 49 Mad 508.

(Until a personal decree is given it cannot be called a money decree.)

('24) AIR 1924 Mad 901 (901) : 47 Mad 948.

('89) AIR 1939 Cal 425 (426). (Person acquiring the interest of one of the judgment-debtors and subsequently getting a transfer of the decree can execute against the other judgment-debtors.)

('87) AIR 1937 Sind 112 (113) : 81 Sind L R 47.

('87) 1937 Mad W N 884 (885).

('20) AIR 1920 All 129 (131) : 42 All 544.

('89) AIR 1939 Cal 425 (426). (Assignee of mortgage decree having previously acquired the interest of one of the judgment-debtors can execute.)

3. ('20) AIR 1920 All 129 (131) : 42 All 544. (Person acquiring a portion of the mortgaged property subsequently becoming a transferee of

representative for payment of money out of the assets of the deceased,<sup>4</sup> or a decree against a purchaser of the equity of redemption in a mortgage suit,<sup>5</sup> was held not to come within that Section. The High Court of Allahabad<sup>6</sup> has in the undermentioned case held that the substitution of the expression "for the payment of money" for the words "for money" in the proviso is intended to emphasise the fact that the proviso is confined to cases of personal decrees. On the other hand, the Judicial Commissioner's Court of Nagpur<sup>7</sup> has held that this is an unduly narrow interpretation of the rule and that it is immaterial whether the assignee decree-holder is one against whom a personal money decree has been passed or one who has been directed to pay the decretal debt out of the assets in his hands.

For meaning of "decree for payment of money," see Note 6 to Section 73 *ante*.

**18. Attachment of decree by co-judgment-debtor.** — One *S* obtained a decree against *A*, *B*, *C* and *D*. *A* obtained decree against *S* and attached the decree of *S* and applied under O. 21 R. 53 for execution of *S*'s decree against his co-judgment-debtors *B*, *C* and *D*. It was held that *A*, by attaching *S*'s decree, did not become an assignee thereof, that the prohibition in this rule did not therefore apply to such a case and that *A* was entitled to execute the decree.<sup>1</sup>

**19. Application for substitution by transferee.** — A transferee from a decree-holder can only apply under this rule to *execute* the decree; an application *merely for recognising* him as transferee is legally incompetent and must be rejected.<sup>1</sup> It is not also necessary for the validity of the proceedings that the substitution of the name of the transferee is actually made.<sup>2</sup> All that is necessary is that the transferee should merely file his application for execution of the decree setting out either in it or in an affidavit filed in support thereof that he is such a transferee; thereupon the Court orders the application for execution to proceed or rejects it.<sup>3</sup> But, although a separate application by the transferee of a decree merely for substitution in place of the original decree-holder is not formally required under the Code, the prayer for such substitution is necessarily implied in an application by him for execution of the decree under O. 21 R. 16 and the substitution of his name is, in practice, generally

**O. 21 R. 16**  
**Notes 17-19**

the mortgage decree cannot recover the whole of the mortgage money from the other portion of the mortgaged property, although his right to execute the decree is not totally extinguished.)

(37) 1937 Mad W N 384 (385.)

4. ('07) 81 Bom 308 (312, 313).

5. ('85) 11 Cal 393 (396).

6. ('32) AIR 1932 All 704 (707) : 54 All 448.

7. ('24) AIR 1924 Nag 41 (41) : 19 Nag L R 151.

#### Note 18

1. ('09) 2 Ind Cas 626 (627) (All).

#### Note 19

1. ('18) 21 Ind Cas 609 (609) (Mad). (An amendment of such application by adding a prayer for execution will not be allowed in appeal.)

('88) AIR 1938 Mad 797 (797, 798). (Application by assignee to be recognized as decree-holder and for transmission of decree for execution is a petition for execution.)

('85) AIR 1935 Sind 26 (26).

('88) AIR 1938 Sind 341 (342) : 27 Sind L R 314. (Such an application is not one in accordance with law.)

(12) 14 Ind Cas 704 (705) (Mad).

('04) 14 Mad L Jour 393 (393).

('27) AIR 1927 All 165 (167) : 49 All 509 (I R).

('26) AIR 1926 Cal 957 (958).

('28) AIR 1928 Oudh 30 (31) : 3 Luck 126.

('87) AIR 1937 Bom 865 (867) : 1 I. R. (1937) Bom 691. (Application by transferee of decree merely to be brought on record is not an application in accordance with law as it is not an application in execution.)

[See also ('02) 29 Cal 235 (236). (Application to transmit to another Court treated as an application under this rule.)]

2. ('09) 8 Ind Cas 324 (326) (Cal).

('09) 1 Ind Cas 168 (174) : 36 Cal 543.

[See also ('78) 19 Suth W R 255 (260).]

3. ('25) AIR 1925 Mad 701 (702) : 48 Mad 553.

('38) AIR 1938 Bom 309 (310).

[See however ('87) AIR 1937 Bom 365 (368) : I L R (1937) Bom 691. (Transferee must first apply for execution to Court passing decree praying for notice — After notice is made absolute, he must apply for execution under O. 21 R. 11.)]



**O. 21 R. 16  
Note 19**

made before the execution is proceeded with.<sup>4</sup>

Where, during the pendency of execution proceedings, the decree-holder dies or transfers the decree by an assignment in writing, can the transferee apply under this rule to continue the execution proceedings? It has been held by the High Courts of Bombay, Calcutta, Madras and Patna and the Judicial Commissioner's Courts of Sind and Peshawar that it is open to the transferee either to apply for continuing the proceedings in execution or to make a fresh application.<sup>5</sup> The reason is that a pending execution application does not abate by reason of the death or devolution of any interest of the decree-holder and, therefore, the transferee can apply by virtue of Section 146 and this rule. Similarly, where the decree-holder dies while his application is pending in a Court to which the decree has been transferred for execution, his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on the record, or may apply to the executing Court for continuing the proceedings, subsequently producing from the Court which passed the decree the necessary order under this rule.<sup>6</sup> According to the High Court of Allahabad,<sup>7</sup> however, the transferee must apply, whenever he does apply, for *fresh execution*, even when the application by his predecessor is pending.

Though an application by the transferee *merely* for substitution of his name is not competent, still it is a step-in-aid of execution within the meaning of Article 182 of the Limitation Act so as to give a fresh starting point of time.<sup>8</sup> In cases governed by Article 183 of the Limitation Act, the order of the Court allowing the transferee to execute the decree after recognition of his transfer will operate as a revivor and be a fresh starting point of limitation.<sup>9</sup> The mere issue of a notice under this rule without a decision of the Court that the decree is executable will not, however, operate as a revivor.<sup>10</sup>

See also the undermentioned cases<sup>11</sup> holding that an application under this rule is an application in accordance with law within the meaning of Article 182 of the Limitation Act.

4. ('35) AIR 1935 Nag 230 (233) 31 Nag L R Sup 111.

5. ('31) AIR 1931 Bom 428 (423).

('30) AIR 1930 Cal 614 (616) : 57 Cal 1137.

('26) AIR 1926 Cal 957 (958). (An order for substitution only cannot be said to continue the execution application.)

('09) 3 Ind Cas 324 (326) (Cal).

('99) 26 Cal 250 (253).

('32) AIR 1932 Mad 73 (80) : 55 Mad 352 (F B). (Overruling AIR 1927 Mad 184 and approving AIR 1931 Mad 303.)

('21) AIR 1921 Pat 180 (182) : 6 Pat L Jour 358.

('24) AIR 1924 Pat 576 (578) : 3 Pat 596.

('30) AIR 1930 Sind 283 (284) : 24 Sind L R 195.

('37) AIR 1937 Pesh 18 (19).

('35) AIR 1935 Pat 117 (118) : 13 Pat 777.

6. ('30) AIR 1930 Cal 614 (615, 616) : 57 Cal 1137. [See also ('08) 11 Oudh Cas 112 (113).

('36) AIR 1936 Pesh 17 (18). (Death of original decree-holder during pendency of execution proceedings—Heirs can continue execution without producing succession certificate.)]

7. ('27) AIR 1927 All 165 (167) : 49 All 509 (F B). [See also ('81) 8 All 759 (765).]

[But see ('28) AIR 1928 All 299 (300) : 50 All 621. (Decided without referring to the Full

Bench ruling in AIR 1927 All 165.)]

8. ('07) 29 All 301 (302).

('33) AIR 1933 Rang 55 (56).

('28) AIR 1928 All 299 (300) : 50 All 621.

('08) 31 Mad 234 (235).

('07) 17 Mad L Jour 475 (475).

('07) 30 Mad 541 (543).

('80) 5 Bom 246 (248).

('35) AIR 1935 Nag 230 (233) : 31 Nag L R Sup 111.

('38) AIR 1938 Bom 309 (311). (Although such application is dismissed for non-payment of process-fees and for failure to serve notices on the judgment-debtors.)

[But see ('34) AIR 1934 Pat 662 (663). (Application under O. 21 R. 16, C. P. C., 1908, is not a step-in-aid.)]

('38) AIR 1938 Sind 341 (343) : 27 Sind L R 314.)]

9. ('29) AIR 1929 Mad 252 (256) : 52 Mad 599. [But see ('36) AIR 1936 Pat 398 (399) : 15 Pat 102.]

10. ('08) 30 Cal 979 (982).

('25) AIR 1925 Cal 23 (25). (As to the meaning of the term 'revivor', see AIR 1916 Cal 489.)

('36) AIR 1936 Pat 398 (399) : 15 Pat 102.

11. ('90) 1890 All W N 245 (246). (Petition con-



**20. Transfer of decree against company in liquidation.** — An application by a transferee of a decree, obtained against a limited company which has since gone into liquidation, for substitution of his name as decree-holder must, in spite of the provisions of Section 171 of the Companies Act, be made to the execution Court and not to the Court in which the winding up proceedings are pending.<sup>1</sup>

**O. 21 R. 16**  
**Notes 20-22**

**21. Equities enforceable against the original decree-holder.** — See Notes to Section 49. As to whether the prohibition under O. 34 R. 14 applies to the assignee of a decree, see Note 4 to Section 49 and O. 34 R. 14 and also the undermentioned case.<sup>1</sup>

**22. Appeal.** — An order allowing or dismissing an application by a transferee from a decree-holder made under this rule is appealable as a decree.<sup>1</sup> The reason is that, as mentioned already in Note 24 to Section 47, the transferee is a representative of the decree-holder and, therefore, a decision on a question whether any person is a representative or not of a party is one within the scope of Section 47, sub-section (3). Sub-section (3) to Section 47 was first introduced in Section 244 of the old Code by the Amending Act, VII of 1888, and the undermentioned decisions<sup>2</sup> prior to that Act holding that no appeal lay in such a case are no longer good law.

taining an unnecessary prayer for attachment of properties covered by a mortgage decree but not followed by an inventory.)

('07) 2 Mad L Tim 389 (340).

('09) 1 Ind Cas 57 (59, 60) (Cal). (Decree transferred for execution on application by executor—Beneficiary under will applying to transferee Court for execution without any authority from transferor Court—Application is in accordance with law when authority is subsequently obtained.)

('11) 9 Ind Cas 349 (350) (Bom). (Even though the instrument of transfer is not obtained.)

('96) 20 Bom 76 (78). (Even though succession certificate is not obtained.)

('95) 19 Bom 261 (268).

('93) 20 Cal 755 (757). (Even though no succession certificate is obtained.)

('08) 81 Mad 77 (79). (Even though the legal representative's name is not brought on the record.)

('94) 1894 Pun Re No. 27, p. 74. (Even though no succession certificate is obtained.)

('99) 1899 All W N 16 (16).

('80) 5 Cal L Rep 258 (256).

#### Note 20

1. ('19) AIR 1919 All 387 (387) : 41 All 432.

#### Note 21

1. ('01) 14 C P L R 35 (36). (Assignee cannot bring to sale the equity of redemption.)

#### Note 22

1. ('08) 25 All 443 (445).

('94) 16 All 483 (492).

('04) 1 All L Jour 61 (63). (He cannot, in a separate suit brought by him, in appeal ask the High Court for the first time to treat it as an execution application.)

('91) 1891 All W N 87 (88).

('87) 9 All 46 (48).

('78) 2 All 91 (92).

('87) 11 Bom 506 (512).

('72) 9 Bom H O R 49 (52).

('28) AIR 1928 Cal 835 (836).

('16) AIR 1916 Cal 471 (472). (Genuineness of purchase between assignee and attaching creditor of the decree.)

(1900) 27 Cal 670 (672, 673).

('99) 26 Cal 250 (252, 253).

('07) 11 Cal W N 239 (241). (Question between executor of decree-holder and judgment-debtor is one under S. 244 about his right to execute.)

('86) 12 Cal 610 (611).

('85) 11 Cal 393 (395).

('17) AIR 1917 Mad 605 (605, 606). (The subsequent dismissal does not take away the right of the judgment-debtor to appeal.)

('15) AIR 1915 Mad 1138 (1140).

('02) 25 Mad 383 (385).

('01) 25 Mad 545 (546).

('06) 16 Mad L Jour 27 (28).

('98) 21 Mad 388 (390). (Real transferee applying for execution of decree—Question determining whether he is real transferee is one falling under Section 47.)

('02) 15 C P L R 69 (72).

('91) 4 C P L R 132 (133).

('37) AIR 1937 All 63 (64).

('99) AIR 1999 Rang 376 (377). (But revision is incompetent.)

[See ('85) 11 Cal 150 (152). (Person adversely claiming against decree-holder is not a representative of the decree-holder.)]

[But see ('98) 20 All 539 (542).

('96) 1896 Pun Re No. 78, page 245.

('33) AIR 1933 Lah 473 (473). (Order recognizing transfer—Appeal by non-assigning co-decree-holder held to be not competent.)

('35) AIR 1935 Lah 609 (611). (Reversing on Letters Patent Appeal, A I R 1934 Lah 328—Validity of assignment questioned by judgment-debtor—Assignment upheld by Court—Held that as judgment-debtor had no interest in the issue involved, he had no right of appeal.)]

2. ('85) 7 All 457 (459).

('89) 12 Mad 511 (511).

**O. 21 R. 16**  
**Note 23**

**23. Suit by assignee for declaration of right or for refund of price.—**

Section 47, sub-section (3) provides that a question as to whether any person is, or is not the representative of a party *shall*, for the purposes of Section 47, be determined by the Court, *i. e.*, the Court executing the decree. The provision in Section 244 of the old Code corresponding to this sub-section was introduced in that Section by the Amending Act, VII of 1888 and ran as follows :

"If a question arises as to who is the representative of a party for the purposes of this Section, the Court may either stay execution of decree until the question has been determined by a *separate suit*, or itself determine the question by an order under this Section."

It was held in cases arising before the date of the amendment that a question as to the validity of the transfer of a decree entitling the transferee to execute the decree was not one within S. 244 and that a suit raising such question was not barred.<sup>1</sup> In one class of cases arising *after* the date of the said amendment it was held that where an application by the transferee under S. 232 of the old Code (O. 21 R. 16) was rejected, the transferee could not be considered to be the representative of the decree-holder and that the question of the validity of the transfer not being thus "*between the parties or their representatives*" was not one within S. 244 and could be agitated in a separate suit by the transferee.<sup>2</sup> In a second class of cases it was held that the above amendment left two courses open to the Court, namely, of either determining the question in execution itself or of referring the parties to a separate suit, and that a mere dismissal of an application under S. 232 did not bar a suit by the transferee for declaration of his right.<sup>3</sup> In a third class of cases it was held that the bar of suit in respect of questions falling within the first sentence of S. 244 could not be reasonably extended to cases falling under the amendment, and a suit was, therefore, not barred.<sup>4</sup>

In view of the present sub-rule (3) it is now clear that a suit raising such a question for the purposes of execution is barred.<sup>5</sup> The High Court of Lahore<sup>6</sup> has, however, taken a contrary view relying on *Bommanapati Veerappa v. Chintakunta Srinivasa*, I. L. R. 26 Madras 264, a decision under the old Code. It is submitted that the decision cannot be accepted as correct. But, where the dispute as to the validity of the assignment of the decree is one purely between the decree-holder and the person claiming to be the assignee, the question being purely one between a party and his own representative, does not fall under Section 47 and a separate suit to agitate the question is not barred.<sup>7</sup> See Notes 5 and 27 to Section 47.

Where a transfer of a decree is not recognized by the executing Court, the transferee is entitled to sue the assignor for refund of the money received by him for the assignment.<sup>8</sup> But the assignee is not entitled to treat the assignment in his favour

(78) 3 Cal 871 (373). (Case under the Code of 1859.)

(71) 15 Suth W R 283 (283). (Do.)

(73) 20 Suth W R 305 (307). (Do.)

[See also (70) 18 Suth W R 224 (226). (Do.)]

**Note 23**

1. ('91) 14 Mad 478 (479).

('86) 12 Cal 105 (107).

[See also ('85) 7 All 457 (459). (Proceeds on the view that as transferee was not recognized he was not a party and therefore a suit lies—Though reasoning is not correct, the conclusion is correct.)]

2. ('96) 20 All 539 (543). (Following 7 All 457.) (1900) 3 Oudh Cas 32 (37).

('05) 28 Mad 64 (65, 66).

[See also ('98) 25 Cal 49 (52). (Dispute arising

between two parties each of whom claims to be representative of the decree-holder.)]

3. [See ('96) 1896 All W N 201 (202).]

4. ('08) 26 Mad 264 (265).

[See also ('98) 21 Mad 353 (356).]

5. ('15) AIR 1915 Mad 799 (799, 800).

('88) AIR 1988 Mad 78 (80).

[See also ('06) 28 All 613 (618).]

6. ('29) AIR 1929 Lah 51 (52).

7. ('87) AIR 1937 Lah 465 (467); I L R (1937) Lah 162. (It may be noted also that under the amendment of Rule 16 by the Lahore High Court the judgment-debtor is not a necessary party to the proceedings for the recognition of the transfer of a decree.)

8. ('98) 16 Mad 825 (826).

('97) 20 Mad 157 (158).

as ineffectual and to maintain a suit, unless he has taken steps to have his transfer recognized. Thus where, after a transfer was effected the decree was attached at the instance of a third person, and the assignee's application for execution was dismissed wrongly on the ground that the decree had been attached, and thereupon the assignee filed a suit for refund of the purchase money, it was held that it was his duty to have the attachment removed by presenting a claim to the attaching Court on the strength of his assignment and that, unless such a claim was presented and rejected, he could not succeed in the suit.<sup>9</sup>

**O. 21 R. 16**  
**Note 23**

**R. 17.** [S. 245.] (1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

**O. 21 R. 17**

**Procedure on receiving application for execution of decree.**

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

#### **Local Amendments**

##### **ALLAHABAD**

*Between* the words "been complied with" and "the Court may" insert the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court."

##### **CALCUTTA**

In sub-rule (1), *cancel* the words "the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" and *substitute* therefor the following :

"the Court shall allow the defect to be remedied then and there or within a

**O. 21 R. 17** time to be fixed by it. If the defect is not remedied within the time fixed, the Court may reject the application."

#### LAHORE

For the words "and, if they have not been . . . to be fixed by it" in sub-rule (1) *substitute* the following words:

"and, if they have not been complied with, the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application."

#### MADRAS

(1). For the words "or may allow . . . fixed by it" in sub-rule (1), *substitute* the words "if the defect is not remedied within a time to be fixed by it."

(2). *Add* the following proviso at the end of the rule:

"Provided that where an execution application is returned on account of inaccuracy in the particulars required under Rule 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount."

#### NAGPUR

In sub-rule (1) for the words "and, if they have not been complied with . . . within a time to be fixed by it," *substitute* the words "and, if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."

#### ODDH

In sub-rule (1), *delete* the last sentence beginning with the words "and, if they . . . ." and ending with the words "to be fixed by it," and *substitute* the following sentence in lieu thereof:

"and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied; and, in case the decree holder fails to remedy the defect within such time, the Court may reject the application."

#### PATNA

In sub-rule (1) *substitute* the following for the words "the Court may reject the application, etc.," to the end of the sub-rule:

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it, and, if the decree-holder fails to remedy the defect within such time, the Court may reject the application."

#### RANGOON

In sub-rule (1) for the words "the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it" the following shall be *substituted* namely:

"the Court may reject the application if the defect is not remedied within a time to be fixed by it."

### Synopsis

- |  |   |
|--|---|
| 1. Legislative changes.  | 6. Execution of declaratory decree.                 |
| 2. Procedure on receiving an application for execution.              | 7. Execution of rent decree under the Tenancy Acts. |
| 3. Amendment and limitation.   | 8. Execution of maintenance decree.                 |
| 4. Non-compliance with the order of amendment within the time fixed. | 9. Value of property attached.                      |
| 5. Procedure on admission of application.                            | 10. Appeal.   |

*Other Topics (miscellaneous)***O. 21 R. 17  
Notes 1-3**

Amendment not made — How far application in accordance with law. See Note 4.

Sale of more properties than sufficient — Court, whether can set aside the sale. See Note 9.

Scope of the Rule. See Notes 2 and 3.

Sub-rule (2). See Note 3.

**1. Legislative changes. —**

1. The words "may allow it to be amended" have been replaced by the words "may allow the defect to be remedied." The object is to make the rule clear and comprehensive so as to include cases of *defects* such as omission to file a copy of the decree.

2. Sub-rule (2) is new. See Note 3, *infra*.

**2. Procedure on receiving an application for execution. —** Sub-rule (1) proscribes the procedure to be followed on receiving an application for execution of a decree. It casts a duty upon the Court to ascertain whether such of the requirements of Rules 11 to 14 as are applicable have been complied with or not. If they are not complied with, the Court can either reject the application at once or allow the defect to be remedied then and there or within a time fixed.<sup>1</sup> If it does neither, it cannot, after the period of limitation for execution has expired, reject the application without giving the decree-holder an opportunity to amend the application.<sup>2</sup> Under this rule the executing Court has got a discretion to allow the necessary amendments.<sup>3</sup>

**3. Amendment and limitation. —** This rule contemplates the amendment of defects in the execution application before *admission and registration*. But supposing the Court overlooks the defects and registers the application, can they be subsequently amended during the pendency of the application? The answer to this depends upon the question whether the decree is or is not barred by limitation on the date of the amendment. If there is no bar of limitation, the amendment can, according to the Patna High Court, be allowed.<sup>1</sup> The reason is that a substantive fresh application can be entertained on that date, and that there is nothing which prevents the Court from treating the amended application as a fresh application for execution.<sup>2</sup> A Full Bench of the Calcutta High Court has, on the other hand, held in *Asgar Ali v. Troilokyanath*, I. L. R. 17 Calcutta 631 (F. B.), that "Section 245 by implication excludes the power of the Court to amend after admission and registration." It was held by the Patna High Court in *Ram Sumran v. Ram Bahadur*, AIR 1923 Patna 224, that the said observations should be understood only as referring to the particular case before the Full Bench where the decree was *barred* on the date when the defect (*viz.*, omission to file a list of property) was sought to be amended. The decision in *Asgar Ali's* case

**Order 21 Rule 17 — Note 2**

1. ('20) AIR 1920 Lah 122 (122).
- ('38) AIR 1938 Oudh 75 (75, 76). (Application for rateable distribution merely is not application for execution—It must be amended under O. 21, R. 17 to proceed in execution.)
- ('24) AIR 1924 Mad 867 (867).
- ('26) AIR 1926 Mad 260 (260).
- ('24) AIR 1924 Pat 23 (24) : 2 Pat 809.
- ('22) AIR 1922 Pat 409 (410, 411) : 1 Pat 149.
- ('85) 1885 All W N 804 (804).
- ('82) AIR 1982 Cal 766 (767, 768) : 59 Cal 1266.
- ('66) 6 Suth W R Misc 15 (16).
- ('19) AIR 1919 Lah 95 (96).
- [See ('88) AIR 1988 Lah 515 (520).]

2. ('84) 10 Cal 541 (543, 544).
- ('66) 6 Suth W R Misc 15 (16).
3. ('33) AIR 1933 P C 68 (70) : 60 Ind App 83 : 60 Cal 662 (PC). (Appellate Court thinking discretion was rightly exercised — Privy Council refused to interfere.)

**Note 3**

1. ('23) AIR 1923 Pat 224 (225) : 2 Pat 328.
- ('32) AIR 1932 Pat 306 (307) : 11 Pat 508.
- ('13) 18 Ind Cas 526 (526, 527) : 1912 Pun Re No. 118.
2. ('23) AIR 1923 Pat 224 (225) : 2 Pat 328.
- ('29) AIR 1929 Pat 407 (409) : 8 Pat 462.
- ('32) AIR 1932 Pat 306 (307) : 11 Pat 508 (513).
- ('19) AIR 1919 Cal 261 (262).

**O. 21 R. 17**  
**Note 3**

was distinguished by the Calcutta High Court itself in a recent decision<sup>3</sup> in which it was held that even after an execution application is registered, the Court has jurisdiction to allow an amendment of the application, provided the period of limitation for the application for execution has not expired.

Where, however, on the date when the defect is sought to be amended the decree would be barred by limitation, there is a conflict of opinion as to whether or not an amendment can be allowed. On the one hand, the High Court of Calcutta<sup>4</sup> holds that no amendment is permissible on the ground that the Court is not empowered under the rule to allow such an amendment. The Sind Judicial Commissioner's Court<sup>5</sup> also has held that an application for execution cannot be allowed to be amended after the period of limitation for the application has expired. On the other hand, the High Court of Madras<sup>6</sup> holds that the Court can allow such an amendment under sub-rule (1) and that such amendment relates back to the date of the application. The reasoning of the Madras High Court is that the law casts a duty upon the Court to notice the defects in the application before admission and if the Court had done its duty properly, the defects could have been remedied within time, and that the decree-holder should not be made to suffer for the failure of the Court to do its duty. The High Courts of Allahabad,<sup>7</sup> Lahore<sup>8</sup> and Patna<sup>9</sup> and the Judicial Commissioner's Court of Peshawar<sup>10</sup> have also allowed the defects to be amended, though the decree had become barred on the date of the amendment. The Bombay High Court<sup>11</sup> has also held that the Court has power to allow an application for execution to be amended even after the expiry of the period of limitation for such application..

Sub-rule (1) refers only to the requirements of Rules 11 to 14. Consequently the rule does not apply where the defect in the execution application is one which has no

**3. ('85) AIR 1985 Cal 614 (617).**

[See also ('85) 39 Cal W N 1144 (1145) (The Court has always got the power to make an order allowing the amendment of an execution petition in the interests of justice. Its power is not limited by O. 21 R. 17, C. P. C.)]

**4. ('90) 17 Cal 681 (685 to 641) (FB). (Overruling 14 Cal 124.)**

('14) AIR 1914 Cal 359 (360).

('25) AIR 1925 Cal 1048 (1050). (Following 17 Cal 681 (FB).)

('86) 12 Cal 161 (165).

[But see ('18) AIR 1918 Cal 78 (74). (Where the original application was one in accordance with law, and a supplementary list of properties was allowed to be filed. Distinguishing 17 Cal 681.)]

**5. ('35) AIR 1935 Sind 26 (26).**

[See also ('39) AIR 1939 Sind 272 (278). (It cannot be said that because the duty is cast upon the Court under O. 21 R. 17 to see whether the requirements of Rules 11 to 14 are complied with, the decree-holder is therefore protected from the ordinary consequences which follow when his request to the Court for its assistance is barred by time.)]

6. ('24) AIR 1924 Mad 867 (868). (Following 17 Mad 67.)

('85) AIR 1985 Mad 161 (169). (Execution application filed *bona fide* against wrong legal representative within time—Amendment allowed but after 12 years' time—Amendment takes effect

from date of original presentation.)

('28) AIR 1928 Mad 24 (25). (Following A I R 1924 Mad 867.)

[See also ('15) AIR 1915 Mad 837 (837). (Court has wide powers of amendment under S. 153 and under such powers, execution application was allowed to be amended by adding a prayer for attachment.)]

[See however ('26) AIR 1926 Mad 260 (260). (The petitioner is not entitled to insist for amendment as of right.)

('11) 9 Ind Cas 760 (760) (Mad). (Amendment cannot be allowed to the prejudice of the judgment-debtor by inserting a prayer for attachment after the decree is barred.)

('14) AIR 1914 Mad 668 (664).]

[But see ('19) 21 Ind Cas 609 (609) (Mad). (Amendment of application for execution application by adding prayer for execution refused to be allowed at appellate stage—17 Cal 681 (F B), Followed.)]

7. ('93) 1893 All W N 112 (113).

('98) 20 All 478 (480).

8. ('20) AIR 1920 Lah 122 (122).

('05) 1905 Pun Re No. 27, page 108.

9. ('32) AIR 1932 Pat 222 (223, 224): 11 Pat 546.

10. ('84) AIR 1984 Pesh 40 (42).

11. ('37) AIR 1937 Bom 865 (870): I L R (1937) Bom 691.

('38) AIR 1938 Bom 405 (408): I L R (1938) Bom 708. (Application for execution by attachment—Particulars of property to be attached not speci-

reference to Rules 11 to 14.<sup>12</sup> The Court can, however, amend such defects under its general powers.<sup>13</sup> As to whether a defect by reason of non-compliance with O. 21 R. 15 can be amended under this rule, see Rule 15, *ante*.

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Notes 3-4**

*Effect of amendment.* — In the absence of any provision under the old Code corresponding to sub-rule (2), there was a conflict of opinion as to whether an amendment took effect only from the date of the *amendment* or from the date of the *application*, and whether the original application which was defective could be considered as being in accordance with law within the meaning of Article 179, clause 4 of the Limitation Act of 1877 (Article 182, clause 5 of the present Limitation Act of 1908) so as to operate as a fresh starting point of limitation.<sup>14</sup> Under sub-rule (2) of this rule it is now clear that the application, though defective, when presented should be deemed to be in accordance with law when the defect is subsequently amended and the amendment dates back to the original date of the application.<sup>15</sup> The effect of the sub-rule is to preclude the judgment-debtor from raising any objection at a later stage on the ground that the application was not in accordance with law at the time it was presented.<sup>16</sup> If, however, the Court without giving an opportunity to amend *rejects* the application, the rejected application cannot be considered to be in accordance with law.<sup>17</sup> Similarly, where the subsequent application is not one for *amendment* of the original application but is really an independent application for execution asking for a relief not included in the original application, sub-rule (2) cannot apply and the subsequent application cannot be deemed as presented on the date of the original application.<sup>18</sup>

As to whether an application returned for amendment and not re-presented is one in accordance with law, see Note 4 below.

#### 4. Non-compliance with the order of amendment within the time fixed.

— Sub-rule (1) empowers the Court to fix a time for the amendment of the execution application. If the party fails to amend within the time fixed or such further time as the Court may extend, the proper course is to reject the application.<sup>1</sup> If, notwithstanding the decree-holder's failure to amend the defect within the time fixed, the Court does not reject the application, it is not precluded from allowing a fresh application for amendment at a subsequent stage.<sup>2</sup>

If the Court returns an application for amendment of the defects, and the

fled—Application to amend by giving particulars after limitation can be allowed.)

12. [See ('89) AIR 1938 Oudh 288 (289). (Execution application filed within time illegally returned by Court for correction — Application filed after some months is not fresh, but same application.)]

13. ('82) AIR 1932 Cal 766 (768) : 59 Cal 1266. [See ('85) AIR 1935 Sind 26 (26). (Application by assignee merely asking for assignee to be brought on record without prayer for execution—*Held*, application should not be amended so as to defeat the law of limitation.)]

14. ('08) 26 Mad 101 (108). (No.)  
(96) 28 Cal 217 (222 to 226). (No.)  
(84) 10 Cal 541 (548, 544). (Yes.)  
(83) 5 All 576 (577). (Yes.)

15. ('10) 7 Ind Cas 19 (21) (Cal).  
(19) AIR 1919 Mad 220 (221, 222).  
(80) AIR 1930 Oudh 65 (66, 67) : 5 Luck 458.

(87) AIR 1937 Bom 365(370): I LR (1937) Bom 691.

16. ('28) AIR 1928 Mad 440 (443).

(30) AIR 1930 Cal 353 (355).

17. ('18) AIR 1918 Cal 245 (246).

(23) AIR 1923 Nag 236 (237).

(21) AIR 1921 Nag 28(28, 29, 30): 17 Nag LR 179.

(83) 1883 Pun Ro No. 23.

18. ('88) AIR 1938 Cal 162 (163). (Application for execution by arrest of judgment-debtor and sale of holding if necessary—Subsequent application asking for attachment of moveables is not one for amendment of previous application.)

#### Note 4

1. ('90) 17 Cal 631 (635) (FB).

(84) 10 Cal 541 (544).

(96) 28 Cal 217 (224).

(16) AIR 1916 Cal 356 (357). (Court can extend time under S. 148.)

(21) AIR 1921 Nag 28 (29) : 17 Nag LR 179.

2. ('84) 10 Cal 541 (544).

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decree-holder does not re-present it within the time fixed, the question arises whether such an application can be treated as one in accordance with law within the meaning of Article 182, clause 5 of the Limitation Act so as to operate as a fresh starting point of limitation for execution. The answer to this question depends upon another question, namely, whether the defect for the amendment of which the application was returned was a *material* defect, without the amendment of which further proceedings could not be taken, or was only a *formal* defect.<sup>3</sup> In the latter case the application will be one in accordance with law,<sup>4</sup> while in the former case it will not.<sup>5</sup>

Where the application is returned not for any defect in Rules 11 to 14 but for some other defect, it has been held by the Allahabad and the Patna High Courts that the application will be one in accordance with law.<sup>6</sup>

**5. Procedure on admission of application.** — Sub-rule (4) prescribes the procedure to be followed after admission of the application. If it is not in any way defective the Court is bound to order execution according to the nature of the application.<sup>1</sup> Thus, if the decree-holder prays for the arrest of the judgment-debtor, the Court cannot refuse the same and direct him to proceed against the property in the first instance.<sup>2</sup> No enquiry as to whether the property sought to be proceeded against belongs to the judgment-debtor is contemplated under the rule before execution can be ordered.<sup>3</sup>

**6. Execution of declaratory decree.** — See Note 33 to Section 47 and Note 5 to Section 38, and the undermentioned cases.<sup>1</sup>

('83) 12 Cal L Rep 279 (280).

('82) 8 Cal 479 (481).

3. ('93) 16 Mad 142 (143).

('94) 17 Mad 76 (77).

('88) 6 Mad 250 (251).

('14) AIR 1914 Mad 632 (633).

('16) AIR 1916 Mad 958 (958).

('98) 25 Cal 594 (597, 598) (FB). (Explaining 23 Cal 217.)

('96) 23 Cal 217 (222, 223, 228).

('10) 8 Ind Cas 833 (834) (Cal).

[See also ('15) AIR 1915 Mad 1042 (1048). (Decisions under the present Code.)

('10) 5 Ind Cas 579 (580) (Cal).]

4. ('18) AIR 1918 All 242 (248) : 40 All 209. (Omission to file a copy of decree.)

('33) AIR 1933 Mad 568 (569). (Application against legal representative of judgment-debtor — No express prayer for adding the legal representative.)

('34) AIR 1934 Nag 117 (118, 119). (Execution application — Rejection as being incorrect does not amount to finding that it is not in accordance with law and such application saves time.)

('18) AIR 1918 Low Bur 103 (104).

('08) 31 Mad 68 (70). (Omission to mention if an appeal has been filed against decree.)

('09) 1 Ind Cas 240 (242) : 5 Nag L R 8. (Omission to specify the Court which passed the decree.)

('26) AIR 1926 Cal 1077 (1081, 1082) : 53 Cal 664. (Incorrect calculation of interest and costs.)

('22) AIR 1922 Pat 409 (411) : 1 Pat 149. (Incorrect calculation of interest.)

('95) 1895 All W N 18 (18). (Overstating the amount due under the decree.)

('01) 18 Cal 462 (465). (Property not specified but reference given to prior application.)

('18) AIR 1918 Pat 41 (51) : 4 Pat L Jour 213.

('17) AIR 1917 Mad 886 (886). (O. 21 R. 17, O. P. Code was not intended to affect the construction put upon the words "applying in accordance with law" occurring in Art. 182 of the Limitation Act by judicial decisions in dealing with formal defects in execution applications.)

('28) AIR 1928 Mad 440 (441, 448). (Do.)

5. ('90) 17 Cal 631 (637) (FB). (List of property not filed.)

('31) 135 Ind Cas 15 (15) (Mad). (Party not signing and verifying application.)

('20) AIR 1920 Pat 615 (616). (Decree-holder failing to comply with a conditional order of Court.)

('22) 65 Ind Cas 120 (120) (Pat). (Amount of the decree and costs not shown — Held material defect.)

6. ('82) AIR 1932 All 484 (484).

('24) AIR 1924 Pat 23 (24) : 2 Pat 809.

**Note 5**

1. ('26) AIR 1926 Lah 110 (110) : 6 Lah 548.

('67) 8 Suth W R 232 (234).

('96) 18 All 482 (486).

2. ('82) 8 Cal 297 (299). (The word 'granted' is equivalent to 'admitted'.)

3. ('69) 12 Suth W R 829 (830).

('85) AIR 1935 Lah 114 (114). (Court declining to attach property on ground that it is mutated in name of some person other than the judgment-debtor — Court has no power to do so where the third person does not take any objection.)

**Note 6**

1. ('85) 9 Bom 108 (110). (Declaratory decree cannot be executed.)

('94) 21 Cal 784 (789) : 21 Ind App 89 (PC). (Do.)



**7. Execution of rent decrees under the Tenancy Acts.** — A landlord who obtains a decree for arrears of rent of an under-tenure is not restricted by the provisions of the Bengal Tenancy Act to execute the decree in the first instance by sale of the under-tenure. He is at liberty to execute it in the ordinary manner against the person or property of his judgment-debtor.<sup>1</sup> Section 163 of the Bengal Tenancy Act, VIII of 1885, and Section 217 of the Bihar and Orissa Tenancy Act, II of 1913, prescribe that the Court shall, on the admission of the application for execution, order the issue simultaneously of the order of attachment and the proclamation for sale.

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**8. Execution of maintenance decree.** — A decree declaring a person's right to maintenance at a certain rate and also directing the payment of such maintenance by future instalments is not a mere declaratory decree and can be executed as each instalment falls due.<sup>1</sup>

Where a decree awarding future maintenance also charges certain property for the due payment thereof, the decree-holder can, if there is default, apply for an order for the sale of the property or file a fresh suit to enforce the charge.<sup>2</sup> The High Court of Calcutta<sup>3</sup> has held that, to avoid the difficulty of a further suit, the Court can provide in the decree for maintenance for the appointment of a receiver with directions to take possession of the property in case of default and sell the same and pay the maintenance from out of the sale proceeds.

**9. Value of property attached.** — Under the proviso to the rule the Court should call upon the decree-holder to specify the approximate value of the property to be attached, to see that the value of the property to be attached corresponded as nearly as may be with the amount due under the decree.<sup>1</sup> But, if more property than is necessary is attached and sold and a purchaser buys the same without notice of the fact that the amount realized by sale of the other plots was more than sufficient to satisfy the decree, the sale in his favour cannot be set aside.<sup>2</sup>

**10. Appeal.** — An appeal lies against an order returning an execution application on the ground that the decree-holder is not entitled to calculate the amount due to him on the basis adopted in the petition, and directing him to amend the same.<sup>1</sup> But an order allowing the decree-holder to withdraw the execution proceedings does not determine anything under Section 47 and is not appealable.<sup>2</sup>

#### Note 7

1. ('88) 15 Cal 492 (494, 496).
- ('90) 17 Cal 301 (303).
- ('99) 26 Cal 103 (108).
- ('04) 8 Cal W N 575 (577).

#### Note 8

1. ('92) 19 Cal 139 (146) (FB).
- ('88) 12 Bom 65 (67).
- ('87) 9 All 33 (34).
- ('94) 16 All 179 (181).
- ('87) 10 Mad 283 (288) (FB). (The decree can be executed against the legal representative of the judgment-debtor.)
- ('07) 30 Mad 324 (326). (Do.)
2. ('97) 2 Cal W N 33 (33).
- [See however ('95) 22 Cal 903 (903).]

3. ('99) 26 Cal 441 (448).

#### Note 9

1. ('29) AIR 1929 Nag 305 (306, 308).
- ('98) 20 All 412 (418) : 25 Ind App 146 (PC).
- [See ('85) AIR 1935 Pat 143 (144). (Execution of money decree—Decree-holder attaching whole of judgment-debtor's land — Judgment-debtor objecting — Court finding that property was worth more and ordering sale of only part of the property does not act without jurisdiction.)]
- [See also ('92) 16 Bom 91 (114).]
2. ('19) AIR 1919 Cal 1095 (1096).

#### Note 10

1. ('14) AIR 1914 Mad 532 (533) : 18 Ind Cas 607 (607) : 37 Mad 314.
2. ('18) 19 Ind Cas 904 (905) (Cal).

O. 21 R. 18

**R. 18.** [S. 246.] (1) Where applications are made<sup>8</sup> to a Court for the execution of cross-decrees<sup>9</sup> in separate suits<sup>4</sup> for the payment of two sums of money<sup>3</sup> passed between the same parties<sup>5</sup> and capable of execution at the same time<sup>7</sup> by such Court, then —

Execution in case of cross-decrees.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum<sup>9</sup> and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees<sup>10</sup> and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless —

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

#### *Illustrations*

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule.

(b) *A* and *B*, co-plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross-decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C*, who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F*, singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint-decree as a cross-decree under this rule.

[1877, Ss. 233, 243, 246; 1859, S. 209. See S. 49 and O. 21, Rr. 19, 20 and 29.]

## Synopsis

**O. 21 R. 18**  
**Notes 1-2**

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. <b>Legislative changes.</b></li> <li>2. <b>Scope and applicability of the Rule.</b></li> <li>3. <b>Cross-decrees for the payment of two sums of money.</b></li> <li>4. <b>Cross-decrees in separate suits.</b></li> <li>5. <b>"Between the same parties."</b></li> <li>6. <b>Same character in both suits necessary.</b></li> </ol> | <ol style="list-style-type: none"> <li>7. <b>Decrees must be capable of execution at the same time.</b></li> <li>8. <b>Decrees must be in the same Court for execution.</b></li> <li>9. <b>Execution can be had only of the decree for the larger sum.</b></li> <li>10. <b>Assignment of the decree.</b></li> <li>11. <b>Sub-rule (4).</b></li> </ol> |
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### Other Topics (miscellaneous)

- |   |   |
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| <p>Applicability only after application for execution. See Note 8.</p> <p>Applicability to an adjudication under S. 144. See Note 4.</p> <p>Barred decrees. See Note 7.</p> <p>Bonami decree-holders. See Note 5.</p> <p>Claims of holder of decree for smaller sum. See Note 9.</p> <p>Claims pending in a suit. See Note 2.</p> <p>Claims under decrees pending, or liable to, appeal. See Notes 7 and 10.</p> <p>Counter-claims. See Note 4.</p> | <p>Court to which application is made. See Note 8.</p> <p>Cross-claims. See Note 4.</p> <p>Cross-decrees in respect of mesne-profits. See Note 3.</p> <p>Decrees of different Courts. See Note 8.</p> <p>Essential conditions for set-off. See Note 2.</p> <p>Execution for smaller sum not invalid. See Note 9.</p> <p>Inapplicability to private awards. See Note 4.</p> <p>Mortgage-decrees. See Note 3.</p> <p>Set-off by order of Court. See Note 8.</p> |
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#### 1. Legislative changes. —

1. The words "where applications are made to a Court for the execution of cross-decrees in separate suits" in sub-rule (1) are new.
2. Sub-rule (4) is new.
3. Illustration (d) is new.

**2. Scope and applicability of the Rule.** — This rule provides that cross-decrees for the payment of money shall be set-off against each other. In order that this rule may apply the following conditions must be satisfied —

- (1) The decrees must be for the payment of *definite sums of money*. (Note 3.)
- (2) They must have been passed in *separate suits*.<sup>1</sup> (Note 4.)
- (3) The decree-holder in one must be the judgment-debtor in the other.
- (4) The parties must fill the *same character* in both suits. (Note 6.)
- (5) Both decrees must be capable of execution<sup>2</sup> and must be so *at the same time and by the same Court*. (Notes 7 and 8.)
- (6) Applications should have been made to the Court for execution of both decrees. (Note 8.)

If the above conditions are satisfied the set-off should be worked out as follows —

- (1) If the amounts under the two decrees are equal, then the two decrees shall satisfy each other and full satisfaction shall be entered upon both.
- (2) If the amounts under the two decrees are not equal, then full satisfaction shall be entered upon the decree for the smaller amount, and part satisfaction upon the decree for the larger amount; and execution shall be allowed only under the latter decree and for so much only as remains due after the set-off. (Note 9.)

A right to set-off under this rule cannot be defeated by an assignment of either decree (Note 10) or by its attachment by the other decree-holder,<sup>3</sup> or by a

#### Order 21 Rule 18 — Note 2

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| <ol style="list-style-type: none"> <li>1. ('68) 9 Suth W R 590 (591).</li> </ol> | <ol style="list-style-type: none"> <li>2. ('71) 16 Suth W R 808 (809).</li> <li>3. ('29) AIR 1929 All 502 (502).</li> </ol> |
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**O. 21 R. 18**  
**Notes 2-4**

stranger.<sup>4</sup> Similarly, where *A, B, C* and *D*, hold decrees against *X*, and *X* holds a decree against *A* and the circumstances are otherwise such that the two decrees can be set off against each other, *B, C* and *D* cannot object to such setting off on the ground that *X*'s decree against *A* should be executed and the proceeds of execution should be rateably distributed among all the decree-holders of *X*.<sup>5</sup>

Where an application is made for the execution of a decree and a suit which is capable of resulting in a cross-decree of the kind contemplated by this rule is at that time pending in *the Court which passed that decree*, the execution may be stayed under Rule 29. But if such suit is pending in any *other Court*, Rule 29 will not apply.<sup>6</sup>

In *Hazariram v. Bansidhar*,<sup>7</sup> their Lordships of the Privy Council observed as follows: "It is true that under Rules 18 to 20 the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction. Whatever they arise from, circuitry of proceedings thereunder can be avoided and should be avoided: this is the principle of the rules."

It has been held that apart from the provisions of this rule and Rule 19 *infra*, the Court has inherent power to allow a set-off in execution proceedings.<sup>8</sup>

**3. Cross-decrees for the payment of two sums of money.** — The first condition for claiming a set-off under this rule is that the decrees should be for the *payment of money* and that the amounts under each decree should be *definite and ascertained*.<sup>1</sup> A decree directing recovery of money by sale of immovable property is a decree for the payment of money under this rule,<sup>2</sup> even though it may be in enforcement of a charge.<sup>3</sup> But a mortgage decree in which there is no *personal* liability does not fall within this rule.<sup>4</sup> See Notes to Rule 20, *infra*.

A decree for mesne profits of which the amount has not been ascertained cannot be set off under this rule as the amount is not *definite*.<sup>5</sup>

**4. Cross-decrees in separate suits.** — The second condition is that there must be cross-decrees and they must have been passed in *separate suits*. An adjudication under Section 144 of the Code is a *decree* to which this rule will apply;<sup>1</sup> but a private *award* is not an adjudication.<sup>2</sup>

4. ('80) 2 All 866 (868). (Case under S. 209 of the Code of 1859.)

('88) AIR 1938 All 180 (181).

('87) AIR 1937 All 422 (422).

[See however ('35) AIR 1935 Mad 587 (588).

(The attachment of one of the decrees by various other decree-holders made it incapable of execution without their concurrence—Hence, it was not capable of execution at the same time and so no set-off could be allowed — AIR 1925 Cal 102, Referred to and distinguished.)]

5. ('88) AIR 1938 All 180 (181).

6. ('67) 8 Suth W R 392 (393).

7. ('87) AIR 1937 PC 39 (41): 64 Ind App 67: 16 Pat 127 (PC).

8. ('38) AIR 1938 Sind 31 (32): 32 Sind L R 162. (Rr. 18 and 19 are not exhaustive — Court has inherent jurisdiction to allow set-off of claims arising at different stages of same proceeding and even if such claims are barred by limitation.)

('89) AIR 1939 Lah 85 (86). (Even if the right to recover the claim sought to be set-off is barred by limitation.)

('25) AIR 1925 Cal 102 (104).

[But see ('37) AIR 1937 Pesh 88 (84).]

**Note 3**

1. ('66) 5 Suth W R Misc 12 (12).

2. ('06) 29 Mad 318 (319).

('33) AIR 1933 Mad 63 (64): 56 Mad 339. (Mortgage decree itself providing for personal liability.)

3. ('10) 8 Ind Cas 835 (836): 35 All 240.

[See however ('86) AIR 1936 All 639 (641): 58 All 907. (Mortgage decree is not a decree for payment of money and cannot be set off against a simple money decree.)]

4. ('80) AIR 1980 Rang 68 (70, 71): 7 Rang 505. (29 Mad 318, Doubtful.)

('38) AIR 1938 Pat 210 (219).

5. ('88) 10 All 188 (193).

('69) 11 Suth W R 488 (489). (But even in cases where amount is not ascertained, if the parties agree to a mode of execution involving a set-off it should be allowed.)

**Note 4**

1. ('25) AIR 1925 Cal 102 (103, 104).

2. ('69) 11 Suth W R 144 (144).

Cross-claims in the *same suit* do not fall within this rule but come under Rule 19.<sup>3</sup>

**O. 21 R. 18**  
**Notes 4-7**

**5. "Between the same parties."** — It is necessary that the parties should be the same in both suits.<sup>1</sup> For this purpose it is the party *on the record* that has to be considered.

#### Illustrations

1. *A* holds a decree against *B*. *B* holds a decree against *C*. The two cannot be set off on the ground that, in respect of the first decree, *A* is *benamidar* for *C*.<sup>2</sup>

2. *A* holds a decree against *B*. *B* holds a decree against *A*. A set-off between the two cannot be objected to on the ground that in respect of the first decree *A* is a *benamidar* for *C*.<sup>3</sup>

#### 6. Same character in both suits necessary. —

#### Illustrations

1. *A* holds a decree against *B* *personally*. *B* files a suit on a mortgage executed by *C*, impleading *A* as a purchaser of a portion of the equity of redemption and obtains a decree. The two decrees cannot be set off.<sup>1</sup> In this illustration, *A* is no doubt acting in his own interest. But his *character* in the mortgage suit is *different* from that in the other suit inasmuch as the mortgage-decree is as against him not a decree for payment of money *personally*. If he had himself been the mortgagor, there would have been his personal liability and the two decrees could have been set off. (See for fuller discussion Notes to O. 21 R. 20). The expression "same character, etc." does not mean that the liability to pay which resulted in the decree should have been incurred by the parties themselves in both suits. Thus, a decree against a widow in respect of a debt contracted by her deceased husband can be set off against a decree obtained by the widow on a debt due to herself.<sup>2</sup> But in the undermentioned case<sup>3</sup> it was held that a decree obtained against the assets in the hands of the heir of a deceased person and a decree obtained by such heir against the holder of the former decree personally cannot be set off against each other.

2. A decree against a firm is binding on the partners personally. It can be set-off against a decree obtained by one of the partners against the holder of the former decree.<sup>4</sup>

**7. Decrees must be capable of execution at the same time.** — It is necessary that the decrees should be capable of execution at the *same time*.<sup>1</sup> Thus, there can be no set-off if one of the decrees is only a preliminary decree<sup>2</sup> or if its execution is time-barred,<sup>3</sup> or if its execution is expressly postponed till the happening of a certain contingency and the contingency has not happened,<sup>4</sup> or if it has already been satisfied.<sup>5</sup> But the fact that the judgment-debtor under one decree intends appealing against the decree will not make it inexecutable so as to prevent a set-off being allowed.<sup>6</sup>

It has been held in some decisions that apart from this rule and Rule 19, *infra*, the Court has inherent power to allow a set-off in execution proceedings even if the

3. ('83) 5 All 272 (273).

[See also ('32) AIR 1932 Lah 537 (537). (Costs in Letters Patent Appeal and under the decree in same suit—Neither Rule 18 nor Section 151 applies.)]

#### Note 5

1. ('66) 5 Suth W R Misc 12 (12).  
(('66) 5 Suth W R Misc 22 (23).  
(('87) 9 All 64 (67).

2. ('68) 10 Suth W R 450 (451).  
3. ('98) 8 Mad L Jour 220 (221).

#### Note 6

1. ('16) AIR 1916 All 290 (293) : 88 Mad 669.  
2. (1864) 1 Suth W R Misc 23 (23).  
(('14) AIR 1914 Mad 2 (8). (A decree obtained against husband can after his death be set off against a decree obtained by the widow against holder of decree against the husband.)  
3. ('89) AIR 1989 All 25 (27).

4. ('27) AIR 1927 Bom 255 (256).

#### Note 7

1. ('31) AIR 1931 Cal 23 (24) : 57 Cal 855.  
(('33) AIR 1933 Lah 372 (373).

2. ('31) AIR 1931 Cal 23 (24) : 57 Cal 855.

3. ('33) AIR 1933 Lah 372 (373). (Maintenance decree in favour of one of the parties payable periodically.)

(('66) 5 Suth W R Misc 16 (16).

(('66) 5 Suth W R Misc 43 (43).

(('71) 16 Suth W R 308 (309).

(('18) AIR 1918 Cal 631 (632).

4. ('67) 7 Suth W R 535 (536).

5. ('85) AIR 1935 Lah 914 (915). (*M* obtaining decree against *G* — *G* depositing in Court the amount due under the decree — *G* then obtaining a decree against *M* — The two decrees cannot be set off against each other.)

6. (1864) 1864 Suth W R Misc 1 (1).

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**Notes 7-10**

claim to set-off is time-barred.<sup>7</sup>

As to whether the attachment of one of the decrees will be a bar to a claim of set-off under this rule, see Note 2 above.

**8. Decrees must be in the same Court for execution.** — It is essential that applications should have been made for execution of *both decrees*<sup>1</sup> and those applications should be pending in *one and the same Court* either as the Court which passed the decrees or as the Court to which the decree or decrees have been transferred for execution.<sup>2</sup>

However, if at the time execution of one decree is sought, no application for the execution of the other decree is pending, execution of the former decree may be stayed in order to enable an application for execution of the latter decree being filed and the set-off worked out.<sup>3</sup>

Further, if one of the decrees expressly stipulates that execution shall not issue till the amount under the other decree is ascertained, a set-off can be ordered even though no application for execution of the latter decree may have been filed.<sup>4</sup>

**9. Execution can be had only of the decree for the larger sum.** — If the amounts due under two cross-decrees are equal, they satisfy each other. If the sums are not equal, execution of the decree for the smaller sum becomes incapable of being issued;<sup>1</sup> execution can only issue under the decree for the larger amount and only in respect of the *balance due* after the set-off.<sup>2</sup> This does not, however, deprive the holder of the decree for the smaller amount of any claim to priority or otherwise which he might possess.<sup>3</sup> Further, if execution of the decree for the smaller sum does take place and properties are sold in auction, the sale is not invalid.<sup>4</sup>

**10. Assignment of the decree.** — Under Section 49 of the Code, every transferee of a decree will hold the same subject to all equities which the judgment-debtor might have enforced against the decree-holder. A right to set-off is one such equity and sub-rule (2) expressly recognizes its enforcement against the assignee.<sup>1</sup>

(‘66) 5 Suth W R Misc 52 (52).

7. (‘39) AIR 1939 Lah 85 (86).

(‘38) AIR 1938 Sind 91 (92) : 92 Sind L R 162.

**Note 8**

1. (‘02) 24 All 481 (482, 488).

(‘87) 9 All 64 (68).

(‘18) 21 Ind Cas 32 (32) (All).

(‘08) 8 Cal W N 118 (120) : 30 Cal 1066.

(‘09) 1 Ind Cas 247 (248) : 32 Mad 836.

(‘35) AIR 1935 Mad 587 (588).

[See also (‘34) AIR 1934 Bom 307 (309) : 59 Bom 1. (Cross suits—Agreement that party entitled to larger amount should take out execution for excess amount — Excess could be determined only on final decree — This rule does not apply — Limitation for execution of excess amount runs from date of final decree.)]

2. (‘66) 6 Suth W R Misc 72 (73).

(‘84) AIR 1984 Cal 820 (821).

(‘88) AIR 1988 Mad 215 (216).

(‘67) 7 Suth W R 480 (481).

(‘71) 16 Suth W R 803 (803).

(‘72) 17 Suth W R 46 (46).

(‘86) 14 Cal 18 (24) : 13 Ind App 106 (P O).

(‘80) AIR 1980 Lah 508 (510, 511).

(‘71) 8 N W P H C R 104 (105).

3. (‘14) AIR 1914 Mad 2 (8). (Per White, C. J.)

(‘78) 22 Suth W R 235 (238).

4. (‘19) AIR 1919 Pat 312 (312).

**Note 9**

1. (‘08) 26 Mad 428 (429).

(‘18) AIR 1918 Cal 133 (184). (Partition suit decreed to plaintiff for Rs. 2180—Plaintiff appealed—Appeal was dismissed with costs — He sought leave to appeal to Privy Council—Application was dismissed with costs — Total costs due to defendant Rs. 586 — Defendant sought execution for costs — Held execution should be refused and costs should be set off against Rs. 2180.)

2. (‘84) AIR 1984 Cal 140 (142). (Attachment of decree by judgment-debtor — Decree-holder can still execute his decree after giving set-off to judgment-debtor's decree.)

(‘31) AIR 1931 Cal 28 (24) : 57 Cal 855.

(‘69) 12 Suth W R 212 (213).

[See also (‘11) 12 Ind Cas 205 (206) (Low Bur).]

3. (‘12) 17 Ind Cas 828 (828) (Mad).

4. (‘87) 14 Cal 18 (25) : 13 Ind App 106 (P O).

**Note 10**

1. (‘88) AIR 1988 Mad 215 (216, 217). (Equities under S. 49 have to be enforced even though assignee is assigned without notice.)

(‘67) 7 Suth W R 470 (471). (Quare.)

Similarly, the assignee of a decree is entitled to set off such decree against a decree which the judgment-debtor has obtained against such assignee.<sup>2</sup>

**O. 21 R. 18**  
**Notes 10-11**

#### Illustrations

1. *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 3,000. *A* assigns his decree to *C*. *B* can claim a set-off to the extent of Rs. 3,000 even as against *C*; and *C* will be entitled to execute the decree only for Rs. 2,000.<sup>3</sup>

2. *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 6,000. *A* assigns his decree to *C*. *B* can claim a set-off and *C* will not be entitled to execute his decree for any amount.<sup>4</sup>

The fact that the assignment took place before the one or the other decree had been passed will not affect the right to set-off, provided that the assignee had notice thereof.

#### Illustrations

1. *A* who holds a decree against *B* assigns it to *C*. Before the assignment *B* has filed a suit against *A*, and the suit results in a decree. *B* can set off the decree even as against *C*.<sup>5</sup>

2. *A* holds a decree against *B*. *B* who has filed a suit against *A* assigns his interest in the suit to *C*. The suit is decreed. *A* can set off his decree as against the decree in favour of *C*.<sup>6</sup>

This right to set-off will be available even though the judgment-debtor had filed an appeal against the assigned decree and the assignee had not been made a party to the appeal.<sup>7</sup>

In the undermentioned case<sup>8</sup> it was held by the Nagpur High Court that the assignee of a decree is not entitled to a set-off under this rule unless the decree was assigned to him before applications were made for the execution of the two decrees sought to be set off against each other. Thus, where *A* had a decree against *B*, and *C* had a decree against *A* and after applications had been made for the execution of both the decrees, *C* assigned his decree to *B*, it was held that *B* was not entitled to claim that such decree should be set off against the decree which *A* had obtained against him. The decision proceeds on the ground that under sub-rule (1) the right to claim a set-off arises when applications for execution are made and that unless the right to set-off existed at such time, it cannot be claimed.

An attaching decree-holder is an "assignee" within the meaning of this rule.<sup>9</sup>

**11. Sub-rule (4).** — This sub-rule is new. Where a person holds a decree against several persons *jointly and severally* and is *singly* liable under another decree in favour of one or more of such persons, he can claim a set-off between the two decrees.<sup>1</sup> He cannot, however, do so if his decree is not a *joint and several* decree as

('72) 18 Suth W R 442 (442, 443).

('73) 19 Suth W R 85 (87).

('74) 21 Suth W R 141 (143).

('11) 12 Ind Cas 205 (206) (Low Bur).

('74) 22 Suth W R 235 (237, 238).

('86) AIR 1936 Pesh 33 (34). (Where the assignee of a decree has at the time of assignment knowledge of a suit pending at the instance of the assignor's judgment-debtor against the assignor, he purchases the decree subject to the right of the judgment-debtor to claim a set-off when he comes to execute his decree.)

[See also ('75) 24 Suth W R 299 (300).]

2. ('88) AIR 1938 All 180 (181). (The fact that O. 21 R. 16 provides that on application for execution by assignee of decree, the decree may be executed in same manner and subject to same conditions as the original decree-holder and that the original decree-holder could only have exe-

cuted the decree and not claimed a set-off is no bar to the assignee claiming a set-off.)

3. ('68) 10 Suth W R 32 (33) (FB).

4. ('03) 26 Mad 428 (429).

('84) AIR 1934 Cal 820 (820, 821).

5. ('89) 16 Cal 619 (622).

6. ('67) 7 Suth W R 219 (221).

('68) 10 Suth W R 380 (380).

7. ('97) 7 Mad L Jour 227 (228, 229).

8. ('37) 20 Nag L Jour 70 (72). (A I R 1933 Cal 865, followed.)

9. ('25) AIR 1925 Cal 102 (103).

[But See ('35) AIR 1935 Mad 587 (588). (A I R 1925 Cal 102, Dissented from.)]

#### Note 11

1. ('92) 14 All 389 (340, 341).

('88) 9 Cal 479 (480, 481).

('87) AIR 1937 P C 39 (41): 64 Ind App 67: 16 Pat 127 (PC).

**O. 21 R. 18**  
**Note 11**

against his judgment-debtors<sup>2</sup> or if he is not the sole decree-holder in his decree.<sup>3</sup> This sub-rule deals with a case where there is a single decree-holder and several judgment-debtors under the same decree. In the converse case, *viz.*, where there is a joint decree *in favour* of several persons against a single judgment-debtor, the latter is not entitled to set off against such joint decree a decree obtained by himself against one of the decree-holders. Thus, where *X* obtains a decree against *A*, and *A* and *B* obtain a decree against *X*, *X* cannot insist on a set-off.<sup>4</sup> (See Illustration (b) to the rule). But where *X*'s decree against *A* is based on a debt incurred by *A* on behalf of himself and *B*, and both *A* and *B* claim to set off their joint decree against *X*'s decree (against *A*), the set-off must be allowed.<sup>5</sup>

**O. 21 R. 19**

**R. 19.** [S. 247.] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case of cross-claims under same decree.

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,
- (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

[1877, S. 247.]

### Synopsis

- 1. Scope and object of the Rule.
- 2. "Two parties."
- 3. Two sums unequal — Procedure.
- 4. Set-off of costs.

### Other Topics (miscellaneous)

"Are entitled to recover sums of money from each other." See Notes 1 and 4.

Costs more than the amount decreed—Court-fee, whether recoverable from the amount decreed. See Note 4.

Execution by party entitled to the larger sum. See Note 3.

Execution for difference only. See Note 3.

"Of a decree." See Note 1.

**1. Scope and object of the Rule.** — This rule provides a set-off in the case of cross-claims contained in the *same* decree.<sup>1</sup> The object of the provision is to prevent each side taking out execution in respect of sums due under the same decree.<sup>2</sup> It is, however, not necessary that the remedy of each party against the other should be *identical*. In an old Allahabad case it was held that a set-off could not be ordered unless

2. ('17) AIR 1917 All 808 (808, 809). (A mortgage decree can never be termed a "joint" and "several" decree within O. 21 R. 18 (4) and therefore there cannot be a set-off of two mortgage decrees not between the same parties but if they are between the same parties it is doubtful whether they can be set-off against each other.)

3. ('78) 2 All 91 (92).

('71) 15 Suth W R 127 (128).

4. ('87) AIR 1987 P C 89 (41): 64 Ind App 67:

16 Pat 127 (PO).

5. ('87) AIR 1987 P C 89 (41): 64 Ind App 67: 16 Pat 127 (PO).

### Order 21 Rule 19 — Note 1

1. ('80) AIR 1980 All 726 (727).

('87) AIR 1987 Pesh 88 (84). (Rule does not apply where two parties are entitled to recover sums of money under different decrees.)

2. ('94) 16 All 895 (897).

('17) AIR 1917 Mad 226 (227).



the parties had identical rights of execution in respect of their claims.<sup>3</sup> This is no longer good law and it is now well settled that a set-off under this rule will be ordered even though the remedy of each party against the other is not precisely of the same nature.<sup>4</sup> Thus, costs awarded can be set off against —

**O. 21 R. 19**  
**Note 1**

(1) Money directed to be realized by sale of hypothecated property<sup>5</sup> or against redemption amount awarded by the decree.<sup>6</sup>

(2) Against mesne profits decreed.<sup>7</sup>

(3) Against pre-emption amount to be deposited under the decree.<sup>8</sup> But in pre-emption suits under Sections 14 and 15 of the Oudh Laws Act the purchase money must be deposited; else, the right is lost. In such suits it has been held that the costs cannot be set off against the pre-emption amount.<sup>9</sup>

(4) Amount decreed as rent and directed to be realised by sale of property.<sup>10</sup>

It has been held by the High Court of Allahabad in the undermentioned case<sup>11</sup> that where *A*, a mortgagee, sues *B*, the mortgagor and *C*, a subsequent mortgagee, and a decree is passed in favour of *A* but awarding costs to *C*, *A* cannot set off the costs against his decree inasmuch as *A* could not have recovered any amount from *C*.

Set-off under this rule and Rule 18 *ante* is not a discretionary matter depending on equitable considerations.<sup>12</sup>

On general principles and in exercise of its inherent power, an executing Court can entertain and give effect to a claim of set-off even in cases which do not come strictly within the provisions of this rule.<sup>13</sup>

The rule applies to cases in which two parties are entitled to recover sums of money from each other under the *same* decree. In the undermentioned case,<sup>14</sup> it was held by the Allahabad High Court that an order against a garnishee in proceedings under O. 21 Rr. 131 to 139 of that High Court directing him to pay a certain sum to the decree-holder forms part of the original decree and hence the garnishee is entitled to set off against such sum the amount awarded to him as costs by the original decree.

3. ('89) 5 All 272 (274).

4. ('94) 16 All 395 (396).

('88) AIR 1988 Mad 638 (639, 640).

5. ('94) 16 All 395 (397).

('14) AIR 1914 Oudh 416 (417).

[See ('09) 16 C P L R 73 (75). (Decree for foreclosure—Execution for costs—Doctrine of set-off not applicable.)]

6. ('98) 17 Bom 82 (84).

(1900) 28 Mad 121 (123).

7. ('15) AIR 1915 Bom 226 (226, 227): 40 Bom 60.

8. ('80) AIR 1980 All 413 (418): 52 All 599.

('22) AIR 1922 Lah 142 (143): 2 Lah 294.

('08) 6 Oudh Cas 23 (24).

('89) AIR 1989 All 228 (229): I L R (1989) All 261.

(Plaintiff awarded certain sum as costs—Defendant awarded a less sum as costs—Plaintiff deducting from pre-emption money the whole of the costs awarded to him without giving credit for the sum awarded as costs to the defendant—Held that his deposit was not bad and that cl. (b) to R. 19 did not strictly apply to the case, there being no question as to the plaintiff taking out execution for the larger sum—Reversing on Letters Patent Appeal, AIR 1987 All 756.)

[See also ('84) 6 All 851 (854, 856).

('86) AIR 1986 Mad 626 (627): I L R (1987) Mad 59. (Plaintiff required to deposit amount

in Court and defendant required to execute conveyance to plaintiff and also ordered to pay costs to plaintiff — Plaintiff entitled to deduct costs from deposit.)]

9. ('24) AIR 1924 Oudh 104 (105): 26 Oudh Cas 345.

10. ('88) AIR 1988 Mad 638 (639, 640).

11. ('34) AIR 1934 All 8 (9, 10).

12. ('87) AIR 1987 P C 39 (41): 64 Ind App 67: 16 Pat 127 (PC). (But the circuity of proceedings can be avoided and should be avoided; this is the principle of the rules.)

13. ('86) AIR 1986 Cal 409 (412): I L R (1987) 1 Cal 57.

('88) AIR 1988 Sind 31 (32): 32 Sind L R 162.

('86) AIR 1986 Mad 626 (627): I L R (1987) Mad 59. (Decree directing plaintiff to deposit into Court certain amount—Defendant to execute deed of re-conveyance to plaintiff — Defendant also to pay costs — Plaintiff depositing amount deducting costs—Claims held to be in nature of cross demands — Doctrine of equitable set-off applied.)

('89) AIR 1989 Lah 85 (86). (Even if the right to recover the claim sought to be set off is barred by limitation.)

[But see ('87) AIR 1987 Pesh 83 (84).]

14. ('84) AIR 1984 All 1066 (1067).

**O. 21 R. 19**  
**Notes 1-3**

By Section 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908), this rule has been made applicable to execution of decrees under that Act, subject to the other provisions of the Act and the rules that may be made under sub-section (1).

**2. "Two parties."** — The expression "two parties" includes two sets of parties.<sup>1</sup> It also includes the legal representatives of a party but not *two different legal representatives* of the same party.<sup>3</sup> See also the undermentioned case.<sup>3</sup>

**3. Two sums unequal — Procedure.** — If the amounts under the two claims are unequal, the claim for the smaller amount is automatically satisfied and no execution should be allowed in respect of it.<sup>1</sup> Execution under the claim for the larger amount should be allowed only to the extent of the *difference*.<sup>2</sup> The Court should first ascertain the amounts due, enter satisfaction in respect of the claim for the smaller amount and enforce execution for the *balance* of the amount due under the larger claim.<sup>3</sup> Since the two claims form a single indivisible decree, and only enforceable for the difference, the fact that one of the claims is barred by limitation, does not alter the position.<sup>4</sup>

If in executing the decree for the larger claim, no deduction is made for the amount due under the smaller claim, and the claim is executed in full, the Court may order refund of the excess under Section 151.<sup>5</sup>

Where a plaintiff obtained against the defendants a decree for costs and realized the same and in appeal by the defendant the High Court vacated the decree for costs and in a further appeal to the Privy Council the appeal was dismissed and the defendant was ordered to pay the costs of the plaintiff, it was held that the defendant could, in answer to the execution of the decree for costs by the plaintiff, claim to set off the amount of costs recovered from him under the decree of the trial Court which was later on set aside.<sup>6</sup>

As seen in Note 1 above, where under a decree for pre-emption, the plaintiff is awarded costs, he is entitled to deduct such costs from the pre-emption money which he is required to deposit under the decree. Where in such a case, a certain sum is awarded to the plaintiff as costs and a smaller sum is awarded to the defendant as costs, and the decree does not direct the plaintiff to deposit the costs of the defendant also in Court, it has been held that a deposit made by the plaintiff deducting the *whole* amount awarded to him as costs and without giving credit for the sum awarded as costs to the defendant is not bad and that clause (b) of this rule does not strictly apply

**Note 2**

1. ('17) AIR 1917 Mad 226 (227). (A plaintiff who holds a joint and several decree against two defendants (who under the same decree are individually entitled to different amounts for costs, which in the aggregate exceed the amount due to the plaintiff), can take out execution of the decree against one defendant alone for the balance due to him by both defendants until the other defendant makes an application in execution to recover the amount due to him by the plaintiff under the decree.)
2. ('28) AIR 1928 Mad 688 (689, 640).
3. ('88) AIR 1988 Oudh 169 (171) : 14 Luck 106. (Order 21 R. 19 deals with a case in which only the two parties are entitled to recover sums of money from each other — As such it cannot cover a case in which the creditors of one of the parties are also concerned.)

**Note 3**

1. ('70) 18 Suth W R 106 (107).
- ('18) AIR 1918 Cal 153 (154).
- ('18) AIR 1918 Cal 188 (184).
- ('23) AIR 1923 Mad 688 (689, 640).
- ('38) AIR 1938 Mad 688 (640).
2. ('01) 5 Cal W N 497 (502).
- ('20) AIR 1920 Cal 488 (489).
- ('23) AIR 1923 Lah 151 (158).
3. ('68) 9 Suth W R 590 (591, 592).
- ('18) AIR 1918 Cal 153 (154).
- [See also ('69) 12 Suth W R 308 (309).
- ('73) 19 Suth W R 187 (188, 189).]
4. ('15) AIR 1915 Bom 226 (226) : 40 Bom 60.
5. ('20) AIR 1920 Cal 488 (489).
6. ('85) AIR 1985 Cal 225 (226) : 62 Cal 298. (Though this rule does not apply, executing Court can grant set-off under its inherent powers.)

to such a case, inasmuch as there is no question of the plaintiff taking out *execution* for the larger sum.<sup>7</sup>

**O. 21 R. 19**  
**Notes 3-4**

**4. Set-off of costs.** — From the illustrations given in Note 1 above it is seen that an award of costs is a claim to "recover money" within the meaning of this rule. Thus, costs awarded to one party in a suit may be set off either against costs awarded to the other party in the suit<sup>1</sup> or against other sums awarded to the latter party.<sup>2</sup> Such costs should, however, have been *actually* awarded.<sup>3</sup>

When costs have been awarded on interlocutory matters in the same suit between the same parties and against each other, they will be deemed to be incorporated in and to form part of, the final decree in the suit and will, therefore, be set off against each other under this rule.<sup>4</sup>

## **R. 20. [New.]** The provisions contained

**O. 21 R. 20**

Cross-decrees and cross-claims in mortgage suits.

in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

**1. Scope and object of the Rule.** — This rule makes the provisions of Rules 18 and 19 applicable to cases where the decrees are, or one of the decrees is, a mortgage decree.<sup>1</sup> Thus,

- (1) a simple money-decree can be set off against a mortgage decree if the other conditions laid down in Rule 18 are satisfied,<sup>2</sup> and
- (2) costs awarded to a judgment-debtor may be set off against a mortgage decree obtained against him in the suit, if the other conditions laid down in Rule 19 are satisfied.<sup>3</sup>

The Rangoon High Court has, however, held that a set-off cannot be allowed if there is no *personal liability* under the mortgage decree.<sup>4</sup> The High Court of Patna has held that it is not necessary that the mortgage decree should be actually one for

7. ('89) AIR 1939 All 228 (229): I L R (1939) All 261. (Reversing on Letters Patent Appeal AIR 1937 All 756.)

### **Note 4**

1. ('06) 28 All 676 (677).
2. ('14) AIR 1914 Oudh 416 (417).
3. ('11) 10 Ind Cas 454 (455) (All). (On this principle where a pauper suit was decreed only partially and the amount decreed to the plaintiff was less than what plaintiff had to pay to the defendant as costs under the decree, it was held in AIR 1922 Mad 125 that the Government could recover nothing out of the amount decreed, towards the court-fee due to it.)  
[See however ('87) 9 All 64 (67, 68). (It was held that a claim to set-off under this rule must yield to the right of the Government for a first charge for court-fee on amount decreed in pauper suit.)]
4. ('71) 16 Suth W R 308 (309).
4. ('17) AIR 1917 Pat 259 (260).  
[See also ('85) AIR 1935 Cal 225 (226): 62 Cal 298. (Decree for costs awarded by the trial Court set aside on appeal to High Court—Appeal to Privy Council dismissed with costs—

In execution of decree for costs in Privy Council, judgment-debtor is entitled to set off costs in trial Court realized by decree-holder.]]

### **Order 21 Rule 20 — Note 1**

1. See the Report of the Select Committee.  
('83) AIR 1933 Pat 210 (214).  
('10) 8 Ind Cas 835 (836): 33 All 240.  
('14) AIR 1914 Oudh 416 (417). (Rule applies to decrees for sale but not for possession in enforcement of mortgage or charge.)
2. ('33) AIR 1933 Pat 210 (215).  
('10) 8 Ind Cas 835 (836): 33 All 240.  
('88) AIR 1933 Mad 68 (64): 56 Mad 839. (Mortgage decree for sale imposing personal liability in case of deficiency — Set-off can be given even before sale.)  
('87) AIR 1937 P C 89 (40): 16 Pat 127: 64 Ind App 67 (P C). (Contention that R. 20 only applies where both the decrees are mortgage decrees rejected.)  
[But see ('36) AIR 1936 All 639 (641): 58 All 907. (Submitted not correct.)]
3. ('14) AIR 1914 Oudh 416 (417).
4. ('30) AIR 1930 Rang 68 (70, 71): 7 Rang 505.

**O. 21 R. 20**  
**Note 1**

the payment of money *personally* by the judgment-debtor; it is enough if the *personal remedy is legally available*.<sup>5</sup> This view of the Patna High Court has been endorsed by the Privy Council<sup>6</sup> and hence, the above-mentioned view of the Rangoon High Court must be treated as not being good law.

The right to set-off is one created by law and must be enforced unless it is lost under the law; it is not lost by merely asking the Court to notify the incumbrance of the decree under Order 21 Rule 66 of the Code.<sup>7</sup>

**O. 21 R. 21**

**R. 21.** [S. 230, para. (2).] The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.  
[1877, Ss. 230, 231. See S. 51 and O. 21 R. 30.]

**Simultaneous execution.**

*Synopsis***1. Simultaneous execution. | 2. Appeal.**

**1. Simultaneous execution.** — Rule 30 entitles the decree-holder to execute his decree against the person, or the property, or both, of the judgment-debtor. But the power to order execution against the person and property *simultaneously* is within the discretion of the Court,<sup>1</sup> and this rule provides that such simultaneous execution may be refused.

In exercising the discretion under this rule, regard must be had to the principle that the decree-holder has a right to realize the fruits of his decree in any manner allowed by law and therefore the refusal of simultaneous execution should be an exception rather than the rule.<sup>2</sup> If the judgment-debtor is evading payment, his arrest can be ordered even though his properties might have been attached under the same decree.<sup>3</sup> But if there is no fraud or *mala fides* on his part, simultaneous execution may be refused.<sup>4</sup>

This rule, however, does not empower the Court to pin the decree-holder down to any particular mode of execution or refuse one mode of execution, on the ground that he had not sought the other in the first instance.<sup>5</sup> Nor does the rule prevent the decree being executed simultaneously in several districts.<sup>6</sup>

5. ('38) AIR 1938 Pat 210 (216, 217).

6. ('37) AIR 1937 P C 39 (41); 16 Pat 127; 64 Ind App 67 (P C). (Confirming on appeal AIR 1938 Pat 210.)

7. ('33) AIR 1933 Pat 210 (218).

**Order 21 Rule 21 — Note 1**

1. ('24) AIR 1924 Rang 361 (361); 2 Rang 362. (Applicable to O. 38.)

('36) AIR 1936 Pat 28 (29). (Where there is already sufficient security for realization of decretal amount and procedure of the decree-holder savours rather of harassment than a genuine desire to realize decretal amount, Court may in its discretion refuse the relief against the person of the judgment-debtor.)

2. ('26) AIR 1926 Lah 110 (111); 6 Lah 548.

('84) AIR 1934 Nag 140 (141, 142). (Court refusing must give reasons.)

('04) 1904 Upp Bur Rul Execution of decree page 1.

3. ('88) 7 Bom 301 (302).

('39) AIR 1938 Lah 307 (308).

4. ('99) 1899 Pun Re No. 21, page 121.

5. ('29) AIR 1929 Lah 86 (87).

('87) 9 All 484 (485).

('39) AIR 1939 Pat 380 (381); 18 Pat 366. (Application for execution by arrest of judgment-debtor — Judgment-debtor cannot object on ground that decree-holder should first proceed against property and be permitted to proceed against person only on failure of his remedy against property — Discretion to refuse simultaneous execution does not extend to compelling the decree-holder to take either of the methods.)

6. ('82) 8 Cal 687 (689, 690).

[See ('21) AIR 1921 Low Bur 25 (25, 26); 11 Low Bur Rul 15.]

The fact that this rule only confers a discretion on the Court to refuse *simultaneous* execution against the person and the property of the judgment-debtor does not mean that where such simultaneous execution is *not* sought for, the Court is bound to grant the application of the decree-holder for the *arrest* of the judgment-debtor. Under O. 21 R. 40 *infra* the Court has a discretion to refuse to grant such application on any of the grounds specified in that rule.<sup>7</sup> See also Noto 10 to Section 38 *ante*.

**O. 21 R. 21**  
**Notes 1-2**

**2. Appeal.**—An order refusing simultaneous execution under this rule amounts to a decree and is appealable as such.<sup>1</sup>

Notice to show cause  
against execution in  
certain cases.

**R. 22.** [S. 248.] (1) Where an application for execution is made —

**O. 21 R. 1**

(a) more than one year after the date of the decree,<sup>11</sup> or

(b) against the legal representative of a party to the decree, *"or where an application is made for execution of a decree filed under the provisions of section 44A, the Court executing the decree shall issue a notice<sup>3</sup> to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:*

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.<sup>12</sup>

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.<sup>16</sup>

[1877, S. 248; 1859, S. 216. See Ss. 48 and 50.]

a. Inserted by the Code of Civil Procedure (Amendment) Act, VIII of 1937, Section 3.

7. ('85) AIR 1935 Oudh 57 (58) : 10 Luck 508.

**Note 2**

1. ('88) 7 Bom 301 (302).

**O. 21 R. 22****Local Amendments****ALLAHABAD**

(1). For the words "one year", wherever they occur in this rule, *read* the words "three years."

(2). To sub-rule (2) of this rule shall be added the following proviso:

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

**BOMBAY**

The words "two years" shall be *substituted* for the words "one year" wherever they occur.

**CALCUTTA**

*Add* the following sub-rule (3):

"(3) Omission to issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree."

**LAHORE**

(1). The words "two years" shall be *substituted* for the words "one year" wherever they occur.

(2). *Add* the following at the end of the rule:

"Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction."

**MADRAS**

(1). In sub-rule (1) the words "two years" shall be *substituted* for the words "one year" wherever they occur.

(2). In sub-rule (1) after clause (b), *insert* the following:

"or (c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in insolvency."

(3). *Between* sub-rules (1) and (2), *insert* the following:

"(1a) Where from the particulars mentioned in the application in compliance with Rule 11 (2) (ff), *supra*, or otherwise the Court has information that the original decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer."

(4). *Add* the following proviso to sub-rule (2):

"Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment-debtor has sustained substantial injury as the result of such omission."

**NAGPUR**

(1). For the words "one year" wherever they occur, *substitute* the words "three years."

(2). To sub-rule (2), *add* the following proviso:

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

**N.-W. F. P.**

For the words "one year," wherever they occur, *read* "two years."

**OUDH**

(1). For the words "one year," wherever they occur in this rule, read the words "three years."

(2). To sub-rule (2) of this rule *add* the following proviso :

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment-debtor has sustained substantial injury by reason of such omission."

**PATNA**

For sub-rule (1) *substitute* the following :

"Where an application for execution is made in writing under Rule 11 (2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him."

**RANGOON**

(1). In clause (a) of sub-rule (1), for the words "one year" the words "three years" shall be substituted.

(2). In the second line of the proviso to sub-rule (1), for the words "one year" the words "three years" shall be substituted.

*Synopsis*

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and object of the Rule.</li> <li>2a. Legal representative.</li> <li>3. "Shall issue notice."</li> <li>4. Proof of notice.</li> <li>5. Effect of omission to give notice.</li> <li>6. Notice to wrong person.</li> <li>7. Irregular service of notice.</li> <li>8. Objection as to notice, when may be taken.</li> <li>9. More than one notice, if contemplated by the Rule.</li> </ol> | <ol style="list-style-type: none"> <li>10. Remedy when property has been sold without notice under this Rule.</li> <li>11. Date of the decree.</li> <li>12. Notice, when not necessary.</li> <li>13. Notice and limitation.</li> <li>13a. Failure to show cause why decree should not be executed — Effect.</li> <li>14. Court executing the decree.</li> <li>15. Revivor of decree by notice to one judgment-debtor — <i>Vide</i> under Note 13.</li> <li>16. Sub-rule (2).</li> <li>17. Appeal.</li> </ol> |
|---|--|

*Other Topics (miscellaneous)*

Court which is to implead legal representative. See Note 14.  
 Notice to some only of judgment-debtors — Effect. See Note 13.  
 Notice — Who is entitled to. See Notes 3 and 12.  
 Writ of *scire facias* and this rule. See Note 13.

**1. Legislative changes. —**

1. The words "of any decree passed on appeal from the decree sought to be executed or" which occurred in the proviso to the old Section 248 have been omitted as being unnecessary, because the decree to be executed in such cases will be the appellate decree, as held in the undermentioned cases.<sup>1</sup>

2. The Explanation contained in the old Section has also been omitted in view of the definition of "Court" given in Section 37.<sup>2</sup>

3. Sub-rule (2) is new. *Vide* Note 16, *infra*.

**2. Scope and object of the Rule. —** The object of the notice required to be given under this rule is not only to furnish an opportunity to the person concerned to urge any objection he may have to the maintainability of the execution application,

**O. 21 R. 22** but also to prevent his being taken by surprise and to enable him to satisfy the decree before execution is issued against him.<sup>1</sup> The rule is imperative and notice *shall* be issued —

(1) where the application is made *one year after* the date of the decree,<sup>2</sup> or

(2) where it is made against the *legal representatives* of a party to the decree.<sup>3</sup>

An amendment, after one year, of an application for execution made within one year, does not render the application one made after one year for the purposes of this rule.<sup>4</sup> The necessity for notice in an application for execution against the legal representatives of the judgment-debtor is not confined to cases where execution is taken out against them in the *first instance*; it equally applies to cases where execution had been previously taken against the judgment-debtor himself and, on his death, the execution is sought to be taken out against the legal representatives.<sup>5</sup>

A notice under this rule may be issued by the Court *executing* a transferred decree, while a notice under O. 21 R. 16 should be given only by the Court which *passed* the decree.<sup>6</sup>

The issue of a notice under this rule to the guardian of a minor judgment-debtor raises no presumption that he has been appointed guardian by implication by the Court.<sup>7</sup>

The rule does not apply to summary proceedings like those contained in Section 111 of the Madras Estates Land Act.<sup>8</sup>

**2a. Legal representative.** — For definition of the expression "legal representative" see Section 2, clause (11). See also Note 10 to O. 22 R. 3. According to that definition, a legal representative is a person who represents the estate of a *deceased* person. Hence, on the adjudication of a person as an insolvent, the Official Receiver cannot be said to be his 'legal representative.'<sup>1</sup> But under the amendment of the rule by the Madras High Court, notice is required to be given to the Official Receiver where the judgment-debtor has been declared an insolvent.<sup>2</sup> In the undermentioned decision<sup>3</sup> of the Calcutta High Court it was assumed that the Official Receiver is a legal representative of an insolvent judgment-debtor to whom notice must issue under this rule. It is submitted that the assumption is not correct. It may be noted in this connexion that the decision of the Privy Council in *Raghunath Das v. Sundar*

#### Note 2

1. ('97) 21 Bom 424 (432) (F B).
- (‘33) AIR 1933 Lah 826 (827). (But he is not bound at that stage to object to the mode of execution. There is no *res judicata*.)
- (‘39) AIR 1939 Pat 658 (662) : 13 Pat 86. (Judgment-debtor not objecting at any stage of execution in spite of service of notice on him — He cannot subsequently object that decree is not capable of execution.)
- (‘09) 1 Ind Cas 168 (171) : 36 Cal 548.
- (‘10) 5 Ind Cas 390 (394) (Cal).
- (‘11) 9 Ind Cas 584 (585) (Cal).
- (‘15) AIR 1915 Cal 268 (269, 270).
- (‘21) AIR 1921 Cal 609 (610).
- (‘26) AIR 1926 Cal 86 (86).
2. [See ('86) AIR 1936 Rang 367 (368). (Sub-rule (1) (a), R. 22 O. 21 has been amended by the Rangoon High Court by the substitution of the words "three years" for the words "one year.")
- (‘85) AIR 1935 Lah 962 (962). (Under the amendment of the rule by the Lahore High Court, the period is two years.)

3. ('21) AIR 1921 Nag 126 (126, 127).
- (‘14) AIR 1914 P O 129 (181) : 42 Cal 72 : 41 Ind App 251 (P O).
4. See Rule 17, sub-rule 2, *ante*.
5. ('32) AIR 1932 Pat 199 (200, 201) : 11 Pat 241.
- (‘86) AIR 1936 Mad 205 (211, 212) : 59 Mad 461 (F B).
- See also Section 50 Note 12.
6. ('25) AIR 1925 Oudh 448 (450) : 28 Oudh Cas 380.
7. ('25) AIR 1925 Cal 28 (25).
- [But see ('07) 5 Cal L Jour 434 (438). (Person named guardian *ad litem* in execution petition and notice issued—Appointment as guardian by implication presumed.)]
8. ('29) AIR 1929 Mad 517 (519).

#### Note 2a

1. ('86) AIR 1936 Mad 205 (207) : 59 Mad 461 (F B).
2. ('85) AIR 1935 Mad 151 (152) : 58 Mad 408.
3. ('85) AIR 1935 Cal 508 (506) : 62 Cal 457. (In the particular circumstances of this case, however, the failure to issue notice was held not to affect jurisdiction.)



*Das*<sup>4</sup> in which it was held that a notice to the Official Receiver was necessary was a decision under the Code of 1882 which did not contain a definition of "legal representative."<sup>5</sup>

**O. 21 R. 22**  
**Notes 2a-5**

**3. "Shall issue notice."** — The provisions of this rule are mandatory<sup>1</sup> and the issue of the notice is a *condition precedent* to the validity of the execution proceedings.<sup>2</sup> It is the duty of the Court to issue the notice whether the decree-holder has asked for it or not<sup>3</sup> and the failure to do so will render the proceedings *null and void*.<sup>4</sup> See Note 5 below.

The rule is, however, sufficiently complied with if notice has been given to all persons interested, and the fact that some of them were minors for whom guardians had not been appointed will not invalidate the execution proceedings if the others sufficiently represented them.<sup>5</sup> Where the Court executing the decree is also the Court which passed the decree, there is nothing in this rule to prohibit the issue of a combined notice under this rule and Rule 16 *ante*.<sup>6</sup>

A minor who attained majority pending execution proceedings is not entitled, on that ground, to a fresh notice under this rule.<sup>7</sup>

A notice under the rule should be to specifically show cause why the decree should not be executed.<sup>8</sup>

**4. Proof of notice.** — Where an execution is impeached on the ground of want of notice under this rule, the onus of proving the want of notice will be on the party setting it up.<sup>1</sup> The reason is that the issue of a notice under the rule being the duty of Court, it will be presumed that the Court has done all that it was legally bound to do. In this connection an entry on the order sheet<sup>2</sup> or a report of the Nazir<sup>3</sup> to the effect that notice has been served will be *prima facie* evidence of the service of notice.

**5. Effect of omission to give notice.** — Before the date of the Privy Council decision in *Malkarjun v. Narhari*,<sup>1</sup> it was held by the High Courts of Allahabad and Calcutta that a sale in execution without giving the notice required by this rule was absolutely void and without jurisdiction.<sup>2</sup> The High Court of Madras, on the other hand, held that the absence of notice was only a *material irregularity* and that the

4. ('14) AIR 1914 P O 129 (181) : 42 Cal 72 : 41 Ind App 251 (PC).

5. ('36) AIR 1936 Mad 205 (207) : 59 Mad 461 (FB).

**Note 3**

1. ('17) AIR 1917 Cal 728 (731) : 44 Cal 954.

2. ('93) 21 Cal 19 (22, 23).

('70) 18 Suth W R 400 (401).

('81) 3 All 424 (426).

('81) 6 Cal 103 (105).

('14) AIR 1914 P O 129 (181) : 42 Cal 72 : 41 Ind App 251 (PC).

3. ('09) 2 Ind Cas 941 (942) (Cal).

('02) 29 Cal 580 (582).

('17) AIR 1917 Cal 728 (731) : 44 Cal 954.

4. ('17) AIR 1917 Cal 728 (731) : 44 Cal 954.

('18) AIR 1918 Cal 918 (915, 916).

('24) AIR 1924 Mad 431 (436) : 47 Mad 288 (FB).

[See also ('21) AIR 1921 Cal 476 (478).

('98) 20 Cal 870 (873).

('81) AIR 1981 Cal 555 (556) : 58 Cal 825.]]

5. ('21) AIR 1921 Cal 476 (478).

6. ('38) AIR 1938 Pat 658 (663) : 13 Pat 86.

7. ('25) AIR 1925 Mad 158 (159).

8. ('32) AIR 1932 Pat 199 (201, 203) : 11 Pat 241. (A notice calling upon the legal representative to show cause why his name should not be substituted in the place of the judgment-debtor is not enough.)

**Note 4**

1. ('02) 29 Cal 580 (582).

('74) 22 Suth W R 5 (6).

[See ('34) AIR 1934 Pat 211 (211). (Order sheet stating issue of notice and service thereof — Judgment-debtor can show that provisions of Code were not complied with.))

2. ('17) AIR 1917 Cal 84 (86).

('92) AIR 1932 Cal 627 (628).

3. ('71) 15 Suth W R 203 (204).

[See also ('14) AIR 1914 Mad 153 (154).

('78) 19 Suth W R 102 (103).]

**Note 5**

1. ('01) 25 Bom 337 (348) : 27 Ind App 216 (PC).

2. ('81) 8 All 424 (426).

('98) 20 Cal 870 (873).

**O. 21 R. 22**  
**Note 5**

sale was only *voidable*, and not *void*.<sup>3</sup> In this state of conflict of authorities the Privy Council decided the case of *Malkarjun v. Narhari*.<sup>4</sup> There, a judgment-debtor having died, the decree was executed against his estate. A notice under the rule was issued and served on a person as the legal representative of the judgment-debtor. He appeared and objected that he was not the legal representative. The Court, however, decided that he was the legal representative and proceeded with the execution. The properties of the judgment-debtor were sold in court-auction. It was ultimately found that the person to whom the notice was sent was not the proper legal representative. The question before the Privy Council was whether the sale was, under the circumstances, *void for want of jurisdiction* or *only voidable on the ground of material irregularity*. Their Lordships decided that the Court had jurisdiction to decide whether a person was a legal representative of a party or not, that having decided it in a particular manner, the decision could not be said to be without *jurisdiction*, that the case was only one of material irregularity in the *exercise* of jurisdiction and that the sale was, therefore, not void.

Notwithstanding the above points of distinction, the decision came to be regarded in India as one equally applying to a *total omission to issue notice* and as laying down the law that, even in the absence altogether of any notice, there was only a *material irregularity* and *not a want of jurisdiction* and that the sale was *voidable* and *not void*. Accordingly, the Calcutta High Court<sup>5</sup> changed its original view and held that an omission to give notice under the rule was only a *material irregularity* rendering the execution sale *voidable*. The Allahabad and Madras High Courts also began to hold the same view.<sup>6</sup> This view held the field till the Privy Council had occasion to clarify the whole position in *Raghunath Das v. Sundar Das*.<sup>7</sup> In that case, the judgment-debtor having become insolvent, his properties had vested in the Official Assignee. When the decree-holder took out execution a notice was issued to the Official Assignee to show cause why he should not be substituted for the debtor but there was no notice to show cause *why the decree should not be executed*. It was, therefore, a case of omission to issue notice under the rule. The execution proceeded and the properties of the debtor were sold in court-auction. The question before the Privy Council was whether the sale was *void* or only *voidable*. Their Lordships of the Privy Council held that a *notice under the rule was necessary in order that the Court should obtain jurisdiction to sell the property*, that the notice to show cause against substitution was not enough and that the sale was, therefore, *void and the purchaser obtained no title*. Their Lordships pointed out —

- (1) that in *Malkarjun's case* a notice having been issued and served, though on a wrong person, the Court had acquired jurisdiction to deal with the matter ;
- (2) that the Court in deciding upon a wrong person as the legal representative nevertheless acted with jurisdiction;

(<sup>'80</sup>) 6 Cal 108 (105, 106).

3. (<sup>'92</sup>) 15 Mad 899 (400).

[But see (<sup>'83</sup>) 6 Mad 180 (181).]

4. (<sup>'01</sup>) 25 Bom 387 (347, 348) : 27 Ind App 216 (PC).

5. (<sup>'10</sup>) 5 Ind Cas 390 (394) (Cal).

(<sup>'11</sup>) 9 Ind Cas 584 (585) (Cal).

(<sup>'11</sup>) 11 Ind Cas 898 (895) (Cal).

(<sup>'12</sup>) 15 Ind Cas 506 (507) : 40 Cal 45.

(<sup>'13</sup>) 18 Ind Cas 715 (716, 717) (Cal).

(<sup>'14</sup>) AIR 1914 Cal 554 (555).

[See also (<sup>'10</sup>) 8 Ind Cas 22 (24) (Cal). (If an order for execution is made without notice to the judgment-debtor, it is not sufficient to debar him from arguing the objection of limitation.)]

6. (<sup>'06</sup>) 28 All 198 (195).

(<sup>'14</sup>) AIR 1914 Mad 158 (154). (*Quare.*)

7. (<sup>'14</sup>) AIR 1914 P C 129 (132) : 42 Cal 72 : 41 Ind App 251 (PC).

[See also (<sup>'88</sup>) AIR 1988 Nag 28 (29) : 28 Nag L R 817. (Adjudication subsequent to execution against insolvent—No saleable interest remains

(3) that in so deciding erroneously, the Court acted only with *material irregularity* and not without jurisdiction.

**O. 21 R. 22**  
**Note 5**

Since the said decision in *Raghunath Das's case*, all the High Courts<sup>8</sup> except the Madras High Court veered round to their old view, *viz.*, that the sale was without jurisdiction and therefore void. The Madras High Court,<sup>9</sup> however, still continued to hold that the sale was only voidable and not void distinguishing *Raghunath Das's case* on the ground that it was a case under the old Code which contained no provision similar to that contained in the present sub-rule (2), and that in view of the recognition in the present sub-rule (2) of the Court's *discretion* in the matter of issuing notice there was no longer any question of want of jurisdiction.<sup>10</sup> The matter came up before a Full Bench of the same High Court which finally laid down that a sale held under the circumstances mentioned above was *void for want of jurisdiction* and *not merely voidable*.<sup>11</sup> This view was affirmed by another Full Bench of the same High Court in *Kanchamalai v. Shahaji Raja*<sup>12</sup> in which it was held that even if the judgment-debtor died *after* the property had been attached and ordered to be sold, the absence of notice to the legal representative under this rule would render the sale void.

Thus, it may now be taken as well settled that in cases of a *total omission to issue a notice* under the rule the sale is *absolutely void* and not *merely voidable*. It is immaterial whether the property sold is immovable or moveable.<sup>13</sup> Nor is it material whether the purchaser is the decree-holder himself<sup>14</sup> or a stranger.<sup>15</sup> The Nagpur High Court has, however, held in the undermentioned case<sup>16</sup> that the failure to

in insolvent — Execution proceedings become nullity after adjudication—Purchaser gets no interest unless Official Assignee made party to execution.]]

8. ('28) AIR 1928 All 74 (76) : 49 All 830.

('32) AIR 1932 Cal 381 (381).

('33) AIR 1933 Posh 41 (43).

('33) AIR 1933 Pesh 71 (72).

('15) AIR 1915 Cal 268 (270).

('18) AIR 1918 Cal 918 (915).

('17) AIR 1917 Cal 728 (731) : 44 Cal 954.

('16) AIR 1915 Cal 536 (539).

('19) AIR 1919 Cal 1095 (1096).

('18) AIR 1918 Cal 171 (172).

('21) AIR 1921 Cal 609 (610, 611).

('26) AIR 1926 Cal 539 (539, 540).

('28) AIR 1928 Cal 60 (62) : 55 Cal 96.

('30) AIR 1930 Cal 948 (949).

('31) AIR 1931 Cal 555 (556) : 58 Cal 825.

('21) AIR 1921 Nag 126 (127).

('21) AIR 1921 Pat 145 (147) : 6 Pat L Jour 319. (An irregularity in the service of process is quite different thing from the absence of the issue of any such process.)

('32) AIR 1932 Pat 199 (201) : 11 Pat 241. (A notice upon legal representative of a deceased judgment-debtor to show cause why he should not be substituted for the judgment-debtor is not a proper notice under O. 21 R. 22. It should call upon him to show cause why the decree should not be executed against him.)

('29) AIR 1929 Rang 161 (161) : 7 Rang 110.

('31) AIR 1931 Cal 555 (556) : 58 Cal 1013. (Where there are several legal representatives against whom execution is sought and only some of them are not served with notice under O. 21

R. 22 and the sale is held, it is without jurisdiction only with respect to the shares of the legal representatives not served and can be set aside only to that extent.)

('33) AIR 1933 Rang 52 (53) : 11 Rang 79. (Notice implied.)

[See also ('34) AIR 1934 Pat 211 (212). (Judgment-debtor major at the time of service but treated as minor—No service as major—There is irregularity in service—So also when no attempt is made to serve on minor after unsuccessful attempt to serve on natural guardian.)]

9. ('21) AIR 1921 Mad 523 (523).

('24) AIR 1924 Mad 130 (132) : 47 Mad 63. (N. B. This case has been overruled by AIR 1936 Mad 205 (K B).)

[See also ('17) AIR 1917 Mad 42 (43). (Sale vitiated by grave and material irregularity—Suit to set aside the sale lies.)]

10. ('22) AIR 1922 Mad 93 (95) : 45 Mad 875.

11. ('24) AIR 1924 Mad 431 (436) : 47 Mad 288 (FB).

[See also ('29) AIR 1929 Mad 609 (611).

('33) AIR 1933 Mad 224 (224). (One of several legal representatives of deceased judgment-debtor not served—Application by him to set aside sale—Sale is invalid only to the extent of the applicant's share and not in its entirety.)

12. ('36) AIR 1936 Mad 205 (214, 219) : 59 Mad 461 (FB). (AIR 1924 Mad 130, Overruled.)

13. ('94) 21 Cal 19 (22). (Where the property sold was an elephant.)

14. ('81) 6 Cal 103 (105, 106).

('17) AIR 1917 Cal 728 (731) : 44 Cal 954.

('21) AIR 1921 Cal 609 (610, 611).

15. ('81) 3 All 424 (426).

('94) 21 Cal 19 (21, 23).

16. ('38) AIR 1938 Nag 303 (303).

**O. 21 R. 22**  
**Notes 5-6**

bring the legal representative of the judgment-debtor on the record does not necessarily make the proceedings in execution a nullity. It is submitted that the decision is not correct.

However, the only object of the rule is to give the person concerned an opportunity to show cause against execution. Consequently, if, though no notice is served, he appears and contests the application<sup>17</sup> or if he was served with a notice under Rule 66 and was thus aware of the application pending against him,<sup>18</sup> the object of the rule is achieved and the proceedings are valid. It has been held by the Judicial Commissioner's Court of Oudh<sup>19</sup> that the omission to issue notice under this rule does not render the sale in execution of a *mortgage decree* void, inasmuch as the jurisdiction to sell the property is derived from the decree itself and not by reason of the notice. See also the undormentioned cases.<sup>20</sup>

**6. Notice to wrong person.** — In *Malkarjun v. Narhari*,<sup>1</sup> their Lordships of the Privy Council held that if a notice is, as a fact, issued but served on a wrong person and on the objection of the latter the Court decides that he is the right legal representative, it acts only in the exercise of jurisdiction and the sale is only *voidable*. In such cases the proper legal representatives are equally bound by the execution proceedings though they were not parties thereto.<sup>2</sup> Similarly, where, owing to the fact that both the decree-holder and the Court are not aware of the true age of the judgment-debtor, a notice is issued to a major judgment-debtor as if he were a minor, the issue of such notice only amounts to an irregularity and no question of jurisdiction arises.<sup>3</sup> But if the decree-holder was aware of the proper legal representatives and deliberately gets notice served on a wrong person and there is no *adjudication* by

17. ('31) AIR 1931 Cal 476 (478).

('29) AIR 1929 Pat 79 (80) : 7 Pat 790.

('69) 11 Suth W R 329 (329).

('86) AIR 1936 Mad 99 (100). (AIR 1931 Cal 476, Followed.)

[See also ('32) AIR 1932 Pat 244 (245, 246).

(Delivery of possession passes possession in spite of non-service of notice under this rule.)]

18. ('31) AIR 1931 Cal 476 (477, 478).

('21) AIR 1921 Lah 384 (385).

('38) AIR 1938 Pat 289 (290).

('39) AIR 1939 Lah 478 (474). (Notice issued under O. 21 R. 66 and judgment-debtor appearing and contesting execution proceedings — Failure to give notice under O. 21 R. 22 and omission to record reasons dispensing with notice is mere irregularity and does not vitiate proceedings.)

[See also ('26) AIR 1925 Mad 158 (159).

('33) AIR 1933 Rang 52 (53, 54) : 11 Rang 79.]

19. ('18) AIR 1918 Oudh 379 (388).

20. ('39) AIR 1939 Cal 403 (406) : I L R (1939) 1 Cal 498. (Guardian of minor judgment-debtor submitting report that he is not in a position to contest execution proceedings and Court accepting report — Failure to issue notice under this rule not material irregularity.)

('35) AIR 1935 Cal 503 (505) : 62 Cal 457. (In this case, it is assumed that on the insolvency of the judgment-debtor, the Official Receiver becomes his legal representative to whom notice should be given under this rule but it is held that failure to give such notice does not render

the proceedings a nullity when the decree-holder was not aware of the adjudication of the judgment-debtor—It is submitted that the assumption that the Official Receiver is the legal representative of the judgment-debtor is not correct.)

('38) AIR 1938 Nag 308 (309). (Legal representative of judgment-debtor not brought on record—Proceedings are not rendered a nullity, especially when legal representative is aware of the proceedings and makes no objection.)

**Note 6**

1. ('01) 25 Bom 337 (347, 352) : 27 Ind App 216 (PC). [See also ('38) AIR 1938 Mad 945 (946). (Death of judgment-debtor — Decree-holder in application for execution stating certain person as heir of judgment-debtor — Court issuing notice on that person and adding him to be legal representative though in fact not heir of judgment-debtor—Person remaining *ex parte* throughout —Sale of property in execution—Sale held not without jurisdiction.)

('92) 1892 All W N 241 (242).

('88) 12 Bom 427 (430).

('05) 32 Cal 296 (314, 315) : 32 Ind App 23 (PC).] [But see ('10) 6 Ind Cas 88 (40) : 32 All 404.]

2. ('26) AIR 1926 Oudh 618 (614).

('38) AIR 1938 Pat 373 (374). (Minor legal representative of deceased judgment-debtor — Notice served on wrong person as guardian — Attachment of properties not without jurisdiction.)

[See also ('92) 16 Bom 686 (688).]

3. ('39) AIR 1939 Mad 5 (6).

the Court as to who is the legal representative, the sale will be void.<sup>4</sup>

**O. 21 R. 22**  
**Notes 6-9**

**7. Irregular service of notice.** — The notice issued under this rule must be in accordance with law and must satisfy the requirements laid down in sub-rule (1).<sup>1</sup> Thus, a day must be specified for the appearance of the person to whom the notice is issued<sup>2</sup> allowing sufficient time to enable him to come and oppose the application,<sup>3</sup> and the notice must be signed by the Judge or other officer.<sup>4</sup>

But an irregularity in the service of notice is quite different from an *omission* to issue notice, and will not make the subsequent proceedings void.<sup>5</sup> The judgment-debtor or the legal representative will not be precluded from setting up his defence of objections at a later stage.<sup>6</sup> The irregularity may also furnish a ground for avoiding a sale under Rule 90.<sup>7</sup>

As regards the *mode* in which service should be effected, it is a matter for the Court to determine in every case whether there has been sufficient service and it is not every departure from the prescribed mode of service that will invalidate the service.<sup>8</sup>

**8. Objection as to notice, when may be taken.** — Since the question of the issue of notice is one affecting the jurisdiction of the Court, an objection that no notice was issued is entertainable at any time, even in appeal<sup>1</sup> but not if it is likely to take the other side by surprise.<sup>2</sup>

But an *irregular or insufficient service* of such notice is only an irregularity and an objection based on the ground of non-service or insufficient service should be taken at the earliest possible opportunity.<sup>3</sup>

**9. More than one notice, if contemplated by the Rule.** — The provisions of the rule as to *notice* are not confined to the *first* execution application. They apply to every subsequent application also.<sup>1</sup> The only exception in the latter case is that contained in the proviso,<sup>2</sup> *viz.* :

(1) If on a prior execution application an order has been passed against the judgment-debtor (or his legal representative), no notice will be necessary on a

4. ('21) AIR 1921 Bom 985 (387) : 45 Bom 1186. (The above was the view of Shah J. — Macleod, O. J., held that the sale would be only voidable though if the auction-purchaser had not obtained possession he would not be entitled to get such possession from the true legal representative.)

#### Note 7

1. ('16) AIR 1916 Cal 511 (512, 513).

2. ('09) 5 Ind Cas 409 (410) : 37 Cal 122.

3. ('28) AIR 1928 Mad 1052 (1054).

4. ('85) 7 All 506 (508, 509).

('86) 8 All 293 (294). (Signature was in initials— Though it is proper that the person signing should write his name in full yet it was sufficient for the officer to execute the warrants.)

5. ('21) AIR 1921 Pat 145 (147) : 6 Pat L Jour 819.

('84) AIR 1984 Pat 274 (278, 279) : 13 Pat 467.

6. ('10) 8 Ind Cas 22 (25) (Cal).

('11) 9 Ind Cas 213 (214) (Cal).

('11) 11 Ind Cas 216 (217) (Cal).

7. (30) AIR 1930 Pat 153 (154).

8. ('86) AIR 1986 Pat 593 (594).

#### Note 8

1. ('11) 9 Ind Cas 584 (585) (Cal).

('86) AIR 1988 Pat 162 (164). (Objection can be taken at any time.)

[See also ('35) AIR 1935 Rang 42 (43, 44).

(Objection as to want of notice clearly stated in the petition of objection — Advocate pointing out wrong provision — The point can be urged in appeal and there is no waiver.)]

2. ('20) AIR 1920 Pat 735 (738) : 4 Pat L Jour 645. (An execution sale which had become final was impeached in the Appellate Court as a nullity on the ground that one of the two judgment-debtors had died and the sale was held without notice to his heirs — *Held*, that the point not having been taken at any stage of the suit and no opportunity having been given of showing that the surviving judgment-debtor was entitled to represent the heirs of the deceased it was impossible to say that the sale was a nullity.)

3. ('74) 21 Suth W R 148 (148).

[See also ('20) AIR 1920 Cal 530 (530).]

#### Note 9

1. ('25) AIR 1925 Pat 474 (476).

[See however ('29) AIR 1929 Mad 275 (279, 280).]

2. ('25) AIR 1925 Pat 474 (476) : 5 Pat 1 (F B). (Overruling AIR 1924 Pat 111.)

**O. 21 R. 22**  
**Notes 9-12**

subsequent execution application presented within one year after that order, though more than one year might have elapsed from the date of the decree.<sup>3</sup>

(2) If on a prior execution application execution has been ordered to issue against the legal representative of a deceased judgment-debtor, no notice will be necessary (on the ground of the application being one against a legal representative) for a subsequent execution application against the same legal representative.

Consequently, if the subsequent execution application is presented more than one year after the decree and after the last order against the judgment-debtor made on an application for execution, notice is necessary.<sup>4</sup> It is, however, unnecessary that the order should be a *subsisting* one.<sup>5</sup>

An order directing the execution proceedings to be struck off for the default of the decree-holder is not an order "against" the judgment-debtor and hence does not furnish a fresh starting point for the calculation of the period of one year under the proviso to this rule.<sup>6</sup>

But the rule will apply only to a *fresh application for execution*. Where the proceedings are but a *continuation* of a prior execution case, no notice of such proceedings is necessary.<sup>7</sup> Acting on this principle the High Court of Madras<sup>8</sup> has held that where properties have been attached in a prior execution application and the application has been dismissed leaving the attachment subsisting, a *subsequent application for sale of the property* will not require a notice under this rule.

**10. Remedy when property has been sold without notice under this Rule.** — When a sale is held without the issue of a notice under this rule, the party aggrieved will be entitled to have the sale declared void and will be further entitled to claim damages.<sup>1</sup> This he may do by means of an application under Section 47.<sup>2</sup> See Note 61 to Section 47. As to the period of limitation for such application, see Note 88 to Section 47 and the undermentioned cases.<sup>3</sup>

**11. Date of the decree.** — The period of one year is to be computed from the date of the decree capable of execution. Thus, if the decree of the first Court is affirmed or modified in appeal, the date of the decree is the date of the appellate decree. But if the appeal is dismissed for default, the date of the decree is that of the decree appealed against.<sup>1</sup>

Where a decree provides for the payment of money in instalments, the period of one year should be computed from the date of the decree and not from the date of *default* in payment of the instalment.<sup>2</sup>

**12. Notice, when not necessary.** — The principle underlying the mandatory provision of the rule is that the interests which *would* be affected by the execution should be sufficiently represented and that an opportunity should be given for showing

3. ('18) AIR 1918 Mad 645 (647).

('86) 9 Mad 508 (509, 510). (An order for rateable distribution is an order within the meaning of this rule.)

('35) AIR 1935 Cal 356 (357).

4. ('25) AIR 1925 Pat 474 (476) : 5 Pat 1 (F B). (Dissenting from AIR 1924 Pat 111.)

5. ('30) AIR 1930 Pat 536 (538) : 9 Pat 499.

6. ('88) AIR 1988 Pat 162 (164).

7. ('28) AIR 1928 Cal 241 (242).

('81) AIR 1981 Bom 425 (427, 428).

[See also ('10) 7 Ind Cas 19 (21) (Cal).]

8. ('20) AIR 1920 Mad 1084 (1085) : 43 Mad 57.

Note 10

1. (1865) 3 Suth W R 120 (122).

2. ('08) 82 Bom 572 (574).

('11) 9 Ind Cas 584 (585) (Cal).

[See also ('88) AIR 1988 Rang 292 (298). (Application to set aside sale on ground of want of notice under this rule is one under S. 47.)]

3. ('18) AIR 1918 Cal 171 (172, 173).

('26) AIR 1926 Pat 397 (398).

#### Note 11

1. ('17) AIR 1917 Cal 728 (731) : 44 Cal 954.

2. ('21) AIR 1921 Lah 884 (885). (The *terminus a quo* is the date of the decree and not the date of default in paying the instalment which gave the right to execute the decree.)

cause, if any, against the execution. A notice should, therefore, be insisted on only to the extent necessary for that purpose. Therefore, in cases falling under clause (a) of sub-rule (1), no notice need be issued to a judgment-debtor who has no interest in the property against which execution is sought.<sup>1</sup> And in cases falling under clause (b) of sub-rule (1), it is enough if notice has gone to an adult legal representative capable of representing the estate; notice to the other legal representatives is not essential.<sup>2</sup> Nor is any notice essential where the legal representative is already a party on the record though in another capacity.<sup>3</sup>

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**Notes 12-13**

**13. Notice and limitation.** — By virtue of clause (5), column 3, Article 182 of the Limitation Act of 1908, a notice issued under this rule will be a step-in-aid of execution in the case of decrees of Courts other than Chartered High Courts.<sup>1</sup> For this purpose it is not necessary that the application on which the notice was issued should be a *bona fide* application.<sup>2</sup> Nor is it material that the application was defective or irregular,<sup>3</sup> or that it was not actually served.<sup>4</sup> But it is necessary that the notice should have been *issued* on an application which was not time-barred.<sup>5</sup> On the question as to the date from which the period of three years is to be computed, there was a conflict of views under the Limitation Act of 1877, the High Courts of Allahabad<sup>6</sup> and Bombay<sup>7</sup> holding that time should be computed from the date when the Court *ordered* the notice to issue, the Calcutta and Madras High Courts holding that it should be computed only from the date when the notice was *actually issued*.<sup>8</sup> The word

#### Note 12

1. ('26) AIR 1926 Cal 86 (86, 87).
2. ('29) AIR 1929 Mad 275 (282).
3. ('25) AIR 1925 Cal 1227 (1228).
4. ('04) 14 Mad L Jour 342 (343).
- [See also ('96) AIR 1936 Pat 253 (254). (Decree against father and son — Son dying before execution — Execution taken out against father personally and not as heir of son—Notice under O. 21 R. 22 is not necessary.)]

#### Note 13

1. ('98) AIR 1938 Mad 553 (555).
- [See also ('98) AIR 1938 Pat 658 (664); 13 Pat 86. (Issue of a combined notice under this rule and Rule 16 is sufficient to save limitation.)]
2. ('74) 22 Suth W R 154 (155).
3. ('74) 22 Suth W R 484 (484).
4. ('74) 22 Suth W R 512 (517) (F B).
5. ('75) 23 Suth W R 327 (328).

The following cases cannot be considered to be good law :

1. ('67) 8 Suth W R 306 (307).
2. (1865) 4 Suth W R Misc G (6).
3. ('66) 6 Suth W R Misc 97 (97).
4. ('66) 6 Suth W R Misc 98 (101).
5. ('67) 8 Suth W R 268 (268).
6. ('68) 9 Suth W R 330 (331).
7. ('68) 9 Suth W R 443 (444).
8. ('72) 18 Suth W R 193 (194).
9. ('78) 19 Suth W R 103 (108).
10. ('98) 15 All 84 (89) (F B).
11. ('38) AIR 1938 Pat 658 (664) : 13 Pat 86.
12. ('09) 3 Ind Cas 817 (818) (All).
13. ('78) 1 All 675 (680).
14. ('81) 3 All 517 (519).
15. ('95) 19 Bom 261 (268).
16. ('15) AIR 1915 Bom 46 (47).
17. ('98) 25 Cal 594 (599) (F B).

18. ('05) 2 Cal L Jour 544 (545).
19. ('08) 35 Cal 1047 (1049).
20. ('09) 2 Ind Cas 941 (942) (Cal).
21. ('11) 10 Ind Cas 411 (412) (Cal).
22. ('22) AIR 1922 Cal 44 (46).
23. ('27) AIR 1927 Lah 106 (107).
24. ('94) 17 Mad 76 (77).
25. ('08) 31 Mad 68 (70).
26. ('08) 18 Mad L Jour 14 (15).
27. ('09) 2 Ind Cas 433 (434) (Mad).
28. ('14) AIR 1914 Mad 435 (435) : 15 Ind Cas 788 (789) : 37 Mad 231.
29. ('98) 11 C P L R 157 (160).
30. ('16) AIR 1916 Oudh 124 (125) : 19 Oudh Cas 17.
31. ('32) AIR 1932 Pat 222 (223, 224) : 11 Pat 546.
32. ('05) 1905 Pun Re No. 22, page 94.
33. ('07) 1907 Pun Re No. 116, page 534.
34. ('10) 8 Ind Cas 377 (378) (Oudh).
- [But see ('08) 1908 Pun L R No. 125. (Issue of notice cannot cure the invalidity of the execution application.)]
35. ('03) 27 Bom 622 (625).
36. ('17) AIR 1917 Mad 363 (364).
37. [But see ('16) AIR 1916 Oudh 278 (279) : 18 Oudh Cas 374.]
38. ('05) 2 All L Jour 67 (68).
39. ('78) 3 Cal 518 (521).
40. ('78) 2 Mad 1 (3, 5).
41. ('81) 1881 All W N 120 (120).
42. ('90) 1890 All W N 244 (245).
43. ('08) 30 All 536 (537).
44. ('08) 27 Bom 622 (625).
45. ('04) 28 Bom 416 (420).
46. ('02) 6 Cal W N 656 (657).
47. ('06) 4 Cal L Jour 530 (531).
48. ('07) 30 Mad 30 (32).

See also the following cases under the Act of 1871 : ('75) 23 Suth W R 195 (195).



**O. 21 R. 22  
Note 13**

"issuing" which occurred in clause (6) of Article 179 of the Limitation Act of 1877 corresponding to Article 182 clause (6) was changed into the word "issue" in the Act of 1908 and it was held by the High Court of Bombay<sup>9</sup> that the effect of the change was to give effect to the Calcutta and Madras view. Under the Act of 1908, it was held by all the High Courts except the High Court of Allahabad and by the Chief Court of Oudh that it is the date of the *issue* of the notice that is the starting point of limitation.<sup>10</sup> The Allahabad High Court, and following it the Oudh Chief Court were, however, of opinion that the new Act did not make any change in the law. They therefore held the same view as that of the Allahabad High Court before the Act of 1908.<sup>11</sup>

Article 182 of the Limitation Act of 1908 has now been amended by Act IX of 1927 by which clauses (5) and (6) of the Article have been amended and substituted as follows :

"Clause 5. (where the application next hereinafter mentioned has been made) the date of the *final order passed on an application made* in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order, or

Clause 6. (in respect of any amount recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of the last-mentioned decree, or, in the case of an appeal therefrom, the date of the final decree of the Appellate Court or of the withdrawal of the appeal, or"

Under the present Act, as amended, therefore, the time is to be computed from the date of the *final order passed* on such an application. Where no notice has been issued at all, a mere *order* for issuing notice will not, however, be a step-in-aid of execution.<sup>12</sup>

In respect of decrees of Chartered High Courts the limitation for execution is prescribed in Article 183 of the Limitation Act. The said Article makes no specific mention of a notice under this rule, but it contains a provision that such decrees may be executed within 12 years from the date when they have been "*revived*." The term "revivor" has nowhere been defined. It was introduced on the basis of the English Common Law Practice (which prevailed in the Supreme Courts of India) under which, if a writ of execution was not served out within a year and a day, it was necessary to revive the decree by a process known as *scire facias*. Till then the decree would be in a "dormant" condition. It will have to be "revived" so as to be made executable. The "revivor," therefore, consists in getting a declaration recorded that execution is intended to be enforced under the decree.

The question, therefore, is whether a notice under this rule will operate as a "revivor." In this connection it has been held that an *order for execution made after the issue of a notice under this rule* will operate as a revivor.<sup>13</sup> It is important to note that to constitute a revivor the following three conditions must be satisfied, *viz.* —

(75) 24 Suth W R 227 (227).

(76) 25 Suth W R 249 (249).

(76) 25 Suth W R 546 (547).

9. ('18) AIR 1918 Bom 167 (167) : 42 Bom 558.

10. ('18) AIR 1918 Bom 167 (167) : 42 Bom 558.

(20) AIR 1920 Cal 22 (24).

(18) AIR 1918 Pat 457 (457) : 8 Pat L Jour 285.

(Following A I R 1916 Pat 205.)

[See also ('17) AIR 1917 Mad 363 (364).]

[But see ('14) AIR 1914 Cal 760 (761).]

11. ('18) AIR 1918 All 188 (184) : 40 All 680.

(19) AIR 1919 Oudh 370 (371) : 22 Oudh Cas 32.

(By analogy.)

[But see ('10) 8 Ind Cas 377 (378) : 18 Oudh Cas 203. (Date of issue of notice was held to be starting point of limitation.)]

12. ('99) 23 Bom 35 (38).

(10) 6 Ind Cas 746 (748) : 18 Oudh Cas 90.

(16) AIR 1916 Oudh 278 (279) : 18 Oudh Cas 374.

13. ('04) 26 All 861 (864).

(81) 6 Cal 504 (511).

(98) 20 Cal 551 (558, 559).

(97) 24 Cal 244 (247).

(09) 1 Ind Cas 168 (173) : 36 Cal 543.

(09) 4 Ind Cas 402 (408) (Cal).



(1) There must be an application for execution. An application for transmission of decree is not enough.<sup>14</sup>

(2) There must be an order for execution passed on the application. The mere fact that an application has been made and notice has been issued to the judgment-debtor is not enough.<sup>15</sup>

(3) The said order for execution should have been passed after the issue of a notice under this rule.<sup>16</sup> If there were several judgment-debtors and notice under this rule was issued to only one or some of them, there will be a revivor only against them and not against the other judgment-debtors.<sup>17</sup>

See also Note 10 to Art. 183 in the Authors' Commentaries on the Limitation Act.

### 13a. Failure to show cause why decree should not be executed — Effect.

— See Note 23 to Section 11 *ante*, and the undermentioned cases.<sup>1</sup>

**14. Court executing the decree.** — The rule provides that the notice shall be issued by "the Court executing the decree." The expression will include the Court to which the decree has been transferred for execution. In cases, therefore, where the decree is transferred for execution, the transferee Court can, and in fact is the only Court competent to issue the notice.<sup>1</sup>

But an *application* to execute against the legal representatives has to be made to the Court which passed the decree.<sup>2</sup> In such cases, therefore, the application will be made to the Court which passed the decree but notice under the rule will be issued by the transferee Court.<sup>3</sup>

**15. Revivor of decree by notice to one judgment-debtor.** — *Vide* under Note 13 above.

**16. Sub-rule (2).** — The mandatory character of the rule is not in any way abrogated by sub-rule (2).<sup>1</sup> The sub-rule gives a discretion to the Court to *dispense* with the notice under certain circumstances.<sup>2</sup> If such notice is dispensed with, the

('16) AIR 1916 Cal 488 (494) : 43 Cal 903.

('84) 7 Mad 540 (542, 543).

('90) 17 Cal 491 (497). (But if such order itself is made out of time, then there can be no revivor.)

14. ('11) 11 Ind Cas 216 (217) (Cal).

[See also ('16) AIR 1916 Cal 488 (491, 492) : 43 Cal 903 (FB).]

15. ('03) 30 Cal 979 (982).

('25) AIR 1925 Cal 668 (670).

16. ('09) 4 Ind Cas 306 (306) : 33 Mad 187.

17. ('16) AIR 1916 Mad 1098 (1099, 1040) : 38 Mad 1102.

('18) AIR 1918 Mad 513 (513) : 40 Mad 1127.

#### Note 13a

1. ('85) AIR 1935 Cal 306 (307). (Failure of judgment-debtor to appear on date fixed in notice under R. 22—Court ordering notice under R. 66 and fixing a certain date — Judgment-debtor appearing on such date and objecting that decree was barred by limitation— *Held* that as period of limitation for appeal or review against the previous order against the judgment-debtor had not expired the Court could go into his objection.)

('84) AIR 1984 Pesh 64 (67). (Court proceeding to execute declaratory decree — Failure of judgment-debtor to appear and object in answer to notice under this rule is not a bar to his raising

objection subsequently as Court's action is without jurisdiction.)

#### Note 14

1. ('08) 12 Cal W N 897 (899).

('18) AIR 1918 Mad 580 (584, 585) : 40 Mad 1069 (FB).

('10) 8 Ind Cas 22 (25) (Cal).

('22) AIR 1922 Cal 3 (4).

('25) AIR 1925 Oudh 448 (450) : 28 Oudh Cas 330.

2. ('98) 18 Bom 224 (226).

('25) AIR 1925 Oudh 448 (450) : 28 Oudh Cas 330.

('12) 17 Ind Cas 293 (294) (Mad).

('07) 17 Mad L Jour 300 (301). (But objection to the jurisdiction of the transferee Court bringing on record the legal representative may be waived by the legal representatives.)

3. ('05) 28 Mad 466 (469) (FB).

#### Note 16

1. ('28) AIR 1928 Cal 60 (62) : 55 Cal 96.

('24) AIR 1924 Mad 431 (436) : 47 Mad 288 (FB). (Effect of sub-rule 2 is not to make issue of notice a matter not pertaining to jurisdiction but gives Court a special power to dispense with issue of notice in the exceptional cases specified.)

('36) AIR 1936 Mad 205 (207) : 59 Mad 461 (FB). (Do.)

2. ('88) AIR 1988 Cal 560 (561).

**O. 21 R. 22**  
**Notes 16-17**

reasons should be recorded.<sup>3</sup> The Rangoon High Court<sup>4</sup> is of opinion that the omission to record reasons is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction. The Bombay,<sup>5</sup> Calcutta,<sup>6</sup> Madras,<sup>7</sup> Patna<sup>8</sup> and Oudh<sup>9</sup> Courts have, however, held that such omission will be a mere irregularity and that the proceedings will not be totally invalid merely by reason of the omission. The rule as amended by the Lahore High Court expressly provides that a failure to record reasons is only an irregularity not affecting jurisdiction.<sup>10</sup>

**17. Appeal.** — An order on a question of notice under the rule will come under Section 47 and is, therefore, appealable as a decree.<sup>1</sup> But an order of arrest without notice is not a *final* order and is not, therefore, appealable.<sup>2</sup> Even in such cases the High Court will interfere in its revisional jurisdiction in extreme cases.<sup>3</sup>

An order allowing or refusing an application to set aside a sale for want of a notice under the rule comes under Section 47 and is, therefore, appealable as a decree.<sup>4</sup>

**O. 21 R. 23**

**R. 23.** [S. 249.] (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

[1877, S. 249; 1859, S. 247. See Ss. 38, 47, 51 and Rr. 24 and 57 below.]

### *Synopsis*

1. Scope of the Rule.
2. "The Court shall consider such objection."
3. Appeal.

### *Other Topics (miscellaneous)*

Execution without objection—Effect. See Note 1.

Form of objection and non-verification. See Note 2.

(‘85) AIR 1935 Cal 125 (126). (Judgment-debtor in previous execution application objecting to execution in answer to notice under this rule — Notice may be dispensed with in second application.)

3. (‘18) AIR 1918 Mad 645 (647).

4. (‘29) AIR 1929 Rang 161 (161) : 7 Rang 110. (‘85) AIR 1935 Rang 42 (48).

5. (‘82) AIR 1932 Bom 509 (511). ("No reason to issue notices"—Held sufficient compliance.)

6. (‘81) AIR 1931 Cal 443 (444) : 58 Cal 940.

7. (‘24) AIR 1924 Mad 431 (436) : 47 Mad 288 (FB). (‘29) AIR 1929 Mad 718 (719).

8. (‘86) AIR 1936 Pat 37 (38). (Warrant of attachment issued without notice under O. 21,

R. 22 (1), C. P. C.—Reasons not recorded under O. 21 R. 22 (2)—Warrant is not illegal.)

9. (‘24) AIR 1924 Oudh 120 (120) : 26 Oudh Cas 288.

10. (‘39) AIR 1939 Lah 473 (474).

### **Note 17**

1. (‘26) AIR 1926 Pat 397 (397).

(‘26) AIR 1926 Cal 538 (539, 540).

2. (‘29) AIR 1929 Mad 718 (720).

3. (‘29) AIR 1929 Rang 161 (162) : 7 Rang 110.

4. (‘08) 32 Bom 572 (574).

(‘12) 40 Cal 45 (49).

(‘24) AIR 1924 Mad 431 (432) : 47 Mad 288 (FB).

(‘21) AIR 1921 Pat 145 (149) : 6 Pat L Jour 819.

**1. Scope of the Rule.** — If the person to whom notice is issued under Rule 22 does not appear and show cause against execution, the Court is bound to order execution. Thereupon such person will be concluded and bound by the order and cannot go behind it.<sup>1</sup> If, however, the execution application is subsequently dismissed under Rule 57 of this Order, the dismissal has been held to have the effect of vacating the previous order for execution.<sup>2</sup>

If, on the day fixed, neither party appears, the application can be dismissed.<sup>3</sup>

**2. "The Court shall consider such objection."** — If the person to whom the notice is issued appears and offers objections, the Court is equally bound to consider those objections.<sup>1</sup> There is no particular form in which the objections are to be presented and, if in writing, they need not be verified.<sup>2</sup>

Such objections should, however, go to the root of the executability of the decree,<sup>3</sup> and not be merely formal or immaterial ones which do not prevent execution,<sup>4</sup> for, apart from considering whether the decree is executable or not, the executing Court cannot go behind the decree. See Section 38, Note 8.

**3. Appeal.** — An order allowing or refusing execution under this rule is appealable as a decree.<sup>1</sup>

**O. 21 R. 23**  
**Notes 1-3**

## PROCESS FOR EXECUTION

**R. 24.** [Ss. 250, 251, para. 1.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

**O. 21 R. 24**

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

### Order 21 Rule 23 — Note 1

1. ('75) 23 Suth W R 310 (311).  
(‘05) 2 Cal L Jour 499 (503, 504).  
(‘09) 1 Ind Cas 284 (285) (Cal).  
(‘22) AIR 1922 Oudh 117 (118) : 25 Oudh Cas 13.  
(Where in the course of a previous execution proceeding, it was open to the judgment-debtor to plead limitation, but he failed to do so, he would be precluded from raising the same in a subsequent application which is within time from the prior application.)  
(‘81) AIR 1981 Pat 422 (424) : 11 Pat 480.
2. ('16) AIR 1916 Mad 886 (886).
3. ('95) 20 Bom 541 (542).

### Note 2

1. ('10) 5 Ind Cas 546 (547) (All).  
(‘87) 8 Suth W R 200 (200).  
(‘70) 14 Suth W R 155 (155).

(‘95) 22 Cal 558 (561). (Even though the legal representative objects to the power of transferee Court to issue such notice.)

2. ('67) 8 Suth W R 200 (200).
3. ('86) 8 All 877 (880).
4. ('97) 21 Bom 814 (817). (Or that a judgment-debtor had died after hearing but before judgment.)  
See ('91) 13 All 848 (844). (That decree did not correctly represent the amount as per judgment — Only a defect in drawing up decree.)

### Note 3

1. ('11) 9 Ind Cas 760 (760) (Mad).  
'88) 11 Mad 180 (182).  
(‘11) 9 Ind Cas 828 (828) (Lah). (But order of a Court that no warrant of attachment should issue before a certain date is not appealable as no order in execution had been made.)

**O. 21 R. 25**  
**Note 1**

(3) In every such process a day shall be specified on or before which it shall be executed.

[1877, Ss. 250, 251 (1), 343; 1859, Ss. 221, 222. *Cf.* R. S. C., O. 42 Rr. 14 and 16. See S. 51.]

### Local Amendments

#### ALLAHABAD

After the words at the end of sub-rule (3) "be executed," *add* the words "and a day shall be specified on or before which it shall be returned to Court."

#### BOMBAY

*Add* the following proviso to sub-rule (2) :

"Provided that a First Class Subordinate Judge may, in his special jurisdiction, send a process to another subordinate Court in the same district for execution by the proper officer in that Court."

#### CALCUTTA

*Add* the following to sub-rule (3) :

"and a day shall also be specified on or before which it shall be returned to the Court."

#### MADRAS

*Delete* the full stop at the end of sub-rule (3) and *add* the following words :

"and a day shall be specified on or before which it shall be returned to Court."

#### NAGPUR

In sub-rule (3), *for* the word "executed," *substitute* the words "returned to the Court."

#### ODDH

In sub-rule (3) after the words at the end of the sub-rule, "be executed", *add* the words "and a day shall be specified on or before which it shall be returned to Court."

#### RANGOON

In sub-rule (3), *add* the following :

"and a day shall also be specified on or before which it shall be returned to the Court."

#### SIND

*Add* the following proviso to sub-rule (2) :

"Provided that First Class Subordinate Judge may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."

### Synopsis

- |  |  |
|--|--|
| 1. "Shall issue process."                              | 4. Arrest or attachment without warrant.                               |
| 2. "Shall be sealed."                                  | 5. "Shall be signed."  |
| 3. Delegation of authority to execute, if can be made. | 6. "A day shall be specified on or before which it shall be executed." |
|  | 7. Application of the Rule to Revenue Courts.                          |

### Other Topics (miscellaneous)

Presumption as to authority to sign and onus. "Unless it sees cause to the contrary." See Note 5. Note 1.

1. "Shall issue process." — If the preliminary measures prescribed by the previous rules have been taken, the Court is bound to issue process and cannot refuse

to do so, unless "it sees cause to the contrary" such as the judgment-debtor being entitled to a right to set-off, or the applicant asking for simultaneous execution.<sup>1</sup>

In the absence of any such cause the Court cannot refuse issue of process.<sup>2</sup> The fact that a previous execution application proved infructuous will not justify such a refusal.<sup>3</sup>

**2. "Shall be sealed."** — Every process issued under this rule *shall* be sealed. The provision is mandatory and without the seal the process will be invalid and its execution illegal.<sup>1</sup> Resistance to the execution of such a process will therefore constitute no offence.<sup>2</sup>

**3. Delegation of authority to execute, if can be made.** — The rule only says that the process shall be *delivered* to the proper officer *to be executed*. It is not necessary that the "proper officer" should himself execute the process,<sup>1</sup> and there is nothing to prevent his delegating a subordinate of his to execute the process.<sup>2</sup> But a process issued to a bailiff cannot be executed by a nazir.<sup>3</sup>

**4. Arrest or attachment without warrant.** — An officer effecting an arrest or attachment should have the warrant in his possession, otherwise the arrest<sup>1</sup> or attachment<sup>2</sup> will be illegal.

**5. "Shall be signed."** — A process issued under this rule which is not signed by the Judge is illegal.<sup>1</sup> If, however, any other officer of the Court is specially authorized in this behalf, it is enough if it is signed by him.<sup>2</sup> Such authority should be in writing and kept in the Court.<sup>3</sup> If, however, such process is signed by a sheristadar "by order," the presumption will be that he was authorized in this behalf,<sup>4</sup> and the *onus* of showing that he had no such authority will be on the party who denies the authority.<sup>5</sup>

**6. "A day shall be specified on or before which it shall be executed."** — A warrant which does not specify the date on or before which it is to be executed is invalid and its execution is illegal.<sup>1</sup>

If such date is specified the process should be executed on or before that date; its execution later is illegal.<sup>2</sup>

#### Order 21 Rule 24 — Note 1

1. ('84) 10 Cal 817 (819).
2. ('97) 1897 Pun Re No. 57, p. 252.
3. ('71) 17 Suth W R 165 (168).

#### Note 2

1. ('19) AIR 1919 Pat 404 (405) : 8 Pat L Jour 686.
- (85) AIR 1985 All 214 (215) : 57 All 660.
2. ('26) AIR 1926 Pat 237 (238, 239) : 5 Pat 216.

#### Note 3

1. ('95) 22 Cal 596 (604, 605).
2. ('84) 6 All 385 (388).
- (82) AIR 1932 All 227 (227).
- (95) 22 Cal 596 (608).
- (95) 22 Cal 759 (761).
- (10) 5 Ind Cas 409 (410) : 87 Cal 122. (But a warrant under S. 45 of the Chaudidari Act cannot be delegated.)
3. ('16) AIR 1916 Pat 272 (272) : 1 Pat L Jour 550.

#### Note 4

1. ('88) 5 All 318 (321).
2. ('05) 27 All 258 (259).

#### Note 5

1. ('85) 7 All 506 (509, 510) (PC). (Execution

sale was set aside.)

- (85) AIR 1985 All 214 (215) : 57 All 660. (Process signed by amin but not bearing seal of Court— Attachment is illegal — Hence removal of such property is not offence.)
2. ('02) 6 Cal W N 845 (846, 847).
- (86) 8 All 298 (294). (The signature may be confined to the initials.)
- (20) AIR 1920 All 51 (52). (Signature by peshkar who was not authorized.)
3. ('87) 1887 All W N 42 (42).
4. ('23) AIR 1923 Cal 584 (585).
5. ('19) AIR 1919 Pat 404 (405) : 8 Pat L Jour 686.

#### Note 6

1. ('10) 5 Ind Cas 409 (410) : 87 Cal 122.
- (16) AIR 1916 pat 272 (273) : 1 Pat L Jour 550.
- (34) AIR 1934 All 1016 (1017). (Resistance to execution of warrant in such case is not an offence.)
2. ('84) 10 Cal 18 (19).
- (04) 81 Cal 424 (426, 427).
- (13) 19 Ind Cas 706 (706) : 40 Cal 849. (But a warrant issued by the Court to be executed by bailiff endorsed by the nazir to a peon with a

**O. 21 R. 24**  
**Notes 6-7**

If the time has been extended, the extended date should be specified ; otherwise the execution of the process will be illegal.<sup>3</sup>

Under the rule as amended by the High Court of Allahabad a date has to be fixed also for the return of the process. When it is so fixed the process cannot be executed after that date.<sup>4</sup>

**7. Application of the Rule to Revenue Courts.** — The provisions of this rule have been held to apply to warrants issued under Section 131 of the Central Provinces Land Revenue Act.<sup>1</sup>

**O. 21 R. 25**

**R. 25.** [Ss. 343 and 251, last para.] (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

[1877, S. 251, last para.; 1859, S. 222, last para.]

**Local Amendments****ALLAHABAD**

*Substitute* the following for paragraph (2):

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

**MADRAS**

(1). *Substitute* the following in the place of the present sub-rule (2):

"(2) Where in the case of a decree for the payment of money the process is not executed owing to the decree having been satisfied, such officer shall also obtain an endorsement on the process to that effect signed by the decree-holder and attested by two respectable witnesses who can identify the decree-holder."

(2). *Add* the following as sub-rule (3):

"(3) Where the endorsement of such officer is to the effect that he is unable

direction to execute it at a date earlier than that fixed by the Court and executed by the person between the two dates is executed rightly.)

3. ('10) 5 Ind Cas 409 (410) : 37 Cal 122.

4. ('38) AIR 1938 All 46 (47) : 55 All 119.

**Note 7**

1. ('24) AIR 1924 Nag 68 (69) : 19 Nag L R 188. (Where the date fixed for the return had already expired on the day the process-server went to execute it he was not acting in the execution of his duty.)

to execute the process, the Court shall examine him or cause him to be examined by any other Court touching his alleged inability, and may if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

**O. 21 R. 25**  
**Notes 1-3**

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause.

Where the inability to execute the process is stated to be due to the satisfaction of the decree and such satisfaction has been endorsed on the process as mentioned in sub-rule (2) above, the Court shall issue notice to the decree-holder to show cause on a day to be fixed by the Court, why such satisfaction should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the satisfaction should not be recorded as certified, the Court shall record the same accordingly.

A record of satisfaction under the provisions of this sub-rule shall have the same effect as one under the provisions of Order 21 Rule 2, sub-rule (2)."

**ODDH**

*For the existing sub-rule (2), substitute the following:*

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result."

*Synopsis*

1. "Officer entrusted with the execution."
2. Delegation of process. See Note 3, Rule 24.
3. Proof of execution.

1. "Officer entrusted with the execution." — The "Officer entrusted with execution" is the person who himself executed the process and not the Nazir.<sup>1</sup>

2. Delegation of process. — See Note 3, Rule 24.

3. Proof of execution. — The report of the Nazir regarding execution of process is by itself not evidence. It must be proved like any other documentary evidence.<sup>1</sup>

STAY OF EXECUTION

**R. 26.** [Ss. 239, 240.] (1) The Court to which a decree

**O. 21 R. 26**

**When Court may stay execution.**

has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order

**Order 21 Rule 25 — Note 1**

1. ('18) 19 Ind Cas 706 (707) : 40 Cal 849.

**Note 3**

1. ('81) 7 Cal 84 (88).  
(1865) 3 Suth W R Misc 11 (15).

(1864) 1864 Suth W R (Gap) Misc 9 (9).  
(1865) 4 Suth W R Misc 4 (5).  
(1866) 6 Suth W R Act X 92 (98).  
(1868) 10 Suth W R 3 (4).  
(1869) 12 Suth W R 865 (866).  
(1872) 18 Suth W R 197 (197).

**O. 21 R. 26** relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.

[1877, Ss. 239, 240; 1859, Ss. 290, 291. *Cf.* R. S. C., O. 42 R. 17 cl. (b). See Ss. 42 and 47.]

#### Local Amendments

##### ALLAHABAD

*For* the words "the Court may" *read* the words "the Court shall, unless good cause to the contrary is shown," in sub-rule (3).

##### CALCUTTA

In sub-rule (3) *cancel* the words "the Court may require such security from, or impose such conditions upon the judgment-debtor as it thinks fit" and *substitute* therefor the following words :

"the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary."

##### LAHORE

*For* the words "the Court may" *substitute* the words "the Court shall, unless sufficient cause is shown to the contrary," in sub-rule (3).

##### NAGPUR

In sub-rule (3), *for* the word "may" *substitute* the words "shall, unless good cause to the contrary is shown."

##### N.-W. F. P.

In sub-rule (3) *for* the words "the Court may" *substitute* the words "the Court shall unless good cause to the contrary is shown."

##### ODDH

In sub-rule (3) *for* the words "the Court may" *read* the words "the Court shall, unless good cause to the contrary is shown."

##### PATNA

In sub-rule (3) *substitute* the words "shall, unless sufficient cause is shown to the contrary," *for* the word "may."

##### RANGOON

In sub-rule (3), *for* the word "may" the words "shall, unless sufficient cause is shown to the contrary" shall be *substituted*.



## Synopsis

**O. 21 R. 26**  
**Notes 1-2**

### 1. Scope of the Rule.

### 2. Appeal.

### Other Topics (miscellaneous)

Powers of transferee Court. See Note 1. Sub-rule (3). See Note 1.

**1. Scope of the Rule.** — Under Section 42 *ante* the Court executing a decree sent to it has the same powers in *executing* such a decree as if the decree had been passed by itself. But such Court cannot question the legality of the order under which the decree was sent to it for execution, nor can it decide the question whether the decree was barred by limitation on the date of the order. See Section 42, Note 1, *ante*.

Such question can properly be dealt with only by the Court which passed the decree and, therefore, to enable the judgment-debtor to apply to such Court for an order in respect of the decree which is sought to be executed, the Court to which a decree is sent for execution may order stay of execution under this rule.<sup>1</sup>

Thus, the executing Court may order stay of execution —

- (i) to enable the judgment-debtor to get the decree amended;<sup>2</sup>
- (ii) to enable him to show that the decree is satisfied,<sup>3</sup> or is not existing;<sup>4</sup>
- (iii) to enable him to get the decree passed *ex parte* against him set aside;<sup>5</sup>
- (iv) to enable him to get the decree passed against him set aside on the ground that it was obtained by fraud;<sup>6</sup>
- (v) for deciding if the decree is barred.<sup>7</sup>

An order for stay of execution under this rule can only be passed on the application of the *judgment-debtor* and no stay can be granted on the application of *third parties* or of the *decree-holder*.<sup>8</sup>

Under sub-rule (3) of this rule, the Court may impose conditions or require security, as it thinks fit, before directing stay of execution.<sup>9</sup>

A Court to which a decree has been sent for execution has no power to refuse to execute the decree even for a short period except in the circumstances set out in this rule.<sup>10</sup>

Under Section 265 (3) of the Chota Nagpur Tenancy Act (VI of 1908), the provisions of the Code relating to stay of execution apply to proceedings referred to in that Section.

**2. Appeal.** — An order directing security under sub-rule (3) is not an order determining the *rights of parties* and is not therefore appealable as a decree under Sections 47 and 96.<sup>1</sup> See also Note 44 to Section 47, *ante*.

### Order 21 Rule 26 — Note 1

1. ('80) 5 Cal 786 (787).
2. ('75) 23 Suth W R 154 (155).  
[See also ('87) AIR 1987 Rang 477 (479) : 1987 Rang L R 287. (Court to which decree is sent for execution cannot itself determine question as to validity of order of Court passing decree— This rule is designed to meet such cases.)]
3. ('89) 1889 Pun Re No. 78, p. 294.
4. ('87) 1887 Pun Re No. 61, p. 121. (Where the judgment contained a provision for payment of the amount due by instalment but the decree was silent.)
5. ('68) 9 Suth W R 861 (861).
6. ('37) AIR 1937 Rang 104 (105) : 4 Rang 562.
7. ('67) 8 Suth W R 202 (208).

6. ('82) 4 Mad 324 (325).
7. ('86) 13 Cal 257 (261).
8. ('82) 8 Cal 916 (918).
9. [See also ('86) AIR 1986 Rang 271 (278) : 14 Rang 550.]
8. ('31) AIR 1981 Lah 690 (691).
7. ('86) 12 Cal 515 (519).
9. ('25) AIR 1925 Lah 552 (554).
10. ('36) AIR 1936 Rang 184 (187). (Suit in Court to which execution has been transferred, by judgment-debtor for declaration that decree is void as having been obtained by fraud— Such Court cannot stay execution.)

### Note 2

1. ('14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72, 73) : 41 Cal 160.

O. 21 R. 27

**R. 27.** [S. 241.] No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

[1877, S. 241; 1859, S. 293. See S. 58, sub-s. (2) and O. 21 R. 40 sub-rule (4).]

**1. Scope of the Rule.** — Under Section 58, sub-section (2) *supra*, a judgment-debtor released from detention under *that Section* is not liable to be re-arrested in execution of the same decree.<sup>1</sup> But an order of discharge of the judgment-debtor consequent on the stay of execution *under Rule 26* above will not prevent the judgment-debtor from being re-arrested in execution of the decree.<sup>2</sup>

O. 21 R. 28

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

**R. 28.** [S. 242.] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

[1877, S. 242; 1859, S. 292. See S. 42 and O. 21 R. 26.]

**1. Scope of the Rule.** — This rule states that any order of the Court which passed the decree in relation to execution of such decree shall be binding on the Court executing the decree.<sup>1</sup> In the absence of any such order it is the duty of the Court executing the decree to enforce the decree in the same manner and to exercise the same powers as if the decree had been passed by itself.<sup>2</sup>

See also Section 42, Notes 1 and 3 and the undermentioned case.<sup>3</sup>

O. 21 R. 29

**R. 29.** [S. 243.] Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such

**Order 21 Rule 27 — Note 1**

1. ('86) 12 Cal 652 (657).
- ('93) 20 Cal 974 (878).
2. [See ('86) 12 Cal 652 (657).]

[See also ('02) 26 Bom 652 (659).]

**Order 21 Rule 28 — Note 1**

1. ('30) AIR 1930 Oudh 805 (808).
  - ('15) AIR 1915 Oudh 142 (148).
  - ('86) AIR 1986 Pesh 97 (100).
- See also S. 42, Note 3.

2. ('15) AIR 1915 Oudh 142 (148). (Objection against right of decree-holder to proceed against property not charged in decree can be determined by Court executing decree.)

3. ('89) AIR 1989 All 97 (101) : ILR (1989) All 181 (FB). (Allahabad Court sending decree for execution to Court in Calcutta — Former Court receiving stay order under the U.P. Encumbered Estates Act should recall decree from Calcutta Court.)

terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided. **O. 21 R. 29 Note 1**

[1877, S. 243; 1859, S. 209.]

### Local Amendment

#### ALLAHABAD.

*Add* "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed" and before the words "the Court may."

### Synopsis

- |   |  |
|---|--|
| 1. Scope of the Rule.                         | 4. Execution of award, if can be stayed under this Rule. |
| 1a. "Holder of a decree."                     | 5. Inherent power to stay execution. See Note 8.         |
| 2. "Such Court."                              | 6. Appeal.   |
| 3. "Until the pending suit has been decided." |  |

**1. Scope of the Rule.** — If a suit by a judgment-debtor is pending in a Court against the holder of a decree of that Court, the execution of the decree may, under this rule, be stayed until the disposal of the suit.<sup>1</sup> The object of this rule is twofold —

- (i) to enable the judgment-debtor, and the decree-holder to adjust their claims against each other, and
- (ii) to prevent a multiplicity of execution proceedings.<sup>2</sup>

But the execution Court has no power, under this rule, to stay execution of the decree if, at that time, no suit is pending against the holder of the decree<sup>3</sup> or if the suit is against the decree-holder, but filed by *third* parties.<sup>4</sup>

If the execution of the decree has been carried out and the decree-holder has obtained possession of the property, the Court has no power under this rule to order *restitution* of such property.<sup>5</sup>

The power to stay execution under this rule is purely a discretionary one.<sup>6</sup>

The mere pendency of a suit in which the decree-holder is a party is not a ground for stay of execution; such stay can be granted only on sufficient grounds being made out.<sup>7</sup> Thus, the pendency of a suit for administration of the estate of the mortgagor is no ground for the stay of execution of the mortgage decree.<sup>8</sup> It has been held by the High Court of Calcutta that if the suit against the decree-holder is for a declaration that the decree is satisfied by an uncertified adjustment out of Court, no stay of execution of the decree can be granted under this rule.<sup>9</sup> But, it has been held by the High Court of Madras that this rule embraces every kind of suit which is maintainable. Thus, according to the Madras High Court a suit by the judgment-debtor for damages for breach of an agreement whereby the defendant had agreed to receive in satisfaction of his decree certain bonds and to get satisfaction entered up, is a suit to which this rule will apply.<sup>10</sup>

#### Order 21 Rule 29 — Note 1

1. ('74) 6 N W P H C R 181 (182).  
[See also ('84) AIR 1984 Pat 637 (637).]
2. ('28) AIR 1928 Cal 222 (224) : 55 Cal 512. ('86) AIR 1986 Mad 102 (103).
3. ('23) AIR 1923 Lah 514 (515).
4. ('84) 8 Bom 582 (584).
5. ('85) 7 All 78 (78, 79). ('80) AIR 1980 Lah 961 (968).
6. ('85) AIR 1985 Rang 389 (390).
7. ('35) AIR 1935 Rang 151 (152) : 13 Rang 351. ('86) AIR 1986 Mad 102 (103).

7. ('67) 8 Suth W R 392 (392, 393).  
[See ('85) AIR 1985 Rang 389 (390). (Execution application—Suit filed by judgment-debtor for specific performance of agreement between parties arranging for settlement of decretal debt—Application for stay of execution dismissed—Pending appeal from such order, suit dismissed—Though appeal was filed from such dismissal, held stay should not be given.)]
8. ('81) 7 Cal 733 (735).
9. ('28) AIR 1923 Cal 645 (646).
10. ('86) AIR 1986 Mad 102 (103).

**O. 21 R. 29**  
**Notes 1-3**

This rule must be read with O. 21 R. 92. Hence, after a sale in execution has taken place, the Court cannot stay the confirmation of the sale.<sup>11</sup>

This rule has no application to the granting of injunctions and no security can be demanded in such applications on principles analogous to this rule.<sup>12</sup>

The distinction between a temporary injunction restraining the execution of a decree and a stay order is that the former is not directed to a *Court* but to an *individual*. Proceedings taken in contravention of a temporary injunction are not a nullity as being without jurisdiction, and the effect of non-compliance with a temporary injunction is only to make the offender liable to punishment. But, proceedings in contravention of a stay order are a nullity.<sup>13</sup> See also the undermentioned case.<sup>14</sup>

**1a. "Holder of a decree."** — This term will include an assignee of a decree and a suit by the judgment-debtor against such assignee is within this rule.<sup>1</sup>

**2. "Such Court."** — The Court in which the suit is pending has power to stay execution of the decree under this rule, only if the decree is a decree of *that Court*.<sup>1</sup> Such power can be exercised by it even if the decree has been transferred for execution to another Court.<sup>2</sup> But if the judgment-debtor's suit is pending before the transferee Court, the transferee Court has no power, under this rule, to stay execution of the decree.<sup>3</sup> But the contrary view has been held in the undermentioned decisions.<sup>4</sup>

The words "decree of such Court" include also the decree passed on *appeal* from the decree of that Court.<sup>5</sup> See Section 37 *ante*.

The words "such Court" refer only to the *Court* and not to the *Judge* presiding over the Court. Where there are two Judges attached to the Court, and the suit is pending before one Judge and the decree is sought to be executed before the other, the Judge before whom the suit is pending has power under this rule to stay execution of the decree.<sup>6</sup>

**3. "Until the pending suit has been decided."** — The Calcutta High Court has held in the undermentioned case<sup>1</sup> that these words should be interpreted to mean "until the *claim* in the pending suit has been *finally* decided after an exhaustion of all rights of appeal and not merely after a decree has been passed by the Court in which the suit is pending." The Rangoon High Court has also held a similar view.<sup>2</sup> But this view has been dissented from in the undermentioned Calcutta case<sup>3</sup> approving of an earlier view of the Punjab Chief Court,<sup>4</sup> wherein it was held that the Court may stay execution, pending appeal, under its *inherent powers* though not under this rule.

11. ('85) AIR 1935 Rang 151 (152): 13 Rang 351.

12. ('83) AIR 1938 Nag 153 (155).

13. ('38) AIR 1938 Lah 220 (221).

14. ('36) AIR 1936 Cal 239 (240): 68 Cal 57. (Temporary injunction restraining execution—Pending suit to set aside decree—Court passing order that attachment is to subsist till decision of suit and that application for execution is to stand dismissed for time being—Order is not warranted by law—It is merely suspensory order keeping execution case pending.)

**Note 1a**

1. ('36) AIR 1936 Mad 109 (108).

**Note 2**

1. ('67) 8 Suth W R 892 (898).

('80) AIR 1930 Lah 951 (958).

('04) 1904 Pun Re No. 41, page 127.

2. ('81) AIR 1981 Bom 247 (248, 249).

3. ('30) AIR 1930 All 121 (121).

('36) AIR 1936 Rang 184 (186).

[See also ('67) 8 Suth W R 892 (898).]

4. ('88) 10 All 889 (898, 894) (Obiter.)

('74) 6 N W P H C R 181 (188).

('08) 1908 Pun Re No. 130, page 588.

('34) AIR 1934 Cal 4 (5): 60 Cal 1119. (On transfer of decree Court passing decree ceases to have jurisdiction to execute it and so transferee Court becomes under Sec. 37 Court which passed the decree.)

5. ('88) 10 All 889 (898, 894).

6. ('81) AIR 1981 Bom 247 (248, 249).

**Note 3**

1. ('28) AIR 1928 Cal 222 (224): 55 Cal 512.

2. ('85) AIR 1935 Rang 889 (890). (Stay can be given even after a suit has been dismissed, provided that an appeal is pending.)

3. ('32) AIR 1932 Cal 19 (20): 58 Cal 1113.

4. ('10) 7 Ind Cas 1017 (1018): 1910 Pun Re No. 83.

**4. Execution of award, if can be stayed under this Rule.** — An award filed into Court under Section 11 of the Arbitration Act of 1899 is *enforceable* as a decree of the Court under Section 15 of that Act. But Section 15 does not enact that the award, when filed, is to be *deemed* to be a decree of the Court.<sup>1</sup> Nor does it give any "power to turn such an award into a judgment."<sup>2</sup> Therefore, it has been held by the High Court of Bombay<sup>3</sup> that the provisions of this rule cannot apply to *stay* execution of an award. The Calcutta High Court has held that the words "*enforceable as a decree*" mean that *all* the provisions relating to execution of decrees such as O. 21 R. 16 (transfer of decrees)<sup>4</sup> and O. 21 R. 50 (execution by or against firms)<sup>5</sup> are applicable to the execution of awards as well.

**O. 21 R. 29  
Notes 4-6**

**5. Inherent power to stay execution.** — See Note 3 above.

**6. Appeal.** — An order directing security to be given is not appealable as it does not determine conclusively the rights of the parties; but the High Court may, if the discretion is not judicially exercised, interfere in revision.<sup>1</sup> See also Note 44 to Section 47, *supra*.

### Local Amendment

**N.-W.F.P.**

After Rule 29 the following Rule shall be *added* :

"29A. When a suit under Rule 63 of this Order is pending, the Court in which such suit is filed, may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided."

**O. 21 R. 29A  
(N.-W.F.P.)**

### MODE OF EXECUTION

**R. 30.** [S. 254.] Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

**O. 21 R. 30**

[ 1887, S. 254; 1859, Ss. 201, 232. ]

### Synopsis

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|--|---|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Decree for the payment of money."</li> <li>3. As an alternative to some other relief.<br/>See Notes to O. 20 R. 10.</li> <li>4. Option as to mode of execution.</li> </ol> | <ol style="list-style-type: none"> <li>5. Detention of surety in civil prison.<br/>See Note 14 to S. 145.</li> <li>6. Attachment and sale.</li> <li>7. Rule not exhaustive of modes of execution.</li> <li>8. Notice to judgment-debtor.</li> </ol> |
|--|---|

**1. Scope of the Rule.** — The words "every decree for the payment of money" have been substituted for the words "every decree or *order directing a party to pay money*" which occurred in Section 254 of the old Code. It was held under the old Code that an order directing a party to refund money wrongly drawn out by him in

#### Note 4

1. ('22) AIR 1922 PC 874 (877): 49 Ind App 866: 50 Cal 1 (PC).
2. [See (1907) 1 K B 478 at 482, *In re a Bankruptcy Notice*. (Per F. Moulton, L. J.).]

3. ('10) 8 Ind Cas 179 (179, 180) : 85 Bom 196.

4. ('24) AIR 1924 Cal 117 (118).

5. ('20) AIR 1920 Cal 886 (887): 47 Cal 29.

#### Note 6

1. ('29) AIR 1929 Sind 110 (111).

**O. 21 R. 30**  
**Notes 1-6**

land acquisition proceedings, could be enforced under that Section.<sup>1</sup> The same procedure will apply under this Code in view of the provisions of Section 36, *ante*.

Under clauses (4) and (5) of Section 36 of the Presidency Towns Insolvency Act (III of 1909), the Insolvency Court is authorized to order payment of money or delivery of property by strangers to the Official Assignee where their liability to the insolvent is established on enquiry. Clause (6) of Section 36 of that Act enacts that such orders shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Civil Procedure Code.

**2. "Decree for the payment of money."**—A decree under which maintenance is payable periodically at a certain rate is a decree for the payment of money.<sup>1</sup>

See also Note 6 to Section 73.

**3. As an alternative to some other relief.**—See Notes to O. 20 R. 10.

**4. Option as to mode of execution.**—It is for the *decree-holder* to decide how he should execute his decree for the payment of money, whether by the arrest of the judgment-debtor, or by attachment and sale of his property. While the Court has discretion to refuse execution against the person and property simultaneously under Rule 21, *supra*, it cannot compel the decree-holder to adopt any particular mode of execution.<sup>1</sup> A decree for rent under the Bengal Tenancy Act is a decree "for the payment of money" and the decree-holder has the right to ask for personal execution against the judgment-debtor, notwithstanding that he has also the right to sell the tenure in arrears.<sup>2</sup>

**5. Detention of surety in civil prison.**—See Note 14 to Section 145.

**6. Attachment and sale.**—The words "attachment and sale" in this rule must be taken together and not distributively. Therefore, an attachment is a necessary preliminary to a sale.<sup>1</sup> As to what property can be attached, see Section 60, and as to whether absence of attachment is a material irregularity or not, see Notes to Rule 90, *infra*.

This rule applies only to cases of decrees for money which do not affect any specific immovable property. Thus, where a consent decree provided that if a certain

**Order 21 Rule 30 — Note 1**

1. ('05) 32 Cal 921 (928).

**Note 2**

1. ('71) 15 Suth W R 128 (129).  
 ('20) AIR 1920 Pat 636 (639).

**Note 4**

1. ('26) AIR 1926 Lah 110 (111) : 6 Lah 548.  
 ('67) 8 Suth W R 282 (284).  
 ('79) 4 Cal 583 (586, 587).  
 ('27) AIR 1927 Lah 153 (153). (Only in exceptional cases Court would interfere.)  
 ('30) AIR 1930 Lah 220 (221). (Cannot compel to accept payment in instalments.)  
 ('34) AIR 1934 Nag 140 (141).  
 ('39) AIR 1939 Pat 380 (381) : 180 Ind Cas 767 (768, 769) : 18 Pat 366.  
 [See also ('35) AIR 1935 All 179 (180). (Application for execution of money decree by attachment and sale—Part of property hypothecated to decree-holder as security bond—Objection by judgment-debtor that suit on bond should be instituted first is not maintainable.)  
 ('33) AIR 1933 Lah 881 (832). (Choice to proceed against two properties given by decree—

Decree-holder can proceed against any one of them.)

('33) AIR 1933 Mad 33 (33) : 56 Mad 343. (Maintenance decree creating charge on some items and making whole property also liable—Security need not be proceeded against in first instance.)

('87) 9 All 484 (485). (Prior to the introduction of O. 34, it was held that decree on hypothecation bond can be executed against property or person—Not law under this Code—See O. 34 Rule 6.)

[But see ('82) 4 All 497 (498). (Where execution against hypothecated property was refused on the ground of fraud—Not law under this Code.)]

2. ('04) 8 Cal W N 575 (577).

('88) 15 Cal 492 (496).

('89) 17 Cal 301 (308).

**Note 6**

1. ('67) 8 Suth W R 415 (419).

[See also ('33) AIR 1933 Rang 172 (174). (Attachment of property—Removal of attachment without hearing parties and on misunderstanding of order passed in another suit—Mistake

sum of money is not paid by a certain date, some specific immovable property should be sold, no attachment is necessary under this rule.<sup>3</sup>

**O. 21 R. 30**  
**Notes 6-8**

The holder of a decree for arrears of rent is not bound to proceed in the first instance against the property in respect of which the arrears are due but may proceed against other property of the judgment-debtor.<sup>3</sup> See also Note 4 to Section 51.

**7. Rule not exhaustive of modes of execution.** — The words “may be executed” in this rule show that it does not purport to be exhaustive of the modes of execution of money decrees. See also O. 21 R. 11. Therefore, rateable distribution of assets is a mode of execution of a decree for the payment of money.<sup>1</sup> Though Section 51 prescribes the appointment of a receiver as one of the modes of execution, nothing is mentioned about it in this rule, since the subject is dealt with in Order 40 *infra*.<sup>2</sup> Execution of a money decree by ejectment of a tenant is a method provided by Section 61 of the Oudh Rent Act in addition to the modes prescribed by this Code.<sup>3</sup>

**8. Notice to judgment-debtor.** — The Court has ample jurisdiction to issue a warrant of arrest under this Section without previously serving a notice on the judgment-debtor.<sup>1</sup>

## R. 31. [S. 259.] (1) Where the decree is for any specific

**O. 21 R. 31**

**Decree for specific moveable property.**

moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds

found by Court and properties directed to be sold — Attachment *held* revived — Order is proper.]]

2. ('24) AIR 1924 Pat 258 (258) : 2 Pat 768.

('34) AIR 1934 Pat 608 (609) : 13 Pat 387.

('21) AIR 1921 Pat 820 (821).

('20) AIR 1920 Pat 636 (638). (Decree for future maintenance with a charge on property — Property can be sold in execution — No separate suit.) [See also ('80) 4 Bom 515 (520). (In case of mortgage decrees direction for sale in the decree is the authority to sell and therefore no attachment is necessary.)

('84) AIR 1934 Rang 281 (282, 288). (Judgment-debtor giving property as security for performance of decree — Property can be realized in execution without attachment.)

('86) AIR 1936 Lah 578 (578). (Decree directing property to be considered as under mortgage

and that judgment-debtor will not be entitled to alienate it — Attachment before sale is not necessary.]]

3. ('35) AIR 1935 Cal 544 (544).

### Note 7

1. ('26) AIR 1926 Oudh 616 (617) : 1 Luck 569.

[See ('28) AIR 1928 Lah 7 (9).]

[But see ('25) AIR 1925 Nag 382 (388).]

2. ('15) AIR 1915 Nag 98 (99) : 11 Nag L R 113. ('89) AIR 1939 Oudh 116 (117, 118) : 14 Luck 588. (Provisions of O. 21 R. 30 are not exclusive and do not override the provisions of S. 51 or O. 21 R. 11 in connection with execution of decree for payment of money by means of appointment of receiver under O. 40 R. 1.)

3. ('13) 19 Ind Cas 88 (39) : 15 Oudh Cas 381.

### Note 8

1. ('82) AIR 1932 Cal 847 (849).

**O. 21 R. 31** the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

[1877, Ss. 259, 260; 1859, S. 200.]

#### Local Amendments

##### ALLAHABAD

For the words wherever they occur in each sub-rule, "six months", *read* the words "three months, or such extended time as the Court may for good cause direct."

##### CALCUTTA

In sub-rules (2) and (3), *substitute* the words "three months" for the words "six months."

##### LAHORE

(1). In sub-rule (2) *for* the word "six" *substitute* the word "three."

(2). *Add* the following proviso after sub-rule (2):

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months; but it shall in no case exceed six months in all."

(3). In sub-rule (3), *for* the words "six months" *substitute* the following words: "three months or such other period as may have been prescribed by the Court."

##### MADRAS

In sub-rules (2) and (3), *for* the words "six months", *substitute* the words "three months", and *add* the following as sub-rule (4):

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit."

##### NAGPUR

In sub-rules (2) and (3), *for* the words "six months" wherever they occur, *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."

##### N.-W. F. P.

In sub-rules (2) and (3), *for* the words "six months", *substitute* the words "three months", and *add* the following as sub-rule (4):

"(4) The Court may, on application, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in all as it may think fit."

##### OUDH

In sub-rules (2) and (3), *for* the words "six months" *substitute* the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."



**PATNA**

In sub-rules (2) and (3) for the words "six months" substitute "three months"; and add the following as sub-rule (4) :

"(4). The Court may, for sufficient cause, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit."

**RANGOON**

In sub-rules (2) and (3), for the words "six months" the words "three months" shall be substituted. The following shall be added as sub-rule (4) of Rule 31 :

"(4). The Court may, on application, extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in the whole, as it may think fit."

*Synopsis*

1. Legislative changes.

2. Scope of the Rule.

3. Decree for specific moveable property.

4. Seizure of property not in the possession of the judgment-debtor.

5. Alternative damages—Sub-rule (2).

6. "In other cases such compensation as it thinks fit."

**1. Legislative changes.** — The words "or for the recovery of a wife" which occurred in Section 259 of the old Code after the words "share in a specific moveable" have been omitted in this rule. The reason is that the wife is not a chattel and cannot, therefore, be delivered to her husband. See Notes to Rule 33, *infra*.

**2. Scope of the Rule.** — This rule does not apply to a case where the property sought to be seized is not in the possession of the judgment-debtor, but in the custody of a third party.<sup>1</sup> The words "specific moveable" in this rule do not include money and therefore a decree for money cannot be executed under the provisions of this rule.<sup>2</sup>

In order to enable a person to obtain delivery of specific moveable property by suit and to enforce the decree by the stringent methods prescribed in this rule, the plaintiff must allege and prove facts which give him a right to compel the delivery of the specific moveables under Section 11 of the Specific Relief Act (I of 1877).<sup>3</sup>

An order under Section 36, clause (5) of the Presidency Towns Insolvency Act (III of 1909) for delivery of any property can be executed in the manner specified in this rule.

**3. Decree for specific moveable property.** — A decree for possession of three-fourths of a person's estate consisting of moveable and immovable property is a decree that can be executed under this rule so far as the *moveable* property is concerned.<sup>1</sup>

**4. Seizure of property not in the possession of the judgment-debtor.** — It has been held in the undermentioned case<sup>1</sup> that Rule 58 *infra* is applicable not only to attachments in execution of money decrees, but also to seizures under this rule.

**5. Alternative damages — Sub-rule (2).** — O. 20 R. 10 provides that the decree in a suit for moveable property should state a certain amount of money as an

**Order 21 Rule 31 — Note 2**

1. ('97) 1 Cal W N 170 (172).

2. ('14) AIR 1914 Mad 572 (573); 14 Ind Cas 254 (255); 87 Mad 881.

('88) AIR 1988 Cal 471 (474).

3. ('16) AIR 1916 Mad 814 (817); 89 Mad 1 (FB). ('88) AIR 1988 Cal 471 (474).

**Note 3**

1. ('08) 1908 Pun W R No. 60.

**Note 4**

1. ('94) 7 C P L R 105 (109, 110).

**O. 21 R. 31**  
**Notes 5-6**

alternative, if delivery of the chattel in dispute cannot be had. This rule provides that if the goods are capable of delivery they must be delivered and that if they are not, then the assessed damages should be paid.<sup>1</sup> Where a decree is passed as provided by O. 20 R. 10, the decree-holder cannot execute the money portion of the decree alone without following the procedure prescribed by this rule, *i. e.*, without applying for delivery of the moveable property.<sup>2</sup>

6. "In other cases, such compensation as it thinks fit." — A decree for the delivery of a specific moveable need not necessarily in all cases be in the alternative form, and an enquiry as to damages in such cases may more profitably be held in execution.<sup>1</sup> Such damages need not be assessed only on the footing of wilful neglect or devastavit.<sup>2</sup>

**O. 21 R. 32****R. 32. [S. 260.]** (1) Where the party against whom a

Decree for specific performance, for restitution of conjugal rights, or for an injunction.

decree<sup>2</sup> for the specific performance of a contract,<sup>3</sup> or for restitution of conjugal rights,<sup>4</sup> or for an injunction,<sup>6</sup> has been passed, has had an opportunity of obeying the decree<sup>7</sup> and has wilfully failed to obey it, the decree may be enforced *"in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction"* by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold,<sup>8</sup> such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or

**Note 5**

1. ('71) 16 South W R 240 (244).

('90) 1890 Pun Re No. 64, page 170.

[See also ('73) 19 South W R 82 (88).]

2. ('27) AIR 1927 Cal 652 (658) : 55 Cal 26.

('85) AIR 1985 Cal 89 (51) : 61 Cal 711.

[See ('08) 18 Mad L Jour 444 (444).]

**Note 6**

1. ('85) AIR 1985 Cal 89 (68) : 61 Cal 711.

2. ('85) AIR 1985 Cal 89 (68) : 61 Cal 711.

where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease. O. 21 R. 32

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed,<sup>9</sup> the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

*Illustration*

*A*, a person of little substance erects a building which renders uninhabitable a family mansion belonging to *B*. *A*, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by *B* and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of *A*'s property would adequately compensate *B* for the depreciation in the value of his mansion. *B* may apply to the Court to remove the building and may recover the costs of such removal from *A* in the execution proceedings.

a. Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923, Section 2.

[1877, Ss. 259, 260; 1859, S. 200, *Cf.* R. S. C., O. 42 Rr. 7 and 30.]

**Local Amendments**

**ALLAHABAD**

For the words "one year," in sub-rule (3), *read* the words "three months," and *after* the words at the end of the sub-rule, "on his application," *add* the words "the Court may for good cause extend the time."

**CALCUTTA**

In sub-rule (3), *substitute* the words "three months" for the words "one year."

**LAHORE**

(1). In sub-rule (3), for the words "one year," *substitute* the words "three months."

(2). *Add* the following proviso to sub-rule (3) :

"Provided that the Court may, for sufficient reasons, on the application of the judgment-debtor, extend the period beyond three months; but it shall in no case exceed one year in all."

(3). In sub-rule (4), for the words "one year", *substitute* the words "three months or such other period as may have been prescribed by the Court."

**MADRAS**

(1). In sub-rule (3) :

(i) for the words "one year" *substitute* the words "three months";

(ii) after the word "application", *insert* the words "the Court may on application extend the period of three months mentioned herein to such period not exceeding one year on the whole as it may think fit."

(2). In sub-rule (4), for the words "one year", *substitute* the words "three

**O. 21 R. 32**  
**Note 1**

months"; and after the words "the date of the attachment" *add* "or of such extended period which the Court may order under sub-rule (3)."

**NAGPUR**

(1). In sub-rule (3):

(i) for the words "one year" *substitute* the words "three months";

(ii) *after* the word "application", *insert* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year"; and

(2). In sub-rule (4), *for* the words "one year", *substitute* the words "three months, or such further time as may have been fixed by the Court under sub-rule (3)."

**N.-W.F.P.**

In sub-rule (3), *for* the words "for one year," *substitute* the words "for three months or such further period not exceeding one year in the whole as may be fixed by the Court."

**ODDH**

(1). In sub-rule (3), *for* the words "one year," *substitute* the words "three months," and at the end of the sub-rule, *add* the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year."

(2). In sub-rule (4), *for* the words "one year," *substitute* the words "three months, or such further time as may have been fixed by the Court, under the previous sub-rule."

**PATNA**

In sub-rule (3) *for* the words "for one year" *substitute* the words "for three months or for such further period, not exceeding one year in the whole, as may, on sufficient cause shown, be fixed by the Court."

**RANGOON**

In sub-rule (3), *for* the words "for one year," the words "for three months or for such further period, not exceeding one year in the whole, as may be fixed by the Court on the application of the judgment-debtor" shall be *substituted*.

*Synopsis*

1. Legislative changes.
2. Scope of the Rule.
3. Decree for specific performance.
4. Restitution of conjugal rights.
5. Form of decree for restitution of conjugal rights.
6. Decree for injunction.

7. "Opportunity of obeying the decree."
8. Sale of property — Sub-rule (3).
9. Disobedience of order for injunction or specific performance.
- 9a. Disobedience of decree for restitution of conjugal rights.
10. Effect of procedure under this Rule.
11. Limitation.

**1. Legislative changes. —**

1. The words "or for an injunction" have been substituted for the words "or for the performance of or abstention from any other particular act."
2. Sub-rules (2) and (5) are new.
3. In sub-rule (3), the word "shall" has been substituted for the word "may."
4. The words "or if made has been refused" are new.

**Amendment after 1908. —**

The words "in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for specific performance of a

contract or for an injunction" have been newly inserted by Act XXIX of 1923. See Note 4 below.

**O. 21 R. 32**  
**Notes 1-5**

**2. Scope of the Rule.** — A decree which does not contain any direction to the defendant to do or to refrain from doing any act, but is merely a *declaratory* one, cannot be executed under this rule.<sup>1</sup>

**3. Decree for specific performance.** — As to the cases in which specific performance can be decreed, see Sections 12 to 30 of the Specific Relief Act (I of 1877). See also the undermentioned cases.<sup>1</sup> A decree for specific performance of a contract for sale of immovable property does not by itself pass title.<sup>2</sup> It has been held by the High Court of Patna<sup>3</sup> that the Court executing a decree for specific performance of a contract of sale is competent to grant possession of the property to the decree-holder, even though no relief for possession was either asked for in the plaint or awarded by the decree. See also Order 2 Rule 2 Note 16, *supra*.

A decree for specific performance operates in favour of both parties. The defendant is as much entitled to enforce it as the plaintiff. A decree that an agreement ought to be specifically performed is a decree against the plaintiff as well as against the defendant, and in favour of the defendant as well as in favour of the plaintiff. The defendant is equally a decree-holder in such cases.<sup>4</sup>

**4. Restitution of conjugal rights.** — A decree for the restitution of conjugal rights passed under the Parsi Marriage and Divorce Act (XV of 1865) is not executable under this rule, since Section 36 of that Act provides a remedy in substitution of the remedy under this rule.<sup>1</sup> But such a decree between Hindus or Mahomedans can be enforced under this rule.<sup>2</sup>

A wife is not a chattel and cannot, therefore, be delivered as such in execution under the previous rule or this rule.<sup>3</sup> A suit for recovery of a wife must, therefore, be treated as a suit for the restitution of conjugal rights.<sup>4</sup> It was held in the under-mentioned cases<sup>5</sup> that where a wife disobeyed a decree for the restitution of conjugal rights passed against her, the decree could be enforced by her imprisonment or by the attachment of her property or by both. But, since the amendment of this rule by Act XXIX of 1923 referred to in Note 1 above, such a decree can be enforced only by the *attachment* of the defendant's property. See also Notes to Rule 33, *infra*.

**5. Form of decree for restitution of conjugal rights.** — In a suit for the restitution of conjugal rights against the wife and other defendants who prevent her

**Order 21 Rule 32 — Note 2**

1. ('04) 1 All L Jour 541 (542).

**Note 3**

1. ('83) AIR 1933 Nag 186 (187); 29 Nag L R 178.  
(33) AIR 1933 Nag 5 (6); 29 Nag L R 178.  
(Mistress living in house adjacent to husband—  
Husband not entitled to decree for restitution  
until he gives sufficient reason to Court to believe  
that his intimate connection will cease if his  
wife returns.)

('88) AIR 1938 Cal 580 (580). (Decree for specific  
performance conditional on payment of amount  
in Court within certain time—Court has jurisdic-  
tion to extend time for payment of such amount  
for adequate reasons.)

('38) AIR 1938 Cal 496 (497).

('32) AIR 1932 Cal 516 (517); 59 Cal 586.

2. ('88) AIR 1938 All 482 (488); 1 L R (1938) All  
677. (Till execution of conveyance, decree-holder

not entitled to possession.)

[See however ('81) 5 Bom 554 (560). (Decision  
under old Code—Decree for specific performance  
coupled with payment of purchase money passes  
ownership to vendee and entitles him to posses-  
sion.)]

3. ('31) AIR 1931 Pat 179 (180, 181).

4. ('32) AIR 1932 Cal 579 (582, 583); 59 Cal 501.  
[See also ('33) AIR 1933 Mad 386 (387, 388); 58  
Mad 796.]

**Note 4**

1. ('72) 9 Bom H C R 290 (303, 304).

2. ('75) 1 Bom 104 (167).

3. ('68) 3 Agra 88 (88).

('67) 2 Agra 337 (337, 338).

('86) AIR 1936 All 657 (658); 1 L R (1937) All 82.

4. ('01) 23 Bom 307 (309).

('68) 9 Suth W R 552 (552).

5. ('66) 6 Suth W R 105 (106).

**O. 21 R. 32**  
**Notes 5-7**

from going to her husband, the decree should declare the husband's right and direct that the other defendants do refrain from preventing the plaintiff's wife from returning to him.<sup>1</sup> Where they do not obey the decree, execution can proceed against them under this rule.<sup>2</sup>

Where, in a decree for the restitution of conjugal rights, the plaintiff's mother-in-law who was impleaded as a defendant in the suit, was directed to refrain from preventing the plaintiff's wife from returning to him, it was held that her action in merely permitting her daughter, who was of age, to reside in her home after decree, did not justify the attachment of her property under this rule.<sup>3</sup>

**6. Decree for injunction.** — This rule applies to cases where a party is directed to do some act, as well as to cases where he is directed to abstain from doing an act.<sup>1</sup> The High Court of Madras has expressed an *obiter dictum* in the undermentioned case<sup>2</sup> that an interim injunction may be enforced under this rule read with Section 36, *ante*.

As to whether a decree for injunction can be executed against vendees from the defendant and against the legal representatives of a deceased defendant, see Note 18 to Section 50, *ante*.

Under the old Code it was held that disobedience to an order directing the defendant to render accounts within a particular time was disobedience to an order "requiring the performance of a particular act" within the meaning of Section 260 and consequently was punishable under that Section.<sup>3</sup> But under the present rule those words have been omitted and an order requiring the defendant to furnish accounts is not an injunction within the meaning of this rule and therefore the disobedience of that order cannot be dealt with under this rule.<sup>4</sup>

**7. "Opportunity of obeying the decree."** — Before allowing execution under this rule against a judgment-debtor, the Court should see if he has had an opportunity of obeying the decree and whether he has wilfully failed to obey it.<sup>1</sup> If he has had such an opportunity, then execution may issue against him without giving him a further opportunity to obey the decree and the Court is not bound to issue notice calling upon him to obey the decree.<sup>2</sup>

Where an application for enforcing a decree under this rule has been dismissed on the ground that the judgment-debtor had no opportunity of obeying the decree,

('67) 8 Suth W R 3 (13) (PC). (*Quare*.)

('76) 1876 Pun Re No. 15, page 20.

('71) 1871 Pun Re No. 2.

[But see ('75) 23 Suth W R 179 (180).]

**Note 5**

1. ('20) AIR 1920 Pat 798 (799).

('67) 2 Agra 111 (112).

('70) 2 N W P H O R 314 (314).

('73) 20 Suth W R 92 (92).

[See ('78) 20 Suth W R 50 (50).

('67) 8 Suth W R 467 (467).]

2. ('14) AIR 1914 Mad 219 (221).

[See however ('20) AIR 1920 Bom 112 (113) :

44 Bom 454. (Where execution by imprisonment of wife was prohibited by decree, injunction in decree against parents allowing their daughter to live with them was held to be improper.)]

3. ('78) 1 All 501 (508).

**Note 6**

1. ('19) AIR 1919 Cal 674 (675) : 46 Cal 108. (Per Richardson, J.)

('80) 1980 Mad W N 809 (810).

('13) 21 Ind Cas 789 (802) (Mad). (Mandatory injunction directing a guardian to hand over custody of a minor.)

('10) 6 Ind Cas 289 (289) (Mad).

[See also ('82) 1982 Mad W N 1059 (1060).

2. ('10) 8 Ind Cas 7 (8) (Mad).

3. ('81) 7 Cal 654 (656, 657).

('05) 27 All 874 (877, 878).

4. ('18) AIR 1918 Pat 451 (452) : 3 Pat L Jour 106. (The change makes 27 All 874 and 7 Cal 654 no longer law.)

**Note 7**

1. ('05) 28 All 800 (802).

('70) 7 Bom H O R O C 122 (186).

('06) 38 Cal 806 (811, 812).

2. ('06) 38 Cal 806 (811, 812).

[See also ('86) AIR 1986 Mad 706 (706, 707).

(Decree in injunction suit passed in presence of defendants — No disobedience of injunction on part of defendants — Plaintiff is not entitled to ask Court to issue notice or order embodying

a second application after such opportunity has been given is not barred.<sup>3</sup>

**O. 21 R. 82**  
**Notes 7-9**

**8. Sale of property — Sub-rule (3).** — This rule is a highly penal one and must be construed strictly. When a sale is ordered under sub-rule (3), the following three conditions must exist —

- (a) a valid original attachment,
- (b) application, *within* one year of the attachment, by the decree-holder, and
- (c) lapse of one year from date of attachment.<sup>1</sup>

Thus, where an order of attachment was made on 27-6-1908 and was carried out on 20-7-1908 and no application for sale was made before 20-7-1909, it was held that the attachment ceased to exist and the order for sale was, therefore, set aside.<sup>2</sup> A sale held under sub-rule (3) cannot be set aside under O. 21 R. 89, sub-rule (1) even where the execution of the decree under which the sale took place is restrained by an injunction granted subsequent to the sale in a separate suit.<sup>3</sup>

Where a *decree* is attached under this rule, the fact that this rule prohibits the sale of the attached property before the expiry of one year from the date of the attachment is no bar to the attached decree being executed by the holder thereof under O. 21 R. 53, sub-rule (2) before the expiry of one year.<sup>4</sup>

In the undermentioned case,<sup>5</sup> a decree for injunction was passed against a defendant prohibiting him from holding a certain fair. He disobeyed the injunction by holding the fair. Thereupon, his property was attached and after the prescribed period it was sought to be sold. The judgment-debtor objected on the ground that the property could be sold under sub-rule (3) only if *after* the attachment he has disobeyed the injunction again. It was held that where the injunction requires the defendant to *do* a certain act, and upon his failure to do the act his property is attached, but subsequently within the period specified in the rule he carried out the directions in the decree, his property cannot be sold. But, where the injunction is one restraining the defendant from doing a certain act and he has disobeyed the decree by doing the act, he has, by his own act made it impossible for himself to obey the decree (so that there can be no question of a second disobedience); and in such a case, the judgment-debtor cannot escape the liability to have the attached property sold after the lapse of the prescribed period and have compensation paid to the decree-holder out of the sale proceeds.

**9. Disobedience of order for injunction or specific performance.** — Where a defendant has wilfully failed to obey a decree for injunction or for specific performance passed against him, the decree may be enforced by his detention in the civil prison or by the attachment of his property or by both.<sup>1</sup> But the Court has no

injunction and have it served on defendants —  
O. 21 R. 82 does not provide for such notice or order.))

3. ('94) 21 Cal 784 (788) : 21 Ind App 89 (P O).

**Note 8**

1. ('11) 10 Ind Cas 841 (848) : 1911 Pun Re No. 69.  
[See also ('87) AIR 1987 Rang 126 (127) : 1987 Rang L R 164. (Sale of attached property before the expiry of the prescribed period is void.)]

2. ('11) 10 Ind Cas 841 (848) : 1911 Pun Re No. 69.

3. ('88) AIR 1988 Cal 96 (97). (In such a case no money could be said to be due to the decree-holder which could be deposited under O. 21 R. 89 (1).)

4. ('85) AIR 1985 Mad 418 (414). (Decree obtained by wife for property against husband—Husband

getting decree for restitution of conjugal rights —Execution of decrees—Wife's decree attached—Wife can execute decree even during one year of husband's attachment provided proceeds go in satisfaction of decree against her.)

5. ('85) AIR 1985 All 480 (480, 481) : 57 All 858.

**Note 9**

1. (1900) 24 Bom 45 (49).

('94) 21 Cal 784 (788, 789) : 21 Ind App 89 (P O).

('81) 6 Cal 445 (446). (He cannot be prosecuted under S. 188, I. P. O. for disobedience of injunction of Civil Court.)

('81) 8 Cal L Rep 487 (488).

('78) 18 Suth W R 282 (288).

**O. 21 R. 32**  
**Nota 9**

power to order the defendant to execute a security bond for obeying the decree.<sup>3</sup>

Where a decree requires the plaintiff to do certain acts necessary for the enjoyment of his property and restrains the defendant from interfering with it, the defendant is bound to give the plaintiff reasonable facilities for doing it and the refusal to do so can be punished under this rule.<sup>3</sup>

Under the old Code, a Court, in executing a decree which directed a defendant to do a particular act, had no power to have the thing done by an officer of the Court when the defendant failed to obey the decree, inasmuch as it was not one of the modes of execution prescribed by Section 260.<sup>4</sup> But now under sub-rule (5) of this rule the Court has got the power to direct the act to be done so far as practicable by the decree-holder or by some other person appointed by the Court at the expense of the judgment-debtor.<sup>5</sup> The Court is, however, not justified in ordering the police to interfere in the matter, or in appointing a commissioner to see that the decree-holder performs without obstruction the acts required to be done.<sup>6</sup> Where, after a decree for injunction has been passed, the defendant does not obey it, the plaintiff's remedy is by execution under this rule and not by a separate *suit*.<sup>7</sup> The reason is that a separate suit would be barred by Section 47.

The words "the act required to be done" in sub-rule (5) mean the act that has to be done to enforce the injunction granted by the decree.<sup>8</sup> Thus, where a decree directs a wall to be demolished as being an obstruction to a right of way and is so demolished in execution of the decree, but the judgment-debtor erects another wall at a different place obstructing the right of way, the remedy of the decree-holder is a fresh *suit* for injunction.<sup>9</sup> The words "act required to be done" in this sub-rule show that this clause applies only to *mandatory* injunctions and not to *prohibitory* injunctions, though the other sub-rules apply to all injunctions generally.<sup>10</sup>

Where a decree for injunction has been passed against several persons jointly, restraining them from holding a fair on the plaintiff's land and all of them have been jointly and severally responsible for the disobedience of the decree as well as for the profit which they have made out of the plaintiff's land by holding the fair on such

(17) AIR 1917 Mad 656 (657). (Even a temporary disobedience is punishable under this rule — In this case it was held that contempt was purged.)

(38) AIR 1938 Pat 522 (523). (Remedy under cl. (5) is not the only remedy.)

(35) AIR 1935 All 480 (481) : 57 All 858. (Judgment-debtor by his own act making it impossible for himself to obey the decree can be proceeded against under this rule.)

2. [See ('17) AIR 1917 Mad 656 (656, 657).]

3. [See ('91) 1891 Bom P J 317 (317).]

4. ('02) 26 Bom 283 (287).

(95) 19 Bom 34 (35).

(87) 1887 Bom P J 74 (74).

(06) 33 Cal 306 (309, 311). (Though execution petition prayed for the act to be done, the Court allowed attachment.)

(82) 8 Cal 174 (176).

(72) 18 Suth W R 282 (283).

(89) 1889 Pun Re No. 107, p. 376.

(90) 1890 Bom P J 22.

[See also ('88) 1888 All W N 149 (149).]

5. ('19) AIR 1919 Cal 674 (675) : 46 Cal 108.

(30) AIR 1980 P C 287 (290) : 58 Cal 692 : 26 Nag L R 888 : 57 Ind App 838 (P C). (Action for specific performance of a contract to sell pro-

perty with cultivating rights—Requiring sanction of Board of Revenue—Defendant can be compelled to prosecute the application.)

(26) AIR 1926 Nag 465 (465, 466) : 22 Nag L R 101. (Affirmed on appeal in AIR 1930 P C 287.)

(88) AIR 1988 Lah 369 (417) (FB). (Per Din Mohammad, J.—Suit for injunction for restoring demolished building to its former condition — Relief can be granted and on failure to obey it, procedure under O. 21 R. 32 (5), can be applied.)

[See ('21) AIR 1921 Lah 376 (377). (Sub-rule (5) will apply only when decree is not obeyed.)]

6. ('18) AIR 1918 All 152 (154) : 40 All 648.

7. ('19) AIR 1919 Cal 674 (675) : 46 Cal 108.

(14) AIR 1914 All 105 (106).

(91) 18 All 98 (100).

(85) AIR 1935 All 480 (480) : 57 All 858.

[See ('01) 23 All 465 (466). (Suit barred by res judicata.)]

8. ('19) AIR 1919 Cal 674 (675) : 46 Cal 108.

9. ('21) AIR 1921 Lah 376 (377).

10. ('84) AIR 1984 Cal 402 (403) : 61 Cal 148.

(38) AIR 1938 Pat 522 (523).

(88) AIR 1988 All 416 (417, 418) : I L R (1988) All 678. (Injunction prohibiting defendant from raising certain building—Defendant disobeying



land, the mere fact that one of them is dead will not justify a reduction of the amount which the plaintiff is entitled to get as compensation out of the sale proceeds of the property of the defendants that has been attached and sold under sub-rule (3).<sup>11</sup>

**O. 21 R. 32**  
**Notes 9-11**

**9a. Disobedience of decree for restitution of conjugal rights.** — The only remedy where the judgment-debtor in a decree for the restitution of conjugal rights wilfully refuses to obey the decree is to proceed to attach the property of the judgment-debtor.<sup>1</sup> The Court cannot compel the wife against whom such a decree has been passed, to go and live with her husband.<sup>2</sup> It would also be wrong in such cases to pass an order under Section 25 of the Guardians and Wards Act directing that the custody of a minor wife should be given to the husband.<sup>3</sup> See also Note 4, *ante*.

**10. Effect of procedure under this Rule.** — The provisions of this rule are intended to punish the defendant for disobedience of the decree and are not intended to be a satisfaction of the decree so as to prevent the decree-holder from taking further steps. Thus, where a decree for possession of a certain plot of land and for the demolition of a house situate thereon was passed, and the decree-holder had received some compensation under this rule by the attachment and sale of the house on the land, it was held that he could still enforce his right to the possession of the property.<sup>1</sup>

**11. Limitation.** — It has been held by the High Court of Allahabad<sup>1</sup> that disobedience to an injunction is a contempt of Court and can therefore be punished at any time and that the provisions of Article 182 of the Limitation Act do not apply to an application to enforce the order under this rule. But the High Court of Madras<sup>2</sup> has held that Article 182 cannot apply from the very nature of the provisions therein but that the decree-holder may enforce his decree by an application made within three years of each successive breach of the injunction and that the application is governed by Article 181 of the Limitation Act. The decree-holder, however, is not obliged to take action in regard to every petty infringement on pain of allowing the decree to become inoperative after three years and depriving him of the fruits of his decree, if a serious infringement of it were afterwards made.<sup>3</sup> The Chief Court of Lower Burma<sup>4</sup> has, on the other hand, held that the application to enforce the decree under this rule is governed by Article 182 of the Limitation Act. The High Court of Lahore has, in the undermentioned case,<sup>5</sup> followed the Madras view.

## **R. 33. [New.] (1) Notwithstanding anything in rule 32, **O. 21 R. 33****

**Discretion of Court in executing decrees for restitution of conjugal rights.**

the Court, either at the time of passing a decree *against a husband* for the restitution of conjugal rights or at any time afterwards, may order that the decree *shall be executed in the manner provided in this rule.*

decree and raising the building — Decree-holder cannot apply under sub-rule (5) for demolition of building—Undoing an act which has been prohibited is not the same thing as restraining it from being done.)

(185) AIR 1935 All 480 (481) : 57 All 858.

11. (135) AIR 1935 All 480 (481) : 57 All 858.

### **Note 9a**

1. (186) AIR 1936 All 657 (658) : I L R (1937) All 182.

2. (184) 150 Ind Cas 307 (308) (Lah).

3. (186) AIR 1936 All 657 (658) : I L R (1937) All

82. (Reversing AIR 1936 All 267.)

### **Note 10**

1. (104) 1 All L Jour 431 (432).

### **Note 11**

1. (101) 23 All 465 (466).

(106) 28 All 800 (802).

2. (106) 29 Mad 314 (317).

3. (106) 29 Mad 314 (317).

4. (12) 15 Ind Cas 945 (949) : 6 Low Bur Rul 85.

5. (185) AIR 1935 Lah 702 (704).

**O. 21 R. 33**  
**Notes 1-2**

(2) Where the Court has made an order under sub-rule (1) \* \* \*, it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

a. Inserted by the Code of Civil Procedure (Amendment) Act, XXIX of 1923, Section 3.

b. Substituted by Section 3, *ibid*, for "shall not be executed by detention in prison."

c. The words "and the decree-holder is the wife" repealed by Section 3, *ibid*.

### Synopsis

#### 1. Amendments after 1908.

#### 2. Scope of the Rule.

**1. Amendments after 1908.** — (1) The words "against a husband" in sub-rule (1) after the words "passing a decree" have been newly inserted by Act XXIX of 1923.

(2) By the same Amending Act the words "shall be executed in the manner provided in this rule" have been substituted for the words "shall not be executed by detention in prison."

(3) The words "and the decree-holder is the wife" after the words "under sub-rule (1)" occurring in sub-rule (2) have been omitted by Act XXIX of 1923, because the rule as amended applies only to cases of decrees against *husbands*.

**2. Scope of the Rule.** — Before the amendment of this rule by Act XXIX of 1923 it was held that the tendency of modern legislation is against sending women to jail in civil matters and therefore, ordinarily, a Court passing a decree for the restitution of conjugal rights against a wife should direct, in the exercise of its discretion under this rule, that the decree shall not be executed by the detention of the wife in civil prison.<sup>1</sup> In view of the amendment of Rule 32 *ante* by Act XXIX of 1923, a

#### Order 21 Rule 33 — Note 2

1. ('24) AIR 1924 All 886 (887). (Condition in decree of trial Court disallowing imprisonment will not be interfered with by High Court in appeal.)

('20) AIR 1920 Bom 208 (204) : 44 Bom 972. (The fact that wife had been in criminal jail is immaterial.)

('24) AIR 1924 Lah 244 (245). (Where wife disobeys she is not entitled to claim maintenance.)

('14) AIR 1914 Mad 219 (221).

('11) 10 Ind Cas 177 (177) (Sind). (Imprisonment will not be allowed when the marriage has been unhappy.)

[See ('28) AIR 1928 Lah 595 (596). (But if wife persists in immorality she may be detained in jail in execution if she disobeys.)]

decree for the restitution of conjugal rights can no longer be executed by imprisonment, whether the decree be against the husband or the wife. See Note 1 to Rule 32, *ante*.

**O. 21 R. 33  
Note 2**

**R. 34.** [Ss. 261, 262.] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

**O. 21 R. 34**

Decree for execution of document, or endorsement of negotiable instrument.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

“C. D., Judge of the Court of  
(*or as the case may be*), for A. B., in a suit by E. F. against A. B.,”  
and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

[1877, Ss. 261, 262; 1859, S. 202.]

**O. 21 R. 34**  
**Notes 1-3**

*Synopsis*

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|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Decree for execution of document.</li> <li>3. Compromise decree for execution of document.</li> <li>4. Execution by Court on behalf of Hindu father is binding on son.</li> </ol> | <ol style="list-style-type: none"> <li>5. Registration.</li> <li>6. Lis pendens.</li> <li>7. Limitation.</li> <li>8. Appeal.</li> </ol> |
|--|---|

**1. Legislative changes. —**

1. The word "document" has been used in this rule instead of the word "conveyance" in the old Code.
2. Sub-rule (6) is new. See Note 5 below.

**2. Decree for execution of document. —** A decree directing a defendant to execute a document in favour of the plaintiff is executable in the manner provided by this rule, on the failure of the defendant to obey the directions given in the decree.<sup>1</sup> The decree for the execution of a document need not have been passed in a suit for specific performance of a contract.<sup>2</sup> Thus, where a decree absolute for divorce directs the judgment-debtor to secure to his wife a certain amount and to execute a proper instrument securing that payment and the judgment-debtor fails to comply with that direction, the Court can, under this rule, execute a special power of attorney in favour of the wife authorizing her on behalf of the judgment-debtor to withdraw the amount decreed out of the provident fund of the judgment-debtor in a railway company in which he was employed.<sup>3</sup> Where the judgment-debtor makes any alteration in the draft submitted to the Court, he could not be compelled to execute the document, but the proper procedure is to act under this rule.<sup>4</sup>

The Registrar of a High Court can, if directed by the Court, execute a document; but he cannot enter into any covenant on behalf of the judgment-debtor.<sup>5</sup> The title of the decree-holder is complete only after the execution of the document; till then there is only an inchoate right capable of being completed.<sup>6</sup>

A British Indian Court cannot, under this rule, direct a party to convey by a document, property which is outside its jurisdiction.<sup>7</sup>

Where a decree directed a defendant to endorse certain promissory notes to the plaintiff and the defendant failed to do so and in the meantime the promissory notes were barred by limitation, it was held that a suit for compensation for failure to carry out the terms of the decree was not maintainable and that the proper remedy of the plaintiff was by way of execution under this rule.<sup>8</sup>

See also the undermentioned case.<sup>9</sup>

**3. Compromise decree for execution of document. —** Where a compromise decree directs the plaintiff to execute a document in favour of the defendant in respect

**Order 21 Rule 34 — Note 2**

1. ('18) AIR 1918 Cal 817 (818).  
 ('84) 10 Cal 710 (712).  
 [See ('28) AIR 1928 Bom 26 (27) : 46 Bom 990.  
 (Defendant also may execute a decree for specific performance.)]  
 [See also ('38) AIR 1938 Cal 496 (498).]
2. ('88) AIR 1988 Cal 767 (767, 768).
3. ('88) AIR 1988 Oudh 48 (49) : 18 Luck 466.  
 (Execution of such a special power of attorney does not contravene the provisions of S. 8 (1) of the Provident Funds Act.)
4. ('02) 5 Oudh Cas 870 (871, 872).

[See also ('09) 10 Cal W N 345 (346).]

5. ('89) 16 Cal 330 (344, 345).
6. ('98) 8 Cal W N 30 (32).
7. ('16) AIR 1916 Mad 1133 (1136, 1137).
8. ('19) AIR 1919 Mad 1071 (1071) : 41 Mad 701.
9. ('36) AIR 1936 All 801 (802). (District Judge has no power under S. 7 of Charitable and Religious Trust Act to compel trustee to carry out his direction— District Judge asking mutawalli of mosque to execute power of attorney in favour of a certain person to collect rents of the endowed property — District Judge has no power to enforce the direction by executing the power of attorney himself.)

of properties which are the subject-matter of the suit, the defendant can enforce the decree under this rule.<sup>1</sup>

**O. 21 R. 35**  
**Notes 3-8**

**4. Execution by Court on behalf of Hindu father is binding on son.** — A document executed by the Court under this rule on behalf of a Hindu father, in execution of a decree, is binding on his son.<sup>1</sup> The reason is that sub-rule (5) provides that such a document shall have the same effect as if it had been executed by the party himself.

**5. Registration.** — Even under the old Code the High Court of Allahabad held that where a document required to be registered under the provisions of the Registration Act, it must be registered even though executed by a Court acting under this rule.<sup>1</sup> Sub-rule (6) gives legislative recognition to the abovementioned decision.

**6. Lis pendens.** — Action taken by the Court in executing a decree under this rule is a proceeding in the suit and, therefore, a transfer of the property in dispute made by the judgment-debtor after the date of the decree but before the proceeding under this rule will be affected by the doctrine of *lis pendens*.<sup>1</sup>

**7. Limitation.** — An application under this rule is an application for execution of the decree and is, therefore, governed by Article 182 of the Limitation Act, 1908.<sup>1</sup>

**8. Appeal.** — Under O. 43 R. 1 clause (i) an appeal lies against an order passed under this rule, on an objection to the draft of a document or of an endorsement, but a second appeal is prohibited by Section 104.<sup>1</sup>

**R. 35.** [S. 263.] (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered<sup>3</sup> to the party to whom it has been adjudged, or to such person as he may appoint<sup>7</sup> to receive delivery on his behalf, and, if necessary, by removing<sup>9</sup> any person bound by the decree who refuses<sup>11</sup> to vacate the property.

**O. 21 R. 35**

(2) Where a decree is for the joint possession<sup>6</sup> of immovable property, such possession shall be delivered by affixing<sup>8</sup> a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may,

**Note 3**

1. ('21) AIR 1921 Cal 227 (229).  
(26) AIR 1926 Cal 975 (975, 976).

**Note 4**

1. ('19) AIR 1919 Oudh 335 (337, 338): 22  
Oudh Cas 84.

**Note 5**

1. ('80) 2 All 392 (393, 394).

**Note 6**

1. ('18) AIR 1918 Nag 221 (223, 224): 14 Nag  
L R 176.

**Note 7**

1. ('86) 10 Bom 91 (93).

**Note 8**

1. ('26) AIR 1926 Cal 975 (976).

**O. 21 R. 35**  
**Notes 1-2**

after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open<sup>13</sup> any door or do any other act<sup>10</sup> necessary for putting the decree-holder in possession.

[1877, S. 263; 1859, Ss. 199, 223. *Cf.* R. S. C., O. 42 R. 5 and O. 88 R. 1. See Rr. 36 and 95 to 103. See also S. 51, cl. (a).]

### Synopsis

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|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Delivery of possession — Symbolical and actual.</li> <li>4. Effect of symbolical possession.</li> <li>5. Symbolical possession and limitation.<br/>See Note 4.</li> <li>6. Joint possession—Undivided share.</li> </ol> | <ol style="list-style-type: none"> <li>7. Delivery of possession to agent.</li> <li>8. Affixture of copy of warrant.</li> <li>9. Removal of person bound by decree.</li> <li>10. Use of force in giving possession.</li> <li>11. Resistance to delivery of possession.</li> <li>11a. Consent of judgment-debtor.</li> <li>12. Identification of land.</li> <li>13. Break open—Sub-rule (3).</li> </ol> |
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### Other Topics (miscellaneous)

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|---|---|
| <p>Actual possession after symbolical possession. See Note 8.</p> <p>Declaratory decree or decrees for possession. See Note 6.*</p> | <p>Delivery of land includes delivery of things attached to earth. See Note 2.</p> <p>Delivery of land not involving delivery of buildings thereon. See Note 9.</p> <p>Second delivery of possession. See Note 2.</p> |
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**1. Legislative changes.** — Sub-rules (2) and (3) are new.

**2. Scope of the Rule.** — This rule and Rule 36 point out the mode of executing decrees *for possession* of immovable property. Rules 95 and 96 of this Order provide for the mode of delivery of possession to the auction-purchaser of the properties purchased by him in a court-sale. This rule corresponds with Rule 95 and Rule 36 corresponds with Rule 96. The procedure for delivery of possession is the same in both sets of rules.<sup>1</sup>

Where property is delivered to the decree-holder in execution of his decree for possession, the decree is satisfied and, therefore, a second application for possession on the ground that he was *dispossessed* by the judgment-debtor is not maintainable.<sup>2</sup> But a subsequent application will lie when the first application has been *ineffectual*.<sup>3</sup> Thus, where the decree-holder asks for delivery of the immovable property with standing crops, but is given delivery of the land only and not of the crops, he can apply again for effective possession of the land and of the crops.<sup>4</sup> Similarly, where

### Order 21 Rule 35 — Note 2

1. ('24) AIR 1924 Lah 801 (802).
2. ('82) 4 All 184 (185). (Delivery of possession was formal.)
- ('16) AIR 1916 All 261 (262, 264).
- ('12) 16 Ind Cas 708 (709) (Cal). (Delivery of possession not effectual in law — Decree-holder can again apply for delivery of possession.)
- ('28) AIR 1928 Mad 25 (26, 27).
- ('16) AIR 1916 Mad 980 (980).
- ('17) AIR 1917 Mad 202 (208).
- ('02) 12 Mad L Jour 96 (97).
- ('27) AIR 1927 Nag 86 (88).
- ('28) AIR 1928 Nag 237 (238).

- (28) AIR 1928 Nag 100 (101, 102). (A case of auction-purchaser.)
- [See also ('69) 1 N W P H O R 218 (219, 220). ('85) AIR 1985 Cal 245 (246).]
3. ('24) AIR 1924 Mad 200 (200).
- ('84) AIR 1984 Cal 798 (794).
- ('38) AIR 1938 Bom 457 (458) (FB). (Failure to apply for removal of obstruction within 80 days does not debar application to obtain fresh warrant for possession under Rule 35.)
- ('12) 16 Ind Cas 708 (709) (Cal). (Possession after unconditional order of stay is a nullity and hence a second application lies.)
- ('69) 12 Suth W R 285 (286).
4. ('27) AIR 1927 Mad 71 (71).

the decree-holder obtained possession against the judgment-debtor but it was ineffectual against a transferee *pendente lite* from the judgment-debtor, it was held that a fresh application for delivery of possession was maintainable against such transferee.<sup>5</sup> Where, however, a decree-holder allows his decree to get time-barred without executing it, and the defendant continues in possession, a second suit for possession is not maintainable.<sup>6</sup>

A delivery of possession in execution of a decree has not the effect of dispossessing a *third* person (not a party to the suit), who was previously in possession and was *not present* when the delivery took place.<sup>7</sup> But it will be operative as an ouster or dispossession of the third person if it takes place in his presence and adversely to his claim.<sup>8</sup>

Where delivery of possession is made under this rule, the delivery must be deemed to have been made, not of the land alone, but of all things attached to it.<sup>9</sup>

An order for delivery of possession should not, ordinarily, be made *ex parte*.<sup>10</sup>

This rule applies to proceedings under the undermentioned Acts,<sup>11</sup> but not to the proceedings noted below.<sup>12</sup>

**3. Delivery of possession — Symbolical and actual.** — This rule provides that where the property is in the occupation of the judgment-debtor or some one on his behalf, possession shall be given, if necessary, by removing the judgment-debtor or any person bound by the decree and placing the decree-holder (or the auction-purchaser in cases coming under Rule 95, *infra*) in occupation of the same. But if the property is of such a nature that the judgment-debtor cannot be in actual possession of it, as, for instance, where the property is in the possession of a tenant, then delivery should be effected by the officer of the Court by going through the process prescribed in Rule 36, *infra* and proclaiming to the occupant of the property that possession has been given to the decree-holder (or auction-purchaser in cases coming under Rule 96).<sup>1</sup> The former kind of delivery is called *khas* or *actual* possession, while the latter is called *symbolical* or *formal* delivery of possession. Where the property is capable of immediate actual possession, possession must be delivered under sub-rule (1) and there

5. ('88) AIR 1938 All 201 (202, 203) : 55 All 285.  
(The position of a decree-holder was different from that of an auction-purchaser.)

6. ('03) 25 All 35 (37).

(21) AIR 1921 Lah 286 (287).

(98) 1898 Pun Re No. 16, p. 96.

[See also ('75) 24 Suth W R 38 (34).]

7. ('96) 20 Bom 351 (353) (FB).

(04) 27 Mad 262 (270).

8. ('04) 27 Mad 262 (270).

9. ('05) 9 Low Bur Rul 129 (130). (It was held in this case that growing crops would also be deemed to be delivered — This was a decision under the old Code where "growing crops" was not moveable property as in the present Code — *Quare* : whether the decision under the present Code would be different — See Section 2, clause (13).)

10. ('28) AIR 1928 Pat 597 (599).

11. See Sections 98 and 210, Agra Tenancy Act (U. P. Act III of 1926) ; S. 18, cl. (2), Bundelkhand Encumbered Estates Act (U. P. Act I of 1908) ; Ss. 74, 47 and 22, Dekkhan Agriculturists' Relief Act (Bombay Act XVII of 1879) ; S. 19, Gujrat Talukdars Act (Bombay Act VI

of 1888) ; Section 25, cl. (b), Central Provinces Tenancy Act (Act I of 1920) ; S. 36, cl. (6), Presidency Towns Insolvency Act (India Act III of 1909).

12. Proceedings of the Provincial Small Cause Court—See O. 50 R. 1 cl. (a), sub-clause (2) : Proceedings of the Presidency Small Cause Courts in the towns of Calcutta, Madras and Bombay—See O. 51 R. 1 ; Proceedings of the Rangoon Small Cause Court Act (Act VI of 1920) — See O. 53, S. 111, cl. (a), sub-cl. (2) inserted in Sch. I to the said Act ; Proceedings for ejectment of a tenant for arrears — See S. 24, cl. (1), Central Provinces Tenancy Act (Act I of 1920.)

### Note 3

1. ('82) AIR 1932 Pat 145 (147, 148) : 11 Pat 165.  
(96) 18 All 440 (449, 450).

(80) 5 Cal 584 (588) (FB).

(37) AIR 1937 Oudh 275 (276) : 18 Luck 96. (Symbolical possession — Sub-rule (1) contemplates actual possession while sub-rule (2) contemplates symbolical possession — No specification of land with reference to khasra numbers — Symbolical delivery can be given under sub-rule (2).)

**O. 21 R. 35**  
**Notes 3-4**

can be no symbolical possession in such a case as between the parties to the decree.<sup>3</sup> The term "symbolical possession" is applied where delivery is made under sub-rule (2) of this rule and Rules 36 and 96 *infra*.<sup>3</sup>

If the property is zamindari or a tank or mineral rights in direct possession of the judgment-debtor, though the delivery of possession will be by ousting the judgment-debtor from it, the judgment-debtor cannot be *physically* removed from it and the decree-holder cannot be put in *physical occupation* of the property. What the bailiff who is entrusted with giving possession can do is to go to the property and proclaim in the name of the Court that so and so has been dispossessed and so and so has been put in possession of it. This delivery of possession is not symbolical but actual and is as effective against the judgment-debtor as his physical removal from a house.<sup>4</sup>

A decree-holder who has been given symbolical possession is entitled to apply again under this rule to be put in actual possession, if he is entitled to it,<sup>5</sup> unless he deliberately accepts such symbolical possession and does not repudiate it.<sup>6</sup> In the latter case his remedy is to file a separate suit.

Where the decree-holder is put in possession of land, such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated on the land.<sup>7</sup>

**4. Effect of symbolical possession.** — The distinction between the effect of the delivery of symbolical possession as between parties to the suit and as against third persons, is important with reference to the question of limitation applicable to suits for actual possession by decree-holders or auction-purchasers who have obtained only symbolical possession.

The effect of delivery of symbolical possession in execution in cases where such possession alone can be delivered is the same as the actual transfer of possession from the judgment-debtor to the decree-holder,<sup>1</sup> that being the only means by which, *as between the parties*, the Court can effectuate and carry out its own decree. Where, therefore, subsequent to this delivery the judgment-debtor dispossesses the decree-holder and remains in possession, such possession would be adverse to the decree-holder only from the date of the dispossession.<sup>2</sup>

2. ('23) AIR 1923 Nag 237 (238).

('38) AIR 1938 Lah 22 (22).

('69) 11 Suth W R 63 (64).

3. ('23) AIR 1923 Nag 237 (238).

4. ('39) AIR 1939 Pat 151 (153).

5. ('18) AIR 1918 Cal 350 (350).

('72) 17 Suth W R 80 (80).

('69) 12 Suth W R 285 (286).

('68) 9 Suth W R 454 (454, 455).

('68) 10 Suth W R 396 (397).

(1865) 3 Suth W R Misc 2 (2).

6. ('31) AIR 1931 Cal 427 (430).

('35) AIR 1935 Cal 245 (246).

[See also ('30) AIR 1930 Lah 914 (915). (Symbolical possession to auction purchaser of undivided share—Starting point for suit for partition and possession against co-sharers.)]

7. ('39) AIR 1939 Rang 888 (389). (8 Low Bur Rul 129, Followed.)

**Note 4**

1. ('39) AIR 1939 Pat 151 (153).

('35) AIR 1935 Lah 612 (613).

2. ('80) 5 Cal 584 (588) (F.B). (Overruling 24 Suth W R 418.)

('17) AIR 1917 P O 197 (201) (P.O). (5 Cal 584, Approved.)

('24) AIR 1924 All 844 (845).

('17) AIR 1917 All 812 (812) : 39 All 460.

('11) 10 Ind Cas 319 (320) (All).

('97) 19 All 499 (502).

('22) AIR 1922 All 463 (465).

('97) 21 Bom 98 (101, 102).

('26) AIR 1926 Cal 1172 (1178).

('22) AIR 1922 Cal 176 (178).

('89) 16 Cal 530 (534). (Overruling 10 Cal 402—A case of joint possession.)

('18) AIR 1918 Cal 545 (546).

('16) AIR 1916 Cal 170 (171). (Second suit is not barred by S. 47.)

('06) 3 Cal L Jour 58n.

(1900) 4 Cal W N 297 (302, 303).

('71) 7 Beng L R App 20 (21).

('75) 23 Suth W R 329 (329, 330).

('05) 9 Cal W N 292 (298, 300). (But after 12 years from date of symbolical possession suit will be barred.)

('13) 21 Ind Cas 972 (974) (Lah).

('10) 8 Ind Cas 236 (238) (Lah).



*Illustrations*

**O. 21 R. 35**  
**Note 4**

1. *J* obtained a foreclosure decree for possession on 16th May 1864, against the mortgagor and took symbolical possession in execution on 30th January 1873. When attempting to take actual possession *J* was prevented by one *R* who had purchased the property from the mortgagor in 1865. *J* filed a suit for actual possession against *R* within 12 years of the date of formal possession. It was held that the delivery of symbolical possession had the effect of interrupting *R*'s adverse possession inasmuch as he was a person bound by the decree, and that his possession after such delivery was a fresh act of trespass giving rise to a new cause of action: *Juggobandhu v. Ram Chunder*, I. L. R. 5 Calcutta 584 (F. B.).

2. *M* purchased immovable property belonging to *D*, the defendant, in court auction in execution of a decree against him on 21st August 1880. Symbolical possession was delivered to *M* on 14th July 1884. *M* filed a suit for possession on 29th May 1895, against *D* who remained in actual possession since the date of the auction purchase. *D* contended that the suit was barred by limitation inasmuch as he was in possession for more than 12 years prior to suit. It was held that a fresh period of limitation must be computed from the date of delivery of symbolical possession and that, therefore, the suit was in time: *Mangli Prasad v. Debi Din*, I. L. R. 19 Allahabad 499.

But where symbolical possession was not delivered in the manner required by law, it will not furnish a fresh starting point of limitation.<sup>3</sup> Again, the delivery of symbolical possession has no such operation as against *third* persons who are not parties to the decree.<sup>4</sup>

A suit might be brought, and a decree obtained, by a person who has neither title nor possession against another person who has neither title nor possession; and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner who had been in actual possession for many years and who was no party to the suit, it would operate most unjustly.<sup>5</sup>

*Illustration*

*S* mortgaged his property to *I*, who obtained a decree on his mortgage in 1883, and in execution of that decree, purchased *S*'s rights on 20th August 1884, and obtained formal possession on 4th May 1885. *N* purchased the same property on 21st April 1884, in execution

('84) 1884 Pun Re No. 103, page 290.

('82) 1882 Pun Re No. 75, page 215.

('20) AIR 1920 Lah 30 (33). (Second suit is not barred by Section 47.)

('26) AIR 1926 Mad 42 (44).

('15) AIR 1915 Mad 145 (149, 150).

('28) AIR 1928 Oudh 8 (8, 9) : 3 Luck 180.

('28) AIR 1928 Oudh 251 (254, 256) : 3 Luck 506 (F B). (Auction-purchaser of undivided share being put in constructive possession by beat of drum.)

('21) AIR 1921 Pat 344 (349).

('29) AIR 1929 Nag 298 (301). (Possession of judgment-debtor after symbolical delivery deemed fresh act of trespass.)

('73) 19 Suth W R 101 (102) (PC). (Symbolical possession puts an end to limitation in respect of parties under Order 21 Rule 96.)

('36) AIR 1936 All 85 (85).

('33) AIR 1933 Cal 424 (425).

('36) AIR 1936 Pesh 7 (8).

[See ('13) 18 Ind Cas 751 (752) (Cal).]

[See also ('95) 18 Mad 405 (407). (Formal possession amounts to dispossession of judgment-debtor.)]

[But see ('16) AIR 1916 Mad 640 (640) : 89 Mad 543. (Symbolical possession (without prejudice) not actual possession for purposes of S. 145,

Criminal Procedure Code.)]

3. ('33) AIR 1933 Lah 427 (428).

('86) AIR 1936 Lah 749 (750).

4. ('12) 15 Ind Cas 10 (12) (All).

('99) 21 All 269 (271).

('95) 19 Bom 620 (625).

('88) 10 Cal 993 (995).

('07) 6 Cal I. Jour 472 (483, 484).

('18) AIR 1918 Cal 258 (255).

('18) AIR 1918 Cal 983 (984).

('18) AIR 1918 Cal 659 (659).

('17) AIR 1917 Cal 199 (201).

('91) 18 Cal 520 (525).

('82) 11 Cal I. Rep 395 (398).

('16) AIR 1916 Cal 745 (746).

('14) AIR 1914 Cal 527 (529).

('14) AIR 1914 Cal 630 (631).

('16) AIR 1916 Cal 408 (409).

('13) 21 Ind Cas 765 (767) (Mad).

('11) 9 Ind Cas 271 (272) (Mad).

('17) AIR 1917 Oudh 135 (135).

('97) 1 Cal W N 843 (844).

('23) AIR 1923 Cal 82 (84).

('28) AIR 1928 Oudh 391 (392) : 3 Luck 668.

('17) AIR 1917 Pat 423 (424).

('18) AIR 1918 Oudh 184 (185) : 21 Oudh Cas 70.

('86) AIR 1936 Mad 571 (572).

5. ('84) 10 Cal 993 (995).

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**Notes 4-6**

of a money decree held by him against *S* and obtained actual possession in January 1885, and was in possession since then. *L* brought a suit on 27th April 1897, for possession against *N*, a week before the expiry of twelve years from the date of delivery to him. It was held that the suit was barred by limitation: *Narain Das v. Lalla Prasad*, I.L.R. 21 Allahabad 269.

Now suppose that symbolical possession is given in circumstances in which *actual possession* ought to have been delivered. What is its effect upon limitation? There is a conflict of opinion on this question. On the one hand, it has been held by the High Courts of Calcutta,<sup>6</sup> Lahore,<sup>7</sup> Madras<sup>8</sup> and Patna,<sup>9</sup> the Chief Court of Lower Burma<sup>10</sup> and the Judicial Commissioner's Court of Nagpur<sup>11</sup> that the delivery of such possession amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned, and that if after that date the judgment-debtor continues in possession, his possession becomes that of a trespasser giving rise to a fresh cause of action. They proceed on the view that though actual possession might have been taken, still, as it was obtained through Court and by process of law, and as the judgment-debtor must be deemed to have been present at the proceedings relating to the taking of possession, it is not open to him to say that the whole proceeding should be taken as a nullity, and that the plaintiff should be treated as one who never obtained possession at all. The High Courts of Allahabad<sup>12</sup> and Bombay<sup>13</sup> have, on the other hand, held that where the judgment-debtor is in possession and the decree-holder or the auction-purchaser is entitled to actual possession, he cannot get anything less than that and if he does not get actual possession, he cannot rely upon symbolical possession; for the law does not allow a person who is entitled to actual possession to get only symbolical possession.

**5. Symbolical possession and limitation.** — See Note 4 above.

**6. Joint possession — Undivided share.** — Sub-rule (2) does not confer on Courts a new power of granting decrees for joint possession. Such decrees were given before this Code was enacted and sub-rule (2) merely defines the manner in which such decrees are to be executed.<sup>1</sup> A person who is entitled to possession of immovable property jointly with others is not merely entitled to a decree declaring his rights in the land but also to a decree for *joint possession*; and it is immaterial whether he was originally in possession and was subsequently dispossessed or whether he had never been in possession at all.<sup>2</sup> But the Court has a discretion in granting such a decree

6. ('97) 24 Cal 715 (719).

('23) AIR 1923 Cal 188 (140, 141).

('81) 7 Cal 418 (419, 420).

('04) 8 Cal W N 49 (51).

('84) 11 Cal 98 (98, 102).

('79) 4 Cal 870 (876).

[But see ('80) 5 Cal 331 (333).]

7. ('26) AIR 1926 Lah 35 (37). (General principles of estoppel similar to *res judicata* will apply.)

('25) AIR 1925 Lah 61 (61, 62).

('30) AIR 1930 Lah 828 (828).

('35) AIR 1935 Lah 612 (613).

[But see ('24) AIR 1924 Lah 301 (302). (Not followed in AIR 1930 Lah 828.)]

8. ('27) AIR 1927 Mad 849 (850). (Reversing AIR 1925 Mad 1140 in Letters Patent Appeal.)

('07) 17 Mad L Jour 598 (600, 601).

[But see ('18) AIR 1918 Mad 207 (208).]

9. ('28) AIR 1928 Pat 76 (82).

10. ('10) 8 Ind Cas 463 (464) (Low Bur).

11. ('14) AIR 1914 Nag 14 (14) : 10 Nag L R 60.

12. ('21) AIR 1921 All 9 (10, 11): 43 All 520 (FB).  
 [But see ('06) 28 All 722 (728). (No longer law in view of AIR 1921 All 9 (FB).)]

13. ('22) AIR 1922 Bom 2 (8) : 46 Bom 932.

('19) AIR 1919 Bom 44 (44, 45) : 43 Bom 559.

('12) 14 Ind Cas 447 (449) : 36 Bom 373 (FB).

(Overruling 25 Bom 275 and 25 Bom 358 and following 16 Bom 722.)

('92) 16 Bom 722 (728).

('94) 18 Bom 87 (40).

('09) 4 Ind Cas 834 (835) (Bom).

[But see ('22) AIR 1922 Bom 27 (28) : 46 Bom 710. (36 Bom 373 doubted in view of AIR 1917 P C 197 (P C).)]

**Note 6**

1. ('28) AIR 1928 All 472 (474) : 51 All 303 (FB).

('11) 11 Ind Cas 87 (88) (All).

2. ('22) AIR 1922 All 814 (816) : 44 All 1.

('22) AIR 1922 All 162 (164) : 44 All 5.

('12) 13 Ind Cas 79 (80) : 34 All 150.

('04) 26 All 588 (590, 591) (FB).

('94) 18 Bom 506 (506).

and the discretion must be exercised in accordance with the principles of justice, equity and good conscience.<sup>3</sup>

Under the old Code it was held that a decree for joint possession may be executed by putting the plaintiff in actual possession of a portion of the property.<sup>4</sup> The difficulty which arose in giving such delivery of joint possession has now been removed by the enactment of sub-rule (2), prescribing the mode in which such delivery should be made.<sup>5</sup> The delivery of joint possession under this rule is merely a symbolical transaction.<sup>6</sup>

Whenever it is a question of giving effective possession of an undivided share in immovable property to an auction-purchaser under a decree, the provisions of Rule 95, *infra*, may be read with sub-rule (2) of this rule.<sup>7</sup>

**7. Delivery of possession to agent.** — Delivery of possession can be made to a person who is orally authorized by the decree-holder.<sup>1</sup>

**8. Affixture of copy of warrant.** — The provisions of this rule, and of Rules 36 and 96 *infra*, imperatively require that a copy of the warrant for delivery of possession should be affixed in some conspicuous place on the property, the object of the provision being that co-sharers and tenants may know that possession has been transferred to the decree-holder or the auction-purchaser as the case may be. Therefore, the failure to comply with the procedure laid down in those rules is fatal to the delivery, which is no delivery at all in the eye of the law, and cannot be the basis for a fresh suit for possession.<sup>1</sup> But where the parties concerned had actually come to know of the proceedings taken to give symbolical possession, it must be presumed that there had been a substantial compliance with the requirements of the rules.<sup>3</sup>

It must also be assumed that a process recorded as served through Court was served with all the formalities required by law and the burden of proof lies on the

('83) 10 Cal 244 (246).

[See also ('96) 20 Bom 467 (468).]

3. ('28) AIR 1928 All 472 (474): 51 All 303 (FB).

See the undermentioned cases in which joint possession was refused:

('90) 18 Cal 10 (21, 22): 17 Ind App 110 (P O).

('15) AIR 1915 Mad 50 (51), (Per Napier, J.—Must not injure another who is legally in possession.)

('98) 1898 Pun Re No. 16, p. 33. (Where property is enjoyed only through receipt of rent.)

('14) AIR 1914 All 210 (210). (Suit by one co-sharer to eject trespasser.)

[See also ('82) 6 Bom 564 (567). (Suit for declaration that mortgage by elder brother is not binding and for recovery of half-share against purchaser—Plaintiff could have asked for possession of whole, leaving purchaser to sue for partition—But possession decreed as prayed for.)]

4. ('66) 5 Suth W R Misc 15 (15).

(1865) 2 Suth W R Misc 80 (81).

[But see ('70) 13 Suth W R 123 (124).]

5. ('26) AIR 1926 Lah 668 (669). (The case is not covered by Rule 86, *infra*.)

('21) AIR 1921 Lah 286 (287).

('36) AIR 1936 Lah 749 (750). (Possession given in any other way is of no legal effect.)

('38) 67 Cal L Jour 89 (40).

('99) 1999 All L Jour 375 (376).

6. ('28) AIR 1928 Lah 719 (719). (But it stops adverse possession.)

('12) 14 Ind Cas 447 (449): 36 Bom 373 (F B).

('39) 1939 All L Jour 375 (376). (Decree for joint possession does not entitle decree-holder to actual possession by ousting person in possession—His remedy for getting actual possession is by bringing suit for partition.)

7. ('14) AIR 1914 All 511 (511): 36 All 181.

('28) AIR 1928 Oudh 251 (256): 3 Luck 506. (Per Misra, J.)

#### Note 7

1. ('17) AIR 1917 Nag 231 (232): 13 Nag L R 87. (Even without a power of attorney.)

#### Note 8

1. ('23) AIR 1923 Lah 693 (693).

('20) AIR 1920 Lah 473 (474).

('17) AIR 1917 Lah 336 (337).

('17) AIR 1917 Lah 364 (365): 1917 Pun Re No. 20.

('29) AIR 1929 Lah 545 (545, 546).

('71) 15 Suth W R 99 (99).

[See also ('25) AIR 1925 Lah 264 (265).

('36) AIR 1936 Lah 749 (750).]

2. ('29) AIR 1929 Lah 545 (545).

('20) AIR 1920 Lah 453 (453).

('37) AIR 1937 Oudh 275 (276): 13 Luck 96. (Possession given with beat of drum but without affixing any warrant—Judgment-debtor acquiescing in such procedure cannot question its validity subsequently—Possession is effective and valid against him.)

**O. 21 R. 35** person asserting the contrary to prove that the formalities, such as the fixing of copy  
**Notes 8-12** of the warrant, had not been complied with.<sup>3</sup>

**9. Removal of person bound by decree.** — The words "any person bound by the decree" in this rule include the judgment-debtor as well as any person who may be held under law as bound by the decree.<sup>1</sup> Therefore, if the property for which a decree for possession has been made is in the occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub-rule (1) must be given to the decree-holder<sup>2</sup> by removing, if necessary, the person bound by the decree and refusing to vacate the property.<sup>3</sup> As to cases in which a party is bound by the decree according to principles of *lis pendens*, see Section 52, Transfer of Property Act, and the undermentioned cases.<sup>4</sup>

**10. Use of force in giving possession.** — Where a person bound by a decree for possession of immovable property refuses to vacate or deliver possession of the property, a reasonable degree of force may be used in removing such person.<sup>1</sup> But the removal by force of a person other than the one bound by the decree is an offence punishable under Section 323 of the Penal Code.<sup>2</sup>

**11. Resistance to delivery of possession.** — Resistance to a warrant for delivery of actual possession by a person in possession who is not a party to the decree and who is not bound by it is not an offence under Section 186 of the Penal Code.<sup>1</sup>

See also Notes to Order 21 Rule 98.

**11a. Consent of judgment-debtor.** — The consent of the judgment-debtor is not essential for the execution of a warrant for the delivery of possession under sub-rule (1), and it is not obligatory upon the decree-holder or the executing official to apprise the judgment-debtor of the fact that the possession had been delivered to the decree-holder; all that is necessary is to deliver possession to the decree-holder, and if any resistance by a person bound by the decree is offered, to remove him from the possession thereof.<sup>1</sup>

**12. Identification of land.** — If in the course of the proceedings in execution of a decree for possession of land, it appears that the boundaries described in the plaint are no longer in existence, the Court can make an enquiry to ascertain the land decreed.<sup>1</sup> Where the plaintiff, who has obtained a decree for possession of land, describes the land as having a particular area and as lying within certain boundaries,

3. ('30) 132 Ind Cas 181 (192) (Lah).  
 ('28) AIR 1928 Lah 910 (910, 911).

**Note 9**

1. ('92) AIR 1932 Cal 241 (241, 242): 59 Cal 739.  
 (Decree for landlord for possession against lessee can be executed against sub-lessee.)

[See ('37) AIR 1937 Cal 301 (303). (The person sought to be removed must be bound by the decree for possession — Mortgage decree for sale against executors under will in representative capacity — Property sold — Proceedings for delivery of property — Beneficiaries under will are not persons bound by the decree for possession but by the decree for sale.)]

2. ('25) AIR 1925 Cal 1243 (1244).

('87) 15 Cal 94 (99).

('73) 20 Suth W R 204 (204, 205, 206).

('69) 11 Suth W R 444 (444).

('74) 11 Bom H C R 24 (31).

3. ('72) 18 Suth W R 526 (528). (Delivery of land

not involving delivery of buildings thereon.)

4. ('98) 20 All 849 (351).

('95) 1 Cal W N 62 (64).

('13) 18 Ind Cas 177 (179, 181) (Cal).

('74) 21 Suth W R 349 (351).

('67) 7 Suth W R 225 (226).

(1862) 1 Hyde 160 (167, 168).

('30) AIR 1930 Cal 15 (16): 56 Cal 1130.

**Note 10**

1. ('15) AIR 1915 Cal 558 (560): 42 Cal 313

2. ('30) AIR 1930 Cal 720 (720).

**Note 11**

1. ('25) AIR 1925 Mad 613 (614).

**Note 11a**

1. ('33) AIR 1933 Lah 22 (23).

('35) AIR 1935 All 988 (989).

**Note 12**

1. ('72) 17 Suth W R 379 (380).

('71) 16 Suth W R 171 (172).

[But see ('69) 12 Suth W R 99 (99, 100).]

the boundaries must prevail even if the land exceeds the area stated in the plaint.<sup>2</sup>

See also Note 3 to Order 7 Rule 3 and Order 21 Rule 94.

**O. 21 R. 35**  
**Notes 12-13**

**13. Break open — Sub-rule (3).** — Though in the old Code there was no provision corresponding to this sub-rule, it was held that where the building or enclosure to be given possession of was locked by the judgment-debtor or some person claiming under him and bound by the decree, the officer of the Court had the power to break open the lock, and place the decree-holder in possession.<sup>1</sup>

**R. 36.** [S. 264.] Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

**O. 21 R. 36**

Decree for delivery of immoveable property when in occupancy of tenant.

[1877, S. 264; 1859, S. 224. Cf. O. 21 R. 96.]

### Synopsis

- |  |  |
|--|--|
| <p>1. Scope and applicability of the Rule.<br/>2. Formal or symbolical possession. See Notes to Rule 35.</p> | <p>3. Possession without the intervention of the Court.<br/>4. Effect of delivery on criminal proceedings.</p> |
|--|--|

### Other Topics (miscellaneous)

"Other persons." See Note 1.

Tenant. See Note 1.

**1. Scope and applicability of the Rule.** — This rule applies only to a case where the property is in the exclusive possession of a person who is not bound by the decree and who is entitled to remain in possession; it does not apply to a case of joint holding which is covered by Rule 35, *ante*.<sup>1</sup> Where the property which is the subject-matter of a suit for possession is in the possession of a tenant<sup>2</sup> or of a usufructuary mortgagee whose term has not expired,<sup>3</sup> or in the possession of a person having a right of residence,<sup>4</sup> delivery of the property in execution should be made under this rule provided, of course, such person is not bound by the decree. But where a third person claims to enter on the land under certain contractual rights and has not derived title

2. ('72) 18 Suth W R 25 (25).

#### Note 13

1. ('74) 22 Suth W R 283 (284).

#### Order 21 Rule 36 — Note 1

1. ('26) AIR 1926 Lah 668 (669).

2. ('96) 18 All 440 (449, 450, 451) (FB).

('71) 15 Suth W R 307 (308).

('67) 7 Suth W R 376 (376).

('17) AIR 1917 Mad 760 (761) : 39 Mad 1042.

('10) 5 Ind Cas 630 (631) : 33 Mad 452.

('03) 26 Mad 78 (79).

('25) AIR 1925 Rang 98 (98, 99).

[See ('88) AIR 1988 Mad 885 (886) : IL R (1939)

Mad 324. (Revenue sale against jenmi in Mulabar — Sale binds only jenmi and kanomdar and not tenants under kanomdar — Purchaser at revenue sale can therefore get only symbolical possession.)]

[See also ('72) 17 Suth W R 236 (236). (In executing a decree under this rule Court should not direct ryots to pay rent to the decree-holder.)]

3. ('12) 16 Ind Cas 420 (421) (Mad).

('19) AIR 1919 Oudh 39 (42) : 22 Oudh Cas 278.

('23) AIR 1923 All 507 (508) : 45 All 482. (Do.)

[See also ('14) AIR 1914 All 440 (441). (Need not even obtain symbolical possession.)]

4. ('18) 20 Ind Cas 571 (572) (Cal).

**O. 21 R. 36**  
**Notes 1-4**

from the defendant in the suit, he cannot be regarded as a tenant against whom an order under this rule can be made.<sup>5</sup>

Delivery of symbolical possession under this rule does not pass the right to the crops on the land, where a third person not bound by the decree is in possession.<sup>6</sup>

**2. Formal or symbolical possession.** — See Notes to Rule 35, *ante*.

**3. Possession without the intervention of the Court.** — A person who has obtained a decree for possession of immovable property may take possession of such property otherwise than in execution and may rely, for the support of his possession, on the title vested in him under the decree.<sup>1</sup> Where, after having obtained possession without the aid of the Court, he is subsequently dispossessed, he can maintain an action against the persons who have dispossessed him, although he has not taken out execution of his decree.<sup>2</sup>

**4. Effect of delivery on criminal proceedings.** — Where a short time before the institution of proceedings under Section 145 of the Criminal Procedure Code, a party has been put in possession of the disputed land by the Civil Court in execution of a decree, it is the duty of the Magistrate to find possession with that party in accordance with the Civil Court's order, even though he might have got only symbolical possession.<sup>1</sup>

### ARREST AND DETENTION IN THE CIVIL PRISON

**O. 21 R. 37**

**R. 37. [S. 245B.]** (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in

Discretionary power to permit judgment-debtor to show cause against detention in prison.

pursuance of the application, the Court *shall*, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison :

*Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.*

(2) Where appearance is not made in obedience to the notice,

5. ('28) AIR 1928 Mad 25 (27).

6. ('08) 8 Low Bur Rul 129 (180).

**Note 3**

1. ('91) 15 Bom 238 (241).

('87) 2 Agra 285 (286).

('74) 22 Suth W R 406 (406).

('81) 5 Bom 387 (391, 392). (If in taking such possession he uses violence he can be prosecuted.)

2. ('16) AIR 1916 All 163 (163, 164); 38 All 509. (Twelve years after such dispossession suit will be barred.)

('74) 6 N W P H C R 187 (189).

('16) AIR 1916 Mad 1089 (1090). (Execution is not the remedy.)

('22) AIR 1922 Lah 459 (460).

**Note 4**

1. ('02) 29 Cal 208 (210).

('99) 26 Cal 625 (628, 629).

('05) 82 Cal 796 (797, 798).

[But See ('16) AIR 1916 Mad 640 (640): 39 Mad 543. (Symbolical possession without prejudice to persons in actual possession — Not actual possession for purposes of S. 145, Cr. P. C.)]

the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

**O. 21 R. 37**  
**Notes 1-2**

- a. Substituted by the Code of Civil Procedure (Amendment) Act, XXI of 1936, S. 3, for "may."  
b. Inserted by *ibid*, Section 3.

### Synopsis

1. Notice to show cause. | 2. Privilege from arrest. See Section 135.

### Other Topics (miscellaneous)

"For the payment of money." See Note 1.

Judgment-debtor residing outside jurisdiction — Whether notice could be issued. See Note 1.

**1. Notice to show cause.** — Under Rules 16 and 22 of this Order, a Court is bound to issue notice to the judgment-debtor, preliminary to ordering the execution of the decree, in three classes of applications for execution, *viz.* —

- (1) those made by transferees of decrees ;
- (2) those made more than one year after the decree; and
- (3) those made against the legal representatives of a party to a decree.

Where, after such preliminary notice the party does not show cause against execution, the Court is bound, under Rule 24, to issue *process* for the execution of the decree. But, where an application is made for the execution of a money decree by the imprisonment of the judgment-debtor, the Court is bound under this rule to issue, in the first instance, a notice to the judgment-debtor to appear and show cause why he should not be committed to the civil prison in execution of the decree. The Court cannot issue a notice and a warrant of arrest at the same time with directions for arrest in case the judgment-debtor intimates he does not propose to appear.<sup>1</sup>

Under the rule as it stood before it was amended by Act XXI of 1936 the Court had a discretionary power to issue a notice to the judgment-debtor to show cause against his detention in prison. This discretionary power was provided only in respect of the execution of *money decrees* by the *arrest and imprisonment* of the judgment-debtor. The classes of cases in which the discretion to issue notice could be exercised were indicated in the provisions of Rule 40, *infra*. It was held that it would be a proper exercise of discretion to order notice where the Court had reason to believe that the judgment-debtor was too ill for imprisonment.<sup>2</sup>

Though a judgment-debtor cannot be *arrested* because he is outside the jurisdiction of the Court at the time of the arrest, a notice under this rule may nevertheless be issued.<sup>3</sup>

See also Note 1a to Rule 40 *infra*.

**2. Privilege from arrest.** — See Section 135, *ante*.

**R. 38. [S. 337.]** Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the

**O. 21 R. 38**

Warrant for arrest to direct judgment-debtor to be brought up.

### Order 21 Rule 37 — Note 1

1. ('32) AIR 1932 Pat 815 (816) : 11 Pat 743.  
( '32) AIR 1932 All 692 (698) : 55 All 109. (The warrant is illegal.)

2. ('11) 9 Ind Cas 746 (747) : 14 Oudh Cas 96.  
3. ('26) AIR 1926 Sind 51 (59).  
[See also ('18) AIR 1918 Pat 427 (428) : 3 Pat L Jour 96.]

**O. 21 R. 38**  
**Note 1**

amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

[1877, Ss. 251, 343; 1859, S. 222.]

#### Local Amendment

#### MADRAS

*Substitute* a comma for the full-stop after the word "paid" and *add* the following :

"or unless satisfaction of the decree be endorsed by the decree-holder on the warrant in the manner provided in Rule 25 (2) above."

1. "**With all convenient speed.**" — Detention, without authority, beyond such time as is reasonably necessary to bring the judgment-debtor to Court after arrest, is illegal.<sup>1</sup>

The date for the return of the warrant should also be specified in the warrant.<sup>2</sup>

#### Local Amendment

#### RANGOON

*Add* the following as Rule 38A :

**O. 21 R. 38A**  
**(Rangoon)**

Costs of conveyance of civil prisoners to be borne by Court.

"38A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor."

**O. 21 R. 39**

**R. 39.** [Ss. 339, 340.] (1) No judgment-debtor shall be

**Subsistence-allowance.**

arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

#### Order 21 Rule 38 — Note 1

1. (1859) 1859 Bourke 59.

2. ('18) AIR 1918 Pat 427 (428): 3 Pat L Jour 95.



(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

[1877, Ss. 339, 340; 1859, Ss. 276, 279.]

#### Local Amendments

##### ALLAHABAD

*Delete* the words "in the civil prison" in sub-rule (5).

##### CALCUTTA

*Omit* the words "in the civil prison" in sub-rule (5).

##### LAHORE

*Delete* the words "in the civil prison" in sub-rule (5).

##### MADRAS

*Delete* the present sub-rules (4) and (5) and *substitute* the following:

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and costs of conveyance of the judgment-debtor for his journey from the Court-house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the Civil Prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and costs of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

##### NAGPUR

(a) To sub-rule (1) the following words shall be added, namely:

"and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house."

(b) For sub-rules (4) and (5), the following sub-rules shall be substituted, namely:

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the Civil Prison and from the Civil Prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the Civil Prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the Civil Prison.

**O. 21 R. 39**  
**Notes 1-2**

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

**N.-W. F. P.**

(1). For sub-rule (4), *substitute* the following :

"(4) All payments shall be made to the officer-in-charge of the Civil Prison."

(2). In sub-rule (5), *omit* the words "in the Civil Prison,"

**ODDH**

In sub-rule (5), *delete* the words "in the Civil Prison."

**PATNA**

In sub-rule (5) *delete* the words "in the Civil Prison" in the first place where they occur.

**RANGOON**

The following shall be *inserted* as sub-rule (2A) :

"(2A) When a civil prisoner is kept in confinement at the instance of more than one decree-holder, he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree-holder. Each decree-holder shall, however, pay the full allowance for subsistence, and when the debtor is released, the balance shall be divided rateably among the decree-holders, and paid to them."

In sub-rule (5) the words "in the Civil Prison" shall be deleted.

### *Synopsis*

1. Subsistence money.
2. Arrest before judgment.
3. Payment of subsistence money and limitation.

**1. Subsistence money.** — This rule is to be strictly followed. The subsistence allowance payable to the officer-in-charge of the civil prison must always be paid for a whole month in advance.<sup>1</sup> Thus, the payment for the month of January must be actually made to the officer-in-charge of the civil prison *before the 1st* of January.<sup>2</sup> Otherwise, the judgment-debtor will be released from imprisonment. See Section 58, Note 3 and the undermentioned cases.<sup>3</sup> The decree-holder is bound to pay, however, only the amount due as *subsistence allowance* according to the prescribed scales<sup>4</sup> and not the costs of bedding, clothing, etc., for the prisoner which are governed by the Prison Rules.<sup>5</sup>

In case the judgment-debtor is not committed to prison, the decree-holder is entitled to a refund of any money unspent between the dates of arrest and release from custody.<sup>6</sup>

**2. Arrest before judgment.** — The same rules apply equally to cases of arrest *before judgment*.<sup>1</sup>

#### **Order 21 Rule 39 — Note 1**

1. ('70) 5 Beng L R App 79 (79, 80).  
(70) 5 Beng L R App 80 (81). (Unspent amount of previous month may be taken into account.)
2. ('14) AIR 1914 Mad 24 (24). (Remittance by postal money order, must actually reach officer before the first day of the month.)
3. Bourke O C 52.  
Bourke O C 109.  
Bourke O C 421.  
(68) 4 Mad H O R 76 (77).

4. Bourke O C 52. (The corresponding Section of the Code of 1859 contained no reference to any scales.)  
Bourke O C 59. (Do.)
5. ('98) 1898 Pun Re 43, page 202.  
See also Note 2 to Section 58.
6. ('68) 5 Bom H O R 84 (85).  
(79) 4 Bom 65 (69, 70). (Time for payment of process fee for arrest under the Code of 1859 was different.)

#### **Note 2**

1. Bourke O C 423.

**3. Payment of subsistence money and limitation.** — A payment or remittance of subsistence money by post to the Superintendent of Jail under sub-rule (4) is a step-in-aid of execution within the meaning of Article 182 of the Limitation Act.<sup>1</sup>

**O. 21 R. 39**  
**Note 3**

**R. 40.** (1) *When a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.*

**O. 21 R. 40**

**Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.**

(2) *Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.*

(3) *Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest :*

*Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.*

(4) *A judgment-debtor released under this rule may be re-arrested.*

(5) *When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.*

a. Substituted by Section 4 of the Code of Civil Procedure (Amendment) Act, XXI of 1936.

**O. 21 R. 40**  
**Note 1a**

**NAGPUR**

**Local Amendments**

*insert* the following as sub-rules (6), (7) and (8) :

"(6) When a judgment-debtor is ordered to be detained in the custody of an officer of the Court under sub-rule (2) or the proviso to sub-rule (3) above, the Court may direct the decree-holder to deposit such amount as, having regard to the specified or probable length of detention, will provide :

(a) for the subsistence of the judgment-debtor at the rate to which he is entitled under the scales fixed under Section 57,

(b) for the payment to the officer of the Court in whose custody the judgment-debtor is placed of such fees (including lodging charges) in respect thereof as the Court may by order fix :

Provided (i) that the subsistence allowance and the fees payable to the officer of the Court shall not be recovered for more than one month at a time, and

(ii) that the Court may from time to time require the decree-holder to deposit such further sums as it deems necessary.

(7) If a decree-holder fails to deposit any sum as required under sub-rule (6) above, the Court may disallow the application and direct the release of the judgment-debtor.

(8) Sums disbursed by the decree-holder under sub-rule (6) shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed."

[ Notification No. 7719, dated 29-11-1938. ]

**ALLAHABAD, MADRAS and OUDH**

Under Section 4 of Act XXI of 1936 the amendments to Rule 40 made by the above High Courts have been repealed.

*Synopsis*

**1a. Legislative changes.**

**1. Scope of the Rule.**

**2. "Poverty or other sufficient cause" (old Rule).**

**3. Insolvency.**

**4. Transfer, concealment, removal or any other act of bad faith — Sub-rule (2), clauses (b) and (c) (old Rule).**

**5. Undue preference—Sub-rule (2), clause (c) (old Rule).**

**6. Refusal or neglect to pay the amount of the decree—Sub-rule (2), clause (d) (old Rule).**

**7. Likelihood of the judgment-debtor absconding—Sub-rule (2), clause (e) (old Rule).**

**8. Sub-rule (3) (old Rule).**

**9. Appeal.**

**10. Madras Amendment.**

*Other Topics (miscellaneous)*

Lunacy — Whether sufficient cause for refusing arrest. See Note 2.

"Shall cause the judgment-debtor to be arrested." See Note 1.

"Unable to pay." See Note 1.

**1a. Legislative changes.** — The rule in its present form was substituted for the old Rule 40 by Section 4 of Act XXI of 1936. The old Rule 40 ran as follows —

**R. 40. [S. 337A.]** (1) Where a judgment-debtor appears before the Court in

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest. obedience to a notice issued under Rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments,

the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

**O. 21 R. 40**  
**Note 1a**

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;
- (b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;
- (c) any undue preference given by the judgment-debtor to any of his other creditors;
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;
- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison."

The above Act also amended Section 51 and O. 21 R. 37 of the Code. (See Section 51 and O. 21 R. 37.) The effect of all these amendments taken together is as follows —

1. It is now obligatory, in every case, on the Court to give an opportunity to the judgment-debtor to show cause why he should not be imprisoned, before ordering his imprisonment in execution of a money decree. But, before the passing of the above Act, the Court had a *discretion* in the matter. (See O. 21 R. 37.)

2. Execution of a money decree by the imprisonment of the judgment-debtor cannot now be ordered except in certain special circumstances specified in the proviso to Section 51. But, before the passing of the above Act, the Court was ordinarily bound to order the imprisonment of the judgment-debtor on the application of the decree-holder, though the Court had a *discretion* to refuse to order such imprisonment in certain circumstances (old R. 40 of O. 21). In other words, the burden is now thrown on the decree-holder to prove the circumstances justifying the imprisonment of the judgment-debtor, whereas formerly, the burden was on the judgment-debtor to establish the circumstances justifying the Court in refusing to order his imprisonment.<sup>1</sup>

3. The provision in Rule 40 for giving a further opportunity to the judgment-debtor to satisfy the decree even after his imprisonment has been ordered by directing

**Order 21 Rule 40 — Note 1a**

1. ('88) AIR 1938 Lah 515 (519). (Provision is retrospective.)

**O. 21 R. 40**  
**Notes 1a-2**

that he should be left in the custody of an officer of the Court for a certain period or should be released on his furnishing security is new.

See also Note 5A to Section 51, *ante*.

**1. Scope of the Rule.** — As seen in Note 1a, the one great distinction between the law as it was before the amendments made by Act XXI of 1936 and the law as it is now, is that previously the Court was ordinarily *bound* to order the imprisonment of the judgment-debtor in execution of a money decree on the application of the decree-holder, though the Court had a discretion in certain exceptional circumstances to refuse to order the imprisonment of the judgment-debtor;<sup>1</sup> whereas, now the Court has *no power* to order the imprisonment of the judgment-debtor in execution of a money decree except in certain specified circumstances. Inability to pay the amount of the decree was recognized under the old rule as a ground for disallowing an application for arrest. But the inability must be a *bona fide* one as implied in sub-rule (2). An order releasing the judgment-debtor without considering the allegations of the decree-holder touching any of the matters referred to in sub-rule (2) of the old rule was not proper.<sup>2</sup> The object of the rule was to prevent creditors from unduly harassing indigent debtors<sup>3</sup> but if no sufficient cause as required by the rule existed, the Court could not refuse the decree-holder the right of arrest and detention.<sup>4</sup> The finding as to inability to pay must be based on evidence,<sup>5</sup> and the burden of proof of such inability rested on the judgment-debtor.<sup>6</sup> The executing Court had no power to excuse the judgment-debtor from liability to arrest, until he actually came before the Court.<sup>7</sup>

A judgment-debtor committed to the civil prison will be deemed to be in unlawful detention if he is delivered to an officer other than the officer named in the warrant of committal issued under the rule, and will be entitled to be released from such custody.<sup>8</sup> Though in the case of a judgment-debtor against whom a warrant had been issued, sub-rule (1) of the old rule in terms was applicable *on his being brought under arrest*, he was not precluded from *surrendering* to the Court before arrest and claiming the protection of the rule.<sup>9</sup>

**2. "Poverty or other sufficient cause" (old Rule).** — The Court had a *discretion* under the old rule to disallow the application for arrest on any one of the grounds specified in the rule.<sup>1</sup> Inability to pay may arise from poverty or other sufficient cause. Where the object of the decree-holder was to harass a judgment-debtor, whose properties had all been sold in execution of decrees, and the amount

[See also ('38) AIR 1938 Rang 477 (478). (As the normal limit under which a man cannot reasonably be expected to support himself and a family is held at Rs. 40, unless there is anything on the record from which it can be said to have been proved that a judgment-debtor earns more than Rs. 40 a month and fails to pay the excess to the decree-holder, the Court should not order arrest of a judgment-debtor.)]

**Note 1**

1. [See ('36) AIR 1936 Rang 280 (281).]
2. ('29) AIR 1929 Pat 728 (729). (Fraudulent concealment of property since date of suit.)
3. ('18) 21 Ind Cas 293 (297) (Mad).
4. ('97) 2 Cal W N 588 (589). (Court is bound to cause the arrest at once.)

('26) 94 Ind Cas 279 (279) (Lah).

[See also ('38) AIR 1938 Pat 248 (248). (Judgment-debtor evading arrest—Court refusing to make further effort to apprehend and dismissing execution case—Order is not proper.)]

5. ('28) AIR 1928 Cal 62 (63) : 54 Cal 782. (And not on a statement at the bar.)

6. ('14) AIR 1914 Low Bur 51 (52) : 7 Low Bur Rul 389.

('97-01) 2 Upp Bur Rul 279.

7. ('33) AIR 1933 Pat 248 (248).

8. ('85) 11 Cal 527 (530).

9. ('29) AIR 1929 Sind 110 (111).

**Note 2**

1. ('35) AIR 1935 Oudh 57 (58) : 10 Luck 508.

could be realized from solvent co-judgment-debtors,<sup>2</sup> or where the assets of a judgment-debtor could not be readily called in, for no fault of his,<sup>3</sup> the Court might, in its discretion, refuse arrest or detention and, in the latter instance, grant him a reasonable time to pay the amount.

Lunacy of the judgment-debtor was held to be a sufficient cause under the old rule for refusing arrest or detention.<sup>4</sup>

**3. Insolvency.** — In the absence of a *protection order* from the Insolvency Court, the insolvency of a judgment-debtor was not necessarily a ground for release under the old rule.<sup>1</sup> The Court was, however, bound to consider, under that rule, the question of his inability to pay, if pleaded, notwithstanding the want of a protection order.<sup>2</sup>

Prior to any enquiry under this rule, the Court must, under Section 55, sub-section (3), inform the judgment-debtor that he may apply to be declared an insolvent<sup>3</sup> and the judgment-debtor must express his intention to do so also before the proceedings under this rule are terminated.<sup>4</sup>

**4. Transfer, concealment, removal or any other act of bad faith — Sub-rule (2), clauses (b) and (c) (old Rule).** — The acts of bad faith contemplated by clauses (b) and (c) of sub-rule (2), of the old rule were akin to those dealt with in Section 53 of the Transfer of Property Act, Sections 55 to 57 of the Presidency Towns Insolvency Act, and Sections 53 and 54 of the Provincial Insolvency Act of 1920. Under clause (b), however, the alleged act must be subsequent to the suit in question and intended to defeat or delay the decree-holder in particular.<sup>1</sup>

One test of good faith is whether the transaction complained of is genuine or colourable.<sup>2</sup>

**5. Undue preference — Sub-rule (2), clause (c) (old Rule).** — It was held that the Court might be guided by the relevant provisions of the Insolvency Acts in dealing with the question of undue preference under clause (c) of sub-rule (2) of the old rule.<sup>1</sup> See also the undermentioned cases.<sup>2</sup>

**6. Refusal or neglect to pay the amount of the decree — Sub-rule (2), clause (d) (old Rule).** — The word “thereof” in clause (d) of sub-rule (2) referred to the

2. ('22) AIR 1922 Lah 259 (260).

3. ('11) 11 Ind Cas 848 (849) (Lah). (Decree debt due to judgment-debtor his only property — Obstruction in its realization.)

('84) AIR 1984 Lah 166 (166). (Judgment-debtor's whole property under attachment in another decree — Refusal to order arrest of judgment-debtor held justified.)

('35) AIR 1935 Oudh 57 (58) : 10 Luck 508.

('85) AIR 1935 Cal 127 (129). (Properties under attachment at the instance of decree-holder or properties form subject-matter of decree for mortgage at the instance of decree-holder—Refusal of prayer for arrest of judgment-debtor justified.)

[See also ('25) AIR 1925 Mad 42 (43) : 48 Mad 494. (Merchant, if short time will enable him to raise money, should not be ruined by arrest.)]

4. ('98) 22 Bom 961 (962).

**Note 3**

1. See Note 16 to Section 55 ante.

('07) 9 Bom L R 898 (900).

('80) AIR 1980 Lah 1070 (1071, 1072). (Protection

order produced—Judgment-debtor immune from arrest.)

2. ('31) AIR 1931 Lah 121 (122). (Insolvency application — Property in the hands of *ad interim* receiver—Sufficient cause.)

[See also ('85) AIR 1935 Rang 415 (418) : 18 Rang 628. (It does not follow, because the Insolvency Court grants leave to execute a decree, that in the regular suit an application for leave to execute the decree by arresting the insolvent will be successful.)]

3. ('09) 1 Ind Cas 402 (403) : 1909 Pun Re No. 16.

4. ('98) 1898 Pun Re No. 59.

**Note 4**

1. [See ('85) 7 All 445 (446).

('95) 17 All 218 (221).]

2. [See ('05) 29 Bom 428 (434).]

**Note 5**

1. ('85) 11 Cal 451 (461).

2. ('98) 16 Mad 499 (508, 505). (Preference must be voluntary and devoid of consideration.)

('81) 3 All 580 (582, 583). (Do.)

**O. 21 R. 40** decree amount generally, whether payable in instalments or otherwise.<sup>1</sup>  
**Notes 6-10**

**7. Likelihood of the judgment-debtor absconding—Sub-rule (2) clause (e) (old Rule).** — See the undermentioned case.<sup>1</sup>

**8. Sub-rule (3) (old Rule).** — This sub-rule was intended to give facility for the enquiry contemplated in the preceding sub-rule.<sup>1</sup> The security to be furnished under the sub-rule must be a substantial one and not a personal security of the judgment-debtor himself.<sup>2</sup> A security bond given under the sub-rule would be in force until the execution proceedings were terminated by a final order.<sup>3</sup> Where a judgment-debtor had not been arrested, but had been given notice to show cause why he should not be arrested, the Court had no jurisdiction to order, under sub-rule (3), the release of the judgment-debtor and take a bond for his appearance.<sup>4</sup>

**9. Appeal.** — By the operation of Sections 2 (2) and 47 of this Code, an appeal lies from an order disallowing an application for the arrest and imprisonment of the judgment-debtor<sup>1</sup> as well as from an order refusing him exemption from arrest.<sup>2</sup>

**10. Madras Amendment.** — Act XXI of 1936 repealed the amendments to the old R. 40 made under Section 122 of the Civil Procedure Code. Before the above Act, under the rule as amended by the Madras High Court, it was provided that a judgment-debtor who had been ordered to be detained in the civil prison might be ordered to be left in the custody of an officer of the Court for a specified period not exceeding ten days, in order to enable the judgment-debtor to satisfy the debt. It was held that the order for leaving the judgment-debtor in the custody of an officer of the Court under this proviso need not be in writing.<sup>1</sup>

## ATTACHMENT OF PROPERTY

**O. 21 R. 41**

**R. 41. [S. 267.]** Where a decree is for the payment of money the decree-holder may apply to the Court for an order that —

Examination of judgment-debtor as to his property.

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof, or
- (c) any other person,

be orally examined as to whether any or what debts are owing

(‘88) 12 Bom 425 (426).

### Note 6

1. (‘14) AIR 1914 Low Bur 51 (53) : 7 Low Bur Rul 339.

### Note 7

1. (‘93) 20 Cal 771 (787).

### Note 8

1. (‘14) AIR 1914 Low Bur 51 (53) : 7 Low Bur Rul 339.
2. (‘28) AIR 1928 Cal 62 (63) : 54 Cal 782.
3. (‘29) AIR 1929 Lah 776 (777). (Surety bond—Execution proceedings consigned to record room on judgment-debtor applying for being declared insolvent — Fresh execution application on dismissal of insolvency petition—Surety’s liability continues.)

4. (‘84) AIR 1984 Lah 217 (218). (The security bond cannot be enforced.)

### Note 9

1. (‘19) AIR 1919 Lah 15 (16) : 1 Lah 77.
- (‘88) AIR 1938 Pat 248 (249).
- (‘22) AIR 1922 Lah 259 (259).
- (‘98) 21 Mad 29 (30).
- (‘95) 1895 Pun Re No. 69, page 388.
- (‘17) AIR 1917 Mad 187 (187).
2. (‘29) AIR 1929 Lah 141 (141).
- (‘37) AIR 1937 Lah 706 (707).

### Note 10

1. (‘33) AIR 1933 Mad 278 (279). (Escaping from such custody is an offence under S. 225 B of the Penal Code.)



to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

**O. 21 R. 41**  
**Notes 1-8**

[1877, S. 267; 1859, S. 219.]

### Synopsis

- |                                    |                                    |
|------------------------------------|------------------------------------|
| 1. Legislative changes.            | 3. "Any other person."             |
| 2. Scope and object of the Rule.   | 4. "Any and what other property."  |
| 2a. "Decree for payment of money." | 5. Production of books of account. |

**1. Legislative changes.** — "Order 21 R. 41 is an amplification of Section 219 of Act VIII of 1859, modified by Section 267 of Act X of 1877."<sup>1</sup> Under the former Codes the Court was also expressly empowered to act *suo motu*.

**2. Scope and object of the Rule.** — The object of the rule is to obtain discovery for purposes of execution in cases where there is any difficulty or cause for delay in obtaining particulars of the judgment-debtor's property.<sup>1</sup> An application under this rule can be made at any stage, though it should not be allowed, if it is calculated to harass any person by personal examination when an order for examination or production is made *ex parte*. It is open to the Court to hear the objections of the respondent without an application by him.<sup>2</sup> The provisions of this rule come into effect only after a decree has been passed and cannot be invoked in the suit stage.<sup>3</sup> The power of the Court under this rule is discretionary.<sup>4</sup>

**2a. "Decree for payment of money."** — A decree directing an enquiry as to damages is a decree for payment of money and a person who has obtained such a decree is entitled to invoke the aid of this rule in order to enable him to effect an attachment, in pursuance of the right given to him under O. 21 R. 42, before the amount due from the judgment-debtor has been ascertained.<sup>1</sup>

**3. "Any other person."** — The Court may order the examination of any person who is alleged to be a mortgagee in possession of the property of the judgment-debtor and if it finds such person not to be in possession, it may order the attachment of the property.<sup>1</sup>

It has been held by the Judicial Commissioner's Court of Sind<sup>2</sup> that permission should not be granted to a judgment-debtor to examine a garnishee on the affidavit filed by him denying his liability to the judgment-debtor. It has also been held by the Madras High Court<sup>3</sup> that the discretionary power under this rule to examine a garnishee must ordinarily be limited to cases where the garnishee *admits* the debt. In such cases, the executing Court may find out the exact extent of the debt before ordering execution.

#### Order 21 Rule 41 — Note 1

1. ('16) AIR 1916 Cal 228 (229) : 43 Cal 285.

#### Note 2

1. ('38) AIR 1938 Mad 771 (772).
  2. ('16) AIR 1916 Cal 228 (229) : 43 Cal 285.
  3. ('84) AIR 1984 Mad 199 (201) : 57 Mad 685.
  4. ('99) AIR 1939 Mad 699 (702).
- ('38) AIR 1938 Mad 771 (773).

#### Note 2a

1. ('39) AIR 1939 Mad 699 (699, 701).

#### Note 3

1. ('99) 17 Bom 514 (518, 519).
2. ('38) AIR 1938 Sind 350 (351).
3. ('38) AIR 1938 Mad 771 (773, 774). (But examination may be allowed to prevent fraud or collusion — Object is to find out if debt is pro-

**O. 21 R. 41**  
**Notes 4-5**

**4. "Any and what other property."** — The rule applies to every description of property of the judgment-debtor legally liable to be proceeded against in satisfaction of the decree.<sup>1</sup>

**5. Production of books of account.** — To prevent the judgment-debtor from defeating the decree-holder's rights, the Court may require the former to produce his books of account and leave them in court-custody.<sup>1</sup> A garnishee may also be directed to produce his books of account or other documents for finding out whether there are any dealings between him and the judgment-debtor making the existence of a debt probable.<sup>2</sup>

**O. 21 R. 42**

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

**R. 42.** [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

[1877, S. 255. See O. 21 Rr. 12, 15 and 16.]

### Synopsis

1. Scope of the Rule.

2. Attachment under a preliminary decree.

3. Enquiry into state of account in suits under Section 92 of this Code.

**1. Scope of the Rule.** — This rule is analogous to the provision in the Code relating to attachment before judgment and its object is to secure to the decree-holder the fruits of his decree. Although, unlike O. 38 R. 5, this rule makes no specific provision for avoiding attachment by furnishing security, it has been held that the Court will be justified in requiring security before acting under this rule.<sup>1</sup> This rule treats the attachment as a proceeding in execution and the application for attachment may, therefore, be treated as one for execution. And as soon as the amount is ascertained, the application for attachment becomes one for the execution of the decree for the realization of the ascertained sum of money and the applicant will also be entitled to share in a rateable distribution of assets under Section 73 *ante*.<sup>2</sup>

**2. Attachment under a preliminary decree.** — An attachment of the property of a *judgment-debtor* under a preliminary decree fixing his *liability* can be validly made under this rule pending enquiry as to the amount due.<sup>1</sup> But where the preliminary decree does not fix the liability but directs enquiry in order to *ascertain*

bably, not really due—Whether debt is admitted or denied by garnishee it can be attached and sold or a receiver may be appointed to realize it—The question whether the debt is really due can be decided only in proceedings taken expressly for the recovery of the debt and not in proceedings for the attachment of such debt.)

#### Note 4

1. [See ('98) 17 Bom 514 (518, 519). (E. g., Equity of redemption.)]

#### Note 5

1. ('71) 8 N W P H O R 384 (385).

2. ('88) AIR 1938 Mad 771 (774). (But garnishee

ought not to be subjected to any examination or cross-examination for the purpose of determining whether the liability subsists or not.)

#### Order 21 Rule 42 — Note 1

1. ('12) 16 Ind Cas 708 (710) (Cal).

('17) AIR 1917 All 158 (154).

2. ('84) AIR 1984 Mad 604 (605) : 58 Mad 288.

#### Note 2

1. ('67) 8 Suth W R 9 (10). (E. g., A preliminary decree for mesne profits directing enquiry into the account.)

('17) AIR 1917 All 158 (154).

the liability, this rule does not apply.<sup>2</sup> "An operative decree obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced."<sup>3</sup> To such a case the present rule can have no application.

**O. 21 R. 42**  
**Notes 2-3**

### 3. Enquiry into state of account in suits under Section 92 of this Code.

— This rule applies also to the case of trustee against whom a decree has been passed in a suit under Section 92 of this Code, with a direction to take accounts of the trust moneys.<sup>1</sup>

## R. 43. [S. 269.] Where the property to be attached is

**O. 21 R. 43**

Attachment of moveable property other than agricultural produce, in possession of judgment-debtor.

moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

[1877, S. 269; 1859, S. 233. See Ss. 2, 13 and 145.]

### Local Amendments

#### CALCUTTA

Read Rule 43 as follows :

"Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and, save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value, or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once."

#### LAHORE

*Re-number* the rule as sub-rule (1) and *add* the following further proviso and sub-rules (2) and (3) :

"and provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and

2. ('26) AIR 1926 Sind 178 (179). (Preliminary decree directing taking of account in partnership suit — Not covered by the rule — It cannot be said "who is judgment-debtor" till after taking of accounts.)

('29) AIR 1929 Mad 641 (648) : 52 Mad 568. (Do. —Per Thiruvenkatachariar, J.)

('37) AIR 1937 Cal 4 (7). (Words "any other matter" in O. 21 R. 42, cannot include a preliminary decree directing the taking of accounts in a partnership suit.)

3. ('91) 18 All 53 (65) : 17 Ind App 150 (PC).

Note 3

1. ('17) AIR 1917 All 153 (154).

**O.21 R. 43** the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance, or

(c) in the charge of a village *lambardar* or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rules 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-clauses (a) or (c), of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by —

- (a) the custodian and his sureties,
- (b) the officer of the Court who made the attachment,
- (c) the person whose property is attached and made over,
- (d) two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian."

#### **MADRAS**

*Substitute the following Rule for Rule 43 :*

"43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once; and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in Rule 55 or Rule 57 or Rule 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment."

#### NAGPUR

*Substitute* the following for Rule 43 :

"43. (1) Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of any of his subordinates and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once ; and

Provided also that when the property attached consists of live-stock, agricultural implements or other articles which cannot be conveniently removed, and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or any person claiming to be interested in such property, leave it in the village or at the place where it has been attached —

(a) in the charge of the judgment-debtor or of the station pound-keeper, if any, or

(b) in the charge of the decree-holder, or of the person claiming to be interested in such property or of such respectable person as will undertake to keep such property, on his entering into a bond with one or more sureties in an amount not less than the value of the property, that he will take proper care of such property and produce it when called for.

(2) The attaching officer shall make a list of the property attached and shall obtain thereto the acknowledgment of the person in whose custody the property is left, and if possible, of the parties to the suit, and of at least one respectable person in attestation of the correctness of the list. If the property attached includes both live-stock and other articles, a separate list of the live-stock shall similarly be prepared and attested."

#### N.-W.F.P.

*Add* the following further proviso :

"Provided further that when the attached property consists of live-stock or articles which cannot conveniently be removed, and the attaching officer does not act under the first proviso to this rule, he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property, subject to the orders of the Court, if such person enters into a written bond for its production.

Any person who has so undertaken to keep attached property may be proceeded against as a surety under Section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

#### PATNA

*Substitute* the following for Rule 43 : .

"43. Where the property to be attached is moveable property, other than

**O. 21 R. 43**  
**Notes 1-5**

agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once."

*Synopsis***1. Scope of the Rule.**

**2. "Moveable property."** See Notes on S. 2 (18) and (16).

**3. "Actual seizure."**

**4. Effect of wrongful attachment.** See Note 28 to Section 60.

**5. "Shall be responsible for the due custody thereof."**

**6. Security bond to produce attached property.**

**1. Scope of the Rule.** — This rule deals with the mode of attachment of all moveable property except (a) agricultural produce and (b) property not in the possession of the judgment-debtor, for both of which provision is made in Rules 44 to 46, *infra*.

The attachment is legally effected only by actual seizure.<sup>1</sup> As to the procedure for the custody and maintenance of such property as live-stock, see the rules framed under this Code by the various High Courts and the undermentioned cases.<sup>2</sup>

**2. "Moveable property."** — See Notes under Section 2 (13) and (16).

**3. "Actual seizure."** — Unlike a prohibitory order under Rule 46, attachment by actual seizure involves a change of possession from the judgment-debtor to the Court.<sup>1</sup> But *actual seizure* does not always imply the doing of something which would bring the property into physical contact with the person attaching.<sup>2</sup> Any overt act short of direct physical apprehension, sufficient to pass possession to the Court, amounts to actual seizure, as for example, the affixing of the Court seal to the outer door of a warehouse containing the property to be attached,<sup>3</sup> or in the case of an attachment of cattle already tied and secured, the announcement on the spot by the attaching officer of his intention to attach.<sup>4</sup> The seizure by a peon of the attaching officer is valid if done in the presence and under the instructions of such officer.<sup>5</sup> Continuance of attachment necessarily involves continuance of court-custody. If such custody is once lost, there can be no further attachment without a fresh seizure.<sup>6</sup>

**4. Effect of wrongful attachment.** — See Note 23 to Section 60, *ante*.

**5. "Shall be responsible for the due custody thereof."** — The attaching officer is primarily responsible for the safe custody of moveable property attached by him.<sup>1</sup> This rule deals only with the liability of the attaching officer so far as the Court

**Order 21 Rule 43 — Note 1**

1. ('89) AIR 1939 Cal 316 (319). (The goods have to be actually seized by the officer of the Court to whom the writ has been given.)  
[See ('81) AIR 1981 All 142 (142).]

2. ('81) AIR 1981 All 567 (568, 578) : 54 All 268 (FB). (Attachment of moveables—Amin entrusting goods to sapurdar—Action approved by Court — Sapurdar giving undertaking to produce goods in surety — S. 145 held applicable.)  
[See ('14) AIR 1914 Mad 652 (658) : 20 Ind Cas 775 (777) : 37 Mad 17 (F B).]

**Note 3**

1. ('14) AIR 1914 Mad 126 (127) : 38 Mad 972 (F B).

2. ('80) AIR 1980 Mad 670 (671).

('87) 11 Bom 448 (454).

3. ('04) 27 Mad 846 (847).

4. ('80) AIR 1980 Mad 670 (671).

5. ('29) AIR 1929 Mad 188 (189).

6. ('80) AIR 1980 Rang 247 (248) : 8 Rang 491. (Attachment of moveables—Claim—Attachment released — Suit under O. 21 R. 68 — Decree in favour of attaching creditor — Attachment not revived.)

**Note 5**

1. ('84) AIR 1984 All 857 (858).

('89) AIR 1989 Cal 816 (819).

[See also ('86) AIR 1986 Rang 12 (14).]

is concerned. It does not affect in any way the liability of a surety who expressly takes charge of the attached property either to the Court or to the decree-holder.<sup>2</sup>

Attaching officers have been authorized by rules to leave the attached property in the custody of the judgment-debtor or other person. See rules by the various High Courts, Rule 93 of the Calcutta High Court General Rules and Circular Orders (Civil) and also Rule 122 of this Order passed by the Allahabad High Court.

See also Note 4 to Section 145.

**6. Security bond to produce attached property.**—On the question whether liability under such a security bond is enforceable in execution or by a separate suit, see Note 4 to Section 145, *ante*.

**O. 21 R. 43**  
**Notes 5-6**

### Local Amendments

#### LAHORE

*Insert* the following as Rules 43A, 43B, 43C and 43D :

"43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

**O. 21 R. 43A**  
**(Lahore)**

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the court-house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to Rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian, he shall be granted a receipt for the same.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court-house.

**O. 21 R. 43B**  
**(Lahore)**

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock, from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43C. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days, before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

**O. 21 R. 43C**  
**(Lahore)**

2. ('21) AIR 1921 All 220 (220, 221).

('26) AIR 1926 All 406 (407) : 48 All 510. (Attaching officer entrusting the attached property to a

third person without the permission of Court—  
Loss of the property—Court can order the attaching officer to make good the loss.)

**O. 21 R. 43D  
(Lahore)**

43D. (1) Any person who has undertaken to keep attached property under Rule 43 (1) (c) shall be liable to be proceeded against as a surety under Section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

**MADRAS**

*Insert the following as Rules 43A and 43B :*

**O. 21 R. 43A  
(Madras)**

"43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to Rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the court-house and delivered to the proper officer of the Court.

**O. 21 R. 43B  
(Madras)**

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court-house.

Nothing in this rule shall prevent the judgment-debtor or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings."

**NAGPUR**

*Insert the following as Rule 43A :*

**O. 21 R. 43A  
(Nagpur)**

"43A. (1) When an application is made for the attachment of live-stock the Court may demand an advance in cash at rates to be fixed half-yearly, or oftener, if necessary by the Courts with the sanction of the District Court, the amount requisite for the maintenance of the live-stock from the probable time of attachment to the probable time of sale, or may, at its discretion, make successive demands for portions of such period. The rates shall include costs of feeding, tending and conveyance and all other charges requisite for the maintenance and custody of the live-stock.

(2) If the live-stock be entrusted to any person other than the judgment-debtor the amount paid by the decree-holder for the maintenance of the cattle, or the part thereof, may, at the discretion of the Court be paid to the custodian of the live stock for their maintenance. The produce such as milk, eggs etc., if any, may either be sold, as promptly as possible for the benefit of the judgment-debtor, or may at the discretion of the Court, be set-off against the cost of maintenance of the live-stock."

**PATNA**

*Insert the following as Rule 43A :*

**O. 21 R. 43A  
(Patna)**

"43A. (1) The attaching officer shall, in suitable cases, keep the attached property in the village or locality either:—

(a) in his own custody in any suitable place provided by the judgment-debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere;

(b) in the case of live-stock and provided the decree-holder furnishes the



necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound-keeper will be responsible for the property to the attaching officer, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon ;

(c) in the custody of a respectable surety, provided the decree-holder furnishes the cost of maintenance and other costs, if any.

(2) If in the opinion of the attaching officer the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree-holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree-holder's expenses. In the event of the decree-holder failing to provide the necessary funds, the attachment shall be withdrawn.

(3) Whenever attached property is kept in the village or locality as aforesaid the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by Rule 66.

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in Rule 68, the officer shall receive the same and forward it without delay to the Court for its orders.

(5) When property is removed to the Court it shall be kept by the nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the court-premises, or in the personal custody of the nazir, he may, subject to approval by the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers of the Court, in whose custody the property is kept.

(6) When property remains in the village or locality where it is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court.

(7) (a) If the decree-holder shall withdraw an attachment or it shall be withdrawn under sub-rule (2) or sub-rule (9) the attaching officer shall inform the debtor, or in his absence, any adult member of his family, that the property is at his disposal.

(b) In the absence of any person to take charge of it, or in case the officer shall have had notice of claim by a person other than the judgment-debtor, the officer shall, if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure.

(8) Whenever live-stock is kept in the village or locality where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer ; but the latter shall, if required by the decree-holder, and on his paying for the same at the rate to be fixed by the District Judge, and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it.

(9) In the event of the judgment-debtor failing to feed the attached live-stock

**O. 21 R. 43A**  
(Patna)

in accordance with sub-rule (8), the officer shall call upon the decree-holder to pay forthwith, for feeding the same. In the event of his failure to do so, the officer shall proceed as provided in sub-rule (2) and shall report the matter to the Court without delay.

(10) When attached live-stock is brought to Court, the nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.

(11) If a pound has been established in or near the place where the Court is held, the nazir shall be at liberty to place in it such attached live-stock as can be properly kept there, in which case the pound-keeper will be responsible for the property to the nazir and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon.

(12) If there be no pound available, or if, in the opinion of the Court, it be inconvenient to lodge the attached live-stock in the pound, the nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The nazir will in all cases remain responsible for the custody of the property.

(13) Each Court shall from time to time fix the rates to be allowed for the custody and maintenance of the various descriptions of live-stock with reference to seasons and local circumstances. The District Judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court."

**O. 21 R. 44**

**R. 44.** [New.] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment, —

Attachment of agricultural produce.

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

[See S. 2 (13).]

**1. Attachment of agricultural produce.** — Agricultural produce, whether standing crop<sup>1</sup> or severed from the soil, is moveable property. Unlike other moveable property agricultural produce of either description cannot be attached by *actual seizure* as provided in Rule 43. *The custodia legis* in the case of agricultural produce on attachment is only symbolical and is not validly created unless the rules of affixture herein provided are strictly complied with.<sup>2</sup> The reason is that no property can be declared to be attached unless, first, the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done.<sup>3</sup> But, when it is proved that an attachment has been made it must be presumed, until the contrary is shown, that all the necessary formalities were duly observed.<sup>4</sup>

This rule, like the preceding one, applies only when the property is in the *possession* of the judgment-debtor and not of a *third party*.<sup>5</sup>

As regards the mode of attachment of growing crops, standing timber or other products of the earth, under the Madras Estates Land Act, V of 1908, see Section 192 (i) thereof.

### Local Amendment

#### BOMBAY

The following shall be *inserted*, namely :

"44A. Where the property to be attached is agricultural produce a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the district in which the land is situate."

**O. 21 R. 44**  
**Note 1**

**O. 21 R. 44A**  
**(Bombay)**

**R. 45.** [New.] (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

**O. 21 R. 45**

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and

#### Order 21 Rule 44 — Note 1

1. Section 2 (18) — Decisions *contra* under old Code no longer law.

('92) 14 All 80 (84).

('82) 6 Bom 592 (598).

('70) 18 Suth W R 275 (275, 276).

('88) 11 Mad 193 (196).

2. ('81) AIR 1981 All 142 (142). (Attachment by beat of drum without affixtures — Invalid — Possession does not pass.)

('88) AIR 1988 Rang 267 (268).

('86) AIR 1986 All 864 (865).

('86) AIR 1986 Sind 20 (28) : 29 Sind L R 190.

(Failure to affix copy of writ of attachment on outer door of judgment-debtors house.)

('85) AIR 1985 Rang 186 (186).

3. ('83) AIR 1983 Rang 267 (268).

('85) AIR 1985 All 214 (215) : 57 All 660.

(Warrant signed by amin but not bearing seal of Court — Attachment is illegal — Hence removal of such property is not offence.)

('86) AIR 1986 Sind 20 (28) : 29 Sind L R 190.

4. ('85) AIR 1985 All 486 (487). (AIR 1984 P C 217, Followed.)

('86) AIR 1986 All 864 (865).

5. ('29) AIR 1929 Lah 200 (201).

('21) AIR 1921 Sind 95 (95, 96) : 15 Sind L R 128.

Provisions as to agricultural produce under attachment.

**O. 21 R. 45** store the produce and do any other act necessary for maturing or preserving it ; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

#### Local Amendments

##### BOMBAY

The following words shall be *added* to sub-rule (1), after *substituting* a semi-colon for the full stop :

"and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time."

##### CALCUTTA

*Add* the following to sub-rule (1):

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time."

##### LAHORE

*Add* the following to sub-rule (1) of Rule 45 :

"and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court."

##### MADRAS

*Substitute* a semi-colon for the full-stop at the end of sub-rule (1), and *add* the following words :

"and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time."

**PATNA**

*Add to sub-rule (1) after deleting the full-stop at the end of the sub-rule :*

"and the applicant shall pay into Court such sums as he may from time to time be required by the Court to pay in order to defray the cost of such arrangements."

**1. "Shall specify the time at which it is likely to be fit to be cut and gathered."** — The attachment of agricultural produce does not prevent the judgment-debtor from doing or continuing all necessary acts of husbandry with respect to the crop or produce. In fact, the Court is bound, under this rule, to make proper arrangements for the custody, tending, cutting, gathering, storing, maturing and preservation of the produce either at the instance of the judgment-debtor, or if he neglects to perform the acts of preservation, at the instance of the decree-holder or otherwise. The attached property continues to be in the possession of the Court during the process of husbandry.

To enable the Court to make the necessary arrangements, an application for attachment must state the time at which the crop is likely to be ready for harvest. If the application is made a considerable time before the harvest, the Court may postpone attachment and prohibit the present removal of the produce.

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**Local Amendments**

**RANGOON**

*Add Rules 45A and 45B :*

**45A.** (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons, Deposit, disbursement and refund of watching fees for attached moveable property. permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in Form 15A, Appendix E from the Bailiff that he has paid in cash as process-fees under Rule 17 (1) (e) (ii) (2) of the Process Fees Rules not less than Rs. 10, for each person whom the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff, the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record. The Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15A, for payments made by the decree-holder as required by such sub-rule (1), the Bailiff shall state in the lower portion of the form the date on which the fees paid will be exhausted, warning the decree-holder that the property will not be kept under attachment after that date, unless further fees are paid before that date. If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15A) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in Rule 15 of the rules regarding process-serving

**O. 21 R. 45**  
**Note 1**

**O. 21 R. 45A**  
**(Rangoon)**

**O. 21 R. 45A**  
(Rangoon)

establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process-fees actually paid under the foregoing sub-rules. Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process-servers' Fees," XVI-A, Law and Justice" — "Courts of Law" — "Court-fees realized in cash."

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge. Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re-payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub-rules (1) and (3) exceeds the total amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund. If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff, that officer shall make the refund in the ordinary way prescribed in his Register II for re-payments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed Treasury Form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub-treasury.

**O. 21 R. 45B**  
(Rangoon)

45B. (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

Charges incurred in connexion with custody and conveyance of attached moveable property and feeding and tending of live-stock.

*Explanation.* — The costs in question might be, for example :

- (a) rent of building in which to store attached furniture,
- (b) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody,
- (c) costs of feeding and tending live-stock,
- (d) cost of proceeding to the place of attachment to sell perishable property.

**O.21 R.45B**  
**(Rangoon)**

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any re-payments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in Form 15A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court. Where the attached property consists of cattle these may be employed, so far as is consistent with Rule 43, in agricultural operations.

(6) If no such suitable place be provided or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when Rule 45 applies. Whenever live-stock is placed at the place where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court and shall with his report forward an accurate list of the property seized.

(8) If the judgment-debtor shall give his consent in writing to the sale of property without awaiting the expiry of the terms prescribed in Rule 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the court-premises or in the personal custody of the Bailiff he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a cattle-pound maintained by Government or any local authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly kept there, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-rule (2) or sub-rule (4), the Bailiff's officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-rule (1) or sub-rule (4)

**O. 21 R. 45B**  
(Rangoon)

remains unexpended it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-rule (9) of Rule 45A. Any difference between the cost of attachment of moveable property (other than the costs referred to in Rule 45A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the fault of the Bailiff, be recovered from the sale proceeds of the attached property, if any, and if there are no sale-proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency the amount shall be paid by Government."

**O. 21 R. 46**

Attachment of debt, share  
and other property not in pos-  
session of judgment-debtor.

**R. 46.** [S. 268.] (1) In the case of —

- (a) a debt<sup>2</sup> not secured by a negotiable instrument,
- (b) a share<sup>11</sup> in the capital of a corporation,
- (c) other moveable property<sup>12</sup> not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;
- (iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.<sup>13</sup>

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

[1877, Ss. 268, 301; 1859, Ss. 236, 239.]

Local Amendment

RANGOON

Delete sub-rule (3).



## Synopsis

O. 21 R. 46  
Note 1

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Attachment of debt, share, or other moveable property — General.</li> <li>2. "Debt," meaning of.</li> <li>3. Salary, whether a debt.</li> <li>4. Attachment of mortgage debt.</li> <li>5. Attachment of decree. See Rule 53.</li> <li>6. Attachment of debt already paid by cheque.</li> <li>7. Procedure where garnishee denies debt.</li> <li>8. Set-off by garnishee of cross-debt.</li> <li>9. Procedure where garnishee resides outside jurisdiction.</li> </ol> | <ol style="list-style-type: none"> <li>10. Procedure where garnishee admits liability but does not pay.</li> <li>11. Attachment of share.</li> <li>12. Attachment of other moveable property.</li> <li>13. Service of prohibitory order.</li> <li>14. Effect of non-compliance with sub-rule (2).</li> <li>15. Notice to debtor.</li> <li>16. Effect of attachment.</li> <li>16a. Payment into Court — Sub-rule (3).</li> <li>17. Inherent power of Court to pass prohibitory orders in proper cases.</li> </ol> |
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## Other Topics (miscellaneous)

Claims. See Note 1.

Insurance policy. See Notes 1 and 2.

## 1. Attachment of debt, share, or other moveable property — General. —

There is a broad distinction between the attachment of moveable property *in the possession* of the judgment-debtor, and the attachment of debts (other than negotiable instruments), shares in a corporation or other moveable property *not in the possession* of the judgment-debtor; in the former case the attachment is effected by *actual seizure* while in the latter case it is done by a *prohibitory order*.<sup>1</sup>

A debt, in order to be attachable under this rule, must be due *solely* to the judgment-debtor<sup>2</sup> and should be described with reasonable certainty in the application for attachment.<sup>3</sup> The Court cannot, on an application under this rule, direct the *garnishee* (judgment-debtor's debtor) to *pay* the amount into Court; it can only pass a prohibitory order as mentioned in the rule.<sup>4</sup> It is, however, *open* to the *garnishee* to deposit the amount of the debt in Court and thereby obtain a valid discharge.<sup>5</sup> But in the case of dispute as to the title to the amount in deposit, the Court must decide the question before ordering payment to the decree-holder.<sup>6</sup> Rules 58 and 63 of this Order are applicable to attachments hereunder.<sup>7</sup>

## Order 21 Rule 46—Note 1

1. ('14) AIR 1914 Mad 126(127); 38 Mad 972 (FB). ('32) AIR 1932 Pat 279 (280, 281); 11 Pat 493. (Property not in possession of judgment-debtor — Officer cannot seal up premises.)
2. ('20) AIR 1920 Mad 403 (404). (A debt due to the estate of a deceased, one of whose heirs is the judgment-debtor, not attachable.) ('14) AIR 1914 Nag 13 (13); 10 Nag L R 17. (The share of an undivided brother in the ancestral family money-lending business cannot be attached.) ('37) I L R (1937) 2 Cal 440 (443). [See also ('37) AIR 1937 Cal 199 (200); I L R (1937) 2 Cal 48.]
3. ('18) AIR 1918 Mad 541 (542). ('94) 16 All 286 (294). ('11) 9 Ind Cas 240 (241) (Oudh).
4. ('10) 5 Ind Cas 145 (145); 38 Mad 264. [See ('29) AIR 1929 Mad 847 (848). (Order for payment by garnishee of amount under life

policy before proof of death according to rules of company, not valid.)]

[See also ('10) 5 Ind Cas 820 (820) (Mad). (Order absolute for injunction to the disburser to pay the judgment-debtor's salary into Court is not an order effecting attachment.)]

5. See sub-rule (3).

('21) AIR 1921 All 81 (85); 43 All 272. (Motive of depositor not material.)

See also Note 7 *infra*.

[See also ('99) 21 All 145 (148). (Payment out of Court to person entitled and duly certified by Court is equivalent to deposit under sub-rule (3).]

6. ('16) AIR 1916 Cal 241 (243); 43 Cal 263. ('13) 18 Ind Cas 205 (207) (Lah). (Rival receivers claiming debt—Garnishee's liability for interest not thereby taken away except on deposit in Court.)

7. ('04) 27 Mad 67 (71).

('10) 8 Ind Cas 608 (609) (Low Bur).

('12) 15 Ind Cas 193 (194) (Mad).

**O. 21 R. 46**  
**Notes 1-4**

Under Section 50 of the Code, where a decree is executed against a legal representative, he is liable only to the extent of the property of the deceased which has come to his hands. Hence, a debt due to the legal representative or moveable property of the deceased which has not yet come into the possession of the legal representative cannot be attached under this rule.<sup>8</sup>

**2. "Debt," meaning of.** — See Notes 7, 14 and 22 to Section 60 and also the undermentioned cases.<sup>1</sup>

**3. Salary, whether a debt.** — A pay or pension in private service *becomes due* on the last day of the month even though it is not paid till the first of the next month and can be attached on the last day of the month.<sup>1</sup> So also, it has been held that the salary of a member of a Provincial Legislative Assembly is not the salary of a public officer and is not attachable before it becomes payable at the end of the month.<sup>2</sup> See also Notes 15 to 17 to Section 60.

**4. Attachment of mortgage debt.** — A mortgage debt due under a *simple* mortgage is a "debt" within the meaning of this rule and can be attached by a prohibitory order.<sup>1</sup> Such attachment carries with it the security of the immovable property without any further attachment of the *property* itself; the purchaser of the mortgage interest in execution is entitled, therefore, to sue for the *sale* of the mortgaged property for the debt.<sup>2</sup>

A *usufructuary* mortgage in which there is a covenant to pay is also a "debt" which can be attached under this rule.<sup>3</sup> But a purely usufructuary mortgage without any liability to pay the mortgage amount is not a "debt" at all and cannot be attached under this rule.<sup>4</sup> Such a mortgage should be attached under Rule 54 as *immovable*

**8.** ('37) AIR 1937 Rang 274 (274). (Security deposit of deceased judgment-debtor in deposit with his employer cannot be attached under this rule.)

**Note 2**

**1.** ('29) AIR 1929 Mad 347 (347, 348). (Life policy requiring proof of death before payment—Money payable by company becomes debt only on proof of death.)

('34) AIR 1934 All 448 (458). (Unpaid portion of loan by mortgagees is not debt.)

('34) AIR 1934 All 954 (956). (Money left with mortgagees is not debt.)

('39) AIR 1939 Bom 90 (91) : I L R (1939) Bom 109. (Deposit made by member of association which is subject to forfeiture and lien and is within absolute control of association, is not liable to attachment as it does not constitute debt nor moveable property not in possession of the judgment-debtor.)

('39) AIR 1939 Mad 811 (819). (A dividend payable to a creditor in insolvency is not debt liable to be attached under O. 21 R. 46—When no dividend has at all been declared, there is nothing to attach.)

**Note 3**

**1.** ('30) AIR 1930 Rang 161 (161).

**2.** ('39) AIR 1939 Cal 428 (429) : I L R (1939) 1 Cal 528.

**Note 4**

**1.** ('98) 15 All 184 (185).

('86) 12 Cal 546 (550).

('15) AIR 1915 Mad 209 (209) : 18 Ind Cas 91 (92) : 37 Mad 51.

('15) AIR 1915 Mad 551 (552).

('01) 14 C P L R 5 (8).

('87) 10 Mad 169 (172).

('19) AIR 1919 Oudh 132 (132) : 21 Oudh Cas 400.

('24) AIR 1924 All 796 (798) : 46 All 917. (It is moveable property under this rule.)

('02) 26 Bom 305 (312). (Do.)

('12) 16 Ind Cas 816 (816) (Mad). (Do.)

('30) AIR 1930 Oudh 473 (474). (Do.)

('09) 1 Ind Cas 450 (451) : 1909 Fun Re No. 18. (Do.)

**2.** ('95) 19 Bom 121 (123).

('02) 26 Bom 305 (310, 312).

('24) AIR 1924 All 796 (798) : 46 All 917.

('01) 14 C P L R 5 (8).

('12) 16 Ind Cas 438 (438) (Mad). (Attachment though under wrong Section passes the mortgagee's rights.)

('98) 20 Cal 805 (809, 810). (Do.)

('87) 10 Mad 169 (179). (Do.)

('95) 18 Mad 437 (439). (Do.)

('96) 18 All 469 (471). (Do.)

('12) 18 Ind Cas 318 (318) (Lah).

('84) AIR 1934 Mad 498 (499).

[See also ('86) 9 Mad 5 (8).

('83) 9 Cal 511 (512). (There must be attachment under Rules 46 and 54.)]

**3.** ('16) AIR 1916 Mad 434 (435, 436) : 39 Mad 389. (In such a case a prohibitory order under this rule is the only appropriate and effective procedure.)

('31) AIR 1931 Mad 38 (39).

('32) AIR 1932 Mad 283 (284). (Othi mortgages.)

('31) AIR 1931 Pat 63 (64).

**4.** ('28) AIR 1928 Mad 648 (651).

('11) 10 Ind Cas 812 (812) : 35 Bom 288.

property.<sup>5</sup> See also Note 4 to Section 16, *ante*.

The locality of a mortgage debt is where the mortgage-bond is found and the Court within whose jurisdiction it is found can attach it even though the mortgagor or the property comprised in the mortgage is outside the jurisdiction of such Court.<sup>6</sup>

For the purposes of execution, a mortgage debt is "moveable property" within the meaning of this rule.<sup>7</sup>

**5. Attachment of decree.** — See Rule 53, *infra*.

**6. Attachment of debt already paid by cheque.** — Payment of a debt by delivery of a cheque extinguishes the debt. There is, therefore, no debt that can be attached in the hands of the garnishee where the latter has delivered a cheque for the debt to the judgment-debtor, even though the latter had not cashed the cheque.<sup>1</sup> The same principle will apply where money due to a judgment-debtor from a bank has been debited by the bank to the judgment-debtor and credited to a third person.<sup>2</sup>

**7. Procedure where garnishee denies debt.** — Under sub-rule (3) a garnishee may, *at his option*, pay the amount of the debt into Court. But the Court has no jurisdiction to *compel* the garnishee to do so;<sup>1</sup> nor can the Court proceed against him or his property for the recovery of the amount,<sup>2</sup> though the Court, in practice, calls on him to pay.<sup>3</sup> In case the garnishee denies that debt, it is not the duty of the Court to enquire and decide if the debt is due.<sup>4</sup> The only course in such cases is either to have a receiver appointed for the collection of the debt or to sell the debt notifying the fact of denial.<sup>5</sup> An order so appointing a receiver or for sale does not, however, debar the garnishee, in a suit on the debt, from setting up the defence that no debt is due.<sup>6</sup> It has been held by the High Court of Rangoon that a decree-holder who has

5. ('31) AIR 1931 Pat 63 (64).

('11) 10 Ind Cas 812 (812) : 85 Bom 288.

6. ('33) AIR 1933 Cal 379 (380) : 60 Cal 782.

7. ('33) AIR 1933 Rang 61 (62).

('33) AIR 1933 Cal 379 (381) : 60 Cal 782.

#### Note 6

1. ('11) 12 Ind Cas 869 (870) (Low Bur). (Cheque delivered to assignee of the judgment-debtor before attachment.)

(1885) 1 T L R 454, *Elwell v. Jackson*. (After a cheque has been given its payment cannot be stopped.)

[See also ('78) 3 Bom 49 (52). (Do.)]

2. ('89) AIR 1933 PC 150 (154) : 60 Ind App 211 : 57 Bom 474 (PC). (On appeal from A I R 1932 Bom 206.)

#### Note 7

1. ('87) 10 Mad 194 (196).

('24) AIR 1924 Nag 98 (100, 101) : 20 Nag L R 11.

('72) 18 Suth W R 40 (41).

('86) AIR 1936 Nag 218 (219).

2. ('86) 1886 Pun Re No. 95, p. 286.

('86) AIR 1936 Nag 218 (219).

3. ('87) 11 Bom 448 (455).

('27) AIR 1927 All 41 (43).

('17) AIR 1917 Low Bur 134 (135).

4. ('06) 28 All 262 (263).

('38) AIR 1938 Sind 350 (351). (Court should not examine and cross-examine garnishee on his affidavit denying liability.)

('26) AIR 1926 Rang 175 (176) : 4 Rang 100.

('31) AIR 1931 Mad 570 (571).

('32) AIR 1932 Mad 283 (284).

('16) AIR 1916 Mad 504 (504).

('24) AIR 1924 Nag 98 (101) : 20 Nag L R 11.

('86) AIR 1936 Mad 152 (152) : 59 Mad 966.

('86) AIR 1936 Nag 218 (219).

[See ('31) AIR 1931 Bom 288 (290). (*Quare*.)]

5. ('26) AIR 1926 Rang 175 (176) : 4 Rang 100.

('24) AIR 1924 Nag 98 (100, 101) : 20 Nag L R 11.

('87) 11 Bom 448 (455).

('06) 28 All 262 (263).

('27) AIR 1927 All 41 (43).

('17) AIR 1917 Low Bur 134 (135).

[See however ('80) 4 Bom 323 (326). (In case of order for sale Court must be satisfied of the existence of debt.)]

('85) 10 Mad 194 (196). (Do.)]

6. ('26) AIR 1926 Mad 1011 (1011).

('74) 22 Suth W R 36 (37). (Although the garnishee's objection to the attachment on the same ground had been ruled out.)

('86) AIR 1936 Mad 152 (153, 154) : 59 Mad 966. (Order disallowing objection of garnishee does not come within the purview of Order 21 Rules 58 to 63.)

[See also ('86) AIR 1936 Nag 218 (219, 220). (Garnishee denying debt and objecting to jurisdiction of Court to order to deposit it in Court — No investigation or decision — Sale — Subsequent suit by purchaser against garnishee — Garnishee can raise those objections in suit.)]

**O. 21 R. 46**  
**Notes 7-12**

attached future rents is not thereby entitled to sue the tenants for the amount of the rent due without his being duly appointed a receiver for the purpose.<sup>7</sup>

**8. Set-off by garnishee of cross-debt.** — The garnishee is entitled to a set-off in respect of any cross-debt due to him from the judgment-debtor, at the date of the attachment<sup>1</sup> or of the sale.<sup>2</sup>

**9. Procedure where garnishee resides outside jurisdiction.** — The executing Court has no jurisdiction to pass any prohibitory order under this rule unless either the debt to be attached is payable or the garnishee is within its jurisdiction.<sup>1</sup> "In its essential elements a garnishment proceeding is a proceeding by the defendant in the suit against the garnishee, in the name and for the benefit of the plaintiff . . . . Wherever the garnishee could be sued by the defendant for the payment, he may be charged as garnishee on account of it."<sup>2</sup> If, therefore, the garnishee resides outside the jurisdiction of a Court and the debt is also payable outside its jurisdiction, no prohibitory order can be made against the garnishee<sup>3</sup> unless specifically provided for by the Code.<sup>4</sup>

A garnishee submitting, in the first instance, to a prohibitory order in ignorance of the want of jurisdiction, may, however, refuse to abide by it subsequently.<sup>5</sup>

As to attachment of property outside jurisdiction, see Note 7 to Section 39.

**10. Procedure where garnishee admits liability but does not pay.** — See Note 7 above. See also the undermentioned case<sup>1</sup> as regards the procedure to be followed in Rangoon.

**11. Attachment of shares.** — An attachment of shares in a corporation is made in the form required by clause (ii) of sub-rule (1) and by sub-rule (2) of this rule.<sup>1</sup>

See also Rules 79 and 80, *infra* as to sale of such shares.

**12. Attachment of other moveable property.** — A judgment-creditor does not, by virtue of his judgment, get a right to the property of the judgment-debtor in

7. ('25) AIR 1925 Rang 318 (819) : 8 Rang 235.  
[See also ('74) 1874 Pun Re No. 24, p. 120 (FB).  
(Decree-holder cannot sue to recover debt due to judgment-debtor.)  
(('80) 1880 Pun Re No. 11, p. 25. (Do.))]

**Note 8**

1. ('14) AIR 1914 Bom 299 (299) : 88 Bom 681.  
(1875) 10 Q B 591 (593), Tapp v. Jeness. (36 Cal 936; AIR 1914 Bom 299, Referred.)  
(('37) AIR 1937 Mad 848 (849).  
2. ('23) AIR 1923 Lah 261 (262) : 3 Lah 414.

**Note 9**

1. ('94) AIR 1934 Nag 167 (168) : 80 Nag L R 92.  
(('34) AIR 1934 Sind 185 (185).  
[See also ('38) AIR 1938 P C 150 (158) : 60 Ind App 211 : 57 Bom 474 (PC).]  
2. ('11) 11 Ind Cas 417 (421) : 89 Cal 104 (116). (Proper course is by transfer or under S. 46, C. P. C.)  
[See also ('18) AIR 1918 Pat 126 (128) : 4 Pat L Jour 141.  
(('82) AIR 1982 Pat 148 (149) : 11 Pat 478.  
(('15) AIR 1915 Lah 278 (278).]  
3. ('11) 11 Ind Cas 417 (419) : 89 Cal 104.  
(('81) 5 Bom 249 (252). (So also, an attachment of

claim over which no Court in British India has jurisdiction is invalid.)

- (('39) AIR 1939 Cal 428 (429) : I L R (1939) 1 Cal 523.  
(('18) AIR 1918 Cal 911 (912). (It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court.)  
(('39) AIR 1939 Mad 811 (812, 813).  
[See ('28) AIR 1928 Nag 210 (210).]  
[See also ('32) AIR 1932 Bom 206 (208) : 56 Bom 349. (The locality of a debt is the place of residence of the debtor.)]  
[See however ('68) 10 Suth W R 447 (449).]  
4. ('29) AIR 1929 Lah 645 (646). (E. g., R. 48.)  
(('11) 11 Ind Cas 417 (420) : 89 Cal 104 (118).  
(('79) 3 Cal L Rep 30 (31).  
5. ('08) 30 Cal 718 (717).

**Note 10**

1. ('16) AIR 1916 Low Bur 38 (38). (All that can be done is to warn him that if he fails to pay into Court he may be subjected to a suit.)

**Note 11**

1. ('23) AIR 1923 Mad 241 (242) : 45 Mad 537.

his hands or in the hands of a third party, and his remedy is not by way of suit but by attachment and sale in execution.<sup>1</sup> But, where a property in the possession of another is *declared to belong to the plaintiff*, the proper remedy for its recovery is by a suit and not in execution.<sup>2</sup>

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**Notes 12-16**

Attachment of agricultural produce not in the possession of the judgment-debtor is covered by this rule.<sup>3</sup> Unpaid purchase money due to the judgment-debtor is moveable property attachable under this rule.<sup>4</sup> Where money is deposited by a judgment-debtor with a railway company as security for the due performance of his duties as a servant of the company, an attachment of such deposit is subject to all the rights of the company on the deposit, though the interest, if any, payable to the judgment-debtor on the deposit amount may be made available to the decree-holder by virtue of the attachment.<sup>5</sup> The attachment of rights under a patent cannot be effected by serving a prohibitory order on the Controller of Patents under this rule, because such rights cannot be said to be in the possession of the Controller.<sup>6</sup>

**13. Service of prohibitory order.** — A prohibitory order under this rule must be duly served on the garnishee.<sup>1</sup>

**14. Effect of non-compliance with sub-rule (2).** — Want of affixture of the order as required by sub-rule (2) is fatal to the validity of the attachment and a *bona fide* assignee from the judgment-debtor after such attachment acquires good title.<sup>1</sup>

The mere *order* to make an attachment does not amount to actual attachment unless it has been effected in the manner prescribed by this rule, *i. e.*, served on the debtor by sending a copy of the order to him.<sup>2</sup>

**15. Notice to debtor.** — Under sub-rule (2) a copy of the prohibitory order shall be sent to the debtor. When it is not so sent, the attachment is ineffectual and the garnishee remains liable to pay the debt to the judgment-debtor.<sup>1</sup> A notice to the *judgment-debtor* is, however, not a condition precedent to the validity of the attachment.<sup>2</sup>

**16. Effect of attachment.** — An attachment under this rule prohibits the creditor from *collecting* the debt, but does not prevent him from *suing* on the debt,<sup>1</sup>

#### Note 12

1. ('76) 3 Ind App 241 (248, 251, 252) (PC).
  2. ('97) 1 Cal W N 170 (172).
  3. ('21) AIR 1921 Sind 95 (96); 15 Sind LR 138.
  4. ('26) AIR 1926 Mad 903 (903, 904).
  5. ('86) 9 Mad 208 (206).
- [See also ('89) AIR 1939 Bom 90 (91); I L R (1939) Bom 109. (Deposit made by judgment-debtor with some association of which he is a member — Deposit liable to forfeitures and lien and returnable, subject to such liabilities, to the judgment-debtor at the end of his membership — Deposit is neither debt nor moveable property in the possession of some person other than the judgment-debtor.)]
6. ('39) AIR 1939 Cal 283 (284, 285); I L R (1938) 2 Cal 618.

#### Note 13

1. ('79) 10 Beng L R App 12 (12). (Service ought to be by delivery, or by registered letter.)
2. ('28) AIR 1928 Rang 36 (38); 5 Rang 685. (Prohibitory order addressed to Secretary — Acceptance by Managing Director — Attachment valid.)

#### Note 14

1. ('05) 9 Cal W N 698 (695).
  2. ('11) 12 Ind Cas 869 (870) (Low Bur).
- [See ('28) AIR 1928 Rang 285 (285): (Removal of property after such attachment — No offence.)]
2. ('34) AIR 1934 Pat 619 (622).
  3. ('39) AIR 1939 Mad 811 (813).

#### Note 15

1. ('67) 7 Suth W R 10 (11).
- [See ('16) AIR 1916 Mad 434 (436); 39 Mad 389.]
2. ('12) 17 Ind Cas 420 (420); 15 Oudh Cas 289.
  3. ('77) 1877 Pun Re No. 67, p. 173.
- [But see ('06) 1906 Pun Re No. 118, p. 453.]

#### Note 16

1. ('91) 13 All 76 (78).
2. ('95) 17 All 198 (210, 211); 22 Ind App 31 (PC). (In fact a suit is proper if to save limitation.)
3. ('11) 10 Ind Cas 569 (569) (Cal).
4. ('94) 1894 Pun Re No. 142, p. 537.
5. ('19) AIR 1919 Oudh 373 (374).

**O. 21 R. 46  
Notes 16-17**

nor is the attachment a bar to a contest of non-liability by the garnishee.<sup>2</sup>

The attaching decree-holder gets no higher rights in the debt than what the judgment-debtor could give him at the date of the attachment and any disposition of the debt by the judgment-debtor prior to attachment binds the decree-holder,<sup>3</sup> nor can a decree-holder compel the judgment-debtor to create larger rights for him.<sup>4</sup> If, on the day of attachment, there was no debt and the attachment was raised, a subsequent accrual of a debt does not by itself revive the attachment.<sup>5</sup> But where a debt existed at the time of attachment, the attaching decree-holder is not precluded from realising the debt by the fact of the debt having been subsequently paid to judgment-debtor by the garnishee.<sup>6</sup>

A prohibitory order under this rule is a process in execution, and money deposited in Court under sub-rule (3) is "assets" within the meaning of Section 73 of the Code.<sup>7</sup> When there are attachments of more Courts than one of varying grades, the garnishee acting under sub-rule (3) is bound to deposit the money in the Court of the superior grade on the analogy of Section 63.<sup>8</sup>

As against an Official Assignee in bankruptcy, the attaching decree-holder obtains rights in the property attached only on complete realization by him before vesting.<sup>9</sup>

**16a. Payment into Court—Sub-rule (3).** — The payment contemplated by sub-rule (3) is payment into the attaching Court so as to be available to the attaching decree-holder. Thus, where the rent due by a tenant is attached and the tenant pays such rent to the credit of some other suit against the judgment-debtor than the one in which it has been attached, the payment will not discharge the tenant from his liability for the rent.<sup>1</sup>

**17. Inherent power of Court to pass prohibitory orders in proper cases.** — Even in cases not strictly governed by O. 21 R. 46 a prohibitory order can be passed under the inherent powers of the Court, where the ends of justice require it to be done.<sup>1</sup>

2. ('15) AIR 1915 Lah 187 (188). (Payment to attaching decree-holder by garnishee without contest—Liability of garnishee to rightful creditor not absolved.)

3. ('24) AIR 1924 Cal 1068 (1068, 1069).

('71) 8 Bom H C R (O C) 169 (178).

(1888) 88 Ch D 288 (268), *Badeley v. Consolidated Bank*.

(1890) 24 Q B D 519 (524), *Davis v. Freethy*.

('88) AIR 1938 Cal 606 (608). (Equitable charge on debt created by judgment-debtor binds attaching creditor.)

[See ('92) 16 Bom 91 (110, 111).]

4. ('27) AIR 1927 Bom 365 (366). (Attachment of deposit with association — Article of Association providing for return of deposit only on termination of membership—Decree-holder cannot compel debtor to resign membership for making deposit payable.)

5. ('22) AIR 1922 All 884 (885).

6. ('26) AIR 1926 Mad 371 (371, 372, 376). (Debt

— Attachment of — Decree obtained on debt by judgment-debtor — Effect — Payment of debt to judgment-debtor or order of Court recording satisfaction thereof — Attaching creditor's right to execute the decree not affected—On the question whether after attachment of debt, attachment of the decree obtained thereon is also necessary, the two Judges in the case take opposite views.)

('27) AIR 1927 Mad 1147 (1148). (Attachment of share in company — Subsequent resolution by company appropriating share—Invalid.)

7. ('92) 16 Bom 91 (98).

8. ('07) 17 Mad L Jour 488 (489, 490).

9. ('81) AIR 1981 Mad 474 (477, 478); 54 Mad 727.

('08) 26 Mad 673 (679).

[See ('92) 5 C P L R 112 (114).]

**Note 16a**

1. ('86) AIR 1986 Mad 251 (252).

**Note 17**

1. ('82) AIR 1982 Lah 295 (296).

('87) AIR 1987 Cal 199 (201); ILR (1987) 2 Cal 48.

**Local Amendments****CALCUTTA****O. 21 R. 46A**  
(Calcutta)*Add the following Rules :*

"46A. The Court may in case of a debt, other than a debt secured by a mortgage or a charge or by a negotiable instrument, which has been attached under Rule 46 or Rule 51 of this Order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so :

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge to which the said Court is subordinate, and thereupon the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal with it in the same manner as if the case had been originally instituted in that Court.

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor.

46B. Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

**O. 21 R. 46B**  
(Calcutta)

46C. Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just.

**O. 21 R. 46C**  
(Calcutta)

46D. Where it is suggested or appears to be probable that the debt belongs to some third person or that any third person has a lien or charge on, or other interest in such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

**O. 21 R. 46D**  
(Calcutta)

46E. After hearing such third person and any other person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest if any of such third or other person as may seem fit and proper.

**O. 21 R. 46E**  
(Calcutta)

46F. Payment made by the garnishee on a notice under Rule 46A or under any such order as aforesaid shall be valid discharge to him as against the judgment-debtor and any other person ordered to appear as aforesaid, for the amount paid or levied although such judgment may be set aside or reversed.

**O. 21 R. 46F**  
(Calcutta)

46G. The cost of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court.

**O. 21 R. 46G**  
(Calcutta)

46H. An order made under Rule 46B, 46C or Rule 46F shall be appealable as a decree."

**O. 21 R. 46H**  
(Calcutta)

(Section 51 of the Code contemplates sale without attachment and so even if a share of debt be not attachable under O. 21 R. 46 or under

any other rule prescribed, a Court can pass prohibitory orders similar to one under O. 21 R. 46 under its inherent powers for the ends of justice.)

**O. 21 R. 46A**  
(Sind)**SIND.** Add the following as Rules 46A to 46I :

"46A. The Court may in the case of a debt (other than a debt secured by a

Procedure when debt or  
any moveable property not  
in possession of judgment-  
debtor attached.

mortgage or a charge or by a negotiable instrument) and any moveable property not in the possession of the judgment-debtor which has been attached under Rule 46 or Rule 51 of this Order, upon the application of the attaching creditor, issue notice to any person liable to pay such debt or deliver or account for such moveable property (such person to be hereinafter called "the garnishee"), calling upon him either to pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so :

Provided that if the debt or property in respect of which the application aforesaid is made is of value beyond the pecuniary jurisdiction of the Court, the execution case shall be sent, if the attaching Court is the Karachi Small Cause Court, to the High Court, if it is any other Court, to the District Court to which the said Court is subordinate ; and thereupon the High Court or, as the case may be, the District Court or any other competent Court to which such case may be transferred shall deal with it in the same manner as if the case had been originally instituted in that Court.

Such application shall be supported by an affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor.

**O. 21 R. 46B**  
(Sind)

46B. Where the garnishee does not forthwith pay or deliver into Court the

Procedure when garnishee  
does not forthwith pay  
amount, etc.

amount due from or the property deliverable by him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the cost of execution, or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order being made execution may issue as though such order were a decree against him.

**O. 21 R. 46C**  
(Sind)

46C. Where the garnishee disputes his liability, the Court may order that any

Procedure when garni-  
shee disputes his liability.

issue or question necessary for the determination of the liability shall be tried as if it were an issue in a suit and upon the determination of such issue shall make such order as may seem just.

**O. 21 R. 46D**  
(Sind)

46D. Where it is suggested or appears to be probable that the debt or the

Procedure when debt or  
property belongs to a third  
person.

property attached belongs to some third person or that any third person has a lien or a charge on or an interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, to such debt or property and prove the same.

**O. 21 R. 46E**  
(Sind)

46E. After hearing such third person and any other person who may

Order to be made  
hearing such person.

subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided, or make such other order upon such terms, if any, with respect to the lien, charge or interest (if any) of such third or other person as may seem fit and proper.

**O. 21 R. 46F**  
(Sind)

Payment or delivery  
under order to be a valid  
discharge.

46F. Payment or delivery made by the garnishee on a notice under Rule 46A. or under any such order as aforesaid shall be a valid discharge to him as against the judgment-



debtor and any other person ordered to appear as aforesaid, for the amount paid or levied or, as the case may be, property delivered, although such order may be set aside or reversed.

**O. 21 R. 46F**  
(Sind)

46G. Debts owing from a firm carrying on business within the jurisdiction may be proceeded against under Rules 46A to 46E of this Order, although one or more members of such firm may be resident outside the jurisdiction: Provided that any person having control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee notice. An appearance by any member pursuant to such notice shall be a sufficient appearance by the firm.

**O. 21 R. 46G**  
(Sind)

46H. The costs of any application made under Rule 46A and of any proceeding arising therefrom or incidental thereto shall be in the discretion of the Court.

**O. 21 R. 46H**  
(Sind)

46I. An order made under Rules 46B, 46C or 46E, shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

**O. 21 R. 46I**  
(Sind)

**R. 47.** [New.] Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

**O. 21 R. 47**

Attachment of share in moveables.

**1. Attachment of share in moveable property.** — A share or interest in moveable property is incapable of actual seizure,<sup>1</sup> and attachment by a prohibitory order is the only proper course where such share or interest is to be proceeded against.<sup>2</sup>

**R. 48.** [S. 268.] (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within

**O. 21 R. 48**

Attachment of salary or allowances of public officer or servant of railway company or local authority.

the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of

**Order 21 Rule 47 — Note 1**

1. ('32) AIR 1932 Cal 408 (408): 59 Cal 808.
- ('15) AIR 1915 Mad 885 (886).
- ('36) AIR 1936 Mad 560 (560). (Standing crops belonging to joint family cannot be attached by actual seizure for recovery of fine from member of Hindu coparcenary as the share of offender in

crops is unascertained.)

2. ('32) AIR 1932 Cal 408 (408): 59 Cal 808.
  - ('37) AIR 1937 Lah 818 (818). (Attachment of share of judgment-debtor in shop can only be by prohibitory order—Attachment of specific goods in shop not permissible.)
- [See ('32) AIR 1932 Mad 538 (540): 55 Mad 1011.]

**O. 21 R. 48** the order to such officer as *the Central Government or the Provincial Government* may by notification in their Official Gazette appoint in this behalf, —

- (a) *where such salary or allowances are to be disbursed within the local limits to which this Code for the time being extends the officer or other person whose duty it is to disburse the same shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be ;*
- (b) *where such salary or allowances are to be disbursed beyond the said limits, the officer or other person within those limits whose duty it is to instruct the disbursing authority regarding the amount of the salary or allowances to be disbursed shall remit to the Court the amount due under the order, or the monthly instalments, as the case may be, and shall direct the disbursing authority to reduce the aggregate of the amounts from time to time to be disbursed by the aggregate of the amounts from time to time remitted to the Court.*

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by *the Central Government or the Provincial Government*, as the case may be, in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind *the Central Government or the Provincial Government* or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and *the Central Government or the Provincial Government* or the railway

company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule. **O. 21 R. 48**  
**Note 1**

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government may, by notification in the Gazette of India or in the Local Official Gazette, as the case may be."

b. Substituted by Section 2 of the Code of Civil Procedure (Amendment) Act, XXVI of 1939, for "in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be".

c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government".

d. *ibid.*

e. *ibid.*

### Local Amendment

#### MADRAS

*Substitute* a comma for the period at the end of the last sentence of sub-rule (1) and *add* the following clause "such amount or instalment being calculated to the nearest anna by fractions of an anna of six pies and over being considered as one anna and omitting amounts less than six pies."

### Synopsis

1. Attachment of salary of public officer, etc.
2. Sub-rule (2) and Section 64, Explanation.
3. Sub-rule (3).
4. Appeal.

**1. Attachment of salary of public officer, etc.** — Under the old Code the salary of a public officer or of a railway servant or of a servant of a local authority could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree.<sup>1</sup> As this led to considerable inconvenience and needless expense, this rule has been newly enacted to provide for such cases; the salary of this class of judgment-debtors can now be attached under this rule whether they or the disbursing officers reside within such local limits, or not.<sup>2</sup> The distinction between this rule and Rule 52, *infra* is that the latter refers specifically to property *actually* in the hands of public officers, while the former provides for the *anticipatory* attachment of salaries.<sup>3</sup>

This rule has no application to the attachment of salaries of judgment-debtors in *private service*. Such salaries are attachable only as *debts* after they fall due.<sup>4</sup> The wages of domestic servants<sup>5</sup> or moneys due to railway contractors<sup>6</sup> are not salary or allowances, within the meaning of this rule. This rule does not apply to the attachment of the salary of a member of a Provincial Legislative Assembly as such member is not a "public officer."<sup>7</sup> The attachment of salaries or allowances at the disposal of the

#### Order 21 Rule 48 — Note 1

1. ('84) 6 All 243 (247, 248).
- ('88) 12 Bom 44 (45).
- ('95) 1895 Pun Ro No. 40, page 165.
- ('03) 30 Cal 713 (716). (Attachment of salary that has not actually fallen due.)
- ('04) 28 Bom 198 (200).
2. ('12) 39 Cal 104 (110, 112, 113).
- ('29) AIR 1929 Lah 645 (646). (*Obiter*).
3. See ('98) 22 Bom 89 (41).

4. ('29) AIR 1929 Nag 333 (334). (Pay of a servant which falls due on the 1st of each month cannot be attached as a debt on an earlier date, as the right to receive pay for a period shorter than a month is contingent on the due performance of service for the entire month.)
5. ('29) AIR 1929 Nag 333 (334).
- ('98) 21 Mad 893 (895).
6. ('28) AIR 1928 Nag 210 (210).
7. ('39) AIR 1939 Cal 428 (429) : ILR (1939) 1 Cal 528.

**O. 21 R. 48**  
**Notes 1-4**

disbursing officer is not invalid by reason merely of the fact that the sanction of the superior authority is necessary before the money is actually disbursed.<sup>8</sup>

Attachment under this rule can be made also by the Court to which a decree is transferred for execution.<sup>9</sup>

Sub-rule (1) of this rule has been amended by Act XXVI of 1939 so as to make it legal for the High Commissioner for India to comply with attachment orders issued by Courts in India in respect of the leave salaries payable in England to officers of the Indian Services.<sup>10</sup>

**2. Sub-rule (2) and Section 64, Explanation.** — Salary attached under this rule is “assets” within the meaning of Section 73 of the Code, and successive attaching decree-holders are entitled to rateable distribution thereof. There is no inconsistency between the Explanation to Section 64 and sub-rule (2) of this rule. The latter provision only lays down what the officer concerned should do.<sup>1</sup> See also Note 13 to Section 64.

**3. Sub-rule (3).** — The effect of this sub-rule is that any sum paid by a disbursing officer in contravention of this rule can<sup>1</sup> and should be<sup>2</sup> recovered directly from the Government or the railway company or the local authority, as the case may be. But no order for recovery thereof can be made without bringing the Government<sup>3</sup> or the railway company or the local authority on the record as a party.

**4. Appeal.** — Where a decree-holder wants to execute his decree by attachment of the pay of the judgment-debtor under this rule, the question whether it is possible to execute the decree in the manner which has been adopted by the executing Court is a question under Section 47 *ante* and the decision of the question is, therefore, appealable as a decree.<sup>1</sup> Where an order directing an attachment under this rule is not appealed against, it becomes final as against the parties to it and a subsequent application contesting the validity of the order of attachment is barred by the general principles of *res judicata*.<sup>2</sup>

**O. 21 R. 49****R. 49. [New.]** (1) Save as otherwise provided by this

Attachment of partnership property.

rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment

8. ('14) AIR 1914 Low Bur 215 (216): 8 Low Bur  
Rul 62.

9. ('27) AIR 1927 Oudh 112 (112): 1 Luck 46.

10. See Statement of Objects and Reasons,  
Gazette of India Sept. 2, 1939, Part V, Page 149.

**Note 2**

1. ('12) 16 Ind Cas 640 (640) (Bom).

('89) AIR 1989 Cal 485 (485, 486): ILR (1989) 1  
Cal 40.

**Note 3**

1. ('14) AIR 1914 Low Bur 215 (216): 8 Low Bur

Rul 62.

2. ('10) 5 Ind Cas 802 (803): 1910 Pun Re No. 10.  
(The Government should settle with the disbursing officer.)

3. ('12) 14 Ind Cas 737 (737): 1912 Pun Re No. 98.

**Note 4**

1. ('33) AIR 1933 Bom 185 (186). (No revision  
therefore lies.)

('36) AIR 1936 Lah 761 (762).

2. ('39) AIR 1939 Rang 384 (385).

of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

**O. 21 R. 49**  
**Note 1**

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

[Cf. R. S. C., O. 46, Rr. 1A, 1B.]

### *Synopsis*

1. Attachment of partnership property.

2. "Against the partners in the firm as such."

3. Decree against individual partner.

4. "Direct accounts." See Note 3.

5. Order under this Rule and insolvency.

**1. Attachment of partnership property.** — This rule and the next deal with the mode of execution affecting partnership property. Execution can be taken against any partnership *property* only on a decree passed against the firm or against all the partners thereof as such.<sup>1</sup> Where the decree is only against an individual partner, the *property* of the partnership cannot be attached but an order creating a *charge on the interest* of the judgment-debtor in the partnership can be obtained, with or without the appointment of a receiver.<sup>2</sup> The prohibition against attachment and sale contained in sub-rule (1) is mandatory and, therefore, a sale in execution contrary to the provision thereof is invalid and inoperative.<sup>3</sup> The provisions of this rule are closely modelled on Section 23 of the English Partnership Act (53 & 54 Viet., Chap. 39).

#### **Order 21 Rule 49 — Note 1**

1. [See ('79) 4 Bom 222 (226).]

2. ('81) AIR 1981 Cal 167 (168); 58 Cal 624 (*Obiter*).

('82) AIR 1982 All 468 (469). (Partner's interest alone vests in receiver—He cannot be appointed to manage entire partnership.)

[See ('70) 5 Beng L R 886 (886, 887).

('19) AIR 1919 Cal 296 (304).]

[But see ('93) 20 Cal 698 (696). (Decision under the Code of 1882.)]

3. ('85) AIR 1985 Cal 275 (278).

('88) AIR 1988 Lah 487 (439).

**O. 21 R. 49**  
**Notes 1-5**

The interest of a partner in partnership business is moveable property, although part of the partnership property may consist of immovable property. The reason is that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts.<sup>4</sup>

2. "Against the partners in the firm as such." — These words do not occur in Section 23 of the English Partnership Act. The introduction of these words in this rule makes it clear that a decree against partners as such is on the same footing as a decree against the firm for the purposes of this rule.

3. **Decree against individual partner.** — The holder of a decree against an individual partner gets no higher rights in execution than what a voluntary assignee of a partner of his share in the partnership gets under such assignment. Such an assignment "does not, as against the other partners, entitle the assignee during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners."<sup>1</sup>

In case of a *dissolution* of the partnership whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and for the purpose of ascertaining that share, to an account as from the date of the dissolution.<sup>2</sup>

4. "Direct accounts." — See Note 3 above.

5. **Order under this Rule and insolvency.** — An order under this rule charging the interest of the judgment-debtor in partnership property is not a "transaction" protected by Section 57 of the Presidency Towns Insolvency Act or by Section 55 of the Provincial Insolvency Act, 1920.<sup>1</sup>

**O. 21 R. 50**

**Execution of decree against firm.**

**R. 50.** [New.] (1) Where a decree has been passed against a firm, execution may be granted —

- (a) against any property of the partnership;
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

4. ('88) AIR 1938 Lah 65 (68). (O. 21 R. 78 applies to sale of partner's interest—O. 21 Rule 90 does not apply.)

**Note 3**

1. See S. 31 (1), Partnership Act, 1890 (58 and 54 Vict., Chapter 39).

('82) AIR 1932 Pat 15 (19, 20): 10 Pat 792. (Nor can receiver appointed under this rule sue for accounts of a continuing partnership.)

(1895) 2 Q B 126 (189), *Brown Janson v. Hutchinson*. (Accounts directed only under special cir-

cumstances, e. g. with a view to dissolution.)

2. See Section 31 (2), English Partnership Act, 1890 (58 & 54 Vict., Chap. 39).

('84) 10 Cal 669 (672, 678).

('90) 13 Mad 447 (450).

('78) 3 Cal 198 (209): 4 Ind App 247 (PC). (*Obiter*.)

**Note 5**

1. (1897) 1 Q B 817 (820), *Wild v. Southwood*. (1895) 1 Ch 325 (330, 331), *O'Shea, Re Courage v. O'Shea*.

(c) against any person who has been individually served as a partner with a summons and has failed to appear: **O. 21 R. 50 Note 1**

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

[*Cf.* R. S. C., O. 48A, R. 8.]

#### Local Amendment

##### PATNA

In sub-rule (2) *add* the words "or to the Court to which it is sent for execution" after the words "passed the decree" and before the words "for leave."

#### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. "Where a decree has been passed against a firm." See Order 30 Rule 6, Note 4.</li> <li>3. Award.</li> <li>4. Against any person who has appeared.</li> </ol> | <ol style="list-style-type: none"> <li>5. Execution against persons other than those referred to in sub-rule (1)—Sub-rule (2).</li> <li>6. Determination of liability under sub-rule (2) operates as a decree.</li> <li>7. Sub-rule (4).</li> <li>8. Minor partner—Proviso to sub-rule (1).</li> <li>9. Insolvency of firm.</li> </ol> |
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#### Other Topics (miscellaneous)

Appeal. See Note 6.  
 "Court which passed the decree." See Note 8.  
 Execution in case of deceased partners. See Note 5.  
 Sub-rule (3), if covers *ex parte* decree. See Note 6.

**1. Scope of the Rule.** — This rule should be read with the provisions of Order 30, *infra*; the latter deals with the procedure in suits instituted by or against

**O. 21 R. 50**  
**Notes 1-3**

firms, while this rule deals with the mode of *execution* of decrees which have been obtained *against* firms in the firm name.<sup>1</sup>

As will be seen in Note 1 to O. 30 R. 1, a decree against a firm in the name of the firm has the same effect as a decree against all the partners. It can, therefore, be executed against the whole of the partnership property<sup>2</sup> [sub-rule (1), clause (a)]. It can also be executed against any one or more of the partners *personally*<sup>3</sup> (*i. e.*, against their person or their personal property), though, before this is done, certain conditions have to be satisfied and a certain procedure has to be followed as prescribed by this rule. Thus, it can be executed personally against any person coming under clauses (b) and (c) of sub-rule (1)<sup>4</sup> inasmuch as, in such cases, it may safely be presumed that the person proceeded against knows of the suit and that his liability as a partner is, in some way, established.<sup>5</sup> The decree can also, *with the leave of the Court*, be executed personally against any *other* person as being a partner of the firm [sub-rule (2)].<sup>6</sup>

Sub-rule (1) of this rule does not require the holder of a decree against a firm to exhaust his remedy under clause (a) and then proceed under the other clauses. Under that rule he has three courses open to him, any of which he may pursue regardless of the order in which they are set out.<sup>7</sup>

As regards execution against a *dissolved firm*, see O. 30 R. 3, Note 2 and the undermentioned case.<sup>8</sup>

The provisions of this rule do not apply to a decree obtained against a limited liability company.<sup>9</sup>

**2. "Where a decree has been passed against a firm."** — See Order 30, Rule 6, Note 4.

**3. Award.** — An award can be validly passed against a *firm*<sup>1</sup> as well as against individuals and when the award against a firm is filed in Court under the provisions of the Arbitration Act, 1899, it is enforceable as a decree of the Court, and the provisions of O. 21 R. 50 apply thereto.<sup>2</sup> But, though an award when filed in Court is on the same footing as a decree of Court, the proceedings before the arbitrators up to the stage of the passing of the award do not constitute 'a suit' for the application of the provisions of Order 30 (See Note 11 to O. 30 R. 1). Consequently, the service of any notice or

**Order 21 Rule 50 — Note 1**

1. ('32) AIR 1932 Bom 334 (885).
2. ('15) AIR 1915 Mad 1078 (1078). (Leave of Court necessary only for arresting partner not served.)
3. (26) AIR 1926 Lah 286 (286).  
[See also ('87) AIR 1987 Bom 365 (870) : I L R (1987) Bom 691.]
4. ('26) AIR 1926 Sind 51 (52, 53).  
('15) AIR 1915 Cal 238 (242). (Case of constructive service as partner under O. 30 R. 5.)  
('28) AIR 1928 Lah 528 (529). ("Individual" service, construed.)  
('38) AIR 1938 Cal 316 (317, 318). (Mere fact that other persons are stated to be the remaining partners of the firm in the petition for execution of the decree cannot make the execution invalid.)  
[See ('11) 12 Ind Cas 1006 (1007) : 36 Mad 414.]
5. ('27) AIR 1927 Bom 447 (448) : 51 Bom 794.  
[See also ('26) AIR 1926 Cal 271 (274, 276, 277) : 53 Cal 214.]

6. ('15) AIR 1915 Cal 238 (242).  
('25) AIR 1925 Rang 317 (318). (Deputy Registrar empowered to grant leave cannot determine liability of contesting party.)  
('26) AIR 1925 Sind 317 (318) : 18 Sind L R 146. (The fact that a decree itself provided for execution personally against certain persons as partners is no bar to applying for leave against others under sub-rule (2).)  
('38) AIR 1938 Cal 316 (317, 318).  
[See ('30) AIR 1930 Lah 243 (244).]
7. ('83) AIR 1933 Lah 472 (472).  
('25) AIR 1925 Lah 379 (379).
8. ('24) AIR 1924 Bom 365 (367, 368).
9. ('37) AIR 1937 Lah 59 (60).

**Note 3**

1. ('20) AIR 1920 Cal 386 (387) : 47 Cal 29.  
('33) AIR 1933 Bom 433 (434) : 58 Bom 162.  
('31) AIR 1931 Lah 786 (787) : 13 Lah 827.  
[But see ('27) AIR 1927 Bom 428 (430). (Obiter.)]
2. ('20) AIR 1920 Cal 386 (387) : 47 Cal 29.  
('33) AIR 1933 Bom 433 (435) : 58 Bom 163.



summons by the arbitrators on an alleged partner of the firm, is not service within the meaning of sub-rule (1) so as to enable the decree-holder to take out execution against the *person* of such partner without the leave of the Court. Before ordering execution of an *award*, the Court will, therefore, have to determine in every case whether the alleged partner is liable as a partner or not, and grant or refuse leave under sub-rule (2).<sup>3</sup>

**O. 21 R. 50**  
**Notes 3-5**

**4. Against any person who has appeared.**—Where an alleged partner *refuses* a summons sent to him under O. 30 R. 3, he must be deemed to be “individually served” and if he fails to appear, execution can proceed against him under sub-rule (1), clause (c) without any leave of the Court.<sup>1</sup> The words “or who has been adjudged to be a partner” in sub-rule (1) evidently provide for a case where the person served on behalf of the firm denies that he is a partner, and the plaintiff asks for an issue being raised in the suit, as to whether the service on him is good service or not.<sup>2</sup> Where a person served with summons under O. 30 R. 3 as a partner of a firm enters appearance and makes an application denying liability on the allegation that he is not a partner, the appearance is one ‘under protest’ under O. 30 R. 8 and not one under O. 30 R. 6 and hence, in such a case an enquiry under sub-rule (2) of this rule is not excluded.<sup>3</sup>

See also Notes on Rules 3, and 5 to 8 of Order 30.

**5. Execution against persons other than those referred to in sub-rule (1) —Sub-rule (2).**—It has already been seen in Note 1 above that execution of a decree against a firm can be taken against the *property* of the partnership as well as *personally* against the partners referred to in clauses (b) and (c) of sub-rule (1) and that, as against an alleged partner not referred to therein, the leave of the Court is a condition precedent to an order for execution. The principle of the distinction is that, in the case of persons who cannot in law be fixed individually with the knowledge of the suit against the firm, an opportunity must be given to them to dispute the liability under the decree.<sup>1</sup> See also sub-rule (4).

(‘24) AIR 1924 Cal 117 (118).

(‘31) AIR 1931 Lah 736 (737, 738) : 13 Lah 327.

(‘25) AIR 1925 Sind 293 (294) : 19 Sind L R 1.

(‘29) AIR 1929 Sind 28 (29) : 23 Sind L R 422.

(‘31) AIR 1931 Sind 82 (84) : 25 Sind L R 460.

(‘36) AIR 1936 Sind 211 (211) : 30 Sind L R 6.

(‘35) 61 Cal L Jour 515 (518) : 62 Cal 833.

[See also (‘24) AIR 1924 Lah 544 (544).]

[But see (‘27) AIR 1927 Bom 428 (430). (*Obiter.*)]

3. (‘29) AIR 1929 Lah 228 (229, 230).

(‘31) AIR 1931 Lah 736 (738) : 13 Lah 327.

(‘13) 19 Ind Cas 363 (366, 367) : 6 Sind L R 127.

(The arbitrator cannot decide this question.)

[See (‘25) AIR 1925 Sind 293 (294) : 19 Sind L R 1.]]

[See also (‘32) AIR 1932 Bom 375 (377). (The arbitrators cannot decide this question unless it is specially referred to them.)

(‘36) AIR 1936 Sind 121 (123) : 29 Sind L R 292. (Question whether all or any of the persons served with notices of an award or of its filing in Court are partners in a firm can only be litigated when an application under O. 21 R. 50, C. P. C., is made and cannot be gone into in proceedings for filing the award.)]

#### Note 4

1. (‘15) AIR 1915 Cal 238 (240, 241).

2. (‘32) AIR 1932 Sind 199 (201) : 26 Sind L R 228.

[See also (‘35) AIR 1935 Lah 520 (521). (Person appearing under protest, asking Court to frame an issue as to his liability cannot, after the issue is decided against him, turn round and say that the proceedings were without jurisdiction and claim the benefit of a fresh inquiry under sub-rule (2) of this rule.)]

3. (‘87) 41 Cal W N 566 (568).

#### Note 5

1. (‘32) AIR 1932 Bom 516 (519).

[See also (‘26) AIR 1926 Cal 271 (274, 275) : 53 Cal 214.

(‘36) AIR 1936 Pat 496 (497). (Decree against firm cannot be executed against individual partners without leave of Court under sub-rule (2)—*Ex parte* decree against firm mentioning also names of individual partners — In peculiar circumstances of this case, it was held that the decree-holder was precluded from contending that the decree was against individual partners.)]

**O. 21 R. 50**  
**Note 5**

Ordinarily, a decree is binding on the executing Court and no question of the liability of the judgment-debtor under the judgment can be allowed to be raised in execution. But as, in the case of a suit against a firm the decree is passed on service of summons in an extremely technical form as set forth in O. 30 R. 3, and as each partner is not necessarily a defendant in the suit and is not required to be served with the summons in the suit before the decree is passed, it is provided specifically in sub-rule (2) read with sub-rule (4) that in the case of persons not served in the suit, their liability under the decree, when disputed, may be heard and determined in execution.<sup>2</sup>

Where a person appears in answer to a notice issued to him under sub-rule (2) and admits that he is a partner in the firm against whom a decree is passed, he cannot at the same time urge that the decree is not binding on the firm.<sup>3</sup> The reason is that the words "where the liability is not disputed" mean and can only mean liability as a partner in the firm, and that is the only question which can be decided in proceedings taken under this sub-rule.<sup>4</sup>

As to the nature of the defence that can be taken where the person on whom notice is served disputes liability as a partner, see Notes 3 and 4 to Rule 8 of Order 30 and the cases cited therein and also the undermentioned cases.<sup>5</sup>

When the liability is decided in favour of the decree-holder and leave is granted, the effect is, that the decree against the firm, which was executable or had been executed<sup>6</sup> against the property of the firm or against the persons referred to in clauses (b) and (c) of sub-rule (1), becomes also *executable personally* against partners not served in the suit. Accordingly, an application for leave under sub-rule (2) is only ancillary to an application for execution, and will not be barred by reason of its being made beyond three years from the date of the decree so long as the decree itself is otherwise kept alive according to law.<sup>7</sup> Though the words "may apply" occur in sub-rule (2), it has been held that no separate application for leave is necessary as the application for execution itself implies a prayer for leave.<sup>8</sup>

In the case of a Hindu son, when the Court finds under sub-rule (2) that the son is *not a partner*, the application against him under O. 21 R. 50 as such must be disallowed, and the decree-holder left to remedies otherwise available to him.<sup>9</sup>

2. ('82) AIR 1982 Bom 516 (520, 521, 522). (In absence of fraud or collusion, the liability must be contested in execution and not by separate suit.) [See ('83) AIR 1983 Lah 591 (591). (Decree-holder must establish the liability of the objector partners.)]

[See also ('82) AIR 1982 Sind 199 (199, 201) : 26 Sind L R 228. (A case of appearance under protest under O. 30 R. 8.)]

3. ('84) AIR 1984 Sind 185 (185). (If he wants to dispute the decree he should take proceedings in the suit to have the decree set aside.)

4. ('84) AIR 1984 Sind 185 (185).

5. ('82) AIR 1982 Bom 516 (520). (Award—Defence on the ground that reference to arbitration was unauthorized.)

('40) AIR 1940 Cal 28 (29) : 43 Cal W N 997 (999). (Objection to liability not confined to ground that the person is not a partner but may be based on other grounds also—Objection may be taken that a contract was beyond the scope of the partnership or that a reference to arbitration was unauthorized.)

6. ('81) AIR 1981 Lah 786 (789) : 18 Lah 827.

7. ('82) AIR 1982 Bom 516 (519).

('85) AIR 1985 Sind 12 (13) : 29 Sind L R 236.

('81) AIR 1981 Lah 786 (789) : 18 Lah 827.

('81) AIR 1981 Sind 82 (89) : 25 Sind L R 460.

('86) AIR 1986 Sind 188 (189) : 30 Sind L R 88.

(An application under O. 21 R. 50 (2) is an application in execution of a decree — Dissenting from AIR 1980 Sind 180.)

('85) AIR 1985 Mad 926 (926).

[See also ('89) AIR 1989 Sind 161 (162) : I L R (1989) Kar 589 (FB). (Application under O. 21, R. 50 (2) is application in execution of decree.)] [See however ('80) AIR 1980 Sind 180 (181, 182) : 24 Sind L R 182. (Though application for leave is not an execution application falling under Art. 182, Limitation Act, it falls under Art. 181 and must be filed within three years of the decree.)]

8. ('29) AIR 1929 Lah 228 (230).

('81) AIR 1981 Lah 786 (788) : 18 Lah 827.

9. ('80) AIR 1980 Pat 205 (207).

('27) AIR 1927 Sind 247 (248).

Order 30 Rule 2 provides that in a suit by a firm the plaintiff shall declare on demand by the defendant the names of all the partners constituting the plaintiff firm. Where in such a suit the defendant makes a counter-claim against the plaintiff firm and succeeds, the persons so declared as partners cannot be proceeded against personally without an adjudication of liability against them under sub-rule (2) of this rule. The reason is that O. 21 R. 50 is not controlled by O. 30 R. 2.<sup>10</sup>

As regards execution under sub-rule (2) in case of death of a partner, see Note 14 to Rule 1, Note 2 to Rule 3, and Rule 4 of Order 30.

As to whether a Court to which the decree is sent for execution can grant leave under sub-rule (2), there is a conflict of decisions, for which see the undermentioned cases.<sup>11</sup> But in such cases, the Court which passed the decree does not cease to have jurisdiction to grant leave under this sub-rule.<sup>12</sup>

### 6. Determination of liability under sub-rule (2) operates as a decree. —

In the case of persons referred to in clauses (b) and (c) of sub-rule (1), they can be deemed to be parties to the decree by reason of service of summons or admission or adjudication as partners. The proceedings in execution as against them fall under Section 47 of the Code and an order therein will be a decree under Section 2, sub-section (2).<sup>1</sup> But a person not coming under clauses (b) and (c) of sub-rule (1) cannot be considered to be a party to the decree as the very fact of his being a partner or of his liability to the decree is allowed to be put in issue under sub-rule (2) for determination. The proceedings as against him under sub-rule (2) cannot fall under Section 47 nor is the determination of the liability one in the *suit*, having arisen only after decree. Hence it is not a decree. In order, however, to confer a right of appeal which does not otherwise exist, from such adjudication, sub-rule (3) lays down specifically that the order shall have the force of a decree.<sup>2</sup> It may also be noted that sub-rule (4) requires a *summons* to be served, and sub-rule (2) prescribes that the issue of liability be tried, as in a *suit*. Where, however, the partner is *ex parte* and there is no trial and determination of the liability, the order granting leave *ex parte* does not have the force of a decree.<sup>3</sup> An application to set the *ex parte* order aside is not governed by Article 164 of the Limitation Act, as the said Article applies only to *ex parte decrees*.<sup>4</sup>

An order having the force of a decree under sub-rule (3) is governed by Schedule I, Article 1 and not Schedule II, Article 11 of the Court-fees Act.<sup>5</sup> The

10. ('27) AIR 1927 Bom 447 (448) : 51 Bom 794.

11. ('21) AIR 1921 All 199 (201) : 43 All 894.  
(Transferee Court can grant leave.)

('29) AIR 1929 Lah 228 (230). (Do.)

('31) AIR 1931 Lah 507 (508). (Do.)

('31) AIR 1931 Lah 736 (738) : 13 Lah 327. (Do.)

('26) 98 Ind Cas 855 (856) (Lah). (Do.)

('31) AIR 1931 Sind 82 (83) : 25 Sind L R 460.  
(Transferee Court cannot grant leave.)

('32) AIR 1932 Pat 823 (824) : 11 Pat 580. (Do.)

('37) AIR 1937 Pesh 96 (97). (Do.)

('39) AIR 1939 Sind 161 (164) : I L R (1939) Kar 589 (FB). (Do.)

('36) AIR 1936 Sind 138 (138) : 30 Sind L R 88. (Do.)

('36) AIR 1936 Sind 11 (12) : 30 Sind L R 290. (Do.)

12. ('87) AIR 1937 All 758 (759) : I L R (1937) All 946.

[See also ('35) AIR 1935 Pat 409 (411) : 14 Pat 857. (Executing Court cannot go behind the

order passed by trial Court under this sub-rule.)]

### Note 6

1. ('15) AIR 1915 Cal 238 (239).

2. ('32) AIR 1932 Bom 516 (518).

[See ('29) AIR 1929 Bom 386 (387, 388) : 53 Bom 839.]

3. ('29) AIR 1929 All 390 (391, 392).

[But see ('35) AIR 1935 Pat 409 (411) : 14 Pat 857.]

4. ('29) AIR 1929 Bom 386 (387, 388) : 53 Bom 839.

5. ('30) AIR 1930 Lah 825 (827). (Court-fee to be paid *ad valorem*.)

('33) AIR 1933 Cal 546 (547) : 60 Cal 530. (Appeal from order should be treated as a regular appeal and *ad valorem* court-fee paid.)

('30) AIR 1930 Sind 255 (256) : 25 Sind L R 25.

('17) AIR 1917 Low Bur 179 (179) : 8 Low Bur Rul 300.

('39) AIR 1939 Sind 161 (163) : I L R (1939) Kar 589 (FB).

**O. 21 R. 50**  
**Notes 6-9**

reason is that the words "conditions as to appeal or otherwise as if it were a decree" mean the conditions whether as to appeal or in other respects as if it were a decree; and these words include conditions imposed by orders or rules outside this Code.<sup>6</sup>

An order under this sub-rule amounting to a decree bars the re-opening of the same matter in any subsequent application for leave against the same person.<sup>7</sup> The order having the force of a decree will not, however, make the proceedings a *suit* within the meaning of Section 38 of the Presidency Small Cause Courts Act.<sup>8</sup> But the fact that the proceedings are not proceedings in a suit will not bar a reference to the High Court of Bombay from an appeal decided by the Resident of Aden in a matter under sub-rule (2).<sup>9</sup>

See also the undermentioned case.<sup>10</sup>

**7. Sub-rule (4).** — Where a decree-holder against a firm claims to execute the decree against a partner not coming within clauses (a) and (b) of sub-rule (1), *i. e.*, a partner who was not *served in the suit*, he has to apply under sub-rule (2) for leave to execute the decree against such partner<sup>1</sup> and for this purpose, a summons to appear and answer the *application* should be issued to such partner under sub-rule (4). The object of this is to give the partner an opportunity of disputing his liability as a partner if he desires to do so.<sup>2</sup> The summons referred to in this sub-rule is not the summons sent in the suit against the firm but means a notice or summons to appear and answer the *application* for leave to execute under sub-rule (2).<sup>3</sup>

**8. Minor partner — Proviso to sub-rule (1).** — See Note 4 to O. 30 R. 1 and the undermentioned cases.<sup>1</sup>

**9. Insolvency of firm.** — The insolvency of a firm does not operate as the insolvency of every member thereof and is, therefore, no impediment to the execution of the decree personally against any partner individually served.<sup>1</sup>

**O. 21 R. 51**

**R. 51.** [S. 270.] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

[1877, S. 270; 1859, S. 238.]

6. ('88) AIR 1933 Cal 546 (547) : 60 Cal 580.  
(89) AIR 1939 Sind 161 (163) : 1 L R (1939) Kar 589 (F B).

7. ('24) AIR 1924 All 34 (37) : 45 All 735.

8. ('90) AIR 1930 Bom 412 (413).

9. ('80) AIR 1930 Bom 57 (58) : 54 Bom 26.  
(Reference under S. 8 of the Aden Civil and Criminal Justice Act (Bombay) (II of 1864).)

10. ('35) AIR 1935 Pat 409 (411) : 14 Pat 857.  
(Decree-holder seeking to proceed against certain property on ground that it was joint property of one L (who was mentioned in the decree as one of the partners) and another person M — M claiming property to be his exclusive property—Claim upheld—Decree-holder then obtaining an order against M under sub-rule (2)—He can now proceed against the property held to be the

exclusive property of M.)

**Note 7**

1. ('32) AIR 1932 Bom 516 (519).

2. ('26) AIR 1926 Cal 271 (274, 277) : 53 Cal 214.

3. ('26) AIR 1926 Cal 271 (273, 277) : 53 Cal 214.  
(23) AIR 1923 Bom 66 (67).

**Note 8**

1. ('30) AIR 1930 Cal 53 (54) : 56 Cal 704. (Defendant a ward under U. P. Court of Wards Act IV of 1912—No ground of defence under sub-r. (2) outside U. P.)

('15) AIR 1915 Low Bur 61 (62) : 8 Low Bur Rul 112. (Extent of liability of minor partner of Hindu joint family firm.)

**Note 9**

1. ('25) AIR 1925 Lah 379 (379).

**1. Attachment by actual seizure.** — An attachment of a negotiable instrument, *whether in the possession of the judgment-debtor or not*, should be made only *by actual seizure*. Unless this is done, there is always a danger that third parties may *bona fide* become possessed of it, and, if a prohibitory order is held to be a valid attachment, they would be prejudiced by such an order of which they may know nothing.<sup>1</sup> A prohibitory order is, however, sufficient attachment as against the debtor or the promisor.<sup>2</sup>

**O. 21 R. 51  
Note 1**

**R. 52.** [S. 272.] Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

**O. 21 R. 52**

Attachment of property  
in custody of Court or  
public officer.

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

[1877, S. 273; 1859, S. 237. *Cf.* R. S. C., O. 46 R. 12.]

#### Local Amendment

#### MADRAS

Add the following as proviso (ii) and *re-number* the existing proviso as (i):

"(ii) Provided further that, where the Court whose attachment is determined to be prior, receives or realizes such property, the receipt or realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets.

*Explanation.* — Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court."

#### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. Property in the custody of the Court or Public Officer.</li> <li>3. Property in the hands of a receiver.</li> <li>4. Property in the hands of the Official Assignee.</li> <li>5. Anticipatory attachment.</li> </ol> | <ol style="list-style-type: none"> <li>6. Determination of questions of title and priority—Proviso.</li> <li>7. Effect of attachment under this Rule on any previous attachment.</li> <li>8. Step-in-aid.</li> <li>9. Appeal.</li> <li>10. Revision.</li> </ol> |
|---|---|

#### Other Topics (miscellaneous)

Service of notice, whether sufficient attachment.  
See Note 1.

Setting aside an order under the proviso—Suit  
for. See Note 6.

#### Order 21 Rule 51 — Note 1

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. ('28) AIR 1928 Mad 317 (318, 319) : 46 Mad 415. (Attachment of pro-note under O. 21 R. 46</li> </ol> | <p>not valid for operation of S. 64, C. P. Code.)</p> <ol style="list-style-type: none"> <li>2. ('28) AIR 1928 Mad 940 (942).</li> </ol> |
|--|--|

**O. 21 R. 52**  
**Notes 1-2**

**1. Scope of the Rule.** — This rule deals with the attachment of property in the custody of a Court or of a public officer.<sup>1</sup> The property sought to be attached must, however, belong to the judgment-debtor. Thus, Government promissory notes standing in the name of the judgment-debtor in a bank, but which have been declared to belong to another, cannot be attached under this rule.<sup>2</sup> Where a judgment-debtor's property is sold in execution and the sale proceeds are deposited in Court, the surplus amount of the sale proceeds payable to the judgment-debtor after payment of the decretal amount can be attached under this rule.<sup>3</sup>

The Court has no discretion to refuse to order attachment in cases under this rule.<sup>4</sup> The circumstance that one decree-holder has attached the property is no ground for preventing another decree-holder of the same judgment-debtor from attaching the same property.<sup>5</sup>

Where a decree-holder seeks to attach money of the judgment-debtor already deposited in Court, it is necessary that he should put in an execution application in his suit to that effect, and give notice to the judgment-debtor.<sup>6</sup> The attachment is to be made by issuing a notice to the custody Court, to hold the property subject to the orders of the Court issuing the notice.<sup>7</sup> Where the attaching Court and the custody Court are the same, the High Court of Lahore<sup>8</sup> has held that it would be a meaningless formality to issue a precept to itself requesting it to hold the property subject to its own orders.

**2. Property in the custody of the Court or public officer.** — The rule permits of attachment of property not merely in the custody of Court but also of property in the custody of public officer, such as moneys in the hands of the Official trustee<sup>1</sup> or insured letters addressed to the judgment-debtor lying in the custody of the post office.<sup>2</sup> Revenue or interest or dividends payable in future can also be attached under this rule.<sup>3</sup> For definition of 'public officer', see Section 2 (17). As to assets in the hands of the Collector in execution, see the undermentioned cases.<sup>4</sup> The word 'custody' in the rule means *actual custody*.<sup>5</sup>

See also the undermentioned case.<sup>6</sup>

**Order 21 Rule 52 — Note 1**

1. ('85) AIR 1985 Sind 214 (215) : 29 Sind L R 251. (Rule 52 deals not only with money deposited in Court in pursuance of a decree but also with money which comes into the hands of an officer of the Court in various ways.)
2. ('97) 1 Cal W N 170 (172).  
[See also ('15) AIR 1915 Lah 147 (149). (Money deposited by agreement as security for decree to be passed cannot be attached.)]
3. ('37) AIR 1937 Nag 391 (392, 398) : ILR (1938) Nag 402.
4. ('81) 8 Cal L Rep 17 (18).
5. ('80) AIR 1930 Mad 4 (11).
6. ('26) AIR 1926 Mad 1104 (1105).
7. ('16) AIR 1916 Cal 570 (573).
- (76) 19 Suth WR 37(40). (Service of notice on the custody Court sufficient to complete attachment.)
- ('14) AIR 1914 Upp Bur 15 (16). (Courts in different districts—Attachment without transfer held illegal.)
- ('11) 11 Ind Cas 859 (859) (Low Bur). (Attachment without notice to the custody Court irregular.)
- ('85) AIR 1935 Lah 914 (915). (Attachment takes effect from date when precept is received by Court

holding property—Refusal of presiding officer to acknowledge attachment will not affect validity of attachment — When attached property is money, custody Court must make it over to the attaching Court when called upon to do so.)

[See also ('86) AIR 1936 Cal 112 (114).]

8. ('28) AIR 1928 Lah 598 (594).

**Note 2**

1. ('89) 12 Mad 250 (252).
2. ('90) 18 Mad 242 (247).
- (16) AIR 1916 All 886 (886).
3. ('15) AIR 1915 Bom 818 (814) : 39 Bom 80.
- (90) 3 C P L R 147 (150).
4. ('12) 16 Ind Cas 59 (60) : 36 Bom 519. (Assets held by Collector in execution are assets of the Court transferring the decree — No other Court can attach them.)
- (92) 18 Suth W R 58 (58). (Assets held by Collector in execution are assets of the Court transferring the decree — Attachment of such assets — Notwithstanding the attachment, assets continue to be the property of judgment-debtor until order of the attaching Court for payment of the assets to the decree-holder.)
5. ('84) 7 Mad 47 (48).
6. ('84) AIR 1934 All 357 (358). (A supardar in

**3. Property in the hands of a receiver.** — Moneys in the hands of a receiver must be regarded as being in the custody of the Court and can be attached under this rule.<sup>1</sup> Leave of Court is, however, necessary before such attachment of property in his hands can be levied. The present rule does not affect the prevailing practice as to the necessity of obtaining leave in such cases.<sup>2</sup>

**O. 21 R. 52**  
**Notes 3-6**

Where a receiver is appointed for the assets of a partnership in a partnership suit, the practice on the original side of the High Court of Bombay has been, to pass a *charging order* against the assets held by the receiver, on the application of an attaching creditor. By virtue of such order the receiver is bound to deal with the charge as per order of the Court issuing the same.<sup>3</sup> Where a receiver is appointed in a suit for administration of the estate of a deceased but no decree is passed, it has been held that the receiver appointed in the suit ought not to be directed to pay a judgment-creditor who has obtained an attachment under this rule.<sup>4</sup>

See also the undermentioned case.<sup>5</sup>

**4. Property in the hands of the Official Assignee.** — The Official Assignee is a public officer coming within the definition of Section 2, clause (17), sub-clause (d) of the Code. The amount in his hands payable by way of dividend to the judgment-debtor can be attached under this rule.<sup>1</sup>

**5. Anticipatory attachment.** — The rule applies only to attachment of property actually in the hands of the Court or the officer and not of property expected to reach the hands of such Court or officer.<sup>1</sup>

**6. Determination of questions of title and priority — Proviso.** — Under the proviso to this rule, a question of title or priority arising between the decree-holder and any other person, is to be determined by the *custody* Court and not by the *attaching* Court.<sup>1</sup> Thus, where Courts B, C and D have, in execution of decrees obtained by X, Y and Z respectively, successively attached a fund in the custody of Court A, it is the latter Court that has to determine the priority between X, Y and Z.

whose custody the amrin has left the attached property is not a public officer.)

**Note 3**

1. ('16) AIR 1916 Pat 321 (322): 1 Pat L Jour 449.
2. ('84) AIR 1934 Rang 174 (176).

[See ('88) AIR 1933 Cal 417 (418): 60 Cal 345. ('36) AIR 1936 Rang 83 (84). (Merely asking permission to attach money in receiver's hands will not effect attachment.)]

2. ('94) 21 Cal 85 (91).

('11) 11 Ind Cas 187 (189) (Cal).

('92) 16 Bom 577 (579). (Leave to be granted on such terms as to ensure equality between creditors.)

('30) AIR 1930 Mad 4 (11). (Court would not ordinarily refuse leave.)

('81) AIR 1981 Pat 204 (204).

[See also ('25) AIR 1925 Mad 51 (51).]

[But see ('34) AIR 1934 Rang 174 (176). (Property in hands of receiver can be attached without permission of Court.)]

3. ('04) 28 Bom 176 (180).

('09) 4 Ind Cas 135 (136): 84 Bom 484.

('30) AIR 1930 Bom 451 (454): 54 Bom 667.

[But see ('27) AIR 1927 Bom 894 (897, 898). (Charging orders not warranted by Code. — Per Mirza, J.)]

('27) AIR 1927 Bom 405 (410). (Do.)]

4. ('30) 82 Bom L R 1315 (1318).

('27) AIR 1927 Bom 657 (659). (Right of receiver in an administrative suit paramount to that of attaching decree-holder to realize debts of the deceased.)

5. ('36) AIR 1936 Rang 83 (84). (Appointment of receiver by consent of parties in suit by A against B—It was held that the other creditors of B could attach in hands of receiver only the amount which was in excess of the amount due to A.)

**Note 4**

1. ('25) AIR 1925 Bom 344 (344): 49 Bom 638.

[See also ('87) AIR 1937 Rang 538 (539). (Dividend in Official Assignee's hands to which judgment-debtor is entitled not declared before particular date — Creditors of such judgment-debtor are not entitled to anything prior to that date.)]

**Note 5**

1. ('98) 22 Bom 39 (41).

('11) 11 Ind Cas 422 (425) (Cal).

('17) AIR 1917 Cal 13 (15): 44 Cal 1072.

('15) AIR 1915 Mad 286 (286).

**Note 6**

1. ('81) 7 Cal 558 (555).

('31) 35 Cal W N 517 (519).



**O. 21 R. 52**  
**Note 6**

It has been held by a Full Bench of the High Court of Madras<sup>3</sup> that *X* is entitled, as being the first attaching decree-holder, to priority over the claims of *Y* and *Z*, and that the custody Court *A* is not entitled to award a *rateable distribution* among *X*, *Y* and *Z*. The reason given is that Section 73 does not, in terms, apply to such cases inasmuch as the decree-holders have not applied to Court *A* for execution of their decrees before the receipt by it of such assets, and that there cannot be any rateable distribution of property apart from Section 73, on equitable grounds, among any other class of decree-holders than those specified in Section 73. And until the money is actually transferred to the credit of the suit in execution of the decree in which it was attached, the Court continues to be merely the *custody Court*.<sup>3</sup> The High Court of Calcutta<sup>4</sup> has, on the other hand, held that attachment does not create any title in the attaching creditor and that the custody Court is bound to apply the rules of justice, equity and good conscience and distribute the fund attached rateably amongst the attaching decree-holders. In the undermentioned case the same High Court has held that where the custody Court is different from the attaching Court, the custody Court has no authority to make any rateable distribution and that it could only determine the question of priority and thereafter act under the instructions of the attaching Court.<sup>5</sup> The question has arisen in the High Court of Bombay with reference to the attachment of funds in the hands of a receiver appointed in a partnership action. In the undermentioned case<sup>6</sup> Farran, J., held that one of several creditors cannot by attachment obtain priority over the other creditors and that a Court of Equity will refuse permission to attach except on terms which ensure equality among all the creditors. A contrary view was taken by Mirza, J., in the cases cited below<sup>7</sup> following the Madras Full Bench case. The same High Court has also held that a creditor who has obtained a charging order in his favour is entitled to priority over other non-attaching creditors.<sup>8</sup> The Lahore High Court has, in the undermentioned case,<sup>9</sup> held that the decree-holder who attaches the money first is entitled to priority.

Where *X* obtains a decree in Court *B* and in execution thereof attaches a fund in Court *A* and before the transfer of the fund to Court *B* to the account of *X*'s suit, other decree-holders have applied for execution to the Court *B*, the matter falls within Section 73, and *X* and other decree-holders will be entitled to rateable distribution.<sup>10</sup> As to the right of rateable distribution in cases in which the attaching Court and the custody Court are one and the same, see Note 11 to Section 73.

The order passed under the proviso is not an administrative but a *judicial* order

(‘68) 10 Suth W R 48 (43).

(‘78) 20 Suth W R 73 (75).

(‘23) AIR 1923 Mad 505 (507) : 46 Mad 506.

(‘16) AIR 1916 Pat 321 (322) : 1 Pat L Jour 449.

(‘18) AIR 1918 Upp Bur 32 (32) : 2 Upp Bur Rul 136.

(‘28) AIR 1928 Sind 165 (166) : 22 Sind L R 345.

(Held, the Official Receiver is entitled to priority over attaching decree-holders.)

(‘81) 6 Cal 142 (148). (Collector having custody cannot however decide claims.)

(‘70) 13 Suth W R 301 (302). (Do.)

(‘95) 19 Bom 710 (713).

(‘89) AIR 1989 Mad 210 (213) : ILR (1989) Mad 1004. (Determination need not be deemed to be in same suit in which property was placed in custody of Court.)

2. (‘21) AIR 1921 Mad 218 (221) : 44 Mad 100. (Overruling AIR 1916 Mad 792.)

[See also (‘19) AIR 1919 Mad 66 (68) : 42 Mad 692.]

(‘15) AIR 1915 Mad 236 (236).]

3. (‘38) AIR 1938 Mad 842 (848). (Attachment by two Courts of different grades—Public officer sending money to superior Court though attachment of inferior Court was prior—Held, decree-holder of inferior Court had no priority.)

4. (‘17) AIR 1917 Cal 18 (17) : 44 Cal 1072.

[But see (‘81) 7 Cal 558 (555).]

5. (‘39) AIR 1939 Cal 814 (814, 815). (AIR 1917 Cal 18 distinguished as a case where the attaching and the custody Courts were the same.)

6. (‘92) 16 Bom 577 (579).

7. (‘27) AIR 1927 Bom 405 (410).

(‘27) AIR 1927 Bom 894 (897, 898).

8. (‘80) AIR 1980 Bom 451 (455) : 54 Bom 667..

9. (‘35) AIR 1935 Lah 914 (915).

10. (‘21) AIR 1921 Mad 218 (222) : 44 Mad 100.

(‘85) AIR 1985 Lah 914 (915).



binding on the parties.<sup>11</sup> The enquiry under the proviso is of the same nature as an investigation of claim proceedings and a suit lies to set aside the order passed therein.<sup>12</sup> Further, a decision in a proceeding under the proviso between the decree-holder and a stranger will not be one under Section 47.<sup>13</sup> Hence, a separate suit to agitate the dispute between the attaching decree-holder and a stranger claiming the money or other property attached will not be barred.<sup>14</sup>

*A* obtains a decree against *B*, *C* and *D*. The decree is joint and several against all the judgment-debtors as regards a portion of the decretal amount, and as regards the balance the decree is against *B* exclusively. Certain money is lying in Court which *A* wants to attach as being the exclusive property of *B*. *C* and *D* claim that the property is the joint property of *B*, *C* and *D* and not the exclusive property of *B*. The dispute is one between the parties to the suit and falls under Section 47.<sup>15</sup>

### 7. Effect of attachment under this Rule on any previous attachment. —

*A* files a suit against *B* and attaches before judgment certain moveable properties belonging to *B*. The attached property being perishable is sold and the proceeds are kept in Court. *C* who has obtained a decree against *B* attaches the amount in Court deposit under the provisions of this rule. If at that time *A* has not obtained a decree in his suit and applied for execution thereof, *C* will be entitled to apply the amount attached in satisfaction of his decree and the prior attachment before judgment obtained by *A* will confer no right in his favour so as to affect the right of *C*.<sup>1</sup> But if *A* has actually obtained a decree and applies for execution at the time of *C*'s attachment, different equities will arise and both *A* and *C* will be entitled to share the proceeds rateably between themselves.<sup>2</sup>

**8. Step-in-aid.** — Where an attachment is effected under this rule of moneys lying to the credit of the judgment-debtor in the treasury, and more than three years after the attachment an application is made for payment of the amount attached, the latter application is not one for execution but one to take a step-in-aid of the prior execution application and is not barred.<sup>1</sup>

**9. Appeal.** — It was held in the undermentioned case that where a decree-holder in a Munsif's Court obtained an order of attachment under this rule of certain moneys lying to the credit of the judgment-debtor in the sub-Court and in pursuance thereof obtained an order of payment from the sub-Court, an appeal lay to the District Court and not directly to the High Court. The dispute was held to be one relating only to the Munsif's Court's decree.<sup>1</sup> As to whether the question arising under the proviso to this rule falls within the scope of Section 47 so as to be open to appeal, see<sup>2</sup> Section 47, Note 5 and the cases cited there.

11. ('25) AIR 1925 Cal 354 (355).

12. ('92) 19 Cal 286 (288).

(15) AIR 1915 All 275 (276, 277) : 37 All 575.

(14) AIR 1914 Upp Bur 15 (16).

(36) AIR 1936 Lah 521 (523).

13. ('89) AIR 1939 Cal 413 (414).

[But see ('89) AIR 1939 Mad 210 (213) : ILR (1939) Mad 1004. (Submitted wrong.)]

14. ('89) AIR 1939 Cal 413 (414).

15. ('27) AIR 1927 All 574 (575).

#### Note 7

1. ('15) AIR 1915 All 275 (276, 277) : 37 All 575.

[See also ('36) AIR 1936 Cal 112 (114). (Moveable property attached before judgment by *A* and in

custody of Court—Same property subsequently sold by *B* in execution of his decree against same judgment-debtor and purchased by himself — *B* gets a good title — But where he has not complied with O. 21 R. 52 and the property is again sold in execution of the decree which *A* gets, the latter cannot be made liable for any loss sustained by *B* on account of such re-sale.]]

2. ('06) 33 Cal 639 (642, 644).

#### Note 8

1. ('01) 24 Mad 188 (194).

#### Note 9

1. ('18) AIR 1918 Mad 921 (921).

**O. 21 R. 52**  
**Note 10**

**10. Revision.** — No revision lies from an order by the custody Court determining a question of priority under the proviso to this rule, as there is no question of *jurisdiction* involved.<sup>1</sup>

**O. 21 R. 53**

**R. 53.** [S. 273.] (1) Where the property to be attached

Attachment of decrees.

is a decree, either for the payment of money<sup>3</sup> or for sale in enforcement of a mortgage or charge,<sup>3a</sup> the attachment shall be made, —

- (a) if the decrees were passed by the same Court,<sup>5</sup> then by order of such Court, and
- (b) if the decree sought to be attached was passed by another Court,<sup>6</sup> then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution<sup>8</sup> of its decree unless and until —
  - (i) the Court which passed the decree sought to be executed cancels the notice, or
  - (ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree<sup>9</sup> and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1)<sup>4</sup> shall be deemed to be the representative<sup>10</sup> of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or

**Note 10**

1. ('86) AIR 1986 Lah 521 (528).

charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. **O. 21 R. 53**

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment<sup>11</sup> of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

[ 1877, S. 273. ]

#### Local Amendments

##### ALLAHABAD

(1). In sub-rule (1) (b) and in sub-rule (4), *after* the words "to such other Court" *add* the words "and to any other Court to which the decree has been transferred for execution."

(2). In sub-rule (6) *for* the words "after receipt of notice thereof," *read* the words "after receipt of notice, or with the knowledge thereof."

##### CALCUTTA

(1). In sub-rule (1) (b) *after* the words "to such other Court" *insert* the words "and to any Court to which it has been transferred for execution"; also *insert* therein the words "or Courts" *after* the words "requesting such other Court."

(2). In sub-rule (1) (b) (ii) *cancel* the words "to execute its own decree" and *substitute* therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court."

(3). In sub-rule (4) *insert* *after* the words "by sending to such other Court" the words "and to any Court to which it has been transferred for execution."

(4). In sub-rule (6) *substitute* the words "in contravention of the said order with knowledge thereof" *for* the words "in contravention of such order after the receipt of notice thereof."

##### LAHORE

(1). *Add* the following words to sub-rule (1) (b), *after* the words "to such other Court":

"and to the Court to which it has been transferred for execution."

(2). In sub-rule (1) (b) (ii), *substitute* the words "the attached" *for* the words "its own"; and *insert* the following words between the words "executed or" and "his judgment-debtor":

**O. 21 R. 53**

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

(3). In sub-rule (6), *substitute* the words "with the knowledge," *for* the words "after receipt of notice."

**MADRAS**

(1). In sub-rule (1) (b) (ii) :

(i) after the words "judgment-debtor" and before the words "applies" *add* the words "if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court," and

(ii) *for* the words "its own," *substitute* the words "the attached."

(2). *Add* the following as sub-rule (1) (c) :

"(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it."

**NAGPUR**

(1). In sub-clause (ii) of clause (b) of sub-rule (1) :

(a) *After* the word "judgment-debtor," *insert* the words "with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court,"

(b) *For* the words "its own," *substitute* the words "the attached."

(2). In clause (b) of sub-rule (1), and in sub-rule (4), *after* the words "to such other Court," *insert* the words "and to any other Court to which the decree has been transferred for execution."

**N.-W. F. P.**

(1). In sub-rule (1) (b) and in sub-rule (4), *after* the words "to such other Court," *add* the words "or to any other Court to which the decree has been transferred for execution."

(2). In sub-rule (1) (b) (ii), *for* the words "its own decree," *substitute* the words "the attached decree."

(3). In sub-rule (6) *for* the words "after receipt of notice thereof," *read* "after receipt of notice or with the knowledge thereof."

**ODDH**

(1). In sub-rule (1) (b) and in sub-rule (4), *after* the words "to such other Court" *add* the words "and to any other Court to which the decree has been transferred for execution."

(2). In sub-rule (6), *for* the words "after receipt of notice thereof," *read* the words "after receipt of notice, or with the knowledge thereof."

**PATNA**

*Substitute* the following for sub-rule (1) (b) :

"(b) If the decree sought to be attached was passed by another Court then by the issue to such other Court (or to the Court to which the decree may have been transferred for execution) of a notice by the Court before which the application has been made requesting such other Court (or the Court to which the decree may have been transferred for execution as the case may be) to stay the execution of the decree sought to be attached unless and until —

(i) the Court which has issued the notice shall cancel the same, or

(ii) the holder of the decree sought to be executed, or his judgment-debtor, with the consent of the said decree-holder expressed in writing or the permission of the attaching Court, applies to such other Court (or to the Court to which the decree may have been transferred for execution) to execute the attached decree."

**O. 21 R. 53**  
**Notes 1-2**

### RANGOON

(1). In clause (b) of sub-rule (1) after the words "to such other Court" the words "and to any Court to which it may have been transferred for execution" shall be added, and for the word "its" the word "the" shall be substituted.

(2). In sub-clause (ii) of clause (b) of sub-rule (1) for the words "its own," the words "the attached" shall be substituted.

(3). To sub-clause (ii) of clause (b) of sub-rule (1) the following shall be added, namely —

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

(4). In sub-rule (6) for the words "after receipt of notice thereof" the words "with the knowledge thereof" shall be substituted.

### Synopsis

- |   |   |
|---|---|
| 1. Legislative changes.                                     | 6. Decree passed by different Courts.             |
| 2. Scope of the Rule.                                       | 7. Effect of attachment.                          |
| 3. Decree for money.  | 8. Stay of execution — Sub-rule (1).              |
| 3a. Decree for sale in enforcement of a mortgage or charge. | 9. Execution of attached decree — Sub-rule (2).   |
| 4. Other decrees.   | 10. Representative — Sub-rule (3).                |
| 4a. Preliminary decree for accounts — Attachability of.     | 11. Adjustment of attached decree — Sub-rule (6). |
| 5. Decree passed by the same Court.                         | 12. Step-in-aid.                                  |

### Other Topics (miscellaneous)

Defective attachment. See Note 6.  
Maintenance decrees. See Note 4.  
Revenue Court decrees. See Note 3.

### 1. Legislative changes. —

1. In sub-rule (1), the words "or for sale in enforcement of a mortgage or charge" have been newly added.
2. In clause (b) (ii) of the same sub-rule the words "or his judgment-debtor" are new.
3. Sub-rules (2), (3) and (6) and clause (a) of sub-rule (1) are new.

**2. Scope of the Rule. —** This rule makes a distinction, for the purposes of attachment, between decrees for the payment of money or for sale in enforcement of a mortgage or charge, and *other* decrees. Where a decree of the former class is attached the mode of realization of the attached decree is by *execution* thereof.<sup>1</sup> The holder of the decree sought to be executed is conferred the power of executing such attached decree and for that purpose the rule declares that he should be deemed to be a representative of the holder of the attached decree.

### Order 21 Rule 53 — Note 2

- |   |                                       |
|---|---------------------------------------|
| 1. ('24) AIR 1924 Rang 21 (21) : 1 Rang 360.  | ('78) 2 All 290 (291).                |
| ('82) AIR 1982 Pat 849 (350) : 12 Pat 36. (Money decree cannot be sold and such a sale will not be upheld.) | ('85) 1885 All W N 128 (128).         |
|   | ('98) 20 Cal 111 (114).               |
|   | [See also ('71) 15 Suth W R 34 (35).] |

**O. 21 R. 53**  
**Notes 2-3**

In the case of other decrees sub-rule (4) prescribes the manner of attachment thereof. But the rule is silent as to how they should be realized after attachment. Such decrees should therefore be sold after attachment by Court auction as being "other saleable property of the judgment-debtor" under Section 60.<sup>2</sup> In Madras, by virtue of Rule 178 of the Civil Rules of Practice, even in cases not falling under sub-rule (1) of this rule, a decree cannot be ordered to be sold in execution of another decree. That rule has been held to be not *ultra vires* of the rule-making powers of the High Court.<sup>3</sup>

A more order for attachment will not effect the attachment of a decree under this rule. The attachment will not be complete unless the formalities prescribed by the rule are observed. Thus, in the case of an attachment of a decree for money passed by a Court other than the Court which orders the attachment, it is essential that notice must be issued to the Court by which the decree has been passed under sub-rule (1), clause (b).<sup>4</sup>

Notice to the holder of the decree sought to be attached is not necessary for effecting an attachment of a decree for the payment of money or for sale in enforcement of a mortgage or charge. Such notice is only necessary in the case of other decrees under sub-rule (4).<sup>5</sup>

The rule applies to attachment of decrees whether made before or after judgment.<sup>6</sup> It does not apply to a case where the creditor of a mortgagee attached the deposit made in Court by the mortgagor to redeem the property before sale in execution.<sup>7</sup> For the attachment and the subsequent execution of decrees of Civil Courts in execution of certificates issued under the provisions of certain local Public Demands Recovery Acts, see the undermentioned provisions.<sup>8</sup>

Where an *ex parte* decree which has been attached in execution of another decree is set aside on the application of the judgment-debtor and a fresh decree in favour of the plaintiff is passed after trial on the merits, the original attachment must be taken to have revived as soon as a fresh decree on the merits is passed.<sup>9</sup>

**3. Decree for money.** — A decree for the payment of money is not attachable as a debt under Rule 46, but should be attached under this rule.<sup>1</sup> The following have been held to be money decrees attachable as such under this rule —

1. Decree for mesne profits<sup>2</sup> whether ascertained or unascertained.<sup>3</sup>

2. Decree for arrears of rent.<sup>4</sup>

3. A certificate as to deficiency of price granted under Rule 71 of this Order.<sup>5</sup>

2. ('82) AIR 1982 Cal 80 (82) : 58 Cal 934.

3. ('84) AIR 1984 Mad 692 (694, 695) : 58 Mad 285. (Judgment-debtor should be allowed to take objection to the saleability of the attached decree in view of R. 178, Civil Rules of Practice.)

4. ('89) 48 Cal WN 874 (877). (In absence of such notice, the holder of the decree sought to be executed does not become representative of decree sought to be attached and cannot execute the same.)

5. ('88) AIR 1988 Cal 401 (402).

6. ('12) 22 Mad L Jour 894 (895).

7. ('88) AIR 1988 Cal 89 (41) : 59 Cal 1464.

8. The Bengal Public Demands Recovery Act III of 1918, S. 19 (2) ; The Bihar and Orissa Public Demands Recovery Act IV of 1914, Section 21 (2).

('87) AIR 1987 Cal 468 (472, 478). (Bengal Public Demands Recovery Act, S. 19—Attaching certi-

ficate holder is representative of original decree-holder only for purposes of execution and cannot agree to adjustment of decree.)

9. ('88) AIR 1988 Rang 346 (347).

**Note 3**

1. ('88) 6 Mad 418 (419).

('25) AIR 1925 All 264 (265). (Revenue Court decree—Attachable under this rule.)

('99) 21 All 405 (406, 407). (Revenue Court decree—Held under the old Code, cannot be attached as a debt.)

2. ('18) AIR 1918 Pat 65 (67) : 4 Pat L Jour 386. ('67) 8 Suth W R 9 (11).

3. ('92) 2 Mad L Jour 288 (289, 290). (A decree for unascertained mesne profits.) ('67) 8 Suth W R 9 (10). (Do.)

4. ('98) 25 Cal 322 (323).

5. ('26) AIR 1926 All 879 (882).

But the rule applies only to cases where the right attached is expressly settled by the decree. Thus, a right to recover mesne profits by way of restitution by reason of reversal of the decree in appeal cannot be attached.<sup>6</sup>

**O. 21 R. 53**  
**Notes 3-4**

As noticed in Note 2, after attachment under this rule, the money decree should be executed and not sold. See also Note 9 below.

**3a. "Decree for sale in enforcement of a mortgage or charge."** — In the absence of these words under the old Code there was a conflict of opinion as to whether a decree for sale in enforcement of a mortgage was or was not a money decree and as to the mode of execution of such a decree after attachment. The High Courts of Allahabad<sup>1</sup> and Calcutta<sup>2</sup> held that it was not a money decree and that it should be sold after attachment. The High Court of Madras,<sup>3</sup> on the other hand, held that it was a money decree which should be attached and executed under the corresponding Section 273. The conflict has been set at rest by the Legislature by giving effect to the Madras view. Under the present rule such decrees are placed on the same footing as money decrees.<sup>4</sup> In the case of a decree for maintenance charging immovable property also, the proper course for the decree-holder is to apply for execution, and not for the sale of the decree attached.<sup>5</sup>

If, however, in contravention of the provisions of this rule a decree for money or a mortgage decree for sale is sold and not executed, after attachment, the sale cannot be regarded as a nullity which confers no rights on the purchasers. The rule is merely one of procedure and ought not to be given a scope which will interfere with the substantive rights of creditors conferred by Section 60 of the Code.<sup>6</sup>

A preliminary decree in a mortgage suit is neither a decree for the payment of money nor one for sale in enforcement of a mortgage and is not covered by sub-rule (1) of this rule.<sup>7</sup> Such a decree is, however, attachable property of the judgment-debtor.<sup>8</sup>

**4. Other decrees.** — A decree relating to immovable property is not itself immovable property. Such a decree should therefore be attached only under this rule and not under the next rule.<sup>1</sup> Thus, a decree for possession of immovable property,<sup>2</sup> or a preliminary decree for partition,<sup>3</sup> or a decree for foreclosure,<sup>4</sup> should be attached under this rule. As pointed out in Note 1, such decrees should be sold after attachment, and cannot be executed.

•6. ('01) 24 Mad 841 (845).

**Note 3a**

1. ('06) 28 All 771 (774).
2. ('10) 5 Ind Cas 302 (304) (Cal).
- ('02) 6 Cal W N 5 (6).
- ('99) 4 Cal W N xxxv (xxxvi).
- ('05) 2 Cal L Jour 499 (502, 503).
3. ('09) 1 Ind Cas 535 (536, 537) : 34 Mad 442.  
(But a sale held in execution of a decree for money is not altogether invalid and without jurisdiction.)
- ('05) 28 Mad 473 (477, 478).
4. ('21) AIR 1921 Bom 127 (127) : 45 Bom 348.
- ('12) 18 Ind Cas 324 (325) (Mad).
5. ('19) AIR 1919 Mad 894 (896).
- ('71) 15 Suth W R 188 (189). (Decree for future maintenance not attachable).  
[But see ('10) 5 Ind Cas 879 (879) (Mad). (Do.)]
6. ('09) 1 Ind Cas 535 (537, 538) : 35 Mad 442.  
[See also ('21) AIR 1921 Cal 882 (888).]
7. ('37) AIR 1937 All 652 (658) : I L R (1937) All 828.
- ('86) AIR 1986 All 857 (858). (Attaching decree-

holder has no *locus standi* to apply for final decree— Nor does mere attachment amount to assignment, creation or devolution of any interest within Order 22 Rule 10.)

- ('37) AIR 1937 Oudh 365 (366) : 13 Luck 237.  
(Attaching creditor of such a decree has no *locus standi* as regards the execution of the final decree that is subsequently passed.)
8. ('37) AIR 1937 All 652 (658) : I L R (1937) All 828. (The procedure for realizing such decree is for the Court to sell it under O. 21 R. 64.)

**Note 4**

1. ('19) AIR 1919 Nag 19 (20) : 16 Nag L R 72.
- ('11) 12 Ind Cas 924 (924) (All).
- ('91) 18 All 89 (91).
- ('86) 10 Bom 444 (447).  
(1864) 1864 Suth W R Misc 28 (28).
2. ('21) 64 Ind Cas 888 (889, 890) (Cal).
- ('81) 8 Cal 219 (217).
- ('81) 8 Cal 243 (246).
3. ('32) AIR 1932 Cal 80 (82) : 58 Cal 984.  
[See also ('37) AIR 1937 Pesh 13 (15, 16).]
4. ('04) 26 All 91 (93).

**O. 21 R. 53**  
**Notes 4a-7**

**4a. Preliminary decree for accounts — Attachability of.** — There is a conflict of decisions as to whether a preliminary decree for accounts can be attached under this rule. It was held by the Bombay High Court in the undermentioned case<sup>1</sup> that a preliminary decree for the dissolution of a partnership and for accounts is a decree for money within the meaning of this rule and can be attached. But, the Calcutta High Court in the case cited below<sup>2</sup> dissented from this view and held that such a decree is not a decree for money and also that it could not be attached and sold in execution. But, in the undermentioned case,<sup>3</sup> the same High Court held that a preliminary decree in a suit for accounts is saleable property which is attachable under Section 60. The question arose before the Madras High Court, in the case noted below,<sup>4</sup> but the Judges who presided differed in their opinion.

**5. Decree passed by the same Court.** — In the case of a decree for the payment of money or for sale in enforcement of a mortgage or charge, where the decree sought to be executed and the decree sought to be attached are passed by the same Court, the attachment is made under sub-rule (1), clause (a) by order of the Court. In the case of other decrees, the attachment is made under sub-rule (4) by the issue of a notice to the holder of the decree sought to be attached prohibiting him from transferring or charging the same in any way.

**6. Decree passed by different Courts.** — An order of attachment under this rule, by Court X, of a decree passed by Court Y, can be made either by Court X or by the Court to which the decree is transferred for execution.<sup>1</sup>

After receiving notice of attachment under this rule, the Court whose decree is attached has no jurisdiction to proceed with the sale ignoring the order. The sale, if held in such a case, will be void.<sup>2</sup>

The attachment of a decree for money passed by another Court is complete as soon as a notice under sub-rule (1), clause (b) is served on the Court which passed such decree.<sup>3</sup>

**7. Effect of attachment.** — The effect of attachment of a decree under this rule is to stay execution of the attached decree until the conditions mentioned therein happen.<sup>1</sup> The decree is not permanently rendered incapable of execution by reason of the attachment, nor is the decree-holder's interest destroyed.<sup>2</sup> "The judgment-creditor," as pointed out by Maclean, C. J., "still had an interest in the decree which he had obtained and the attachment order did not prevent him from presenting the decree with a view to execution." The addition of the words "or his judgment-debtor" in sub-rule (1), clause (b) gives legislative recognition to the right of the holder of the decree attached, to apply for execution after attachment.<sup>3</sup>

**Note 4a**

1. ('03) 27 Bom 556 (560).
2. ('37) AIR 1937 Cal 4 (6, 7).
3. ('85) AIR 1985 Cal 751 (752).
4. ('29) AIR 1929 Mad 641 (643, 649) : 52 Mad 568 (FB). (Preliminary decree directing taking of partnership accounts is money decree — Per Phillips, J.,—Thiruvengkatachari, J. *contra*.)

**Note 6**

1. ('12) 17 Ind Cas 323 (326, 329) (Mad). (Even if the attachment by the transferee Court is considered defective it is not void—Such defect if any, may be waived by parties—Per Sundara Iyer, J.)
2. ('05) 32 Cal 1104 (1105).

3. ('87) AIR 1937 All 63 (64).

**Note 7**

1. ('12) 18 Ind Cas 907 (907) (Cal).
2. ('16) AIR 1916 Cal 620 (621).
3. ('38) AIR 1938 Oudh 349 (349, 350). (Preliminary decree for foreclosure obtained by A—Attachment of preliminary decree by B—Subsequent final decree obtained by A—A is entitled to execute decree and take possession in spite of attachment.)
4. ('08) 18 Mad L Jour 265 (266).
5. ('10) 5 Ind Cas 56 (56) (Mad).
6. ('98) 21 Mad 417 (419).
7. [But see ('11) 9 Ind Cas 786 (787) : 85 Mad 622. (Not good law under the present Code.)]
8. ('97) 24 Cal 778 (779).



The rule mentions only the *holder of the decree* sought to be executed or his *judgment-debtor* as having the right to apply for execution after attachment. But, can a *transferee* of the decree, whose transfer is prior to the attachment, apply for execution of the decree after attachment under this rule? The High Court of Madras in its earlier decisions<sup>4</sup> held that the words "his judgment-debtor" do not include a transferee from the judgment-debtor and that the remedy of the latter is only to prefer a claim under Rule 58 of this Order and have the attachment raised before he can apply for execution. In a later decision,<sup>5</sup> however, the same High Court has dissented from this view and held that the transferee is entitled to execute the decree notwithstanding the subsequent attachment inasmuch as his rights are prior to the attachment and Rule 16 confers a right of execution in his favour. The High Court of Rangoon<sup>6</sup> and the Judicial Commissioner's Court of Nagpur,<sup>7</sup> have also held that a transferee stands in the same position as his transferor, and is entitled to apply for execution. The High Court of Patna<sup>8</sup> has gone a step further and held that a transferee of the decree *even after attachment* is entitled to apply for execution by virtue of Rule 16. The reasoning of the Patna High Court is that in the case of money decrees, the present rule does not prohibit a transfer of the decree during the pendency of the attachment, and the general prohibition contained in Section 64 does not apply to the specific provision in this rule. But the right of the assignee to execute the decree in such a case is subject to the right of the attacher just as the assignor's right would be.<sup>9</sup>

A filed a suit against B and attached before judgment a decree which B had obtained against C. C paid into Court various sums of money towards the latter decree. Then a decree was passed in favour of A in the suit which he had filed against B. Thereupon, A applied to draw out the moneys which had been deposited by C. It was held that A was entitled to do so.<sup>10</sup>

**8. Stay of execution — Sub-rule (1).** — The object of the stay is to prevent the holder of the attached decree from realizing and taking away the fruits of that decree.<sup>1</sup> But the stay is not an absolute stay but a limited one and, as already noticed, does not prevent the holder of the decree sought to be executed or his judgment-debtor from executing the attached decree.<sup>2</sup> The provision in clause (b) (ii) of sub-rule (1) does

(34) AIR 1934 Cal 140 (142).

(34) AIR 1934 Lah 142 (143). (Either may apply — Original decree-holder applying and receiving money before satisfaction of attaching decree-holder's claim — Court can order refund under Section 151.)

(35) AIR 1935 Mad 413 (414). (The fact that the attachment of the decree is in execution of a decree for restitution of conjugal rights and that under O. 21 R. 82 property attached in execution of such a decree cannot be sold before one year of the attachment does not preclude the execution of the attached decree under this sub-rule before one year.)

(35) AIR 1935 Bom 416 (417). (But amount realized should be deposited in Court for benefit of creditor.)

4. ('12) 18 Ind Cas 659 (660) (Mad).

(10) 5 Ind Cas 1010 (1010) (Mad).

(09) 8 Ind Cas 938 (939) : 33 Mad 62.

5. ('12) 17 Ind Cas 323 (325) (Mad).

[See also ('10) 5 Ind Cas 92 (94) : 33 Mad 429. (Attachment and assignment on the same date.)]

6. ('28) AIR 1928 Rang 25 (26) : 5 Rang 595.

7. ('27) AIR 1927 Nag 132 (133) : 23 Nag L R 20.

8. ('29) AIR 1929 Pat 1 (3) : 7 Pat 726.

9. ('12) 17 Ind Cas 323 (325) (Mad).

(37) AIR 1937 All 63 (64). (A holding a money decree against B and B holding a money decree against A — A attaching B's decree against himself — B thereafter transferring the decree to C — C held not entitled to execute the decree against A.)

[See also ('38) AIR 1938 Cal 401 (401, 402). (In this case, the assignee wanted to execute the decree for his own exclusive benefit without the liability of paying anything to the attaching decree-holder — It was held that the assignee was not entitled to do so.)]

10. ('39) 43 Cal W N 1076 (1077). (After the decree in favour of A, the attachment operates as a *pro tanto* assignment of the attached decree in favour of A — Per Nasim Ali, J. — After the decree is passed, A becomes entitled to all the rights given by O. 21 R. 53 — Per Mitter, J.)

#### Note 8

1. ('97) 24 Cal 778 (782).

2. ('24) AIR 1924 Bom 383 (384) : 48 Bom 485.

**O. 21 R. 53**  
**Notes 8-10**

not mean that when the holder of the decree sought to be executed makes such an application, the attached decree ceases to be an attached decree; it only means that a period is provided by the rule up to which a stay of execution is to be made by the Court to which notice is sent, to enable the attaching decree-holder to apply for execution of the attached decree.<sup>3</sup>

**9. Execution of attached decree — Sub-rule (2).** — Under sub-rule (2) the attaching decree-holder is entitled to apply for execution of the attached decree. He can take the necessary steps for the realization of the proceeds of the attached decree and apply them in satisfaction of his decree.<sup>1</sup>

**10. Representative — Sub-rule (3).** — Sub-rule (3) makes it quite clear that once a decree has been attached by another decree-holder, the latter becomes a representative of the holder of the attached decree and is entitled to take out execution in the same way as the original holder thereof could have done.<sup>1</sup> See also Note 25 to Section 47.

Thus, where in execution of a decree obtained by *A* against *B*, a decree which *B* holds against a company in liquidation is attached, the Court will direct the liquidator to recognise *A* as the representative of *B* and allow him to prove for the decree debt in the name of *B* and to receive and apply dividends payable to *B* in satisfaction of *A*'s decree debt.<sup>2</sup>

The attaching decree-holder is entitled to take moneys deposited by the judgment-debtor and certify payment.<sup>3</sup> Moneys brought into Court by the judgment-debtor become forthwith available for the satisfaction of the decree sought to be executed and interest ceases to run from the date of the deposit.<sup>4</sup> The attaching creditor has the same remedies as his judgment-debtor and can also proceed against any sureties for the decree amount.<sup>5</sup> If the decree is attached after execution sale but before confirmation, it has been held that the attaching decree-holder is entitled to

**3.** ('85) AIR 1935 Lah 194 (196) : 15 Lah 910.

**Note 9**

**1.** ('93) 17 Mad 58 (60).  
 (1900) 1900 All W N 99 (100). (Death of judgment-debtor after transfer of the attached decree to the attaching Court—Legal representative not to be impleaded.)

[See ('26) AIR 1926 Mad 371 (372, 376). (Debt attached—Subsequent suit and a decree on the debt—Does the attachment fasten itself on the decree without fresh attachment of the decree itself—Yes, per Venkatasubba Rao, J.; No, per Reilly, J.)]

**Note 10**

**1.** ('30) AIR 1930 All 659 (661).  
 ('06) 29 Mad 818 (819).  
 ('98) 16 Mad 20 (22).  
 ('07) 6 Cal L Jour 141 (142). (Acknowledgment in favour of attaching decree-holder saves limitation in favour of the original decree-holder also.)  
 ('28) AIR 1928 Mad 976 (977). (Attachment before judgment of decree—Suit dismissed—Attaching creditor cannot execute.)  
 ('29) AIR 1929 Oudh 413 (414). (Attaching decree-holder becomes a representative only on the date when the attachment is effected.)  
 ('05) 8 Oudh Cas 186 (188).  
 ('14) AIR 1914 Oudh 859 (859) : 17 Oudh Cas 374.

('88) 15 Cal 371 (375).

('85) AIR 1935 All 125 (125). (Attaching decree-holder is entitled to make objection in execution proceedings of that decree.)

('39) AIR 1939 Cal 465 (465, 466). (*A* in execution of a decree against *B*, proceeding against the other properties of *B* and also attaching a decree which *B* had against *C*—*A*'s execution case as regards the other properties of *B* dismissed for default—Held that this was no bar to *A* proceeding with the execution of the attached decree.)

('37) AIR 1937 Lah 368 (369). (Consent as required by Rule 53 (1) (b) (ii) (Lahore) of attaching decree-holder or of attaching Court in writing is necessary only when judgment-debtor wants to execute his own decree—No consent is necessary for attaching decree-holder to execute attached decree.)

[See also ('97) 24 Cal 778 (783).]

**2.** ('07) 30 Mad 533 (535).

**3.** ('80) AIR 1930 All 659 (661).

('39) 48 Cal W N 1076 (1078). (Suit by *A* against *B*—Attachment before judgment of *B*'s decree against *C*—Payment into Court by *C*—Then decree passed in *A*'s suit—*A* is entitled to draw the moneys deposited by *C*.)

**4.** ('21) AIR 1921 Cal 580 (581, 582).

**5.** ('19) AIR 1919 Lah 275 (276) : 1919 Pun Re No. 44.

apply for confirmation of sale in his favour.<sup>6</sup>

Where an alleged attachment under this rule is invalid for want of compliance with the prescribed formalities, the attaching decree-holder does not become the representative of the holder of the attached decree. In such a case, the mere fact that the name of the attaching decree-holder is substituted in the record for that of the original holder of the attached decree will not preclude the judgment-debtor under the latter decree to object to the execution of such decree by the substituted person, when no notice of the substitution was given to him and he had no opportunity to contest the same.<sup>7</sup>

A question arising between a person attaching a decree under this rule and an assignee of such decree will be a question between persons claiming to be representatives of the same party and as such will not be within Section 47 of the Code.<sup>8</sup> See also the undermentioned cases.<sup>9</sup>

**11. Adjustment of attached decree — Sub-rule (6).**— As pointed out by their Lordships of the High Court of Madras in the undermentioned Full Bench decision,<sup>1</sup> clause (6) of the rule provides an exception to the general rule embodied in Section 64 of the Code, and is a special case of the application of the well-known principle of justice and equity intended for the protection of parties to a *bona fide* transaction. After the judgment-debtor under the attached decree receives either through Court or otherwise notice of the order of attachment, any payment or adjustment by him to his decree-holder will not be recognized by the Court.<sup>2</sup> But if such judgment-debtor should, in ignorance of the attachment, have made any payment or adjustment it should be regarded as a payment or adjustment properly made under the decree to the rightful person.<sup>3</sup> The judgment-debtor under the attached decree cannot plead, as against the attaching decree-holder, an uncertified payment or adjustment made before the date of attachment.<sup>4</sup> The reason is that the judgment-debtor could not have successfully raised the same plea as against his decree-holder by reason of the provisions of O. 21 R. 2 *ante*.

The rule prohibits an adjustment between the judgment-debtor under the decree attached and the decree-holder thereof and not an adjustment between the attaching decree-holder and the judgment-debtor.<sup>5</sup>

If an application for execution by the attaching decree-holder is struck off for default, it has been held that the attachment is not put an end to and the judgment-debtor cannot therefore make any payment to his decree-holder. The provisions of

6. ('07) 11 Cal W N 158 (160).

7. ('39) 43 Cal W N 374 (378, 379).

8. ('27) AIR 1927 Mad 1025 (1025, 1026).

[But see ('16) AIR 1916 Cal 471 (472). (Submitted not correct.)]

9. ('85) AIR 1985 Oudh 272 (273) : 11 Luck 26. (Question between holder of attached decree and holder of decree sought to be executed by the attachment is not one between parties to the attached decree and S. 47 does not apply.)

('37) AIR 1937 Cal 177 (178). (Dispute between two persons attaching same decree—Judgment-debtor under attached decree interested — S. 47 applies.)

('39) 43 Cal W N 1076 (1077). (Dispute between attaching decree-holder and another decree-holder against same judgment-debtor in respect of certain moneys lying in Court to the credit of the latter is not within S. 47 and no appeal lies.)

#### Note 11

1. ('27) AIR 1927 Mad 728 (731); 50 Mad 677 (FB).

('19) AIR 1919 Mad 840 (841).

('92) 16 Bom 522 (525).

('02) 6 Cal W N 5 (7). (Service on the judgment-debtor can be implied.)

('81) AIR 1981 Rang 185 (188) : 9 Rang 140. (Adjustment after knowledge of attachment though imperfect is invalid.)

[See also ('21) AIR 1921 Mad 135 (136).]

2. ('75) 24 Suth W R 245 (246).

('32) 1932 All L Jour 792 (794).

('37) AIR 1937 All 63 (64).

3. ('39) 43 Cal W N 374 (377).

('88) AIR 1988 Cal 401 (402).

('89) AIR 1939 Nag 17 (18). (Notice served after adjustment—Adjustment is valid.)

4. ('38) AIR 1938 Rang 289 (240) : 11 Rang 420.

5. ('24) AIR 1924 Pat 696 (698).

**O. 21 R. 53** Rule 57 of this Order do not apply to a default on the part of the attaching decree-holder.<sup>o</sup>  
**Notes 11-12**

**12. Step-in-aid.** — An application for execution of a decree under attachment by the attaching decree-holder is a step-in-aid of execution of the decree within the meaning of Article 182 of the Limitation Act.<sup>1</sup> But an application for attachment of a decree is not a step-in-aid of execution of the attached decree.<sup>2</sup> The reason is that instead of being a step-in-aid of execution, it rather arrests the execution of that decree, for the Court has to stay the execution under clause (b).

**O. 21 R. 54**

**R. 54.** [S. 274.] (1) Where the property is immoveable,<sup>1</sup> the attachment<sup>3</sup> shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed<sup>6</sup> at some place on or adjacent to such property by beat of drum<sup>7</sup> or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property<sup>8</sup> and then upon a conspicuous part of the court-house,<sup>9</sup> and also, where the property is land paying revenue to the Government, in the office of the Collector<sup>10</sup> of the district in which the land is situate.

[1877, S. 274; 1859, Ss. 235, 239. See S. 64 and O. 21 R. 67.]

#### Local Amendments

##### ALLAHABAD

Add the following as sub-rule (3):

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made."

*Note.* — See the undermentioned decision<sup>1</sup> under the sub-rule.

##### BOMBAY

Add the following to sub-rule (1):

"Such order shall take effect, where there is no consideration for such transfer

[But see ('87) AIR 1937 Cal 468 (473). (Attaching decree-holder becomes representative of original decree-holder only for executing attached decree and satisfying his own decree — Attaching decree-holder is not clothed with original decree-holder's right to adjust decree in any way he likes.)]

6. ('14) AIR 1914 All 284 (285).

('85) AIR 1985 Lah 194 (195) : 15 Lah 910.

('27) AIR 1927 Mad 1025 (1028).

[See also ('89) AIR 1989 Cal 465 (465, 466). (A in execution of decree against B attaching B's decree against C and also proceeding against other properties of B—Execution case dismissed

for default as regards the latter — Still, A can execute the attached decree.)]

#### Note 12

1. ('10) 8 Ind Cas 675 (676) (Cal).

('85) 7 All 882 (883).

('12) 18 Ind Cas 179 (179) (Mad).

2. ('84) AIR 1984 Cal 284 (285) : 60 Cal 1857.

**O. 21 R. 54 (Allahabad Amendment.)**

1. ('89) AIR 1989 All 154 (155, 156). (Person taking transfer long before order of attachment had been proclaimed would not be bound by prohibition contained in the order, although order may have been passed on same date—Transferee is entitled to priority on equitable grounds as well.)

or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged."

**O. 21 R. 54****CALCUTTA**

*Add the following as sub-rule (3):*

"(3) Such order shall take effect, where there is no consideration for such transfer, or charge from the date of the order, and where there is consideration for such transfer, or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged, or from the date when the order is proclaimed under sub-rule (2) whichever is earlier."

**LAHORE**

(1). At the end of sub-rule (2), *substitute* a semicolon for full stop and *add* :

"Where the property is land situated in a Cantonment, a copy of the order shall also be forwarded to the Military Estates Officer in whose area that Cantonment is situated."

(2). *Add* following as sub-rule (3):

"(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation, whichever is earlier."

**MADRAS**

*Add the following as sub-rule (3):*

"(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2) whichever is the earlier."

**NAGPUR**

*Add the following as sub-rule (3):*

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made."

*Note.* — See the undermentioned case.<sup>1</sup>

**N.-W. F. P.**

*Add the following as sub-rule (3):*

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made."

**OUDDH**

*Add the following as sub-rule (3):*

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made."

**RANGOON**

*Add the following as sub-rule (3):*

"(3) The order of attachment shall take effect, as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2), whichever is the earlier."

**O. 21 R. 54 (Nagpur Amendment)**

1. ('86) 19 Nag L Jour 94 (97). (The word "purchaser" in sub-rule (3) to R. 54 of O. 21, is used in its technical English legal sense and includes a mortgagee.)

**O. 21 R. 54**  
**Notes 1-3a**

*Synopsis*

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|--|--|
| <ol style="list-style-type: none"> <li>1. Attachment of immovable property — General.</li> <li>2. Attachment of mortgage debt. See Note 4 to Rule 46.</li> <li>3. Immovable property.</li> <li>3a. Attachment of property belonging to a Hindu coparcener.</li> <li>4. Attachment, when complete.</li> <li>5. Service of prohibitory order.</li> </ol> | <ol style="list-style-type: none"> <li>6. Proclamation of order of attachment.</li> <li>7. Beat of drum.</li> <li>8. Affixing copy on conspicuous part of the property.</li> <li>9. Affixing copy in court-house.</li> <li>10. Affixing copy in Collector's office.</li> <li>11. Effect of attachment and re-attachment.</li> <li>12. Absence of attachment and irregular and invalid attachment.</li> </ol> |
|--|--|

**1. Attachment of immovable property—General.** — The rule deals with attachment of *immovable property*. The word "attachment" in Section 64 of the Code means, so far as immovable property is concerned, an attachment effected in the manner provided for by this rule.<sup>1</sup> An attachment is a necessary preliminary to execution proceedings<sup>2</sup> and the object of the rule in prescribing a particular way of notifying the attachment is, as pointed out by Mahmood, J., in *Ganga Din v. Khushali*,<sup>3</sup> "to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him."

See Note 2 to Section 64, *ante*.

As already pointed out in Rule 53 above, a decree, though relating to immovable property, is not itself immovable property, and cannot be attached as such under this rule but only under Rule 53.<sup>4</sup>

This rule extends to attachment of immovable property under the Chota Nagpur Tenancy Act, VI of 1920. See Section 50.

**2. Attachment of mortgage debt.** — See Note 4 to Rule 46.

**3. Immovable property.** — See Note 4 to Section 16, *ante*, for the meaning of the words "immovable property." The following have been held to be immovable property within the meaning of this rule —

- (1) The equity of redemption in a mortgage.<sup>1</sup>
- (2) The life interest taken by a Parsee widow under her husband's will in the income of his immovable property.<sup>2</sup>

**3a. Attachment of property belonging to a Hindu coparcener.** — An attachment of the share of an undivided coparcener in a joint Hindu family should be made in respect of his undivided share in the *whole family property*, and not of his share in *each item* of it.<sup>1</sup> Such an attachment has the effect of preventing the accrual of title by survivorship to the other members, in the event of the member,

**Order 21 Rule 54 — Note 1**

1. ('17) AIR 1917 Cal 832 (832).
2. ('80) AIR 1930 Pat 108 (110) : 8 Pat 801.
- ('88) 5 All 86 (91).
- ('91) 15 Bom 222 (228) : 18 Ind App 22 (PC). (No attachment is necessary in the case of mortgage decree for sale.)
- ('80) 4 Bom 515 (520). (Do.)
- ('94) 21 Cal 639 (641). (Do.)
- ('95) 18 Mad 437 (439). (Do.)
- [See ('88) 12 Bom 368 (370). (Do.)
- ('99) 26 Cal 127 (129). (Do.)]

3. ('85) 7 All 702 (707).

4. ('19) AIR 1919 Nag 19 (19) : 16 Nag L R 252.

('02) 6 Cal W N 5 (6).

('86) 10 Bom 444 (447).

[But see ('71) 9 Bom H O R 64 (65). (Not good law.)]

**Note 3**

1. ('21) AIR 1921 Cal 801 (803).
- ('97) 21 Bom 226 (228).
2. ('99) 28 Bom 1 (11).

**Note 3a**

1. ('20) AIR 1920 Mad 1085 (1086).

whose share is attached, dying after attachment and before sale.<sup>3</sup>

**4. Attachment, when complete.** — An attachment under this rule is not complete unless *first*, the order of attachment has been issued and *secondly*, in execution of that order, the other formalities prescribed by the Code have been complied with.<sup>1</sup> No notice is necessary before ordering an attachment of property.<sup>2</sup> See for a full discussion Note 3 to Section 64, *ante*.

**5. Service of prohibitory order.** — The mere writing of an order is not enough. It must be served on the judgment-debtor and he must have an opportunity of knowing that he is prohibited.<sup>1</sup> There is a presumption that official acts are regularly performed. Where it was found that the prohibitory order was duly served on the judgment-debtors, but that portion of the record which would show that the service was effected in the prescribed manner had been destroyed, it was held that the execution sale was not vitiated on that account.<sup>2</sup>

Where the property to be attached is within the jurisdiction of the Court, there is nothing to prevent the Court from issuing the prohibitory order to the judgment-debtor living outside the jurisdiction of the Court.<sup>3</sup>

**6. Proclamation of order of attachment.** — A mere prohibitory order will not constitute a sufficient attachment so as to operate as a valid prohibition against any alienation by the judgment-debtor unless the proclamation described in the second part of the rule is carried out.<sup>1</sup> The publication of the proclamation as required by

**O. 21 R. 54**  
**Notes 3a-6**

2. ('14) AIR 1914 Mad 68 (68).

('82) 4 Mad 302 (307).

('26) AIR 1926 All 157 (158) : 48 All 4.

('92) 20 Cal 895 (899).

('14) AIR 1914 Mad 118 (118). (Attachment before judgment followed by decree has the same effect.)

('94) 17 Mad 144 (145). (Attachment before judgment — Defendant dying before decree — Held survivorship not affected.)

[But see ('14) AIR 1914 Bom 256 (257) : 21 Ind Cas 830 (832): 38 Bom 105. (Attachment before judgment without an order for sale is not sufficient to operate as a bar to survivorship.)]

#### Note 4

1. ('31) AIR 1931 Cal 763 (766) : 58 Cal 598.

('84) AIR 1934 Rang 207 (208).

('83) AIR 1933 Cal 212 (212): 59 Cal 1176. (Copy of prohibitory order not affixed on the court-house—Attachment is not effective.)

('18) AIR 1918 Cal 489 (489).

('68) 1 Beng L R (SN) XX.

('27) AIR 1927 Mad 450 (452).

('05) 1 Cal L Jour 565 (570).

('37) AIR 1937 Cal 7 (8). (Failure to affix order on court-house—No valid attachment — But that fact will not affect the right of person obtaining order of attachment to apply under O. 21 R. 90 to set aside sale of property in execution of another decree held after his order of attachment and decree.)

('37) AIR 1937 Lah 671 (672). (Omission to affix notice, etc., and make proclamation cannot be looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment.)

('39) AIR 1939 Mad 793 (793).

[See also ('38) AIR 1938 Lah 16 (17). (All formalities except that of affixing order on conspicuous part of court-house proved — No evidence to the contrary—Attachment is presumed to be valid.)]

[See however ('38) AIR 1938 Cal 286 (237). (Conditional order of attachment under O. 38, R. 5—No process issued under O. 21 R. 54 but bailiff observing all formalities required by R. 54 — Attachment held to be effectual.)]

2. ('36) AIR 1936 Nag 77 (78).

#### Note 5

1. ('19) AIR 1919 Mad 594 (595) : 42 Mad 565.

('05) 27 All 258 (259). (Warrant of attachment should show the amount for which property is attached.)

[See also ('39) AIR 1939 Mad 793 (793, 794). (Prohibitory order must be passed by the Court, and it is not enough for the Court to say "attach" and for the amin to say "I have attached" to constitute a valid attachment.)]

2. ('24) AIR 1924 All 747 (748) : 48 All 741.

3. ('39) AIR 1939 Rang 433 (434): 1939 Rang L R 587 (588, 599).

#### Note 6

1. ('23) AIR 1923 Lah 423 (424) : 4 Lah 211.

('29) AIR 1929 All 846 (847).

('27) AIR 1927 Cal 885 (886) : 55 Cal 545.

('28) AIR 1928 Pat 600 (602) : 8 Pat 1.

('25) AIR 1925 Rang 89 (91). (Warrant of attachment not legal evidence against person disputing it.)

[See also ('37) AIR 1937 Cal 375 (376). (Attachment before judgment—Order of attachment in form No. 5 of Appendix F published—No publi-

**O. 21 R. 54**  
**Notes 6-10**

the rule constitutes sufficient notice to the judgment-debtor.<sup>2</sup>

The proclamation is merely a *ministerial act*, and the delay on the part of the officer in effecting it, as for instance, where an attachment which was ordered before judgment is not completed till after judgment, does not vitiate the proceedings.<sup>3</sup> As to the effect of the omission to publish the sale proclamation, see Notes to Rule 90, *infra*.

See also the undermentioned case.<sup>4</sup>

**7. Beat of drum.** — A proclamation of attachment should be made by beat of drum at some place on or adjacent to the property attached. The omission to have the drum beaten as required by the rule is a material irregularity which will vitiate the execution sale.<sup>1</sup>

**8. Affixing copy on conspicuous part of the property.** — A copy of the proclamation order must be affixed on a conspicuous part of the property.<sup>1</sup> Where *prima facie* this is not done, it is a material irregularity which will afford a ground for setting aside the execution sale.<sup>2</sup>

**9. Affixing copy in court-house.** — A copy of the proclamation of sale must, under Rule 67, *infra*, read with this rule, be affixed on a conspicuous part of the court-house and, under Rule 68 the sale must take place only after the expiration of at least 30 days from the day on which it was so affixed.<sup>1</sup>

An omission to affix a copy of the attachment order in a conspicuous part of the court-house is also a material irregularity within the meaning of Rule 90.<sup>3</sup>

Where the process-server's report which purports to say what was done by him, omits to mention that a copy of the attachment order was affixed on the court-house, it must be presumed, until the contrary is proved, that such copy was not affixed, and the attachment must be held to be invalid.<sup>3</sup>

**10. Affixing copy in Collector's office.** — Where the property attached is land paying revenue to Government, the rule requires, in addition, that the order of attachment should be affixed in the Collector's office.<sup>1</sup> Rent payable in the case of

cation of attachment in form No. 24, Appendix E as laid down under O. 21 R. 54—Attachment is invalid — No reference in order sheet to O. 21, R. 54 or to publication of attachment order as required by it — No presumption under S. 114, Evidence Act, can be drawn that attachment was properly made.))

2. ('26) AIR 1926 Oudh 45 (46).
- ('39) AIR 1939 Rang 434 (435) : 1939 Rang L R 594 (S B). (Personal service of the prohibitory order on the judgment-debtor is not necessary.)
- ('36) AIR 1936 Rang 408 (405). (Personal service on judgment-debtor not necessary.)
3. ('19) AIR 1919 Mad 752 (753) : 42 Mad 1.
4. ('33) AIR 1933 Oudh 225 (226). (Process fee for proclamation of order of attachment—Non-payment of—Held in circumstances of case there was no negligence on decree-holder's part and that dismissal of execution application for default was not justified.)

**Note 7**

1. ('86) 10 Bom 504 (505).
- ('82) AIR 1982 Oudh 76 (76). (Drum not beaten owing to resistance—Order proclaimed in a loud voice—Held there was sufficient compliance.)

**Note 8**

1. ('81) 7 Cal 466 (469).
- ('85) AIR 1985 Lah 57 (58). (Mere affixture in the village is not sufficient compliance.)
- ('76) 25 Suth W R 864 (865).
- ('28) AIR 1928 Pat 25 (27) : 6 Pat 588. (A separate proclamation of sale need not be served on every mauza comprising an estate or tenure.)
- ('86) AIR 1986 Rang 408 (405). (Single parcel of land with buildings thereon — Copy of order of attachment may be affixed on any building or conspicuous part of land.)
2. ('23) AIR 1923 Lah 671 (671).
- ('97) 1897 Pun Re No. 5, page 20.
- ('78) 1878 Pun Re No. 82, page 180.
- ('18) AIR 1918 Pat 266 (268).

**Note 9**

1. ('18) AIR 1918 Nag 213 (214).
2. ('20) AIR 1920 Lah 24 (25).
- [See also ('80) 2 All 58 (60).]
- [See however ('98) 1898 Pun Re No. 88, p. 291.]
3. ('89) AIR 1989 Lah 284 (285).

**Note 10**

1. ('81) AIR 1981 Pat 58 (59) : 9 Pat 860.
- ('82) 8 Cal 982 (982). (Decision under O. 21 R. 67.)



enfranchised *shrotriem* villages in the Presidency of Madras is "revenue" within the meaning of this rule and the procedure prescribed should be followed in attaching such properties.<sup>2</sup> Where a house stands on a site which is assessed to revenue, the property is still land paying revenue to Government and omission to affix a copy of the order in the Collector's office constitutes a material irregularity under Rule 90, *infra*.<sup>3</sup>

See also the undermentioned case.<sup>4</sup>

**11. Effect of attachment and re-attachment.**—An attachment under this rule does not constitute dispossession of the party in actual possession.<sup>1</sup> Nor does it confer any interest or title in the property in favour of the attaching party.<sup>2</sup> As noticed in Note 5 to Section 64 *ante*, the effect of attachment is to restrain alienation by the judgment-debtor and any rights acquired by reason of a private transfer subsequent to the attachment are void against all claims enforceable under the attachment.<sup>3</sup> But, an agricultural lease granted by a landlord in the *ordinary course of management* would not be prohibited under this rule.<sup>4</sup> It has also been held that a sale effected in pursuance of a contract for sale entered into before the attachment is not affected by the attachment.<sup>5</sup>

A re-attachment of property *ex majori cautela* after decree does not imply an abandonment of the attachment obtained before decree.<sup>6</sup> See also Note 7 to Section 64.

**12. Absence of attachment and irregular and invalid attachment.**—Attachment is a step taken only in order to keep the property of the judgment-debtor intact and to enable the decree-holder to bring it to sale. It is a step in execution designed for the protection of the judgment-creditor and not for the benefit of the judgment-debtor.<sup>1</sup> Where, therefore, a sale takes place without the property sold having been attached, it is not a nullity and will not be set aside unless substantial loss or injury is proved to have resulted therefrom.<sup>2</sup> The absence of attachment is only an *irregularity* which does not affect the jurisdiction of the Court to sell.<sup>3</sup> Similarly, any

2. ('24) AIR 1924 Mad 217 (219, 223); 46 Mad 736.

3. ('25) AIR 1925 Lah 583 (584).

4. ('84) AIR 1984 PC 217 (218); 61 Ind App 371 : 15 Lah 836 (P C). (Attachment proved—Fixing of copy of order in Collector's Office may be presumed under S. 114, Evidence Act.)

#### Note 11

1. ('80) 4 Bom 529 (535).

2. ('26) AIR 1926 Sind 199 (200) : 19 Sind L R 35.

3. ('26) AIR 1926 Mad 42 (43). (Adverse possession not put an end to by attachment.)

4. ('07) 30 Mad 207 (209). (Attaching creditor cannot maintain an action for wrongful removal of attached property.)

[See however ('86) AIR 1986 Nag 120 (120, 121) : 31 Nag L R Sup 212. (Immoveable property attached in execution is in possession of Court.)]

5. ('29) AIR 1929 Bom 200 (201).

6. ('38) AIR 1938 Mad 860 (863) : ILR (1938) Mad 744 (F B). (Hence attaching creditor is not secured creditor.)

See also Note 5 to S. 64.

3. See Notes 5 and 10 to S. 64 and also the following cases :

1. ('03) All 481 (484). (Property not belonging to judgment-debtor attached—Rightful owner not prevented from alienating.)

2. ('89) 1889 All W N 182 (183).

3. ('17) AIR 1917 Cal 281 (282).

4. ('73) 14 Moo Ind App 543 (549, 550) (P C).

5. ('08) 1908 Pun Re No. 81, page 381.

6. ('93) 1893 Pun Re No. 139, page 540. (Property not belonging to judgment-debtor attached—Rightful owner not prevented from alienating.)

7. ('27) AIR 1927 Mad 190 (191).

8. ('35) AIR 1935 Lah 71 (75) : 16 Lah 328.

[See also ('37) AIR 1937 Mad 811 (812).]

9. ('36) AIR 1936 All 265 (266). (Attachment of *malguzari* share—Letting out lands in ordinary course of management is not prohibited—Such power however cannot be exercised to defraud attaching creditor.)

10. ('85) AIR 1935 Mad 872 (873) : 59 Mad 1. (Attachment fastens to debtor's right to unpaid purchase money.)

11. ('15) AIR 1915 Mad 386 (386).

12. ('16) AIR 1916 Pat 353 (355).

#### Note 12

1. ('34) AIR 1934 Bom 241 (243).

2. ('18) AIR 1918 Mad 1262 (1263).

3. ('12) 16 Ind Cas 438 (438) (Mad).

4. ('98) 8 Mad L Jour 1 (3).

5. ('16) AIR 1916 Cal 465 (467, 468).

6. ('07) 34 Cal 787 (802).

7. (1900) 25 Cal 789 (792).

8. ('91) 18 Cal 188 (192).

9. [But see ('88) 10 All 506 (511).]

10. ('99) 21 All 811 (814).

11. ('30) AIR 1930 Lah 686 (686).

**O. 21 R. 55**  
**Note 12**

defect or error in the *mode* of attachment is only an irregularity which does not render the sale *ipso facto* void.<sup>4</sup> See Notes to Rule 90, *infra*.

But as between the decree-holder and the auction-purchaser on the one hand, and an alienee from the judgment-debtor on the other, different equities come into operation.<sup>5</sup> As pointed out in Note 4, a *regularly perfected attachment* is a condition precedent to a restraint on alienation after attachment so as to attract the provisions of Section 64.<sup>6</sup> A private alienation of property after an order of attachment which has not been carried into effect is valid unless proof is given that all the requirements of the rule have been complied with.<sup>7</sup>

An attachment which is *prima facie invalid* as, for instance, where the decree is set aside on appeal at the time of attachment, cannot confer any jurisdiction on the Court to sell, and the sale, if held in pursuance of such attachment, is *void*.<sup>8</sup>

**O. 21 R. 55**

Removal of attachment after satisfaction of decree.

**R. 55. [S. 275.] Where —**

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

[1877, S. 275; 1859, S. 245. See Rule 57 and Order 38 Rule 9.]

4. ('10) 6 Ind Cas 713 (715): 1910 Pun Re No. 40. ('85) 7 All 781 (783). (Order not affixed in Collector's office.)

('96) 18 All 469 (471). (Attachment under wrong provision of law.)

('19) 52 Ind Cas 167 (167) (Upp Bur B. R.). (Case of revenue sale.)

('30) AIR 1930 Cal 358 (355).

('91) 18 Cal 422 (426).

('07) 5 Cal L Jour 80 (84).

('07) 6 Suth W R Misc 52 (58).

('95) 5 Mad L Jour 70 (73, 74). (Delay in affixing sale proclamation.)

('28) AIR 1928 Nag 78 (79).

('10) 5 Ind Cas 798 (799): 18 Oudh Cas 48.

[See ('29) AIR 1929 Lah 441 (442).]

[But see ('90) 1890 Pun Re No. 76, page 227.]

5. ('16) AIR 1916 Oudh 169 (178).

6. ('85) 7 All 702 (708, 710).

('85) AIR 1985 Lah 57 (59). (Failure to affix copies of order on conspicuous part of the attached property.)

('81) 3 All 698 (701).

7. ('14) AIR 1914 Oudh 308 (309).

('38) AIR 1938 Cal 212 (212): 59 Cal 1176. (Mortgage after order of attachment but before affixing copy of order on court-house — Mortgage prevails over attachment.)

('83) AIR 1983 Rang 198 (199). (Copy of order not affixed in the office of the Collector.)

('16) AIR 1916 Cal 185 (185).

('70) 4 Beng L R AC 24 (26).

('68) 10 Suth W R 264 (266).

('05) 9 Cal W N 698 (694). (Order not affixed on court-house — Transfer held valid.)

('78) 2 All 58 (60). (Copy not affixed on conspicuous part of the property.)

('67) 2 Agra 206 (208, 209).

8. ('06) 29 Mad 175 (176).

## Local Amendments

O. 21 R. 55

## ALLAHABAD

*Substitute* the following for Rule 55 :

"55. (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under Section 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

(2) Where —

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)], is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] is set aside or reversed,

the attachment shall be deemed to be withdrawn, and in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

## ODDH

*Substitute* the following for Rule 55 :

"55. (1) Where an application has been made to the Court under Section 73, sub-section (1), for rateable distribution of assets in respect of the property of a judgment-debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed, notice shall be sent to the sale officer executing the decree.

(2) Where —

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court; or

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] is otherwise made through the Court or certified to the Court; or

(c) the decree [including any decree, passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] is set aside, or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

*Note.* — See the undermentioned case.<sup>1</sup>

*Synopsis*

1. Legislative changes.

2. Scope of the Rule.

3. "Attachment shall be deemed to be withdrawn."

4. Revival of attachment.

**O. 21 R. 55 (Oudh Amendment)**

1. ('86) 164 Ind Cas 1081 (1082) (Oudh). (Unless along with the decree of the attaching creditor,

the decree of an applicant for rateable distribution is also satisfied, the attachment shall not be deemed to be withdrawn.)

**O. 21 R. 55**  
**Notes 1-3**

**1. Legislative changes. —**

1. The words "or certified to the Court" are new.
2. The words "the attachment shall be deemed to be withdrawn, etc.," have been substituted for the words "an order shall be issued . . . . . for the withdrawal of attachment."

**2. Scope of the Rule. —** On any of the three things mentioned in clauses (a), (b) and (c) happening; the attachment is automatically deemed to be withdrawn. No express order is now necessary, as it was, under the old Code.<sup>1</sup>

The rule applies only where the decree is fully and entirely satisfied.<sup>2</sup> An attachment cannot be partially raised by consent of parties without an express order of the Court.<sup>3</sup>

The words "amount decreed" mean, in the case of an instalment decree, the instalment which has become due and in respect of which the attachment has been made.<sup>4</sup>

A mere tender of money before the Judge is not sufficient to entitle the judgment-debtor to have the sale of properties stayed; the law contemplates that payment should be made in accordance with the rules and forms of the Court.<sup>5</sup>

It is the duty of the judgment-debtor to apprise the Court of the fact of satisfaction of the decree; otherwise, if the Court executes the decree in ignorance of the satisfaction thereof, the sale will not be held to be invalid on that ground alone.<sup>6</sup>

This rule applies to proceedings in respect of immovables under the Chota Nagpur Tenancy Act : see Section 210 (3) (b), Bengal Act, VI of 1908, as amended by Bihar and Orissa Act, VI of 1920, Section 50 (1).

As to whether money paid under this rule is available for rateable distribution to other decree-holders who have not attached the properties, see Note 4 to Section 73 *ante*, and also the undermentioned case<sup>7</sup> under the Allahabad amendment to this rule.

The rule is not exhaustive of the modes in which attachment ceases.<sup>8</sup> Thus, an attachment ceases as soon as the sale of the property attached takes place.<sup>9</sup>

**3. "Attachment shall be deemed to be withdrawn." —** As has been seen already, an attachment will automatically cease on payment made under clause (a). Where, therefore, by reason of such payment an attachment ceases, another decree-holder who has applied for execution against the same judgment-debtor, but who has not attached the properties, cannot have the property sold under the attachment that has ceased.<sup>1</sup>

Even under the old Code it was held that, on payment of the decree-amount into Court, the attachment became inoperative even though it was not formally withdrawn,<sup>2</sup> and that a private alienation after the attaching creditor had been satisfied would prevail against subsequent attachments.<sup>3</sup>

**Order 21 Rule 55 — Note 2**

1. ('09) 4 Ind Cas 97 (97) (Mad).
2. ('12) 15 Ind Cas 677 (678) (All).
3. ('27) AIR 1927 Mad 648 (649).
4. ('28) AIR 1928 Nag 65 (66).
5. 2 Hay 302.
6. ('11) 9 Ind Cas 472 (474) (Low Bur).
7. ('84) AIR 1984 All 896 (897). (Applicant for rateable distribution is on the same footing as attaching decree-holder.)
8. ('87) AIR 1987 Cal 890 (892). (O. 21 R. 60

mentions one of the circumstances under which attachment may be withdrawn.)

('87) AIR 1987 Pesh 90 (91).

9. ('87) AIR 1987 Pesh 90 (91). (Attachment ceases with sale and does not subsist till confirmation—Therefore objection under O. 21 R. 58 cannot be considered after sale.)

**Note 3**

1. ('11) 12 Ind Cas 911 (912): 86 Bom 156.
2. ('05) 28 Mad 380 (385).
3. ('08) 1908 Pun Re No. 81, page 381.

As seen in Note 4 to Section 73 *ante*, the payment under this rule is subject to the claims of other decree-holders for rateable distribution. It has been held that where the decretal amount is paid into Court under clause (a) of this rule but owing to the claims of other decree-holders for rateable distribution, the attaching decree-holder gets only a portion of the money deposited, the attachment will not cease.<sup>4</sup> The reason given is that the rule contemplates a cessation of attachment only on the decree being fully satisfied.

**O. 21 R. 55.**  
**Notes 3-4**

**4. Revival of attachment.** — The rule provides that the attachment shall be deemed to be withdrawn when the decree is set aside or reversed. But, if on second appeal, the reversal of the decree by the first Appellate Court is in turn reversed and the original decree restored, the attachment will be revived and a sale can be ordered on the strength thereof.<sup>1</sup> See also Note 9 to Section 64.

**R. 56.** [S. 277.] Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

**O. 21 R. 56.**

Order for payment of coin or currency notes to party entitled under decree.

[1877, S. 277 ; 1859, S. 242. See Rr. 64, 79 and 81. *Cf.* O. 39, R. 10.]

**1. "Current coin."** — The word "current" has been newly added before the word "coin." If the coin is not current, it has to be dealt with as any other moveable property.

**R. 57.** [New.] Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

**O. 21 R. 57.**

Determination of attachment.

[See Rr. 55, 60 and 63. *Cf.* O. 38, Rr. 8, 9 and 11.]

(192) 16 Bom 91 (106).

(182) 8 Cal 279 (281).

4. (199) AIR 1989 Pat 892 (896); 18 Pat 404. (Per Manohar Lall, J.)

**Note 4**

1. (118) AIR 1918 Oudh 275 (278).

[See however (137) AIR 1987 Lah 169 (170,

171). (Attachment in execution of decree — Reversal of decree and consequent order removing attachment — Subsequent decree after remand in favour of decree-holder — Original attachment cannot revive and alienation between removal of original attachment and subsequent attachment is not void.)]

**Q. 21 R. 57**  
**Note 1**

### Local Amendments

#### CALCUTTA

*Add the following words at the end of the rule :*

"Unless the Court shall make an order to the contrary."

#### MADRAS

*Substitute the following for Rule 57 :*

"57. (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date, it shall state whether the attachment continues or ceases: Provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease.

(2) Where the property attached is a decree of the nature mentioned in sub-rule (1) of Rule 53 and the Court executing the attached decree dismisses the application for execution of the attached decree, it shall report to the Court which attached the decree the fact of such dismissal. Upon the receipt of such report the Court attaching the decree shall proceed under the provisions of sub-rule (1) and communicate its decision to the Court whose decree is attached."

#### NAGPUR

*Substitute the following rule for Rule 57 :*

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist."

#### N.-W. P. P.

*Cancel the concluding sentence of Rule 57, "upon the dismissal . . . shall cease", and substitute the following :*

"In dismissing such application the Court shall direct whether the attachment shall continue or cease. In the absence of any such direction the attachment shall be deemed to cease."

#### ODDH

*Substitute the following for Rule 57 :*

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist."

#### PATNA

*Delete the last sentence and add the following sub-paragraph :*

"Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs."

### Synopsis

1. Scope and object of the Rule.
2. "By reason of the decree-holder's default."
3. Effect of dismissal of application.
4. Dismissal of application by Collector.
5. Execution removed from file for statistical purposes.

6. Responsibility of sapurdar of attached property after dismissal for default.
7. Revival of attachment, when possible.
8. Attachment before judgment.
9. Default in executing attached decree. See Note 11 to Rule 58.

### Other Topics (miscellaneous)

Limitation inapplicable to execution petition subsequent to "striking off" order. See Note 5.  
Not retrospective. See Note 1.

Proper course on default. See Note 5.

"Striking off"—Effect. See Note 5.

**1. Scope and object of the Rule.** — This rule is new. There was no corresponding provision in the Code of 1882, enabling the executing Court to dismiss

an execution application when the decree-holder was not diligent in prosecuting the same. The Court could not act under Chapter VII (now Order 9) or under Section 157 (now O. 17 R. 2) as those provisions applied only to *suits*; nor could the Court apply those provisions by virtue of Section 647 (now Section 141), inasmuch as the Judicial Committee held in *Thakur Prasad v. Fakirulla*, I. L. R. 17 Allahabad 106 (P. C.), that that Section did not apply to execution proceedings. Hence, with a view to prevent the accumulation of execution applications from encumbering the files of the Courts and in order to show a better statistical return, the subordinate Courts resorted to the practice of disposing of them by passing such orders as "recorded" or "struck off" on such applications. Such a practice was not authorized by the provisions of the Code and, in spite of the fact that the High Courts condemned the same,<sup>1</sup> and although a Full Bench of the High Court of Allahabad<sup>2</sup> pointed out that the Court could, under its *inherent* power, *dismiss* an application for the laches of the decree-holder, this unauthorized practice nevertheless persisted. Such disposals also led to further doubts and complications as to whether an attachment previously effected did or did not subsist after the passing of the order. It was held in several cases that the attachment was not necessarily put an end to by reason of the order "striking off" the application and that it was a question of *intention* depending on the circumstances of each case as to whether or not it subsisted.<sup>3</sup>

The present rule proscribes the procedure to be followed, where after attachment in execution, the application for execution cannot further be proceeded with *by reason of the decree-holder's default*.<sup>4</sup> The object of the rule is —

- (1) to put an end to the practice of disposing of execution applications by such orders as "application struck off" or "lodged";<sup>5</sup> and,
- (2) to remove the doubt that existed under the old Code as to the effect of an order of dismissal upon attachment, by providing in explicit terms that the attachment should cease upon the dismissal, *irrespective of any question of intention*.<sup>6</sup>

Under the present rule, the Court should not "strike off" execution applications for default of the decree-holder.<sup>7</sup> If it does pass such an order, it will be deemed to be one of dismissal.<sup>8</sup>

The provisions of this rule have been held to have no retrospective effect and do not apply to orders passed before the coming into force of the present Code.<sup>9</sup>

**2. "By reason of the decree-holder's default."** — The default referred to by the rule is not confined merely to a default in appearance or in the payment of

#### Order 21 Rule 57 — Note 1

1. ('84) 10 Cal 416 (422).
- ('95) 18 All 49 (51).
- ('98) 15 All 84 (90, 95).
2. ('98) 15 All 84 (95).
3. ('12) 14 Ind Cas 264 (265): 36 Mad 553.
- ('16) AIR 1916 Mad 1104 (1104, 1105).
- ('19) AIR 1919 Mad 1001 (1002, 1008).
- ('15) AIR 1915 All 371 (372): 37 All 542.
- ('11) 10 Ind Cas 245 (246) (All).
- ('97) 19 All 482 (488).
- ('68) 2 Beng L R A O 86 (92).
- ('78) 20 Suth W R 188 (186) (P C).
- ('96) 1 Cal W N 617 (621).
- ('81) 8 Cal L Rep 157 (160).
- ('82) 11 Cal L Rep 17 (21, 22).
- [But see ('74) 21 Suth W R 66 (68).]
4. ('29) AIR 1929 Cal 465 (466): 56 Cal 416.

- ('37) 1937 Mad W N 480 (486).
5. ('19) AIR 1919 Lah 387 (389): 1919 Pun Re No. 154.
- ('15) AIR 1915 Mad 885 (886).
- [See also ('17) AIR 1917 Mad 705 (705).]
6. ('11) 9 Ind Cas 558 (560): 38 Cal 482.
- ('22) AIR 1922 Lah 108 (109): 3 Lah 7.
7. ('80) AIR 1930 Bom 16 (20).
8. ('19) AIR 1919 All 194 (196): 41 All 157.
- ('13) 18 Ind Cas 441 (442) (Cal).
- ('24) AIR 1924 Lah 645 (645, 646).
- ('29) AIR 1929 Nag 82 (82).
- ('80) AIR 1930 Rang 325 (326). (The order closing the proceedings treated as dismissal of application.)
9. ('15) AIR 1915 Mad 1121 (1122).
- ('16) AIR 1916 Mad 890 (890).
- ('16) AIR 1916 Mad 1104 (1105).

**O. 21 R. 57**  
**Notes 1-2**

**O. 21 R. 57**  
**Notes 2-3**

process fees, or in production of documents. It means failure to do what one is legally bound to do, that is, to go on with the application and have the property sold.<sup>1</sup> Thus, an omission to serve notice on the judgment-debtor as required by Rule 66 of this Order,<sup>2</sup> or failure to furnish any information called for by the Court,<sup>3</sup> amounts to a default within the meaning of this rule. Similarly, if the decree-holder withdraws his application,<sup>4</sup> or requests the Court to strike it off,<sup>5</sup> or consents to an application for adjournment of the sale made by the judgment-debtor,<sup>6</sup> he thereby precludes himself from proceeding with the execution application and the Court can dismiss the same for default under this rule. But an omission to do anything which he is not under an obligation to do, such as not being present at the time of the sale, or his failure to bid at such sale, does not constitute a default<sup>7</sup> and, therefore, a dismissal of the application for want of bidders at the sale will not have the effect of putting an end to the attachment under this rule.<sup>8</sup>

The default contemplated by this rule refers to a stage *after* the attachment and not *before* the attachment. Applying this principle, the High Court of Madras has held in a case where, though there was an attachment, the parties as well as the Court were proceeding in ignorance of the attachment, as though there was none, the dismissal of the application at a stage when the Court thought that the attachment was yet to be effected, does not come within the scope of this rule.<sup>9</sup> This view has also been followed by the Lahore High Court.<sup>10</sup>

As to the effect of dismissal on a ground other than the default of the decree-holder, see Note 3 below.

**3. Effect of dismissal of application.** — Where an execution application is dismissed for default of the decree-holder under this rule, the attachment previously effected ceases forthwith.<sup>1</sup> No question of any intention arises, under the present Code; a mistaken impression on the part of the decree-holder that the attachment continued notwithstanding the dismissal of the application or the fact that he prays for sale only of the attached property in a subsequent petition will not have the effect of nullifying the imperative provisions of this rule.<sup>2</sup> The decree-holder can only apply for a *fresh attachment* and then bring the property to sale, if he wants to proceed against that property.<sup>3</sup>

**Note 2**

1. ('19) AIR 1919 All 194 (195, 196) : 41 All 157.

('34) AIR 1934 Lah 895 (896).

('85) AIR 1935 Mad 17 (20).

('11) 9 Ind Cas 558 (560) : 38 Cal 482.

('24) AIR 1924 Lah 645 (645, 646).

('22) AIR 1922 Lah 108 (109, 110) : 8 Lah 7.

('20) AIR 1920 Oudh 175 (176, 177) : 28 Oudh Cas 166.

('34) AIR 1934 Lah 697 (698).

('88) AIR 1938 Bom 18 (20) : I L R (1937) Bom 890.

2. ('11) 9 Ind Cas 558 (560) : 38 Cal 482.

('13) 18 Ind Cas 441 (442) (Cal). (Proclamation not made.)

3. ('26) AIR 1926 Mad 980 (983) : 50 Mad 67.

4. ('25) AIR 1925 Mad 1113 (1114).

5. ('24) AIR 1924 Lah 645 (646).

('29) AIR 1929 Nag 82 (82).

[See also ('38) AIR 1938 Lah 590 (592). (Execution application consigned to record room at decree-holder's request—*Held*, application dismissed for default.)]

6. ('28) AIR 1928 Pat 446 (447).

7. [See ('38) AIR 1938 Lah 728 (728, 729). (Omission to do an unnecessary thing is no default. A I R 1938 Lah 123, Reversed.)]

8. ('23) AIR 1923 Mad 708 (708).

[But see ('33) AIR 1933 Rang 169 (171).]

9. ('23) AIR 1923 Mad 708 (705).

10. ('38) AIR 1938 Lah 728 (728, 729) (AIR 1938 Lah 123, Reversed.)

**Note 3**

1. ('23) AIR 1923 Bom 30 (31) : 46 Bom 942.

('13) 20 Ind Cas 149 (150) (Cal).

('22) AIR 1922 Lah 108 (110) : 8 Lah 7.

('23) AIR 1923 Pat 446 (447).

[See ('34) AIR 1934 Lah 697 (698). (On dismissal of execution application for default under this rule the execution proceedings come to a close and any intermediate order passed in the course of such proceedings becomes a nullity.)]

2. ('15) AIR 1915 Mad 337 (337).

3. ('13) 20 Ind Cas 149 (150) (Cal).

[See ('14) AIR 1914 Mad 312 (312). (Application for arrest dismissed — Attachment not put an end to.)]



Where the Court passes an order "Petition dismissed, attachment to continue", what is the legal effect of the direction regarding the continuance of the attachment? On the one hand, the High Courts of Calcutta,<sup>4</sup> Lahore<sup>5</sup> and Madras<sup>6</sup> and the Judicial Commissioner's Court of Nagpur<sup>7</sup> have held that the direction is of no legal effect or consequence and that attachment ceases forthwith. The High Court of Allahabad<sup>8</sup> has, on the other hand, held that the order though not a proper one, cannot be treated as a nullity having no effect upon the parties, but that it should be treated as an order adjourning the case *sine die*. Under the rule as amended in Nagpur in 1930, the Court has power, while dismissing an application for execution, to continue the attachment.<sup>9</sup>

The rule applies, in terms, only to cases of dismissal by reason of the *decree-holder's default*. Where the dismissal is not due to the default of the decree-holder, the question whether the attachment ceases by reason of the dismissal, depends upon the circumstances of each case.<sup>10</sup> It has thus been held that where the dismissal is due to a mistake of the Court,<sup>11</sup> or in consequence of an order of stay,<sup>12</sup> or of injunction<sup>13</sup> passed by a competent Court, the attachment is not put an end to by reason of the order of dismissal. But the Court has power to direct even in such cases by an *explicit order*, that the attachment should cease even though there is no default on the part of the decree-holder.<sup>14</sup>

**4. Dismissal of application by Collector.** — Where execution proceedings are transferred to the Collector he has power to dismiss the execution application for default under this rule, and upon such a dismissal the attachment ceases.<sup>1</sup>

**5. Execution removed from file for statistical purposes.** — As seen in Note 1, the Court should, under this rule, either dismiss or adjourn the application and not simply "strike it off." Even in cases to which the rule does not apply, there is no provision of law authorizing the Court to lodge an application or record it or strike it off from the file for what is commonly called statistical purposes.<sup>1</sup> The proper course in such cases is to adjourn the application and not to strike it off the file. Where the

4. ('11) 9 Ind Cas 558 (560) : 38 Cal 482.

5. ('38) AIR 1938 Lah 590 (592).

6. ('30) AIR 1930 Mad 414 (415).

[See however ('35) AIR 1935 Mad 17 (20).

(One of the conditions in the instalment order under O. 20 R. 11, sub-rule (2) being that the execution petition of the decree-holder should be dismissed but that the attachment should continue—O. 21 R. 57 and O. 20 R. 11 (2) should be read together and it must be held that notwithstanding the dismissal of the execution application, the attachment must be held to continue—But where there is default in paying the instalments and there is a fresh application for execution and this application is dismissed for default, the attachment will cease under O. 21 R. 57.)]

7. ('29) AIR 1929 Nag 82 (83).

8. ('25) AIR 1925 All 456 (456).

('22) AIR 1922 All 62 (63) : 44 All 274.

[But see ('19) AIR 1919 All 194 (195, 196) : 41 All 157.]

9. ('36) AIR 1936 Nag 277 (278) : I L R (1936) Nag 346.

10. ('17) AIR 1917 Mad 705 (705).

('33) AIR 1933 Pat 609 (610).

('18) AIR 1918 Mad 1010 (1011).

('18) AIR 1918 Pat 599 (600) : 8 Pat L Jour 810.

(No default by decree-holder—*Held* attachment not put an end to.)

[See also ('10) 8 Ind Cas 727 (728) (Oudh).]

11. ('12) 15 Ind Cas 49 (50) : 34 All 490.

('35) AIR 1935 Mad 275 (276). (Dismissal of petition behind decree-holder's back and without notice to him—Attachment continues.)

('15) AIR 1915 Mad 885 (886).

12. ('30) AIR 1930 Lah 647 (649).

('17) AIR 1917 Mad 705 (705).

('09) 2 Ind Cas 265 (266) (Cal).

('19) AIR 1919 Cal 545 (545) : 46 Cal 64.

('36) AIR 1936 Oudh 14 (16). (Property attached in execution — Insolvency application by judgment-debtor—Execution stayed pending decision — Judgment-debtor adjudged insolvent—Annulment for failure to apply for discharge — Application by decree-holder to proceed with execution — Attachment *held* merely dormant during insolvency proceedings and latter execution application *held* to be continuation of the former.)

13. ('26) AIR 1926 Mad 453 (454).

14. ('21) AIR 1921 Oudh 176 (184).

#### Note 4

1. ('23) AIR 1923 Nag 18 (19).

('22) AIR 1922 Nag 267 (270) : 18 Nag L R 152.

#### Note 5

1. ('26) AIR 1926 Mad 453 (454).

**O. 21 R. 57**  
**Notes 5-8**

Court does, however, pass such an order as "struck off" or "recorded" or "closed" or "consigned to the record room," etc., it would only amount to an adjournment *sine die* and the application will be deemed nevertheless to be pending.<sup>3</sup> The removal for statistical purposes is not a judicial determination and no fresh application is necessary to continue the same.<sup>3</sup>

**6. Responsibility of sapurdar of attached property after dismissal for default.** — A *sapurdar* is responsible to the Court for the production of the property entrusted with him. He cannot escape liability by pleading that owing to the decree-holder's default the execution application was dismissed with the result that the attachment terminated under this rule and that therefore he handed over the property to the judgment-debtor.<sup>1</sup>

**7. Revival of attachment, when possible.** — On the dismissal of an execution application for default, the attachment ceases. A revival of the execution proceedings, for instance, by an application for review, does not operate to revive the attachment, so as to prejudice the rights of a third party in the property acquired in the meantime.<sup>1</sup> Thus, if the judgment-debtor transfers the property after an order of dismissal under this rule, the transferee gets the property free from attachment.<sup>2</sup> But where there is no question of prejudice to third parties the attachment can also be revived.<sup>3</sup>

**8. Attachment before judgment.** — There is a conflict of judicial opinion as to the effect of an order of dismissal of an execution application under this rule upon attachment effected *before judgment*. The High Courts of Allahabad,<sup>1</sup> Calcutta<sup>2</sup> and Patna<sup>3</sup> have held that the present rule applies only to cases where the property is "*attached in execution of a decree*" as the rule itself expressly states, and that consequently the dismissal of an execution application for default does not put an end to the attachment before judgment. A Full Bench of the High Court of Madras<sup>4</sup> and the Judicial

('30) AIR 1930 Mad 303 (305).

2. ('12) 15 Ind Cas 406 (406) (Mad). (Sale stayed by High Court—Petition struck off.)

('35) AIR 1935 Mad 212 (212). (The attachment will still be subsisting.)

('26) AIR 1926 Mad 453 (455). (Execution restrained by temporary injunction—Petition recorded.)

('30) AIR 1930 Mad 303 (305). (Petition recorded because appeal pending—Attachment not put an end to.)

('28) AIR 1928 Mad 898 (399). (Petition closed—Must be deemed pending.)

('30) AIR 1930 Lah 647 (651). (Sale stayed — Petition consigned to record room.)

('26) AIR 1926 All 784 (786) : 48 All 698. (Petition recorded to reduce pending file.)

('28) 107 Ind Cas 574 (575) (All).

('37) 1937 Mad W N 480 (485). (Order "Adjourn. Rejected" does not amount to dismissal.)

('36) AIR 1936 Lah 873 (874).

[See however ('36) AIR 1936 Nag 277 (278) : I L R (1938) Nag 346. (Execution application "struck off as wholly infructuous" — Merely because attachment is ordered to continue, application cannot be said to be pending—Under amendment of rule by Nagpur High Court, a Court has power while dismissing an application to continue the attachment.)

('38) AIR 1938 Lah 590 (592). (Application for execution consigned to record room at request of decree-holder—Held that this was a dismissal

of the application.)]

3. ('20) AIR 1920 Mad 358 (358). (Limitation inapplicable to execution petition after "struck off" order.)

('16) AIR 1916 Mad 937 (938). (Do.)

('67) 9 Suth W R 205 (206).

**Note 6**

1. ('19) AIR 1919 Lah 108 (108) : 1919 Pun Ro No. 60.

**Note 7**

1. ('11) 12 Ind Cas 65 (67) (Cal).

('25) AIR 1925 Mad 1113 (1114). (A claimant is entitled to rely on a prior dismissal for default under this rule and plead that attachment has ceased.)

2. ('13) 20 Ind Cas 149 (150) (Cal).

3. ('22) AIR 1922 Nag 267 (270) : 18 Nag L R 152.

('36) AIR 1936 Pat 126 (127). (Undivided share of judgment-debtor attached—Judgment-debtor dying during pendency of attachment — Execution case dismissed for want of prosecution—Order of dismissal set aside — Attachment held to have revived.)

**Note 8**

1. ('24) AIR 1924 All 860 (861) : 46 All 894.

2. ('20) AIR 1929 Cal 465 (466) : 56 Cal 416.

('12) 14 Ind Cas 845 (846) (Cal).

3. ('87) AIR 1937 Pat 626 (627) : 16 Pat 589.

4. ('24) AIR 1924 Mad 494 (500) : 47 Mad 483

(F B). (Overruling AIR 1919 Mad 752.)

[See also ('26) AIR 1926 Mad 211 (213). (Following the Full Bench.)]

Commissioner's Court of Nagpur<sup>5</sup> have, on the other hand, taken a contrary view. According to them, the words "any property attached in execution of a decree" should be construed as meaning "where property has been in a state of attachment in execution" and the decree-holder by electing to take the benefit of O. 38 R. 11 and proceeding to execute the decree without a fresh attachment is, in effect, asking the Court to treat the attachment as one in execution; the attachment before judgment therefore ceases upon the dismissal of the application for execution. The High Court of Bombay<sup>6</sup> has accepted the view of the Madras Full Bench but held that the dismissal of an execution application in relation to *moveable* property has not the effect of putting an end to an attachment of *immovable* properties.

**O. 21 R. 57**  
**Notes 8-9**

**9. Default in executing attached decree.** — See Note 11 to Rule 53, *ante*.

### Local Amendment

#### RANGOON

The following shall be inserted as Rule 57A :

"57A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court."

**O. 21 R. 57A**  
**(Rangoon)**

## INVESTIGATION OF CLAIMS AND OBJECTIONS

**R. 58.** [S. 278.] (1) Where any claim is preferred<sup>3</sup> to,<sup>7</sup> or any objection is made<sup>3</sup> to the attachment of, any property attached<sup>7</sup> in execution of a decree<sup>2</sup> on the ground that such property is not liable to such attachment,<sup>4</sup> the Court shall proceed

**O. 21 R. 58**

Investigation of claims to, and objections to attachment of, attached property.

to investigate the claim<sup>20</sup> or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided<sup>21</sup> that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

[ 1877, S. 278; 1859, S. 246. See S. 47. ]

### Local Amendments

#### ALLAHABAD

Add the following words to sub-rule (2) :

"or may in its discretion make an order postponing the delivery of the property

5. ('21) AIR 1921 Nag 57 (59) : 17 Nag L R 121.  
( '22) AIR 1922 Nag 81 (81).

6. ('81) AIR 1931 Bom 550 (554) : 55 Bom 693.  
(Affirming AIR 1929 Bom 821.)  
( '29) AIR 1929 Bom 321 (322, 323): 58 Bom 543.

**O. 21 R. 58** after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

**CALCUTTA**

Add the following words at the end of sub-rule (2) :

"upon such terms as to security, or otherwise, as to the Court shall seem fit."

**LAHORE**

Add the following to proviso under sub-rule (1) :

"and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree, unless he can prove a title acquired subsequent to the date of the first attachment."

**NAGPUR**

In sub-rule (2), after the word "objection" where it occurs for the second time insert the following words :

"or, where the property to be sold is immovable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided."

**OUDH**

Add the following words to sub-rule (2) :

"or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

**PATNA**

Substitute the following for Rule 58 :

"58. (1) When any claim is preferred to any property, the subject-matter of the execution proceedings, or any objection is made to the attachment thereof, on the ground that the applicant has an interest therein which is not bound under the decree, or that such property is not liable to attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may in its discretion make an order postponing the delivery of the property after the sale pending the investigation of the claim or objection. And in no case shall the sale become absolute until the claim or objection has been decided."

### *Synopsis*

1. Investigation of claims and objections.
2. Attachment before judgment. See Note 6 to Rule 58.
3. "Where any claim is preferred to or any objection is made."
4. "On the ground that such property is not liable to such attachment."
5. Objections raised after sale.
6. Burden of proof is on claimant to establish possession in himself.
7. Any property attached.
  8. Claim to debts attached in execution.
  9. Claim to decree attached in execution.
  10. Claim to property seized by receiver.
  11. Claims to properties ordered to be sold under a mortgage decree.
12. Claim to property attached in execution of rent decree.
- 12a. Property attached in execution of decree in favour of company in liquidation—Claim to such property.
13. Who can prefer claim.
14. Parties and representatives.
15. Trustees and shebaita.
16. Claim by Official Receiver or Official Assignee.
17. Claims by third persons.
18. Claims by transferee of property from the judgment-debtor.
19. Assignee of decree from the judgment-debtor.
- 19a. Objection by tenant of judgment-debtor. See Notes to O. 21 R. 61.

**20. "Shall proceed to investigate the claim."****21. Proviso.****22. Dismissal for default.** See Note 4 to Rule 68.**22a. Reference to arbitration.****22b. Transfer of proceedings under this Rule.****23. Effect of order — Res judicata.****23a. Proclamation of sale pending claim-petition.****24. Appeal.****25. Revision.****O. 21 R. 58  
Note 1***Other Topics (miscellaneous)*

Applicability. See Notes 4, 5, 11 and 12.

Insolvency of judgment-debtor—No bar to claim. See Note 10.

Nature of investigation. See Note 1.

Nature of remedy. See Note 1.

Scope and object of Rules 58 to 63. See Note 1.

**1. Investigation of claims and objections.** — Where property is attached in execution of a decree, it is possible that third parties, or even the parties themselves, have objections to such attachment being made. Where a *party or his representative* has any such objection, the question is one falling also within Section 47 and therefore must be decided by the Court *executing* the decree and *not by a separate suit*.<sup>1</sup> The enquiry under that Section is a *full* enquiry and the determination of the question after such enquiry amounts to a *decree*.<sup>2</sup> The remedy of the party aggrieved by the order is by way of appeal.<sup>3</sup> On the other hand, where a *third party* has a claim or an objection to the attachment of property attached in execution of a decree, there are two courses open to him. He may straightway file a *suit* claiming the appropriate relief, or he may file an *application* under this rule to the Court executing the decree. But he cannot prefer an *appeal* against the order of attachment.<sup>4</sup> He is not *bound* to prefer a claim or an objection under this rule.<sup>5</sup> The reason is that the remedy provided by this rule is a *summary and concurrent* remedy provided with the object of securing a speedy settlement of title raised at execution sales,<sup>6</sup> and, as has been seen in Note 63 to

**Order 21 Rule 58 — Note 1**

1. See notes 45 and 46 to Section 47.

('85) AIR 1935 All 183 (184). (Legal representative of deceased judgment-debtor brought on record — Objection to attachment by him that property belongs to him is under Section 47.)

('34) AIR 1934 Cal 258 (259).

('29) AIR 1929 Pat 141 (142):8 Pat 717. (Objection by defendant against whom suit was dismissed falls under Section 47.)

('39) AIR 1939 Lah 207 (208). (Objector joined as defendant but no relief claimed against him in the suit — Objection falls under S. 47 as objector must be deemed a 'party' within S. 47.)

('36) AIR 1936 Bom 227 (231) : 60 Bom 516.

('22) AIR 1922 Pat 572 (573). (Objection by legal representative of judgment-debtor that property belongs to him falls under S. 47.)

('39) AIR 1939 Nag 183 (185). I L R (1939) Nag 548. ("Representative" in S. 47 includes not only legal representatives but also representatives-in-interest — Objection by representative-in-interest falls under S. 47.)

('35) AIR 1935 Mad 928 (924). (Legal representative of judgment-debtor claiming attached property to be his own — Objection falls under S. 47.)

See also the following cases :

('95) 17 All 245 (250). (Objection by judgment-debtor's representative that attached property is his own.)

('09) 2 Ind Cas 432 (432) (Mad). (Judgment-debtor's representative claiming charge on land sold in

execution.)

('17) AIR 1917 Mad 168 (169). (Claim preferred by legal representative.)

('29) AIR 1929 Oudh 21 (21). (Objector legal representative of deceased judgment-debtor.)

('27) AIR 1927 Lah 905 (906). (Objection by transferee from judgment-debtor — Held to fall under S. 47.)

('87) 10 Mad 117 (121).

('01) 24 Mad 658 (659).

('07) 30 Mad 215 (216).

('26) AIR 1926 Oudh 64 (64). (Objection by *pro forma* defendant falls under S. 47.)

[But see ('39) AIR 1939 Pat 354 (356). (Representative of judgment-debtor objecting that the property is his personal property — Objection can be treated as coming under O. 21 R. 58.)]

2. ('35) AIR 1935 All 183 (185). (In such cases Court cannot shut out any party from producing evidence.)

3. See Note 84 to Section 47.

4. ('37) AIR 1937 Lah 313 (313).

5. ('18) 18 Ind Cas 949 (951) : 40 Cal 598 : 40 Ind App 56 (P C). (The remedy under this rule is merely a permissive one.)

[See also ('36) AIR 1936 Pat 442 (443). (Execution sale not without jurisdiction cannot be ignored unless it is set aside — Courses open to a person not bound by a decree, if his property is in danger of being sold in execution, stated.)]

6. ('20) AIR 1920 Mad 187 (190).

('85) 11 Cal 678 (679).

**O. 21 R. 58**  
**Notes 1-4**

Section 9, *ante*, the existence of such a remedy does not bar a regular suit or other available remedy to the party aggrieved.<sup>7</sup> Where such third party prefers a claim under this rule the enquiry is only a *summary investigation* and not a full trial of the issues between the parties.<sup>8</sup> The party aggrieved by an order passed after such investigation should file a suit under Rule 63 within one year thereof for setting aside the order.

Where a decree-holder applies for the attachment of a certain property as belonging to the judgment-debtor, it is not for the Court to anticipate proceedings under this rule and refuse to order attachment on the ground that the property does not belong to the judgment-debtor.<sup>9</sup>

As seen in Note 2 to Section 70, a Collector to whom the execution of a decree has been transferred has no power to inquire into objections to attachment under this rule.<sup>10</sup>

This rule and Rule 63 do not apply to the Vizagapatam Agency Tracts.<sup>11</sup>

**2. Attachment before judgment.** — See Note 6 to Rule 63.

**3. "Where any claim is preferred to or any objection is made."** — The rule is very wide and comprises claims of *third* parties whether put forward by themselves or on their behalf by the parties to the suit or their representatives.<sup>1</sup>

See also the undermentioned case.<sup>2</sup>

**4. "On the ground that such property is not liable to such attachment."** — The rule pre-supposes the *existence of an attachment* and the ground of the application is that the property is *not liable* to attachment.<sup>1</sup> Where there is *no attachment* at all, an objection under this rule is incompetent.<sup>2</sup> Nor can the objector prefer an application under this rule merely on the ground that he has not been made a party to the execution proceedings.<sup>3</sup> It has been held by the High Court of Allahabad<sup>4</sup> that the words "on the ground that such property is not liable to attachment" have reference merely to a case where an *objection is made to an attachment* and not to a claim preferred to the property. The High Court of Madras<sup>5</sup> has also held that it is open to a claimant to put forward his claim under this rule on the ground that the Court which passed the decree had *no jurisdiction* to pass it or that the Court which executes the decree has

[See however ('95) AIR 1985 All 183 (185).  
(Procedure to be followed is not a summary procedure.)]

7. ('05) 4 Low Bur Rul 252 (258).

('96) 18 All 410 (412).

('07) 4 All L Jour 574 (578).

('06) 28 All 644 (646).

('99) 23 Bom 266 (270).

('96) 18 Mad 18 (17).

('04) 17 C P L R 178 (191).

[See also ('81) AIR 1981 Oudh 1 (4): 6 Luck 461.

('81) AIR 1981 Lah 598 (598). (Non-objection

under R. 58 is no bar to applying under R. 100.)

('27) AIR 1927 Mad 827 (828). (Omission to take

action under O. 21 R. 58 by withdrawing claim

does not bar action under Rule 89.)]

8. ('20) AIR 1920 Mad 187 (189).

('26) AIR 1926 Nag 197 (198).

9. ('85) AIR 1985 Lah 114 (114, 115). (If the decree-holder misused his powers he is liable to pay damages and costs and that is a sufficient guarantee against a frivolous application by the decree-holder.)

10. ('86) AIR 1986 Bom 227 (231): 60 Bom 516.

11. ('16) AIR 1916 Mad 4 (5).

('22) AIR 1922 Mad 271 (272): 46 Mad 85.

**Note 3**

1. ('99) 28 Mad 195 (202) (FB).

2. ('88) AIR 1988 Sind 126 (127). (Decree-holder not objecting to oral objections to attachment — He cannot subsequently urge that no written application was submitted.)

**Note 4**

1. ('28) AIR 1928 Bom 881 (882).

('24) AIR 1924 Mad 889 (889).

2. ('28) AIR 1928 Bom 881 (882).

('85) AIR 1985 All 848 (844, 845).

[See ('85) AIR 1985 Lah 114 (114, 115). (Decree-holder alleging judgment-debtor as owner of property—Court must, accepting his statement, attach property leaving real owner to file objection—Court should not enquire into title of its own accord in the absence of objecting owner.)]

3. ('26) AIR 1926 Mad 855 (856).

4. ('27) AIR 1927 All 598 (596): 49 All 908.

5. ('39) AIR 1929 Mad 888 (884).

no jurisdiction to do so or that the attachment made is not legal or valid.<sup>6</sup>

But it is not open to a claimant to attack the *validity* of the decree<sup>7</sup> or the decree-holder's *right to execute* the same; it is thus not open to him to plead that the execution application is barred by limitation.<sup>8</sup>

**5. Objections raised after sale.** — It has been held by the High Courts of Calcutta, Lahore, Patna and Rangoon and the Judicial Commissioner's Court of Peshawar that a Court has no jurisdiction to entertain a claim under this rule after the execution sale has taken place.<sup>1</sup> The reason is that the attachment is *ipso facto* determined after the sale has taken place.<sup>2</sup> But the High Courts of Madras and Nagpur and the Judicial Commissioner's Court of Sind have expressed the view that a claim can be preferred after court-auction sale but before confirmation of the same, on the ground that the attachment subsists till the confirmation of the sale.<sup>3</sup> The Patna High Court<sup>4</sup> has also held in a recent case that under the amendment of the rule by that Court, a Court can deal with a claim petition under Rule 58 even after a sale has taken place, provided that it has not been confirmed. The amendment of the rule by the Allahabad High Court also contemplates that an objection under this rule can be dealt with after an execution sale but before its confirmation.<sup>5</sup>

An objection by a *party* to the suit or his representative falls under Section 47 and can be raised even after the sale.<sup>6</sup>

**6. Burden of proof is on claimant to establish possession in himself.** — Rule 59 prescribes that the claimant must adduce evidence to show that on the date of the attachment he had some interest in, or was possessed of, the property attached. The burden of proof is therefore clearly upon the claimant or objector to establish possession in himself.<sup>1</sup>

**7. Any property attached.** — The rule applies to *any* property attached in execution of a decree. Thus, it will include a claim to moveables,<sup>1</sup> or to a fractional share of the immovable property attached,<sup>2</sup> or to a share of the moveables seized in

6. ('27) AIR 1927 Mad 450 (455).

7. ('85) AIR 1985 Lah 549 (550). (Mortgage decree for sale of certain property passed against A — A's legal representatives after A's death cannot object in execution proceedings that property belonged to him and not to the deceased and was not liable to sale in execution.)

('89) AIR 1989 Pat 430 (432). (Question of justification for decree cannot be gone into in suit under O. 21 R. 63.)

8. ('21) AIR 1921 Pat 311 (311).

('29) AIR 1929 Rang 152 (152, 153); 7 Rang 182.

#### Note 5

1. ('26) AIR 1926 Cal 468 (468).

('12) 15 Ind Cas 58 (58) (Cal).

('69) 11 Suth W R 54 (55).

('24) AIR 1924 Pat 76 (76).

('28) AIR 1928 Rang 80 (80); 5 Rang 751.

('37) AIR 1937 Cal 390 (392). (Objection filed on the date of sale—Objection dismissed for default after sale—Neither R. 58 nor R. 63 applies.)

('88) AIR 1988 Lah 568 (568); 1 I L R (1988) Lah 598.

('87) AIR 1987 Pesh 90 (91). (Order rejecting such objection is not conclusive.)

('87) AIR 1987 Pesh 97 (99).

2. ('24) AIR 1924 Pat 76 (76).

3. ('81) AIR 1981 Mad 782 (783); 55 Mad 251.

('05) 1 Nag L R 167 (168).

('38) 1938 Sind 198 (200); 27 Sind L R 226.

('98) AIR 1998 Nag 475 (476).

('40) AIR 1940 Nag 7 (7); 1939 Nag L Jour 496 (497).

4. ('89) AIR 1989 Pat 430 (431); 1939 Pat W N 229 (230).

5. ('89) AIR 1989 All 598 (599); 1989 All L Jour 622 (623).

6. ('37) AIR 1937 Pesh 82 (83). (Widow of deceased judgment-debtor added as legal representative can object that property attached and sold is her dower property.)

#### Note 6

1. ('69) 11 Suth W R 8 (15) (FB).

('87) AIR 1987 Cal 639 (640). (When claimant has proved his possession, onus of proving that his possession is on behalf of or for benefit of judgment-debtor is on decree-holder.)

#### Note 7

1. ('10) 8 Ind Cas 77 (78) (Cal).

('07) 4 Low Bur Rul 16 (16).

('01) 14 O P L R 124 (125).

('94) 7 O P L R 105 (110).

2. ('70) 18 Suth W R 68 (67, 68) (FB).

**O. 21 R. 58** execution.<sup>3</sup>  
**Notes 7-11**

An objection by a third party to the attachment of any property can be entered only *after* an attachment has been made.<sup>4</sup>

**8. Claim to debts attached in execution.** — The procedure laid down in this rule applies also to claims relating to the attachment of debts. A garnishee who has failed in his claim cannot, without filing a suit within one year from the date of the order against him, assert either as plaintiff or as defendant the right denied to him by that order.<sup>1</sup> But where a garnishee denies the *existence* of the debt, he does not lay any claim to attached property and this rule does not apply to such a case.<sup>2</sup>

**9. Claim to decree attached in execution.** — The rule applies also to claims in respect of decrees attached in execution.

Where *A* obtains a decree against *B* for money and in execution thereof attaches a decree in favour of *B*, and *C* who had obtained before the attachment a transfer of the decree attached prefers a claim to the decree, his claim falls under this rule.<sup>1</sup>

**10. Claim to property seized by receiver.** — Where a receiver in insolvency after adjudication of the judgment-debtor seizes properties as belonging to the insolvent, it is open to third persons to prefer their claims or objections, if any, to such property. But such claims fall under Section 4 of the Provincial Insolvency Act and are triable by the Insolvency Court,<sup>1</sup> although the *procedure* to be followed is that prescribed by this rule.<sup>2</sup> The decision of the Insolvency Court on such claims can, however, be challenged by the aggrieved party only by way of appeal or otherwise as provided by the Insolvency Act itself, and not by way of a *suit* under Rule 63.<sup>3</sup>

Where a property has been *attached* in execution of a decree, the mere fact that subsequent thereto the judgment-debtor becomes an insolvent and his properties become vested in the Official Receiver or the Official Assignee, will not disentitle a claimant from preferring an objection under this rule.<sup>4</sup>

**11. Claims to properties ordered to be sold under a mortgage decree.** — As has been seen in Note 4 *ante*, proceedings under this rule are applicable only when properties have been *attached* in execution. Attachment is necessary in the case of money decrees and not in the case of *mortgage decrees*. Consequently, the provisions of this rule do not apply to claims or objections relating to properties ordered to be sold under a mortgage decree.<sup>1</sup> The remedy of an objector in such a case is by way of a

('66) 6 Suth W R 164 (164).

('72) 17 Suth W R 74 (74).

3. ('70) 14 Suth W R 52 (53).

4. ('85) AIR 1935 All 343 (344).

**Note 8**

1. ('14) AIR 1914 Bom 299 (300) : 38 Bom 681.

('31) AIR 1931 Bom 288 (290). (Assumed.)

('24) AIR 1924 Lah 367 (367).

('04) 27 Mad 67 (70, 71) (Overruling 24 Mad 20.)

('23) AIR 1923 Mad 562 (562).

('31) AIR 1931 Mad 570 (571).

[But see ('74) 22 Suth W R 36 (37). (Not good law.)]

2. ('36) AIR 1936 Mad 152 (153) : 59 Mad 966.

**Note 9**

1. ('26) AIR 1926 All 244 (245).

**Note 10**

1. ('14) AIR 1914 All 212 (212) : 36 All 8.

2. ('11) 9 Ind Cas 344 (344) (Bom).

('14) AIR 1914 All 264 (265) : 36 All 65.

3. ('28) AIR 1928 All 158 (159).

4. ('87) 9 All 232 (233, 234).

('28) AIR 1928 All 158 (159).

**Note 11**

1. ('05) 27 All 700 (701).

('33) AIR 1933 Lah 75 (76). (Sale under mortgage decree—Objection disallowed—Suit need not be brought within one year.)

('97) 19 All 480 (482).

('06) 1906 All W N 62 (63).

('94) 18 Bom 98 (100).

('90) 14 Bom 369 (369).

('80) 4 Bom 515 (520) (F B).

('21) AIR 1921 Cal 479 (480).

('87) 14 Cal 681 (683).

('13) 18 Ind Cas 215 (216) (Cal).

('96) 1 Cal W N 701 (702).

('29) AIR 1929 Lah 760 (761).

('29) AIR 1929 Lah 167 (168).



separate suit.<sup>2</sup>

Where, however, a mortgagee decree-holder erroneously applies for, and gets an attachment effected on the properties and a claim is thereupon preferred, this rule will apply,<sup>3</sup> and the order on the claim will be conclusive within the meaning of Rule 63.<sup>4</sup>

**O. 21 R. 58**  
**Notes 11-12a**

**12. Claim to property attached in execution of rent decree.**—Section 170, Bengal Tenancy Act (VIII of 1885), expressly provides that the provisions of the Code as to claim cases, *i. e.*, Rules 58 to 63 shall not apply to a tenure or holding attached in execution of a decree for arrears of rent thereof. Hence, no claims or objections can be filed under this rule in respect of the same.<sup>1</sup>

The rule applies to proceedings in execution of rent decrees under the Madras Estates Land Act, 1908.<sup>2</sup> This Act, unlike the Bengal Tenancy Act, contains no provision excepting the applicability of this rule to proceedings thereunder.

Rules 58 to 63 of the Code are made applicable to proceedings under the Chota Nagpur Tenancy Act (Bihar and Orissa Act, VI of 1920) by Section 210, sub-section (3), clause (b).

**12a. Property attached in execution of decree in favour of company in liquidation—Claim to such property.**—Section 171 of the Companies Act of 1913 provides that no legal proceeding can be taken without the leave of the Court against a company in liquidation. But this does not preclude an objection being taken under this rule when property is attached in execution of a decree in favour of a company in liquidation.<sup>1</sup> The reason is that in such cases it is the company that sets the law in

(‘32) AIR 1932 Lah 618 (618).

(‘30) AIR 1930 Mad 712 (712).

(‘32) AIR 1932 Mad 716 (719).

(‘25) AIR 1925 Nag 185 (185, 186).

(‘20) AIR 1920 Lah 214 (215).

(‘19) AIR 1919 Pat 131 (131).

(‘18) AIR 1918 Lah 368 (368) : 1918 Pun Re No. 58.

(‘07) 4 Low Bur Rul 82 (83).

(‘35) AIR 1935 All 897 (898).

(‘35) AIR 1935 Lah 549 (550).

[See (‘34) AIR 1934 Lah 176 (176). (Compromise decree providing for payment of decretal amount by instalments and also stating that certain property should be considered as mortgaged for the satisfaction of the decree—This does not make the decree a mortgage decree.)]

[See also (‘16) AIR 1916 Lah 377 (378) : 1915 Pun Re No. 101.]

2. (‘87) 14 Cal 631 (633).

3. (‘36) AIR 1936 Pesh 53 (54). (Attachment effected though unnecessary—Objector can come in under this rule.)

(‘37) AIR 1937 Lah 360 (361).

4. (‘28) AIR 1928 Mad 525 (527).

(‘15) AIR 1915 Low Bur 136 (137) : 8 Low Bur Rul 215 (F E).

(‘98-1900) 1898-1900 Low Bur Rul 509.

(‘32) AIR 1932 Mad 716 (719). (*Quare*.)

(‘37) AIR 1937 Lah 360 (361). (AIR 1915 Low Bur 136 relied on—Objector can sue under O. 21 R. 63.)

[But see (‘02) 2 Low Bur Rul 138 (139).]

#### Note 12

1. (‘26) AIR 1926 Pat 213 (214).

(‘88) AIR 1988 Pat 82 (83) : 11 Pat 790. (Rent

decree—Objector claiming title to tenure cannot come under this rule.)

(‘26) AIR 1926 Pat 210 (211).

(‘29) AIR 1929 Pat 195 (196, 197).

(‘01) 28 Cal 382 (385, 386) (F B).

(‘10) 8 Ind Cas 50 (51) (Cal).

(‘06) 33 Cal 566 (569) (F B).

(‘98) 3 Cal W N 386 (387).

(‘99) 4 Cal W N 732 (734).

(‘10) 7 Ind Cas 490 (491) (Cal). (*Held*, the Tenancy Act did not apply and therefore claim under this rule competent.)

(‘23) AIR 1923 Cal 715 (716). (Do.—Also that executing Court can enquire if property claimed is of the class falling under the Tenancy Act.)

(‘09) 3 Ind Cas 306 (306) : 36 Cal 765. (*Held* S. 170 of the Bengal Tenancy Act did not apply to this case.)

(‘90) 17 Cal 390 (392) (F B). (Do.)

(‘37) AIR 1937 Pat 341 (342).

(‘37) AIR 1937 Pat 278 (279) : 15 Pat 812.

(‘36) AIR 1936 Pat 480 (481) : 15 Pat 614.

[See (‘36) AIR 1936 Cal 279 (281, 282) : 63 Cal 1117. (Tenant transferring holding to the knowledge of the landlord, during the pendency of the suit—Transferee not impleaded—Decree obtained is not a rent decree—Objection by transferee under this rule competent.)]

[See also (‘24) AIR 1924 All 910 (911).

(‘27) AIR 1927 Cal 381 (382).]

2. (‘28) AIR 1928 Mad 360 (360) : 51 Mad 774.

(‘32) AIR 1932 Mad 716 (718).

#### Note 12a

1. (‘86) AIR 1986 Pesh 185 (186).

**O. 21 R. 56** motion and the person preferring the objection is merely in the position of a defendant  
**Notes 12a-14** defending a suit.

**13. Who can prefer claim.** — All persons, who at the date of the attachment have some interest in or are possessed of the property attached, can prefer a claim under this rule<sup>1</sup> (see Rule 59). Thus, an objection by a person who *subsequent* to the attachment purchases the property in execution of another decree is not one within this rule.<sup>2</sup> The Court has, however, inherent power to deal with such an objection.<sup>3</sup>

In the undermentioned case,<sup>4</sup> where certain post office cash certificates standing in the name of a person were attached in execution of a decree, it was held that an objection by the Postmaster-General having custody of the cash certificates came within this rule. It has also been held that an objection taken by the Secretary of State for India to whom notice is issued under O. 21 R. 48 for the attachment of the salary of a Government servant, comes under this rule.<sup>5</sup>

A co-operative society has an interest in the shares of a member as these shares form part of its capital. Hence, where these shares are attached in execution of a decree against the member, the society has *locus standi* to object to the attachment under this rule.<sup>6</sup>

There is a difference of opinion as to whether an application by a mortgagee praying that the sale may be subject to his mortgage is one falling under Rule 66 or under this rule. See Note 2 to Rule 62.

As to whether a usufructuary mortgagee can make a claim under this rule, see Rule 62, *infra*.

**14. Parties and representatives.** — It has been seen in Note 46 to Section 47 that objections to attachment raised by parties or their representatives *as representing third parties or as trustees*, are really objections by third parties and do not fall within the scope of Section 47. Such objections will, therefore, have to be decided under the provisions of Rules 58 to 63.<sup>1</sup> Thus, a claim by the *karnavan* of a Malabar *tarwad* that the whole of the *tarwad* property is not liable to attachment in execution of a personal decree against him, falls under this rule.<sup>2</sup>

*A*, a Hindu debtor, dies leaving *B*, a daughter, and *C* a daughter's son. *A*'s

#### Note 13

1. ('84) AIR 1934 Pat 511 (511, 512): 13 Pat 765. (Where the interest of a claimant accrued after the attachment which was effected, he cannot come under Rule 58.)

('88) AIR 1938 Lah 677 (678). (Occupancy rights of judgment-debtor attached — Landlord has sufficient interest in the property to entitle him to prefer objection.)

2. ('84) AIR 1934 Pat 511 (512): 13 Pat 765. (Dismissal of objection on ground of claimant not having any interest in the attached property at the date of the attachment does not affect the claimant's title as the order does not come under O. 21 R. 63.)

('85) AIR 1935 Nag 171 (172): 31 Nag L R 301.

('89) AIR 1939 Lah 380 (381): 41 Pun L R 305 (307).

3. ('85) AIR 1935 Nag 171 (172): 31 Nag L R 301.

('89) AIR 1939 Lah 380 (381).

4. ('88) AIR 1938 Cal 445 (446).

5. ('86) AIR 1936 Lah 761 (762).

6. ('89) AIR 1939 Lah 305 (306).

#### Note 14

1. See the cases cited in Note 46 to Section 47, and the following cases:

('85) 7 All 547 (549, 550).

('01) 23 All 268 (265).

('82) 4 All 190 (192). (Decree against firm — Claim by a partner that property attached is his private property — Falls under this rule.)

('86) AIR 1936 Pat 256 (257). (Above rule not confined to cases where objection is made by shebait, mutawalli or trustee — Judgment-debtor objecting that property in his possession which is attached, is debutter property — Objection is within O. 21 R. 58.)

('85) AIR 1935 All 897 (898).

[See ('28) AIR 1928 All 10 (11). (Decree against one member of a firm and attachment — Other members' claim is one under this rule.)]

2. (1900) 10 Mad L Jour 85 (86).

('16) AIR 1916 Mad 789 (789).

creditor sues *C* alone and obtains a decree against *A*'s assets in his hands. In execution of the decree, property in the hands of *B* (the daughter) is attached as being the assets of the deceased. *B* objects on the ground that the property is her personal property and does not form part of the assets of the deceased. It was held that *B*'s objection was one by a *stranger* and as such came within this rule and not under Section 47.<sup>3</sup> See also Notes 45 and 46 to Section 47.

**O. 21 R. 58**  
**Notes 14-17**

**15. Trustees and shebait.** — On the same principle as discussed in Note 14 above, a personal decree against a trustee or *shebait* does not estop him from asserting the claim of the beneficiary or of the charitable institution under this rule when the latter's property is attached in execution.<sup>1</sup> Thus where *A*, in execution of a decree for money against *B* personally, attaches and proceeds to sell property of which *B* alleges that he is in possession, not in his own right but as *shebait* of a deity to whom the property has been dedicated, *B*'s claim will fall under this rule.<sup>2</sup>

See also Note 46 to Section 47 and the cases cited therein.

**16. Claim by Official Receiver or Official Assignee.** — If the vesting order takes place before attachment, the Official Receiver can prefer a claim under this rule.<sup>1</sup> But if the vesting order is subsequent to the attachment, then the claim of the Official Receiver does not fall under this rule, but is a statutory claim under Section 51 of the Provincial Insolvency Act which should be dealt with under Section 151 of the Code. Articles 11 and 13, Limitation Act, do not apply to the latter class of cases.<sup>2</sup>

See also Note 23 to Section 47.

**17. Claims by third persons.** — The procedure under this rule applies, as has been seen in Note 1 *ante*, only to claims of *third* persons.<sup>1</sup> Pending suit by a creditor against his debtor's estate, the Administrator-General was authorized to collect the debts due to the deceased debtor. The creditor on obtaining decree in his suit

[See however ('04) 14 Mad L Jour 137 (138).]

3. ('32) AIR 1932 All 263 (264).

[See also ('38) AIR 1938 Nag 321 (322).

(Decree against sons as legal representatives of the deceased — Widow not impleaded—Objection by widow.)]

#### Note 15

1. ('18) 21 Ind Cas 748 (748) (Mad).

('88) 15 Cal 329 (340) : 15 Ind App 1 (PC).

('04) 28 Bom 458 (460).

('19) AIR 1919 Cal 245 (246, 247) : 46 Cal 877.

('15) AIR 1915 Cal 275 (276).

('15) AIR 1915 Cal 327 (329, 330) : 42 Cal 440.

('98) 1 Oudh Cas Supp 11 (12, 13).

('86) AIR 1936 Rang 403 (404). (But it is not open to him in his capacity as trustee to question authority of pleader for himself in his personal capacity to consent to attachment.)

[See also ('74) 22 Suth W R 392 (393).

('93) 1893 All W N 67 (68).

('91) 1891 Bom P J 207 (208).]

[But see ('04) 8 Cal W N 353 (354).]

2. ('11) 12 Ind Cas 168 (164) : 39 Cal 298 (FB).

#### Note 16

1. ('86) AIR 1936 Cal 578 (574) : I L R (1937) 1 Cal 264. (Official Receiver not representative of insolvent judgment-debtor.)

('35) AIR 1935 Mad 151 (152) : 58 Mad 408. (In such cases Official Receiver does not act as representative of judgment-debtor but of the

creditors.)

('36) AIR 1936 Sind 2 (3) : 30 Sind L R 288.

(Receiver not a representative of judgment-debtor — Objection does not fall under Section 47.)

[See also ('38) AIR 1938 Rang 319 (320). (Objection by receiver in administration suit falls under this rule.)]

2. ('22) AIR 1922 Mad 189 (190, 191) : 45 Mad 70.

See also the following cases :

('85) 7 All 752 (755).

('96) 21 Bom 205 (216).

('96) 20 Bom 403 (406).

('01) 29 Cal 428 (432) (FB).

('01) 28 Cal 419 (421).

('08) 31 Mad 347 (349).

('97) 1897 Pun Re No. 57, p. 252.

('35) AIR 1935 Mad 151 (152) : 58 Mad 408.

(Application by Official Receiver to stay execution proceedings — Whether he is representative within S. 47 depends on nature of proceedings — If he applies for release of attachment on ground that property of insolvent has vested in him, S. 47 does not apply — It is claim under O. 21 R. 58 and as such order on such application is not appealable.)

#### Note 17

1. ('85) 7 All 365 (366).

('92) 16 Bom 700 (702). (As to form of application under the old Code.)

[See 2 Ind Jur (N S) 339.]

**O. 21 R. 58**  
**Notes 17-20**

attached a debt due to the deceased. It was held that the Administrator-General was entitled to make a claim under this rule and have the attachment raised.<sup>2</sup>

See also Note 13 above.

**18. Claims by transferee of property from the judgment-debtor.** — A transferee of property attached in execution of a decree is entitled to object under this rule to the attachment made subsequent to his transfer.<sup>1</sup> A simple mortgagee can also prefer a claim under this rule.<sup>2</sup> See also Notes under Rule 62.

**19. Assignee of decree from the judgment-debtor.** — The transferee of a decree from the judgment-debtor can put in an application under this rule to remove an attachment of the decree made subsequent to the transfer.<sup>1</sup>

**19a. Objection by tenant of judgment-debtor.** — See Notes to O. 21 R. 61.

**20. "Shall proceed to investigate the claim."** — It is the duty of the Court to investigate a claim preferred to it under this rule,<sup>1</sup> unless it sees reason to reject it on the ground of delay. It ought not, without investigation, simply *notify the claim* in the sale proclamation,<sup>2</sup> although if the Court does pass such an order, it is not invalid and will be conclusive until set aside by a suit under Rule 63.<sup>3</sup> Similarly, the Court should not reject a claim without investigation merely on the ground that the question of possession or title is doubtful or complicated.<sup>4</sup> In the undermentioned case,<sup>5</sup> it was held by the Madras High Court that an order for merely notifying a claim does not preclude the executing Court from subsequently investigating the claim on the merits. See also Note 5 to Order 21 Rule 63.

As pointed out by Lord Hobhouse in delivering the judgment of the Board in *Sardhari Lal v. Ambika Prasad*<sup>6</sup> :

"The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him."

2. ('99) 28 Bom 428 (439).

**Note 18**

1. ('26) AIR 1926 All 244 (245).

('67) 8 Suth W R 378 (379).

('17) AIR 1917 Mad 4 (5). (Attachment of property subject to a contract of sale.)

('12) 18 Ind Cas 563 (564) (Lah).

('30) AIR 1930 Pat 390 (391).

('11) 9 Ind Cas 194 (194) (Cal). (Purchaser after attachment cannot claim under this rule.)

('39) AIR 1939 All 264 (267) : I L R (1939) All 854. (Transfer made after the order for attachment but before attachment was actually effected — Objection by transferee is under this rule and not under S. 47.)

[See ('39) AIR 1939 Nag 188 (186) : I L R (1939) Nag 548. (Transferee subsequent to attachment cannot claim under this rule, he being bound by decree and being thus a 'representative' of a party to the suit.)]

2. ('18) AIR 1918 Mad 1054 (1054).

('27) AIR 1927 All 593 (595) : 49 All 903.

**Note 19**

1. ('28) AIR 1928 Rang 25 (26) : 5 Rang 595.

(1900) 10 Mad L Jour 116 (117).

**Note 20**

1. ('67) 8 Suth W R 28 (27).

('88) AIR 1988 Lah 421 (421). (Court should not

allow claim hastily without investigation.) (1865) 4 Suth W R 35 (35).

('35) AIR 1935 All 183 (185). (Court cannot shut out any party from producing evidence.)

('35) AIR 1935 Rang 207 (208). (Claimant setting up mortgage — Executing Court should inquire into existence and genuineness of mortgage — Merely leaving it to bailiff to make intimation to bidders that there was a claim of mortgage is not enough.)

[See also ('32) AIR 1932 Bom 210 (212).

('33) AIR 1933 All 135 (135). (Attachment under S. 386, Cr. P. C., and claim to property — Government rules providing for inquiry as in Rr. 58 to 61 of C. P. C. — Magistrate is under a duty to investigate claim.)]

2. ('19) AIR 1919 Mad 788 (748) : 41 Mad 985 (FB). (Per Seshagiri Ayyar, J.)

('24) AIR 1924 Mad 147 (148). (AIR 1919 Mad 788 (FB), Followed.)

('26) AIR 1926 Mad 216 (217).

('23) AIR 1923 Mad 295 (295).

3. ('19) AIR 1919 Mad 788 (742) : 41 Mad 985 (FB).

('25) AIR 1925 Mad 868 (869).

4. ('14) AIR 1914 Lah 508 (509).

5. ('35) AIR 1935 Mad 1015 (1017).

6. ('88) 15 Cal 521 (526) : 15 Ind App 123 (PC).

It is not possible to define the amount of enquiry which constitutes an investigation. If the order purports to deal with the merits it must be taken that there has been an investigation.<sup>7</sup>

**O. 21 R. 58:  
Note 20;**

What is to be investigated is indicated by the next three following rules, viz., Rules 59 to 61. The question to be decided is, whether on the date of the attachment the judgment-debtor or the objector was in possession and where the Court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgment-debtor.<sup>8</sup> The sole question to be investigated is, thus, one of possession.<sup>9</sup> Questions of *legal right* and *title* are not relevant, except so far as they may affect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person.<sup>10</sup> To that extent the title may be part of the enquiry. But ultimate questions of trust,<sup>11</sup> or complicated questions like the *benami* nature of a transaction,<sup>12</sup> are not within the scope of the enquiry and are not intended to be gone into. As pointed out by Mr. Justice Sadasiva Ayyar in *Ramaswami Chetty v. Mallappa*<sup>13</sup>:

"In summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of 'emergent' disputes, the Court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary enquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit. . . . The Court is bound to order the release of an attached property if it finds possession in the claimant on his own account, even if there is title and disposing power remaining in the judgment-debtor."

The High Court of Allahabad<sup>14</sup> has however held that it cannot be said that the Court acts without jurisdiction if it does not go into the question of possession but decides the claim on some other basis. Similarly, where the claimant adduced no

7. ('06) 29 Mad 225 (227).

('17) AIR 1917 Oudh 99 (101); 19 Oudh Cas 357. (Order passed on a perfunctory investigation is an operative order.)

8. ('29) AIR 1929 Pat 273 (274).

('20) AIR 1920 Mad 748 (759); 43 Mad 760 (FB).

('39) AIR 1939 All 117 (119).

('35) AIR 1935 Pat 267 (268). (For this purpose, it is often necessary to go into the question if objector's possession was the result of a purchase and whether the purchase was a *benami* purchase or not.)

9. ('31) AIR 1931 Lah 666 (666).

('02) 29 Cal 543 (546).

('15) AIR 1915 Cal 116 (117).

('28) AIR 1928 Mad 163 (163).

('27) AIR 1927 Nag 286 (288).

('29) AIR 1929 Nag 66 (67).

('26) AIR 1926 Nag 197 (198).

('22) AIR 1922 Low Bur 16 (16). (Court should not go into the question whether possession is fraudulent or void.)

('07) 4 Low Bur Rul 289 (290).

('71) 16 Suth W R 119 (120).

('74) 21 Suth W R 56 (56).

('27) AIR 1927 Sind 114 (115). (To some extent title may be enquired into.)

('37) AIR 1937 Cal 639 (641).

('39) AIR 1939 All 117 (119). (Court is incompetent to consider and decide the question of title.)

[See ('36) AIR 1936 Rang 161 (163).]

[See also ('96) 9 C P L R 113 (115).]

10. (1900.02) 1 Low Bur Rul 180 (181, 182).

('97) 1 Cal W N 617 (622).

('36) AIR 1936 Rang 306 (307); 14 Rang 516. (Sale deed in favour of claimant appearing on the face of it to be invalid — Enquiry into title necessary.)

('37) 1937 Mad W N 320 (320).

('30) AIR 1930 Rang 395 (396). (If necessary, Court can go into question of validity of registered or other document.)

('34) AIR 1934 Rang 212 (213).

('35) AIR 1935 Pat 267 (268). (Possession of claimant as a result of purchase from judgment-debtor — Inquiry whether purchase is *benami* or not is often necessary.)

[See also ('36) AIR 1936 Sind 208 (209). (Execution of mortgage decree — Partition in mortgagor's family — Question whether partition is *bona fide* or collusive cannot be gone into in execution proceedings — But partition can be notified in sale proclamation.)]

11. ('24) AIR 1924 Cal 744 (748); 51 Cal 548.

('87) 14 Cal 617 (620).

12. ('24) AIR 1924 Pat 506 (507).

('29) AIR 1929 Pat 273 (274).

('36) AIR 1936 Bom 160 (162); 60 Bom 226.

[But see ('73) 20 Suth W R 202 (202).]

13. ('20) AIR 1920 Mad 748 (756); 43 Mad 760. (FB).

[See also ('02) 29 Cal 543 (546). (Observations to the same effect.)]

14. ('12) 14 Ind Cas 790 (792); 34 All 865.

**O. 21 R. 58** evid ence as to possession,<sup>15</sup> or where the title of the claimant had been expressly  
**Notes 26-28** negatived in a prior litigation to which he was a party,<sup>16</sup> it was held that the Court  
 rightly decided the claim on the basis of title alone.

**21. Proviso.** — If the Court is of opinion that the application preferred under this rule has been designedly or unnecessarily delayed, it can refuse to investigate it. But the Court cannot dismiss a claim petition under this rule on the ground of delay, without giving an opportunity to the claimant or his counsel to explain the delay and without considering the explanation that might be so offered.<sup>1</sup> If the Court does entertain the claim and investigate the same, it is bound to pass an order under Rule 60 or Rule 61. A dismissal on the ground of delay *after* investigation is illegal.<sup>2</sup>

It has been held that an order rejecting a claim on the ground of delay has also to be set aside by a regular suit within one year from the date of the order. Otherwise, the order is conclusive within the meaning of Rule 63.<sup>3</sup> But there is a conflict of decisions as to whether an order passed without investigation falls under Rule 63. See Note 5 to Rule 63.

In the case of an attachment before judgment, a claim or objection under this rule need not be preferred before a decree is passed in the suit; a claim or objection preferred within a reasonable time after an application for execution is made by the decree-holder cannot be considered to be unnecessarily delayed.<sup>4</sup>

**22. Dismissal for default.** — See Note 4 to Rule 63.

**22a. Reference to arbitration.** — An objection under this rule is a proceeding *in execution*. Hence, Section 141 of the Code does not apply to such an objection. Consequently, Schedule II of the Code also does not apply to such an objection and so, the Court has no power to refer it to arbitration.<sup>1</sup>

**22b. Transfer of proceedings under this Rule.** — An objection under this rule can only be decided by the executing Court. Hence, a transfer to another Court of such an objection alone without transferring the execution proceedings also is not according to law.<sup>1</sup>

**23. Effect of order — Res judicata.** — An order passed on a claim petition disallowing the claim bars, on general principles of *res judicata*, a fresh application on the same grounds<sup>1</sup> and is conclusive between the parties, subject to the result of suit contemplated by Rule 63. On the same principle a defeated claimant is not entitled to apply under O. 21 R. 100 *infra*, the reason being that the scope of an enquiry under Rule 100 is the same as that of an enquiry under this rule.<sup>2</sup> So also, where a claim

15. ('17) AIR 1917 Mad 311 (311).

16. ('17) AIR 1917 Low Bur 79 (80).

**Note 21**

1. ('89) AIR 1938 All 751 (751).

('87) AIR 1937 Oudh 268 (269) : 13 Luck 111.

2. ('18) AIR 1918 Upp Bur 32 (32) : 2 Upp Bur Rul 136.

('17) AIR 1917 Cal 9 (10). (Proviso applies even to cases where Court has become possessed of the property attached by usurpation of authority.)

3. ('28) AIR 1928 Mad 525 (526).

('88) AIR 1938 Bom 190 (191).

('85) AIR 1935 Pat 122 (123).

('85) AIR 1935 Cal 500 (501).

4. ('87) AIR 1937 Pat 245 (245, 246).

('85) AIR 1935 Nag 222 (222, 224) : 31 Nag L R 426.

**Note 22a**

1. ('36) AIR 1936 All 878 (380) : 58 All 797.

**Note 22b**

1. ('88) AIR 1938 Lah 95 (96).

**Note 23**

1. See Section 11 Note 23 foot-note 7.

('70) 14 Suth W R 144 (145).

[See also ('88) AIR 1938 Cal 233 (234). (Unsuccessful claimant under R. 58 not competent to apply under R. 100 without a suit under R. 63.)]

2. ('88) AIR 1938 Cal 233 (234).

('85) AIR 1935 Pat 122 (123).

('85) 158 Ind Cas 898 (398) (Pat).

[See also ('84) AIR 1984 Lah 193 (194). (Petitioner's father's claim under this rule dismissed and order becoming conclusive—He cannot object under R. 97.)]

under this rule is rejected, the claimant cannot raise the same question by way of defence to a suit for possession by the auction-purchaser.<sup>3</sup>

**O. 21 R. 58**  
**Note 23**

But the order passed in a claim proceeding is only *quoad* the particular claimant or the particular property attached and cannot be regarded as a general decision enuring to the benefit of others who are not parties thereto.<sup>4</sup> Thus, an order in favour of one of several decree-holders disallowing a claim cannot be availed of in favour of the other decree-holders who are not parties to the claim.<sup>5</sup> A in executing a decree against B attaches certain properties and C prefers a claim thereto. C's claim is dismissed and he does not file a suit under Rule 63. A purchases the property in court-auction in execution of his decree and gets delivery of possession by dispossessing D, who is a *bona fide* court-auction-purchaser of C's interest in execution of a decree against him. D is not barred from applying under Rule 101 for restoration of possession of which he was dispossessed, by reason of the fact that C became concluded by the order against him in his application under this rule.<sup>6</sup> But, where a claim under this rule has been disallowed and the order disallowing the claim has not been set aside by a suit under Rule 63, it has been held that a person holding a decree against the defeated claimant and seeking to attach the property in execution of his decree will be bound by the previous order dismissing the claim of his judgment-debtor.<sup>7</sup> Where a claim is preferred by the manager of the Court of Wards on behalf of a minor ward without the sanction of the Court of Wards, the order disallowing the claim is not binding on the minor ward.<sup>8</sup>

In execution of a decree by A against B, C prefers a claim on the basis of a transfer of the property (which has been attached) in his favour by the judgment-debtor. The claim is upheld. A does not get the order upholding the claim set aside by a suit under Rule 63. Then B is declared an insolvent and in the insolvency proceedings, A applies for the annulment of the transfer in favour of C. The application is not barred. The reason is that in the execution proceedings A was acting on his own behalf, but in the insolvency proceedings he acts in a representative capacity on behalf of all the creditors of the insolvent generally.<sup>9</sup>

Where on a claim by a third party that he is the owner of a property attached in execution of a decree against another, the attachment is set aside on that ground, the decision that the third party is the owner of the property is not binding on the judgment-debtor. But, if the judgment-debtor has appeared and opposed the claim and the matter is decided, the decision may be binding on him.<sup>10</sup>

3. ('35) AIR 1935 Cal 500 (502). (Claimant asserting his own title to the property — Claim dismissed — Suit for possession by auction-purchaser — Defence by defeated claimant on same ground is barred.)

('35) AIR 1935 Rang 161 (162).

[See however ('39) AIR 1939 Mad 456 (461) : I L R (1939) Mad 803 (S B). (Though dismissal of claim is based on finding that claimant was not in possession of the attached property, adverse possession from before attachment can be relied on by claimant when he is sued for possession by auction-purchaser.)]

4. ('67) 8 Suth W R 27 (28).

('74) 21 Suth W R 230 (231).

('66) 6 Suth W R 157 (157).

('02) 25 Mad 721 (723).

('92) 15 Mad 477 (479).

5. ('96) 18 All 413 (413).

[See also ('39) AIR 1939 Mad 456 (460) : I L R (1939) Mad 803 (S B). (A getting decree against B and attaching property — C claiming such property — Claim disallowed — Subsequently A's decree satisfied otherwise — D, another decree-holder of B, attaching same property — Previous order disallowing C's claim is not conclusive so as to preclude C from preferring claim under this rule again.)]

6. ('27) AIR 1927 Cal 339 (340).

7. ('86) AIR 1936 All 722 (723). (A I R 1935 All 888, Relied on.)

8. ('99) 27 Cal 242 (252, 253).

9. ('35) AIR 1935 Mad 670 (671).

10. ('39) AIR 1939 All 728 (729).



**O. 21 R. 58****Notes 23a-25****23a. Proclamation of sale pending claim petition.** — A Court cannot order

the issue of a proclamation of sale while a claim petition is pending.<sup>1</sup>

**24. Appeal.** — No appeal lies against an order allowing or rejecting a claim under this rule. The order is *conclusive* subject to the result of the suit contemplated by Rule 63.<sup>1</sup> Under the special provisions of the Agra Tenancy Act, 1926, such an order passed by an Assistant Collector, Second Class is, however, appealable to the Collector, but the party aggrieved by the appellate order of the Collector is not barred from filing a suit under O. 21 R. 63.<sup>2</sup> There is a conflict of opinion as to whether an order dismissing a claim petition is a "judgment" within the meaning of Clause 15 of the Letters Patent and is appealable as such. According to the High Court of Madras<sup>3</sup> it is a "judgment" and is appealable as such, and the period of limitation for the suit under Rule 63 runs from the date of the appellate order. The High Court of Rangoon<sup>4</sup> has, on the other hand, held that the refusal of the summary remedy under O. 21 R. 58 leaves open the right of bringing a regular suit and have the question finally decided, and that it cannot therefore be a "judgment" within the meaning of Clause 13 of the Letters Patent (Rangoon). The High Court of Calcutta<sup>5</sup> has held, without deciding whether the order is a "judgment" or not, that the concluding words of Rule 63 *infra* preclude an appeal from the order.

Where the claim is one coming under Section 47, the order passed thereon is a decree and is appealable even though the objection was misdescribed as one under O. 21 R. 58 and the Court acting under a misconception dealt with it as such.<sup>6</sup>

**25. Revision.** — See Notes 8, 11 and 23 to Section 115 *ante* and the cases cited below.<sup>1</sup>

**Note 23a**

1. ('40) AIR 1940 Mad 6 (7): 1939 Mad W N 776 (776).

**Note 24**

1. ('23) AIR 1923 All 292 (292).
- ('32) AIR 1932 All 263 (264).
- ('82) 4 All 190 (191, 192).
- ('80) 2 All 752 (753).
- ('86) 1886 All W N 39 (40).
- ('88) 1888 All W N 77 (78).
- ('04) 28 Bom 458 (460).
- (1900) 2 Bom L R 241 (242).
- ('81) 7 Cal 403 (405).
- ('02) 6 Cal W N 63 (65).
- ('71) 12 Suth W R 333 (333, 334).
- ('71) 15 Suth W R 339 (339).
- ('67) 8 Suth W R 304 (306).
- ('66) 6 Suth W R Misc 61 (62).
- ('73) 19 Suth W R 97 (98).
- ('73) 20 Suth W R 90 (90).
- ('74) 21 Suth W R 865 (866).
- ('66) 1866 Pun Re No. 9.
- ('23) AIR 1923 Rang 195 (195): 1 Rang 276.
- ('17) AIR 1917 Mad 664 (665).
- ('16) AIR 1916 All 341 (341): 38 All 537.
- ('18) AIR 1918 Mad 1140 (1140).
- ('35) AIR 1935 Mad 151 (152): 58 Mad 403. (No appeal lies even though the application is headed as one under S. 47.)
- ('86) AIR 1936 Lah 830 (831).
- ('36) AIR 1936 Sind 2 (2): 30 Sind L R 288.
- ('37) AIR 1937 Pat 341 (343).
2. ('82) AIR 1982 All 502 (503): 54 All 767.

3. ('02) 25 Mad 555 (559).

- ('16) AIR 1916 Mad 883 (884): 39 Mad 1196.

*Note.* The corresponding Clause in the Letters Patent for the High Courts at Lahore and Patna is Clause 10 and that for Rangoon is Clause 13.

4. ('27) AIR 1927 Rang 287 (287): 5 Rang 381.
5. ('33) AIR 1933 Cal 715 (716): 60 Cal 914.
6. ('32) AIR 1932 Lah 876 (877).
- ('35) AIR 1935 All 183 (185).
- ('34) AIR 1934 Mad 435 (435): 57 Mad 822. (Claim under O. 21 R. 58 by party to suit and by non-party — Former must appeal under S. 47 and latter sue under O. 21 R. 63.)
- ('39) AIR 1939 Lah 207 (208). (Person added as party to suit but against whom no relief is claimed is 'party' within S. 47 and objection by him is one under Section 47.)
- ('35) AIR 1935 Mad 923 (924). (Separate suit to question order deciding objection is barred — Remedy is by way of appeal.)
- ('29) AIR 1929 Pat 141 (144): 8 Pat 717. (Do.)
- ('29) AIR 1929 Pat 472 (472). (Objection by defendant against whom suit was dismissed comes under Section 47.)

**Note 25**

1. ('87) 9 All 282 (283, 284). (Refusal to entertain claim—Revision lies.)
- ('83) AIR 1933 All 751 (751). (Dismissal of claim on the ground of delay without giving opportunity to claimants to explain delay—Court acts with material irregularity.)
- ('35) AIR 1935 All 843 (845). (Court disallowing decree-holder's prayer to attach property of judg-



**R. 59. [S. 279.]** The claimant or objector must adduce **O. 21 R.**

Evidence to be adduced by claimant.

evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

**Local Amendment****PATNA**

*Substitute the following for Rule 59 :*

"59. The claimant or objector must adduce evidence to show that at the date of the decree or of the attachment, as the case may be, he had some interest in, or was possessed of, the property in question."

**Synopsis**

1. The claimant or objector must adduce evidence.
2. "Some interest."

3. "Or was possessed of."
4. Limits of enquiry under Rules 59 to 61. See Note 20 to Rule 58.

**1. The claimant or objector must adduce evidence.** — The burden is on the claimant to prove that on the date of the attachment he was in possession of the property attached.<sup>1</sup> If he proves that, then the burden of proving that he is not the owner or holds it in trust for the judgment-debtor is upon the decree-holder.<sup>2</sup>

**2. "Some interest."** — The claimant may raise an objection not only on the ground that he is in possession of the property attached but also on the ground that he has some interest in the property.<sup>1</sup> A bonaficial interest is as much an interest within the meaning of the rule as a legal interest in the property attached.<sup>2</sup> The Upper Burma Judicial Commissioner's Court<sup>3</sup> has held that a mortgagor without possession can prefer a claim on the ground that his interest in the property, *viz.*, the equity of

mont-debtor without adequate reasons by allowing objections of third party before attachment is effected — High Court should interfere in revision.)

('83) AIR 1933 Lah 421 (421). (Allowing claim without investigation—Revision will lie.)

('83) AIR 1933 Pat 158 (159).

('83) AIR 1933 Rang 259 (260). (Wrong order on claim petition—There can be no defence to suit under Rule 63—In such a case High Court may interfere in revision.)

('29) AIR 1929 Pat 751 (752) : 9 Pat 647. (Not deciding question of possession—Revision lies.)

('84) AIR 1934 Lah 176 (176). (Objection rejected treating the decree wrongly as a mortgage decree—Revision lies.)

('36) AIR 1936 Lah 761 (762). (Revision does not lie.)

('37) AIR 1937 Oudh 268 (269) : 18 Luck 111. (No opportunity given to explain delay — Revision lies.)

('34) AIR 1934 Rang 280 (280). (No revision lies as unsuccessful party can bring a suit.)

('39) AIR 1939 All 117 (120). (Court ignoring the question of actual possession and rejecting objection solely on the ground of want of title—Revision lies.)

('86) AIR 1936 Rang 806 (808) : 14 Rang 516. (Failure to make enquiry into the question of

title when it was necessary—Revision lies.)

('36) AIR 1936 Sind 2 (3) : 30 Sind L R 288. (Remedy by way of suit open—No revision lies.)

('38) AIR 1938 Rang 319 (320). (No revision lies against order under rule as another remedy, *viz.*, by suit, is available to set aside such order.)

('84) AIR 1934 Rang 212 (213). (Remedy by suit open—Interference in revision *held* unnecessary.)

[See ('71) 15 Suth W R 163 (164).

('75) 24 Suth W R 422 (423).

('72) 17 Suth W R 74 (74).]

**Order 21 Rule 59 — Note 1**

1. ('69) 2 Beng L R 91 (102) (FB). (Per Peacock, C. J.)

('38) AIR 1933 Oudh 473 (474).

('35) AIR 1935 Pat 31 (31) : 11 Pat 690.

('05) 4 Low Bur Rul 228 (229).

('37) AIR 1937 Cal 639 (640).

2. ('08) 2 Low Bur Rul 152 (155, 158).

('33) AIR 1933 Oudh 473 (474).

('37) AIR 1937 Cal 639 (640).

**Note 2**

1. ('12) 14 Ind Cas 790 (792) : 34 All 365.

('91) 18 Cal 290 (296).

2. ('02) 25 Mad 555 (560).

('35) AIR 1935 Mad 193 (194). (Interest is not necessarily interest in land — Person is entitled under a contract to sell in favour of claimant.)

3. ('11) 10 Ind Cas 994 (996) : 1 Upp Bur Rul 75.

**O. 21 R. 59** redemption cannot be attached and sold in execution of a decree against the mortgagee  
**Notes 2-4** in possession.

The rule does not mean that if the claimant establishes that he has some interest in the property he is entitled to succeed irrespective of the question of possession; nor does it imply that if he fails to establish the particular interest he sets up, his claim must be disallowed irrespective of the question of possession. In each of the cases mentioned in Rules 60 and 61, the Court must determine the question of possession of the judgment-debtor and cannot base its decision merely on the question of validity of the claim or of title to the attached property. The expression "some interest" means such interest as would render the possession of the judgment-debtor, possession, not on his account, but on account of or in trust for the claimant.<sup>4</sup>

*X* advances money to *A* in order that *A* may advance it to *B* and *B* executes a mortgage in favour of *A* for the money. *A* then sues *B* on the mortgage and gets a decree. *X* has no interest in the decree and is therefore not entitled to object to the attachment of the decree.<sup>5</sup>

An attachment of property does not by itself create any interest in the property in favour of the person at whose instance the attachment is made. Hence, the mere fact that a person has already attached the property will not entitle him to raise an objection under this rule.<sup>6</sup>

See also Note 13 to Order 21 Rule 58.

**3. "Or was possessed of."** — These words are not restricted merely to tangible or physical possession but include *constructive* possession and possession in law of debts and other intangible property.<sup>1</sup>

**4. Limits of enquiry under Rules 59 to 61.** — See Note 20 to Rule 58.

**O. 21 R. 60**

**R. 60.** [S. 280.] Where upon the said investigation the

Release of property  
from attachment.

Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on

4. ('15) AIR 1915 Cal 116 (117).  
 ('88) AIR 1938 Nag 297 (298). (Claimant claiming title adversely to judgment-debtor, but not in possession at the date of attachment— So far as this rule is concerned he has no interest in the property.)  
 ('97) 1 Cal W N 617 (622).

5. ('87) AIR 1987 Nag 80 (80); I L R (1987) Nag 82. (If *X* advances money to *A* in order that *A*

may advance it to *B*, *X* does not thereby obtain any rights in the bond that may be executed by *B* in favour of *A*.)

6. ('85) AIR 1985 Nag 171 (172); 81 Nag L R 301.

**Note 3**

1. ('04) 27 Mad 67 (70) (FB).  
 ('07) 4 Low Bur Rul 289 (290).

account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

**O. 21 R. 60**  
**Note 1**

[1877, S. 280; 1859, S. 220. See S. 63.]

### Local Amendment

#### PATNA

*Substitute the following for Rule 60 :*

"60. Where upon the said investigation the Court is satisfied that for the reasons stated in the claim or objection such property was not, at the date of the decree, or when attached, as the case may be, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from the execution proceedings, or from attachment.

Where the property has been sold, such order shall have the effect of setting aside the sale ; and if it has been purchased by a third party in good faith, the Court may make such order for his compensation by the decree-holder or objector, to an extent not exceeding 12½ per cent. of the purchase price, as it thinks fit."

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Release of property from attachment — General.</li> <li>2. Property in possession of third person.</li> <li>3. Property in possession of judgment-debtor.</li> </ol> | <ol style="list-style-type: none"> <li>4. Partly on his own account and partly on account of some other person.</li> <li>5. Effect of an order of release.</li> <li>6. Appeal.</li> <li>7. Revision. See Note 25 to Rule 58.</li> </ol> |
|--|---|

**1. Release of property from attachment — General.** — A release from attachment can be made under this rule, only if the conditions prescribed in this rule are satisfied, namely—

- (1) That the property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him or in the occupancy of a tenant paying rent to him.
- (2) That the property being in the possession of the judgment-debtor at such time, it was so, not on his own account or as his own property, but on account of, or in trust for, some other person, *viz.*, the claimant.
- (3) That the property was in possession of the judgment-debtor partly on his own account and partly on account of some other person.<sup>1</sup>

In the last case, the release is to be ordered to *the extent* to which the possession of the claimant is established.<sup>2</sup> In such a case the Court should define the share of the judgment-debtor and that of the claimant and sell only the former.<sup>3</sup>

#### Order 21 Rule 60 — Note 1

1. ('06) 8 Bom L R 794 (797).
- ('28) AIR 1928 All 668 (669).
- ('18) AIR 1918 Low Bur 82 (82). (Extent of enquiry into title laid down.)
- ('97) 24 Cal 568 (566).
2. ('70) 18 Suth W R 68 (66, 67) (F B).
- ('97) 24 Cal 568 (566).

('87) 12 Bom 281 (285).

- [See also ('82) AIR 1932 Bom 210 (212). (Undivided interest of a member of a joint family attached during pendency of partition suit — Final decree for partition passed subsequently — Court must take notice of partition and pro-claim for sale ascertained share of the member.)]
3. ('05) 27 All 464 (465).

**O. 21 R. 60**  
**Notes 1-4**

An order of release should be unconditional.<sup>4</sup> It has been held by High Court of Patna in the undermentioned case<sup>5</sup> that the Court has, apart from this rule, an inherent power to release property from illegal attachment in proper cases.

But the rule expressly recognizes a release (from attachment) to a *limited* extent. Thus, where the claimant only claims a life-interest in the property attached, the Court can release the property to the extent necessary to give effect to the right claimed, by directing that the property was liable to be sold subject to the life-interest of the claimant.<sup>6</sup>

**2. Property in possession of third person.** — If it is found that the claimant was in possession and that such possession was on his own account, the claimant is entitled to an order of release under this rule,<sup>1</sup> notwithstanding the fact that the judgment-debtor may have some beneficial interest in, or title over, the property.<sup>3</sup> Thus, in a case where the wife of the debtor claimed the Government securities attached by the creditor and proved that they were in her name, that she dealt with them as owner and that she had separate properties of her own, it was held that the claim should not be dismissed on the mere suspicion that she might be holding it for the benefit of her husband.<sup>3</sup>

**3. Property in possession of judgment-debtor.** — If the property is found to be in the possession of the judgment-debtor, then the attachment should continue unless it is established that such possession was on account of, or in trust for, the claimant.

A advanced money to B under an agreement that B would cut and send timber to A who was to sell and appropriate the sale proceeds in discharge of the debt due by way of advances. B accordingly cut and despatched the timber to A. While the goods were in transit, C attached them in execution of a decree against B. On a claim preferred by A, it was held that B was a trustee for A, that B's possession was on account of A, and that the timber was not liable to attachment.<sup>1</sup>

The words "possession in trust for" mean possession as servant, or agent having no right to possession on his own account,<sup>2</sup> i. e., possession of such a character as to be really the possession of the debtor.<sup>3</sup>

**4. Partly on his own account and partly on account of some other person.** — The Judicial Commissioner's Court of Upper Burma has held in the undermentioned case<sup>1</sup> that a mortgagee in possession is so partly on his own account,

('01) 23 All 263 (265).

(1865) 4 Suth W R 35 (35).

4. ('19) AIR 1919 Cal 473 (473).

('67) 8 Suth W R 93 (93).

5. ('21) AIR 1921 Pat 409 (410).

6. [See ('20) AIR 1920 Bom 132 (133) : 44 Bom 860.]

**Note 2**

1. (72) 18 Suth W R 402 (403).

('33) AIR 1933 Rang 259 (260).

('69) 12 Suth W R 41 (42).

('67) 8 Suth W R 362 (363). (Claimant admitting that judgment-debtor had some interest — No release can be ordered.)

('80) AIR 1980 Cal 390 (391). (No registered sale in favour of claimant — Held possession not on his own account.)

('89) AIR 1989 All 117 (119). (Claimant found to be in possession in his own right — Claim

cannot be rejected on the ground of want of title.)

('35) AIR 1935 Rang 11 (12). (Court cannot declare that the claimant is liable under the decree though it was not passed against him.)

2. ('91) 18 Cal 290 (295, 296).

3. ('02) 29 Cal 543 (546, 547).

**Note 3**

1. ('11) 9 Ind Cas 255 (258) (Mad).

('97) 21 Bom 287 (293). (Goods).

('70) 2 N W P H C R 337 (338). (Stones).

[See ('34) AIR 1934 Rang 212 (213). (Persons in possession claimed by decree-holder to be in possession on behalf of judgment-debtor — Claim of title should be gone into.)]

2. ('02) 2 Low Bur Rul 152 (158).

3. ('87) 14 Cal 617 (620).

**Note 4**

1. ('11) 10 Ind Cas 994 (995) : 1 Upp Bur Rul 75.

*i. e.*, to the extent of his right as a mortgagee in possession, and partly on account of the mortgagor, *i. e.*, to the extent of the mortgagor's interest, and that the Court is bound to investigate into the claim of a mortgagor and order a release to the extent of his interest when the mortgaged properties are attached in execution of a decree against the mortgagee. See also Note 3 to Rule 62.

**O. 21 R. 60**  
**Notes 4-7**

Where in an objection preferred under this rule, the Court finds that the claimant has a *half share* in the attached moveable property, the proper course, according to the High Court of Calcutta, is to release the entire property, and to proceed by way of attachment under Rule 47, *ante*.<sup>2</sup>

**5. Effect of an order of release.** — An order of release from attachment under this rule is only provisional and is subject to the result of the suit contemplated by Rule 63. The attachment is merely suspended pending the result of the suit and if the decree-holder succeeds in the suit the attachment will revive. An alienation made in the interval cannot prevail against the claim of the attaching decree-holder who eventually succeeds in a suit brought by him under this rule.<sup>1</sup>

Where an attachment of property is raised under this rule on a claim preferred by the owner thereof, he is entitled to have the property restored to him in *status quo ante* the attachment. Hence, where moveable property is attached and left in the custody of a *sapurdar*, and before the attachment is raised, the property is accidentally destroyed, the successful claimant is entitled to recover the value of the property.<sup>3</sup>

See also Note 16 to Rule 63, Note 4 to O. 21 R. 55 and Note 9 to Section 64.

**6. Appeal.** — An order under this rule is not appealable.<sup>1</sup> See also Note 24 to Rule 58.

**7. Revision.** — See Note 25 to Rule 58.

**R. 61.** [S. 281.] Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person,

**O. 21 R. 61**

**Disallowance of claim to property attached.**

or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

[1877, S. 281; 1859, S. 246.]

2. ('32) AIR 1932 Cal 408 (408) : 59 Cal 808.

**Note 5**

1. ('21) AIR 1921 Cal 101 (103).

('06) 83 Cal 1158 (1162).

('96) 28 Cal 829 (833, 834).

('09) 1 Ind Cas 951 (951) : 81 All 967.

('22) AIR 1922 Mad 176 (178) : 45 Mad 84.

('18) AIR 1918 Oudh 275 (278).

('28) AIR 1928 Rang 287 (298).

[See also ('90) 14 Bom 872 (877).

('88) 6 Mad 98 (99).]

2. ('36) AIR 1936 Nag 257 (257) : I L R (1937) Nag 19.

**Note 6**

1. ('84) 6 All 21 (22).

('88) 1883 All W N 178 (178).

('04) 28 Bom 458 (460).

(1900) 2 Bom L R 241 (242).

('02) 6 Cal W N 68 (65).

('74) 21 Suth W R 865 (366).

('95) 8 O P L R 67 (68).

('06) 8 Low Bur Rul 203 (204).

O. 21 R. 61  
Notes 1-3

## PATNA

## Local Amendment

*Substitute the following for Rule 61:*

"61. Where the Court is satisfied that the property was, at the time of the decree, or of the attachment, as the case may be, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim."

## Synopsis

- |   |                                     |
|---|-------------------------------------|
| 1. Disallowance of claim.                                 | 3. Effect of order under this Rule. |
| 2. Order without dealing with the question of possession. | 4. Appeal.                          |
|   | 5. Revision.                        |

**1. Disallowance of claim.** — Where the property attached is found to be in the possession of the judgment-debtor on his own account, or if the claimant is in possession as trustee for the judgment-debtor, the Court is bound to disallow the claim under this rule.<sup>1</sup> Similarly, where the claimant, though in possession, is only a tenant of the judgment-debtor paying rent to him, his possession is regarded as that of the judgment-debtor and his claim cannot be allowed.<sup>2</sup>

**2. Order without dealing with the question of possession.** — As already pointed out in Note 20 to Rule 58, the sole question to be considered in the investigation of a claim is the question of possession. But if the Court erroneously does not consider the question of possession, but decides the claim on some other ground, *e.g.*, on the ground of title, the order cannot be considered to be one passed without jurisdiction and a nullity. It will nevertheless be conclusive unless set aside in a suit under Rule 63.<sup>1</sup> But such an order can be revised by the High Court.<sup>2</sup>

**3. Effect of order under this Rule.** — An order disallowing a claim under this rule is only *provisional* and if the defeated claimant succeeds in the suit filed under Rule 63, his rights as on the date of attachment will be restored. If the court auction sale takes place, the auction-purchaser's rights will be subject to the result of the suit.<sup>1</sup> An order under this rule, when it becomes conclusive under Rule 63 *infra*, does not operate as an order *in rem* so as to render void the transfer upon which the claimant relied. The order only precludes the defeated claimant from proceeding against the decree-holder or the auction-purchaser on the basis of that transfer; but otherwise it does not affect the validity of the deed of transfer.<sup>2</sup> An order dismissing a claim does not necessarily imply an *adjudication* that the claimant was not in possession at the

## Order 21 Rule 61 — Note 1

1. ('12) 17 Ind Cas 12 (12) (Cal).
- ('38) AIR 1938 Mad 839 (840).
- ('88) 1888 All W N 205 (205). (After disallowing claim Court should not stay sale.)
- ('17) AIR 1917 Oudh 92 (96). (Defeated claimant to pay full costs to decree-holder though claim only to portion of attached property.)
- ('86) AIR 1936 Rang 806 (807) : 14 Rang 516. (Sale deed in favour of claimant invalid and not intended to pass any title—Possession of claimant is not in his account.)
- ('85) AIR 1985 Rang 395 (396).
2. ('35) AIR 1985 Mad 547 (548) : 58 Mad 986.

## Note 2

1. ('12) 14 Ind Cas 790 (792) : 34 All 865.
2. ('15) AIR 1915 Cal 116 (117).
- ('16) AIR 1916 Mad 19 (19).

## Note 3

1. ('90) 17 Cal 260 (262).
2. ('88) AIR 1938 Mad 879 (882, 883) : 57 Mad 195. (A obtained a decree against B—B had mortgaged his property to C—A attached B's properties—C preferred claim stating that he had purchased property mortgaged to him from B—C's claim was dismissed and the order becoming conclusive under O. 21 R. 63, C brought present suit on his mortgage and contended that his claim petition having been dismissed the mortgage revived under law—Mortgage in favour

date of the attachment as under Rule 58 a claim may also be dismissed on the ground of undue delay.<sup>3</sup>

See also Note 16 to Rule 63, Note 4 to O. 21 R. 55, and Note 9 to Section 64.

**4. Appeal.** — No appeal lies from an order under this rule.<sup>1</sup>

**5. Revision.** — See Note 25 to Rule 58.

**O. 21 R. 61**  
**Notes 3-5**

## **R. 62. [S. 282.]** Where the Court is satisfied that the

**O. 21 R. 62**

Continuance of attachment subject to claim of incumbrancer.

property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may

do so, subject to such mortgage or charge.

[1877, S. 282.]

### *Synopsis*

**1. Scope of the Rule.**

**2. "Subject to mortgage."**

**3. Mortgage in favour of a person not in possession.**

**4. Notification of mortgage or charge.**

See Note 1.

**5. Effect of order under this Rule.**

**6. Appeal.**

**7. Revision.** See Note 25 to Rule 58.

**1. Scope of the Rule.** — The rule is an enabling provision which empowers the Court to direct the continuance of the attachment subject to a mortgage or charge in favour of a person not in possession.

The question of the existence of a mortgage over the property attached can be raised in two ways and at two stages in execution. One is, when the Court has to prepare the proclamation for sale by public auction. This is provided for in Rule 66 of this Order. That rule enacts that the sale proclamation shall specify as fairly and accurately as possible any encumbrance to which the property is subject after giving notice to the decree-holder and the judgment-debtor. The other stage is that provided for by this rule.<sup>1</sup> The difference between the two provisions is very important. Where properties are sold subject to a mortgage under this rule, the Court does so *after being satisfied of the existence of the mortgage and sells only the judgment-debtor's right of redemption* so that the purchaser does not acquire any greater rights than that of redeeming the mortgage.<sup>2</sup> The order continuing the attachment subject to the mortgage or refusing to do so, is conclusive as to the rights of the parties and if no suit is filed within the period of one year prescribed by Article 11 of the Limitation Act, the mortgagee or the purchaser, as the case may be, cannot either as plaintiff or as defendant assert the right denied by that order.<sup>3</sup> In the case of a proclamation of sale issued

of C did not revive and the mortgage had become extinguished in sale.)

3. ('89) AIR 1989 Mad 456 (461) : ILR (1989) Mad 808 (S B). (Even if the dismissal is based on finding that claimant was not in possession he is not barred from raising plea of adverse possession in suit for possession by auction-purchaser.)

#### **Note 4**

1. ('84) 6 All 109 (110).

('27) AIR 1927 Rang 187 (188) : 5 Rang 110.

#### **Order 21 Rule 62 — Note 1**

1. ('86) AIR 1986 Cal 590 (592).

2. ('06) 28 All 418 (420).

('15) AIR 1915 Oudh 157 (158).

('30) AIR 1930 Oudh 362 (365).

('20) AIR 1920 Cal 354 (357) : 47 Cal 446.

('38) AIR 1938 Mad 879 (881) : 57 Mad 195.

('35) AIR 1935 Oudh 23 (25) : 10 Luck 343.

('89) AIR 1989 Nag 805 (808) : 1989 Nag L Jour. 487 (491, 492) : ILR (1989) Nag 665.

('89) AIR 1989 Cal 620 (621) : ILR (1989) 2 Cal 291.

3. ('27) AIR 1927 Bom 234 (235).

('35) AIR 1935 Oudh 28 (26) : 10 Luck 343.

('26) AIR 1926 Nag 446 (447).

('28) AIR 1928 Nag 282 (288) : 19 Nag L R 15.

('89) AIR 1989 Nag 805 (808) : 1989 Nag L Jour 487 (491, 492) : I L R (1989) Nag 665. (Auction-purchaser cannot challenge validity of mortgage.)

**O. 21 R. 62**  
**Notes 1-2**

under Rule 66, the Court does not decide the question whether the mortgage subsists or not and the purchaser buys the property subject to such risks as the notice might involve; he is not precluded from questioning the validity of the mortgage.<sup>4</sup> The Chief Court of Oudh has in the undermentioned case<sup>5</sup> held that there is no difference between an order passed under this rule and an order passed under Rule 66 so far as the auction-purchasers are concerned. It is submitted that the view is not correct.

The rule does not apply to claims arising in execution of a mortgage decree.<sup>6</sup>

**2. "Subject to mortgage."** — Has the executing Court power to decide under this rule the question of the truth or validity of the mortgage? In other words, if the Court rejects a claim of the mortgagee on the ground that the mortgage is not true, is he bound to file a suit within the period of limitation prescribed by Article 11 of the Limitation Act on pain of losing his rights under the mortgage if he does not do so? Upon this point there is a conflict of judicial opinion. The High Court of Bombay,<sup>1</sup> and the High Court of Allahabad<sup>2</sup> in a case decided under the old Code, have held that the rule is only a provision enabling the Court to continue an attachment subject to a mortgage if it finds that a mortgage exists and that the Court has no power to declare the mortgage invalid. The *ratio* of these decisions is that it is only where the Court is satisfied as to the existence of the mortgage that it can act under this rule, but that where it is not so satisfied, it can do nothing under this rule, but can only notify the mortgage under R. 66. The Lahore High Court<sup>3</sup> has also held that the objection of a mortgagee of the attached property does not come under Rule 58 and that an order rejecting his objection does not come under Rule 63. The High Court of Allahabad<sup>4</sup> in cases decided under the present Code, the High Courts of Calcutta,<sup>5</sup> Madras,<sup>6</sup> Patna<sup>7</sup> and Rangoon<sup>8</sup>

('39) AIR 1939 Cal 620 (621) : ILR (1939) 2 Cal 291.

('36) AIR 1936 Cal 590 (592). (Attachment continued subject to mortgage—Suit under Rule 63 not brought — Auction-purchaser cannot challenge mortgage.)

('39) AIR 1939 Mad 998 (995) : ILR (1939) Mad 600. [See ('37) AIR 1937 Oudh 159 (164) : 12 Luck 540. (Property purchased in execution subject to mortgage — Mortgage declared invalid—As between judgment-debtor and execution purchaser, latter is entitled to benefit arising out of this declaration.)]

[See also ('24) AIR 1924 Nag 208 (209),

('15) AIR 1915 Oudh 157 (158).

('19) AIR 1919 Oudh 122 (128). (But can question the accuracy of the description.)

('14) AIR 1914 Bom 302 (303)].

[But see ('94) 7 C P L R 73 (75).]

4. ('22) AIR 1922 All 443 (445) : 44 All 714.

('88) AIR 1938 Mad 879 (881, 882) : 57 Mad 195.

('35) AIR 1935 Oudh 23 (24, 26) : 10 Luck 343.

('21) AIR 1921 All 79 (80) : 43 All 489.

('18) 20 Ind Cas 182 (182) : 35 All 257.

('21) AIR 1921 Cal 435 (439). (If mortgage is invalid benefit goes to the purchaser.)

('09) 3 Ind Cas 798 (794) : 31 All 583 : 26 Ind App 208 (P C).

('98) 16 Mad 207 (210).

('19) AIR 1919 Lah 163 (164).

('16) AIR 1916 Oudh 169 (172, 173).

('30) AIR 1930 Lah 40 (40, 41) : 11 Lah 90.

('18) 18 Ind Cas 461 (463) (Oudh).

('15) AIR 1915 Oudh 163 (164).

('20) AIR 1920 All 165 (166).

('39) AIR 1939 Nag 305 (308) : ILR (1939) Nag 665.

('30) AIR 1930 Oudh 362 (365).

[See also ('11) 10 Ind Cas 913 (914) : 35 Bom 275.

('94) 18 Bom 175 (176) (F B).

('36) AIR 1936 Cal 590 (593). (Purchaser is bound by mortgage whether it is notified or not — But in the case of a charge he is not bound if he has no notice.)]

5. ('25) AIR 1925 Oudh 154 (156, 157) : 27 Oudh Cas 308.

6. ('31) AIR 1931 Oudh 157 (159).

('17) AIR 1917 Oudh 92 (96).

**Note 2**

1. ('16) AIR 1916 Bom 179 (180) : 41 Bom 64. (Distinguishing 22 Bom 640.)

('88) 12 Bom 231 (233).

('81) 5 Bom 470 (477) (F B).

2. ('04) 1 All L Jour 531 (536).

3. ('88) AIR 1938 Lah 760 (761).

4. ('27) AIR 1927 All 593 (595, 596) : 49 All 903.

('39) AIR 1939 All 657 (659).

[See however ('88) AIR 1938 All 542 (544). (The mere question whether there is a prior charge will not be an 'objection' to attachment.)]

5. ('36) AIR 1936 Cal 590 (592).

('39) AIR 1939 Cal 620 (622) : ILR (1939) 2 Cal 291.

6. ('20) AIR 1920 Mad 936 (937).

('20) AIR 1920 Mad 191 (192).

7. ('39) AIR 1939 Pat 21 (22).

8. ('31) AIR 1931 Rang 310 (311, 312) : 9 Rang 367.



and the Judicial Commissioner's Court of Nagpur<sup>9</sup> have, on the other hand, held that an order rejecting the claim of a mortgagee on the ground that the mortgage is not true or valid is an order which will be *conclusive* unless set aside in a suit under Rule 63. As pointed out by Ashworth, J., of the Allahabad High Court, the expression "where the Court is satisfied" *confers jurisdiction* on the Court to come to a finding of fact as to the existence of the mortgage. Without such finding of fact it cannot be said to be satisfied about it. The rule, in effect, provides for two alternative or mutually exclusive orders. One is an order that, as the mortgage exists, the attachment shall be continued subject to it, and the other is that no mortgage shall be deemed to exist. The latter order, no less than the former, is contemplated by Rule 63.<sup>10</sup> It may appear anomalous that an executing Court should thus be given power to decide as to the validity and existence of a mortgage in favour of a third party the value of which may exceed the pecuniary limits of the jurisdiction of the Court. But the mortgagee is not bound to prefer a claim. If he chooses to avail himself of the advantages of the speedy and summary remedy provided for in this Chapter, he must suffer its disadvantages as well.<sup>11</sup> But, where a mortgagee does not file a petition of *objection or claim*, but merely informs the Court about his mortgage and prays that it may be notified in the sale proclamation, and the Court, on the allegation of the judgment-debtor, goes into the question of the satisfaction of the mortgage and finds that it is discharged and dismisses the mortgagee's petition, the order is not one under this rule and hence, the mortgagee is not bound to bring a suit to set it aside within a year.<sup>12</sup>

Where a claim is preferred on the ground that the properties attached in execution of a decree are subject to a mortgage, the Court is bound to investigate the claim and cannot order simply without investigation that the sale would be held with notice of the mortgage. Such an order is not contemplated by this rule.<sup>13</sup>

**3. Mortgage in favour of a person not in possession.** — The rule refers only to the case of a claim of a *mortgagee not in possession*.<sup>1</sup> Can a mortgagee in possession ask the Court to direct the continuance of the attachment subject to his mortgage? The High Court of Bombay<sup>2</sup> has held that a mortgagee in possession is not in possession as *trustee* for the judgment-debtor *but on his own account* and that, therefore, he is *entitled to a release of the attachment under Rule 60* and not merely to an order directing the sale subject to his mortgage. The High Courts of Calcutta<sup>3</sup> and Patna<sup>4</sup> and the Judicial Commissioner's Court of Oudh,<sup>5</sup> while agreeing with the view of the Bombay High Court that he is entitled to a release under Rule 60, have held that in cases where the intention of the decree-holder is to attach only the equity of redemption and not the whole property, the Court can order the continuance of the attachment of the equity of redemption alone. The High Court of Rangoon<sup>6</sup> has also held that the equity of redemption in a possessory mortgage can be attached and sold.

9. ('30) AIR 1930 Nag 116 (119) : 26 Nag L R 136 (F B). (AIR 1926 Nag 428, Overruled.)

10. ('27) AIR 1927 All 598 (595, 596) : 49 All 402. ('39) AIR 1939 Cal 620 (622) : ILR (1939) 2 Cal 291. (AIR 1927 All 598, Approved.)

11. ('29) AIR 1929 Lah 865 (866) : 11 Lah 369. ('39) AIR 1939 Pat 21 (22).

12. ('39) AIR 1939 Cal 620 (622) : ILR (1939) 2 Cal 291. ('39) AIR 1939 All 657 (659).

13. ('39) AIR 1939 All 657 (659).

[See ('39) AIR 1939 Cal 620 (628) : ILR (1939) 2 Cal 291. (On the construction of the application in this case it was held to be a claim petition

under R. 58 and not merely an application to notify the mortgage in the sale proclamation.)]

13. ('38) 67 Cal L Jour 79 (80).

#### Note 3

1. ('24) AIR 1924 Oudh 884 (885).

2. ('09) 1 Ind Cas 106 (107) : 33 Bom 311.

('78) 10 Bom H C R 100 (102).

[But see ('82) 6 Bom 582 (583).]

3. ('25) AIR 1925 Cal 296 (297).

4. ('27) AIR 1927 Pat 51 (52). (Distinguishing AIR 1922 Pat 408.)

5. ('24) AIR 1924 Oudh 404 (404).

6. ('28) AIR 1928 Rang 119 (119) : 4 Upp Bur Rul 182.

**O. 21 R. 62**  
**Notes 3-7**

It has been held in certain decisions<sup>7</sup> that a usufructuary mortgagee is not entitled to object to an attachment under Rule 58 and that if he does file an objection and such objection is dismissed, he is not bound to sue to set aside the order within one year but may proceed under O. 21 R. 100 when he is dispossessed by the auction-purchaser.

See also the undermentioned case.<sup>8</sup>

**4. Notification of mortgage or charge.** — See Note 1 above.

**5. Effect of order under this Rule.** — The effect of an order under this rule continuing an attachment subject to a mortgage is that the purchaser at the auction sale takes only the mortgagor's right of redemption.<sup>1</sup> But he is entitled to file a suit questioning the *bona fides* and validity of the mortgage within a year of the order.<sup>3</sup> If the Court disallows the claim of the mortgagee, the order is conclusive against him unless he files a suit within one year to vacate the order.<sup>3</sup>

**6. Appeal.** — An order under this rule is not appealable. See Note 24 to Rule 58.

**7. Revision.** — See Note 25 to Rule 58.

**O. 21 R. 63**

**R. 63.** [S. 283.] Where a claim or an objection is preferred, the party against whom an order is made<sup>3</sup> may institute a suit to establish the right which he claims<sup>7</sup> to the property in dispute,<sup>17</sup> but, subject to the result of such suit, if any, the order shall be conclusive.<sup>16</sup>

Saving of suits to establish right to attached property.

[1877, S. 283; 1859, S. 220.]

### Synopsis

1. Legislative changes.
2. Scope of the Rule.
3. "The party against whom an order is made."
4. Order dismissing a claim for default.
- 4a. Ex parte order against decree-holder.
5. Order refusing to investigate.
- 5a. Withdrawal of claim.
6. Attachment before judgment.
7. "May institute a suit to establish the right which he claims."
8. Parties to the suit.

9. Consequential relief, if and when should be asked.
10. Damages for wrongful attachment—If can be asked for under this Rule.
11. Suit not necessary if property is released from attachment.
12. Claimant can pay money under protest.
13. Other remedies open to a claimant or objector.
14. Objector can plead invalidity of attachment.
15. Limitation for suits under this Rule.

7. ('88) AIR 1938 Lah 568 (569) : I L R (1938) Lah 593.

('87) AIR 1937 Pat 68 (64) : 16 Pat 54 (FB). (Claim by mortgagee dismissed for default—Suit under O. 21 R. 63 not necessary.)

('22) AIR 1922 Pat 408 (408) : 1 Pat 159.

8. ('86) AIR 1936 Oudh 268 (264) : 12 Luck 144. (Usufructuary mortgagee's objection to attachment dismissed and property sold and delivered to auction-purchaser—Usufructuary mortgagee is not entitled to sue under S. 68, T. P. Act.)

### Note 5

1. ('19) AIR 1919 Low Bur 124 (124).

('10) 5 Ind Cas 874 (875) (All).

('16) AIR 1916 Cal 849 (851).

[See also ('10) 8 Ind Cas 117 (118); 35 Mad 85.]

2. ('31) AIR 1931 All 189 (140) : 52 All 1082.

('06) 2 Cal L Jour 599 (601). (He can do so even by way of defence to a suit by the mortgagee.)

3. ('98) 22 Bom 640 (645).

('89) AIR 1939 All 657 (659).

('89) AIR 1939 Pat 21 (22).

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| <p>16. Subject to the result of the suit the order is conclusive.</p> <p>17. Property in respect of which the order is conclusive.</p> <p>18. Effect of decision in claim cases as to possession.</p> <p>19. Burden of proof in a suit under this Rule.</p> <p>20. Defence of fraudulent transfer by the judgment-debtor — If can be raised in the suit.</p> | <p>21. Jurisdiction.</p> <p>22. Valuation of suit for court-fees.</p> <p>23. Insolvency of judgment-debtor.</p> <p>24. Effect of attachment on adverse possession.</p> <p>25. Costs.</p> <p>25a. Decree-holder's suit under this Rule, whether step-in-aid of execution.</p> <p>26. Appeal.</p> <p>27. Revision.</p> |
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**O. 21 R. 63**  
**Notes 1-2**

*Other Topics (miscellaneous)*

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| <p>Auction-purchaser's right to question validity of encumbrance. See Notes 8 and 16.</p> <p>Effect of decree in claim suit on attachment and execution proceedings. See Notes 2, 7, 16 and 17.</p> <p>Hindu reversioner's suit. See Note 8.</p> <p>Inapplicability in the absence of claim order. See Note 2.</p> <p>Limitation for suit by minors. See Note 15.</p> <p>Limitation for suit for damages for wrongful seizure of moveables. See Note 15.</p> | <p>Nature of trial. See Notes 2 and 7.</p> <p>Non-parties to claim petition — Limitation. See Note 3.</p> <p>Remedy by suit permissive or alternative. See Notes 4, 12 and 13.</p> <p>Right of suit not personal. See Note 8.</p> <p>Sale prior to suit—<i>lis pendens</i> — Vendee bound by decree. See Note 16.</p> <p>Vendee from successful claimant — Unnecessary party. See Note 8.</p> <p>Withdrawal of claim—Effect. See Note 5.</p> |
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**1. Legislative changes.** — The words "Where a claim or an objection is preferred the party against whom an order is made" have been substituted for the words "the party against whom an order under Sections 280, 281 or 282 is passed." The result of the change is to widen the scope of the rule so as to include *any order* passed on an investigation of a claim.<sup>1</sup> See also Notes 4 and 5, *infra*.

**2. Scope of the Rule.** — The rule gives a statutory right of suit to the party against whom an order is passed in the claim proceedings.<sup>1</sup> Such a suit has to be filed within one year from the date of the order as prescribed by Article 11 of the Limitation Act.<sup>2</sup> If no suit is filed the order becomes *conclusive* as to the rights

**Order 21 Rule 63 — Note 1**

1. ('16) AIR 1916 Mad 443 (444).

**Note 2**

1. ('18) AIR 1918 Mad 76 (77).  
 ('88) AIR 1933 Mad 340 (340). (Appointment of receiver under S. 92—Attachment in execution of decree—Dismissal of claim and suit under O. 21 R. 63—Sanction to sue receiver is not necessary—Statutory right of suit cannot be defeated by a rule of practice.)  
 ('84) AIR 1984 Mad 485 (485): 57 Mad 822. (Claim under O. 21 R. 58 by party to suit and by non-party—Former must appeal under S. 47 and latter sue under this rule.)  
 ('70) 14 Suth W R 839 (841).  
 ('70) 14 Suth W R 192 (193).  
 ('26) AIR 1926 Rang 73 (73): 8 Rang 515.  
 ('37) AIR 1937 Lah 860 (861). (Mortgage decree—Proceedings by way of attachment are not appropriate—Decree-holder, however, attaching property—Claims and objection under O. 21 R. 58 can be made — Suit lies under O. 21 R. 63 on dismissal of objection.)  
 ('88) AIR 1988 Oudh 85 (87). (Attachment removed—Attaching creditor can sue under this rule.)  
 ('85) AIR 1985 Mad 140 (141). (Decree benami—

- Attachment in execution of decree against real owner—Objection by benamidar allowed—Suit by decree-holder for declaration is maintainable.)  
 [See ('23) AIR 1923 Rang 82 (83, 84). (No cause of action for suit under this rule before attachment and claim order.)  
 ('32) AIR 1932 All 502 (503): 54 All 767. (Claim in suit on Revenue Court—Order affirmed or reversed in appeal under S. 247, Agra Tenancy Act, by Collector—The appellate order is not final, and aggrieved party has right of suit under this rule.)  
 ('82) AIR 1982 Cal 661 (669): 59 Cal 827. (Claim under Rule 102 of the Rules of Practice of the Calcutta Presidency Towns Small Cause Court. This rule has no application and order of Small Cause Court is conclusive and no suit lies.)  
 ('86) AIR 1986 Pesh 15 (16). (No attachment in execution—Suit to declare alienation by judgment-debtor void does not lie under Rule 63.)  
 [See also ('88) 9 Cal 888 (894).]  
 2. ('19) AIR 1919 Cal 835 (886): 45 Cal 785. (Suit brought after one year was dismissed.)  
 ('29) AIR 1929 Pat 116 (117). (Dismissal on preliminary ground as to maintainability falls under this rule.)

**O. 21 R. 68**  
**Note 2**

asserted in the objection proceedings.<sup>3</sup> The policy of the Legislature is to secure a speedy settlement of questions of title raised in execution sales and the finding of the Court in the claim proceedings is a summary decision from which the suit allowed under this rule is *in the nature of an appeal*. The object of the Legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases *fully* before the Court because a summary investigation might not furnish sufficient material for a decision by an Appellate Court.<sup>4</sup> In a suit filed under this rule, the Court is not restricted to the question of possession, but questions of title also can be fully gone into.<sup>5</sup>

The object of the suit is to establish the right which has been negated by the claim order<sup>6</sup> and is in substance to set it aside.<sup>7</sup> But there is no other restriction prescribed as regards the *nature* of such a suit, though the defeated party is placed at a disadvantage as regards the period of limitation for filing the suit.<sup>8</sup> Thus, his right of suit under this rule is not, in any way, governed or qualified by the proviso to Section 42 of the Specific Relief Act and a suit cannot be dismissed on the ground that a *further relief* than a mere declaration has not been asked for.<sup>9</sup> On the other hand, a plaintiff in a suit under this rule is not precluded from asking for *other reliefs* than a mere declaration of the right denied to him by the claim order.<sup>10</sup>

The order passed in the claim proceedings, as the rule itself says, is *subject to the result of the suit*.<sup>11</sup> The right restored to the parties on the termination of the suit is the right which they asked the Court to give a decision upon *on the date of attachment*, and the decision places the parties in *status quo ante* either by vacating or confirming the order.<sup>12</sup> See also Notes 7 and 24, *infra*.

If an objection to attachment does not fall under O. 21 R. 58, an order disposing of the objection will not be governed by this rule.<sup>13</sup>

3. ('23) AIR 1923 Rang 156 (156).

(20) AIR 1920 Mad 206 (208).

[See also ('34) AIR 1934 Bom 189 (193). (Two persons making unsuccessful claims asserting prior mortgages against oral charge—Suit by one to establish his rights making other defendant and admitting his claim—No suit by other—Order should be set aside against both and order does not become conclusive even against non-suing claimant.)

(34) AIR 1934 Cal 356 (362): 60 Cal 1406. (Claim proceeding taken against plaintiffs in their capacity as stridhan heirs to their mother—Order passed becoming conclusive under this rule—Subsequent suit for partition by plaintiffs as heir to their father's estate is not barred.)

4. ('26) AIR 1926 Nag 197 (198).

5. ('20) AIR 1920 Mad 748 (753, 756): 43 Mad 760 (FB).

(69) 11 Suth W R 482 (485).

(21) AIR 1921 Bom 368 (369): 45 Bom 1020.

(11) 9 Ind Cas 260 (260) (Mad).

(70) 14 Suth W R 95 (98).

[See however ('12) 14 Ind Cas 715 (716) (Cal).]

6. ('72) 17 Suth W R 304 (305).

(73) 1878 Bom P J 505 (506).

7. ('86) 8 All G (9): 12 Ind App 150 (PC).

(38) AIR 1938 Nag 376 (377). (The suit under O. 21 R. 68 is substantially one to set aside a summary decision or order of any Civil Court.)

8. ('81) AIR 1931 Lah 480 (481).

9. ('80) AIR 1980 All 895 (396). (But a Court of

equity has to see whether there is an honest suit for declaration or whether the declaration is sought on principles which would be held by a Court to be inequitable.)

(38) AIR 1938 Mad 741 (742).

10. See Note 9 *infra*.

11. ('92) 2 Upp Bur Rul 255.

12. ('18) AIR 1918 Mad 572 (573).

(94) 18 Bom 260 (263).

(38) AIR 1938 Mad 857 (858).

13. ('85) AIR 1935 All 158 (185). (Objection by party or his representative falls under S. 47, though wrongly treated as one under O. 21 R. 58—Decision of objection falls under S. 47—Remedy is by appeal and regular suit not maintainable.)

(38) AIR 1938 Lah 700 (761). (Objection by mortgagee is not within R. 58—Correctness of view doubtful—See Notes to O. 21 R. 62.)

(35) AIR 1935 Rang 186 (186). (Attachment invalid—Objection does not come under Rule 58—Suit under this rule does not lie.)

(37) AIR 1937 Pat 68 (64): 16 Pat 54 (FB). (Claim by usufructuary mortgagee of attached property not governed by Rule 58 or Rule 68.)

(85) AIR 1935 Nag 171 (172): 31 Nag L R 301. (Mere prior attachment does not give sufficient interest to object under Rule 58—Suit by defeated claimant will not be governed by Art. 11 of Limitation Act in such cases.)

(26) AIR 1926 Oudh 64 (64). (Objection by *pro forma* party to suit—Rejection of—Suit by such party is barred by S. 47.)

**3. "The party against whom an order is made."** — The rule does not speak of any party but only the party against whom the order is made<sup>1</sup> and the right of suit and the conclusiveness of the order in the absence of such suit are only with reference to such a party. A person who is not a party to the claim proceedings and against whom there is no order, is not affected by the order, although he may be interested in the property attached; nor is he *bound* to file a suit under this rule. Thus, a judgment-debtor who is not, in fact, a party to the claim proceedings does not, in the eye of law, become such by reason solely of his being the judgment-debtor.<sup>2</sup> He cannot be regarded as a necessary party to the claim enquiry and it depends on the facts and circumstances of each case whether he was in fact a party.<sup>3</sup> In objection proceedings the contest is really between the decree-holder who asserts that the property is liable to attachment and the claimant who alleges that it is not in the actual or constructive possession of the judgment-debtor and therefore not liable to attachment. The order made in such a case is either that the property is released from attachment as not being in the possession of the judgment-debtor or the claim be disallowed. But such an order does not affect the right or title of the judgment-debtor to the property. The order is only conclusive between the claimant and the decree-holder who is proceeding against the property.<sup>4</sup> Hence, a suit by the judgment-debtor against the successful claimant<sup>5</sup> or a suit by the defeated claimant against the judgment-debtor,<sup>6</sup> in cases where the judgment-debtor is not a party to the claim enquiry, is not affected by the provisions of this rule and is not governed by the period of limitation prescribed by Article 11 of the Limitation Act. But if the judgment-debtor was in fact a party to the claim, he is bound by the order passed therein and he can also file a suit under this rule in case the order is against him.<sup>7</sup>

A Hindu reversioner, whose right to the estate is contingent and accrues only after the death of the limited owner, is not bound to sue within one year by reason of his having preferred a claim unsuccessfully in execution of a decree against the widow. He is not debarred by reason of the claim order from filing a suit after the death of the widow.<sup>8</sup>

(‘37) AIR 1937 Pesh 97 (99). (In this case it was held that attachment ceases after sale and that dismissal of objection after sale is not within R. 58 or R. 63.—But there is conflict of decisions as to whether objection under R. 58 can be considered after execution sale and before confirmation—See Note 5 to O. 21 R. 58.)

**Note 3**

1. (‘19) 1919 Mad 738 (742): 41 Mad 985 (FB).
2. (‘24) AIR 1924 All 302 (303): 46 All 45.
- (‘22) AIR 1922 All 411 (412).
- (‘81) 3 All 233 (235).
- (‘07) 30 Mad 335 (339).
- (‘98) 22 Bom 875 (879, 884) (FB).
3. (‘87) 11 Bom 114 (119).
- (‘93) 17 Bom 629 (631).
- (‘69) 11 Suth W R 184 (186).
- (‘20) AIR 1920 Mad 187 (189).
- (‘11) 10 Ind Cas 424 (428): 35 Mad 168.
- (‘08) 13 Mad L Jour 367 (368, 369).
- (‘90) 13 Mad 366 (368).
- (‘02) 25 Mad 721 (723).
- (‘08) 31 Mad 168 (168).
- (‘18) AIR 1918 Mad 1095 (1099): 40 Mad 955.
- (‘28) 110 Ind Cas 511 (512) (Mad).
- (‘76) 1 Mad 891 (898).
- (‘71) 6 Mad H O R 416 (418).

(‘14) AIR 1914 Lah 447 (448); 1914 Pun Re No. 84.

(‘35) AIR 1935 Lah 534 (535): 16 Lah 1100. (Claim proceedings—Decree-holder and judgment-debtor impleaded by objectors.—Judgment-debtor *ex parte*—Order passed is against judgment-debtor as well as decree-holders—Judgment-debtor is entitled to file regular suit.) [But see (‘69) 4 Mad H C R 472 (475, 477).

(‘73) 1873 Bom P J 159 (159).

(‘29) AIR 1929 Lah 657 (658).]

4. (‘31) AIR 1931 Lah 74 (76).

5. (‘88) 15 Cal 674 (679).

(‘68) 2 Beng L R App 49 (50).

(‘29) AIR 1929 Pat 604 (605). (A suit by the successful claimant against the judgment-debtor for possession of the suit property.—Judgment-debtor setting up title in defence—Judgment-debtor's defence not barred under Art. 11 he not being a party to the claim proceedings.)

6. (‘10) 8 Ind Cas 157 (158): 34 Mad 533.

7. (‘15) AIR 1915 Mad 463 (463).

(‘35) AIR 1935 Lah 534 (535): 16 Lah 1100. (Objector impleading both decree-holder and judgment-debtor—Latter not appearing—Order passed *ex parte* against him—He can sue under this rule.)

8. (‘96) 20 Bom 801 (803).

**O. 21 R. 63**  
**Notes 4-4a**

**4. Order dismissing a claim for default.** — Unlike the old Section 283 of the Code of 1882, the present rule applies to any order passed in the claim proceedings, whether with or without investigation.<sup>1</sup> An order dismissing a claim for default is an order which comes within the purview of this rule.<sup>2</sup> An application under Rule 58, *ante*, is a proceeding in execution and therefore the Court cannot, under Order 9, restore an application which has been dismissed for default.<sup>3</sup> As to whether such application can be restored under the Court's inherent powers, see the undermentioned cases.<sup>4</sup> See also Note 1 to Order 9, General, *ante*.

An objection by a party, as has been seen in the Notes to O. 21 R. 58, falls under Section 47 and not under Rule 58 or this rule. Where such an objection is dismissed for default, it has been held that a separate suit by the party to re-agitate the same question cannot be brought.<sup>5</sup>

**4a. Ex parte order against decree-holder.** — It has been held that an order accepting a claim *ex parte* in the decree-holder's default is conclusive within the meaning of this rule and that the only remedy of the decree-holder is by a separate suit and not by an application for restoration of the claim proceeding.<sup>1</sup> But where

('25) AIR 1925 Lah 84 (85).

('32) AIR 1932 Lah 179 (180) : 13 Lah 524.

**Note 4**

1. ('30) 130 Ind Cas 200 (201) (All).

('20) AIR 1920 Mad 936 (937). (Claim under O. 21, R. 62.)

('18) AIR 1918 Mad 1054 (1055). (Do.)

('81) 1881 All W N 126 (126). (Case under S. 283 Act X of 1877—Order allowing objection in claim proceedings without investigation is not an order under S. 283 to bar a suit after 1 year of such an order for that purpose.)

('68) 3 Agra 397 (398). (Case under Act VIII of 1859—Order in a claim proceeding without investigation is not an order within the meaning of S. 246 of C. P. O. of 1859 to bar the suit after one year for that purpose.)

('10) 5 Ind Cas 890 (891) : 1910 Pun Re No. 28. (Order passed against the decree-holder after investigation—Decree-holder did not adduce any evidence but remained absent—Evidence by objector.)

('98) 22 Bom 875 (884). (Case under Act XIII of 1877—Order passed without investigation—Suit to set aside order—One year rule is not applicable.)

('15) AIR 1915 Cal 121 (122). (Order passed under old Code of 1877.)

('71) 16 Suth W R 59 (60). (A fresh claim can be brought—Claim under Act VIII of 1859.)

('94) 1894 Pun Re No. 62 p. 201. (Order passed under Act XIV of 1882—Dismissal for default—One year rule is not applicable.)

('08) 81 Mad 5 (6). (Do.)

('04) 1904 Pun Re No. 87, p. 318. (Do.)

('97) 1 Cal W N 24 (29). (Do.)

('81) 3 All 504 (505). (Case under Act X of 1877—No investigation—Dismissal for default—Does not come within S. 283, C. P. O.)

('89) AIR 1989 Cal 620 (623) : I L R (1989) 2 Cal 291.

2. ('27) AIR 1927 All 593 (595) : 49 All 903.

('19) AIR 1919 All 247 (248) : 41 All 623.

('18) AIR 1918 All 72 (78) : 40 All 825.

('88) 1888 All W N 19 (19).

('22) AIR 1922 Cal 166 (167).

('22) AIR 1922 Cal 164 (164).

('04) 32 Cal 537 (540).

('05) 1 Cal L Jour 296 (299).

('82) 12 Cal L Rep 43 (44).

('75) 24 Suth W R 411 (412).

('74) 22 Suth W R 39 (39).

('74) 21 Suth W R 409 (409). (Following 20 Suth W R 345.)

('78) 20 Suth W R 345 (345).

('71) 15 Suth W R 311 (312).

('66) 5 Suth W R 213 (214).

('27) AIR 1927 Lah 872 (872). (Dismissal in default renders a bar to the entertainment of a fresh objection.)

('15) AIR 1915 Mad 1144 (1144).

('21) AIR 1921 Oudh 54 (55) : 24 Oudh Cas 213.

('11) 12 Ind Cas 345 (347) (Oudh).

('08) 11 Oudh Cas 180 (182).

('97-01) 2 Upp Bur Rul 267.

('23) AIR 1923 Nag 69 (69).

('26) AIR 1926 Nag 423 (425) : 22 Nag L R 94.

('37) 1937 Mad W N 1046 (1046).

('39) AIR 1939 Cal 620 (628) : I L R (1939) 2 Cal 291. (Claim dismissed for non-prosecution—Rule applies.)

[See ('87) AIR 1987 Cal 890 (392). (Claim or objection cannot be investigated after sale has been held—Dismissal of claim for default after sale is without jurisdiction—This rule does not apply in such cases.)]

3. ('08) 1903 Pun Re No. 76, page 318.

('84) AIR 1934 Mad 699 (699). (AIR 1924 Mad 715 held to be not good law in view of the Full Bench decision in AIR 1981 Mad 666.)

4. ('84) AIR 1934 Mad 699 (699). (No inherent power.)

('88) AIR 1938 Nag 176 (176) : 29 Nag L R 176. (Can be restored under inherent powers.)

5. ('36) AIR 1936 Pat 268 (270). (Question raised in previous application cannot be re-agitated.)

**Note 4a**

1. ('36) AIR 1936 Pesh 115 (116). (Court cannot restore the proceeding under Section 151.)

such order has been passed without notice to the decree-holder, it has been held that the Court has inherent power to set aside the order.<sup>2</sup>

**O. 21 R. 63**  
**Notes 4a-5**

**5. Order refusing to investigate.** — Section 283 of the old Code applied only to orders *passed under* Sections 280, 281 and 282 and consequently it was held that an order passed without investigation rejecting a claim on the ground of delay was not an order contemplated by the Section and hence, the one year's rule of limitation would not apply to such a case.<sup>1</sup> Under the present rule, it has been held that orders passed, whether with or without investigation, are placed on the same footing, with the result that, if the party against whom the order of rejection is made under the proviso to Rule 58 does not file a suit within one year, the order becomes conclusive against him.<sup>2</sup> (See also Note 21 to O. 21 R. 58 and Notes 4 and 4a to this rule.) Thus, an order passed on a claim, that the allegation of the claimant will be notified to the bidders as the petition was put in too late, has been held by a Full Bench of the High Court of Madras<sup>3</sup> to be a conclusive order against the claimant within the meaning of this rule. But in several decisions, even under the present Code, it has been held that an order passed without investigation is not within this rule.<sup>4</sup>

An order refusing to entertain a claim on the ground that the Court has no *jurisdiction* to entertain it, has been held not to amount to an order under this rule.<sup>5</sup> Similarly, an order saying "Whatever right the defendant has will pass by the sale. The petition *does not require any investigation*. The claim put forward by the petitioner will be noted in the sale proclamation"<sup>6</sup>, or an order "Sale stopped. The claim cannot be

2. ('36) AIR 1936 Pat 176 (177). (*Ex parte* order made without notice to decree-holder — Such order is made subject to the implication that it may be revoked at the instance of decree-holder.)

**Note 5**

1. ('74) 6 N W P H C R 185 (188).

('79) 4 Bom 21 (23).

('10) 5 Ind Cas 298 (300) (Cal).

('86) 12 Cal 108 (109).

('72) 8 Beng L R App 39 (41).

('71) 7 Beng L R 238n (239n).

('67) 7 Suth W R 441 (445).

('70) 13 Suth W R 431 (431).

(1865) 2 Suth W R 263 (263, 264).

('70) 14 Suth W R 364 (364).

('08) 31 Mad 5 (6).

('95) 18 Mad 265 (266).

('94) 1894 All W N 14 (14).

2. ('23) AIR 1928 All 827 (828).

('38) AIR 1938 Bom 190 (191) : 57 Bom 213.

('35) AIR 1935 Pat 122 (123).

('35) AIR 1935 Pat 31 (32). (Objection on ground of possession under family arrangement—Order stating "property does not belong to claimant" Order held to be under Rr. 58 and 59—Suit is governed by Limitation Act, Article 11.)

('23) AIR 1928 All 435 (436) : 45 All 438.

('26) AIR 1926 Mad 593 (593, 594).

('24) AIR 1924 Mad 111 (112) : 47 Mad 160.

('23) AIR 1923 Nag 187 (188) : 19 Rang L R 34.

('24) AIR 1924 Rang 42 (44) : 1 Rang 481.

('35) AIR 1935 Rang 207 (208).

('35) AIR 1935 Cal 500 (501, 502). (Order refusing to investigate claim—Rule applies.)

('39) AIR 1938 Lah 677 (677, 678). (There is a right of suit when the objections are dismissed without enquiry on the ground that they were

belated.)

('39) AIR 1939 Cal 620 (623) : ILR (1939) 2 Cal 291.

3. ('19) AIR 1919 Mad 738 (742) : 41 Mad 985 (FB).

[See also ('25) AIR 1925 Mad 368 (368).

('26) AIR 1926 Mad 216 (217). (Order expressing no final judgment but simply directing sale after notifying the claim is order against claimant and suit under this rule is necessary.)]

4. ('37) AIR 1937 Oudh 493 (497) : 13 Luck 484.

('39) AIR 1938 All 542 (544).

('35) AIR 1935 Mad 328 (330). (Order 21 Rule 63 does not apply where a claim has not been disposed of on the merits or has been rejected as being too late.)

('37) AIR 1937 Nag 149 (149) : ILR (1939) Nag 450. (No investigation under R. 58—O. 21 R. 63 does not apply.)

('36) AIR 1936 Pesh 185 (186). (Order refusing to entertain objections under O. 21 Rule 58 is not one under O. 21 Rule 61, so as to give a right of suit under Order 21 Rule 63.)

('37) AIR 1937 Pesh 97 (99). (It is necessary under O. 21 Rr. 58 to 63 that the Court should investigate the claim and give its decision on the merits.)

5. ('23) AIR 1923 Mad 76 (80) : 45 Mad 827.

('34) AIR 1934 Pat 511 (513) : 13 Pat 765. (Claimant's interests accruing after attachment—Order dismissing claim on that ground.)

('37) AIR 1937 Nag 170 (171) : ILR (1938) Nag 276. (Claim summarily rejected on ground of execution having been already transferred to Collector—Rejection is on ground of want of jurisdiction.)

[See also ('37) AIR 1937 Pesh 90 (91).]

6. ('28) AIR 1928 Mad 295 (295, 296).

('82) 11 Cal L Rep 352 (354).



**O. 21 R. 63**  
**Notes 5-6**

investigated by this Court. Petition dismissed"<sup>7</sup> has been held not to amount to an order against the claimant under this rule. So also, an order merely recording the objections by reason of the claimant withdrawing or not pressing his claim is not, according to the High Courts of Madras,<sup>8</sup> Bombay<sup>9</sup> and Rangoon<sup>10</sup> and the Judicial Commissioner's Court of Nagpur,<sup>11</sup> an order negating the claim and, therefore, is not an order *against* the claimant within the meaning of this rule. The proper order to be passed in such a case is to record on the petition "withdrawn" and not "dismissed," and even if the Court has stated that it is dismissed, the claimant is not affected by the order and is not bound to sue within one year from the date of the order.<sup>12</sup> A Full Bench of the Chief Court of Oudh<sup>13</sup> has, however, held that an order passed on a claim which is not pressed, and therefore dismissed, is conclusive against the claimant until set aside in a suit under this rule. See also Note 5a below.

Where, after the filing of a claim, the execution petition itself is struck off for default and the claim petition is thereupon ordered to be closed, there is no order against the claimant so as to compel him to file a suit.<sup>14</sup>

The High Court of Calcutta<sup>15</sup> has held that the present rule and Article 11 of the Limitation Act have no application to a consent order. The High Court of Madras<sup>16</sup> has, on the other hand, held that an order passed by consent, without objection, is an 'order against' the claimant or the decree-holder as the case may be, within the meaning of this rule.

**5a. Withdrawal of claim.** — It has been held that where an objector voluntarily withdraws his claim and the claim is dismissed in consequence of such withdrawal, there is no order 'against' the claimant within the meaning of this rule which, therefore, does not apply.<sup>1</sup>

**6. Attachment before judgment.** — The rule applies also to orders on claims preferred to property attached before judgment.<sup>1</sup> Hence, a party aggrieved by reason of the dismissal of his claim in respect of an attachment before judgment is bound to file a suit under this rule, and the suit, if instituted, cannot abate by reason of the dismissal of the suit in which the attachment was effected.<sup>2</sup> But with regard to the period of

[See also ('25) AIR 1925 Mad 1113 (1114).

('85) AIR 1935 Mad 1015 (1017). (A previous order on a claim petition "the petition is filed late, claim will be notified, subject to that the petition is recorded" cannot be regarded as an implied adjudication on the merits against the claim so as to preclude the executing Court on a later occasion when the sale had not taken place from investigating the claim on the merits.)]

7. ('21) AIR 1921 Mad 488 (488, 489).

8. ('28) AIR 1928 Mad 878 (879).

('28) 110 Ind Cas 511 (518) (Mad).

('20) AIR 1920 Mad 822 (824) : 52 Ind Cas 988 (989).

('95) 18 Mad 265 (266).

('74) 7 Mad H O R 859 (861).

[See also ('85) AIR 1935 Mad 547 (549) : 58 Mad 986. (Order stating that the petition was filed late and dismissing petition but providing that the sale should not prejudice petitioner's rights — Order is not "against" petitioner.)]

9. ('81) AIR 1981 Bom 288 (290).

10. ('29) AIR 1929 Rang 128 (125).

('07) 4 Low Bur Rul 75 (75).

11. ('25) AIR 1925 Nag 2 (6) : 20 Nag L R 106.

[See also ('78) 20 Suth W R 456 (456). (Case under the old Code.)]

12. ('25) AIR 1925 Mad 265 (266).

13. ('81) AIR 1981 Oudh 1 (4) : 6 Luck 461 (FB).

14. ('29) AIR 1929 Rang 128 (125).

15. ('19) AIR 1919 Cal 126 (127).

16. ('15) AIR 1915 Mad 1128 (1129).

**Note 5a**

1. ('85) AIR 1935 Mad 328 (330).

('85) AIR 1935 Mad 544 (544).

**Note 6**

1. ('18) AIR 1918 Mad 26 (28, 29) : 41 Mad 849 (FB). (Overruling AIR 1918 Mad 640.)

('18) AIR 1918 Mad 587 (587, 588).

(1862) 1 Bom H O R 224 (227).

('29) AIR 1929 Cal 225 (226).

('29) AIR 1929 Cal 162 (162).

('68) 10 Suth W R 21 (22).

('81) AIR 1981 Rang 279 (280) : 9 Rang 561. (The effect of O. 38 R. 8 is to make O. 21 R. 63 applicable to orders passed on objections to attachment before judgment.)

2. ('16) AIR 1916 Mad 295 (296).



limitation for such suits the question arises whether Article 11 of the Limitation Act will apply. That Article in terms applies only to an order on a claim preferred to, or objection made to the attachment of, property attached *in execution of a decree*. Therefore, if the claim is preferred and decided *before decree*, Article 11 would not apply and the period of limitation to set aside the order would be governed by the residuary Article 120.<sup>3</sup> But where, after decree, the decree-holder applies for execution and a claim to the attachment is thereafter *raised and decided in the course of execution*, it has been held by a Full Bench of the High Court of Madras that Article 11 would apply.<sup>4</sup> The reason is that an attachment before judgment becomes one in execution by virtue of the decree-holder's application for execution, and a claim preferred thereafter may be considered to be one preferred to property attached *in execution of a decree*.

Under O. 38 R. 9 the Court is bound to withdraw the attachment upon the dismissal of the suit. The reversal of the dismissal does not operate so as to revive the attachment. A fresh attachment is necessary and the objector is entitled to prefer a *fresh* claim in respect of such attachment and the period of one year should be counted from the date when such claim is rejected.<sup>5</sup> Under Rule 13 of Order 38, a Provincial Small Cause Court has no jurisdiction to attach immovable property before judgment or to determine any claim or objection in respect of such an attachment.<sup>6</sup>

**7. "May institute a suit to establish the right which he claims."**—An order in a claim proceeding is not conclusive; a suit may be brought to contest it within the period prescribed by Article 11 of the Limitation Act.<sup>1</sup> This right of suit cannot be defeated or affected by reason of the fact that the property has been sold away in court-auction.<sup>2</sup>

The suit contemplated by the rule is a suit *to establish the right claimed in the enquiry*,<sup>3</sup> that is, the liability or non-liability of the property attached to satisfy the decree under execution,<sup>4</sup> and not the liability of third persons to satisfy the decree by the sale of their right, title and interest in the property.<sup>5</sup> The suit is in essence a continuation of the execution proceedings,<sup>6</sup> though the scope of the enquiry is much wider. What is decided in the suit is the question of *title* and not merely

3. ('34) AIR 1934 Pat 580 (581).

('21) AIR 1921 Mad 168 (166, 167) : 44 Mad 902 (FB).

4. ('21) AIR 1921 Mad 168 (166, 167) : 44 Mad 902 (FB).

[See also ('11) 10 Ind Cas 805 (807) : 38 Cal 448. (Attachment before judgment—No objection—Decree—Execution—Objection to attachment can be raised.)]

5. ('25) AIR 1925 Cal 1147 (1148).

[See also ('11) 9 Ind Cas 918 (920, 921) (Cal)].

6. ('24) AIR 1924 Cal 193 (196).

**Note 7**

1. ('88) 15 Cal 521 (526) : 15 Ind App 123 (PC). ('03) 25 All 57 (59).

('35) AIR 1935 Rang 161 (162). (Order can be got rid of only by instituting a suit—Otherwise, the order cannot be impeached even by way of defence to a suit.)

2. ('23) AIR 1923 Pat 152 (152).

3. ('28) AIR 1928 Mad 840 (841).

('68) 11 Suth W R 40 (41).

('84) 7 Mad 295 (297) (FB).

('05) 1 Cal L Jour 296 (299, 300).

('86) AIR 1986 Pesh 206 (207). (But a defeated

claimant suing under this rule is not bound to press the whole of the claim raised by him in the objection under O. 21 R. 58.)

[See ('66) 6 Suth W R 67 (70).

('37) 20 Nag L Jour 199 (200). (Suit by defeated claimant—Frame of—Prayer for declaration of right as against decree-holder is necessary—Suit merely for possession as against persons in possession is not one under this rule.)]

4. ('36) AIR 1936 Lah 524 (527) : 17 Lah 668. (Plaintiff is not bound to establish his title to the property in every case.)

5. ('96) 23 Cal 302 (308).

('15) AIR 1915 Cal 411 (411).

6. ('28) AIR 1928 Mad 1201 (1207) : 52 Mad 465.

('25) AIR 1925 Nag 82 (85) : 22 Nag L R 67.

('37) AIR 1937 Rang 478 (474).

('30) AIR 1939 Pat 138 (139) : 17 Pat 588. (Suit under O. 21 R. 63 is mere continuation of claim proceeding — Purchaser of property from claimant after order has been passed in his favour but before institution of suit under O. 21 R. 63 is *alienae pendente lite* and hence is not necessary party to suit.)

('88) AIR 1988 Pat 468 (471).

**O. 21 R. 63  
Notes 7-8**

the question of possession.<sup>7</sup> Suits brought under this rule are substantive suits and must be tried like any other suit, subject to the ordinary rules of procedure and evidence.<sup>8</sup> They are not limited by any special standard of evidence or law. The claimant may, if necessary, thrash out his title in the fullest and most ultimate sense.<sup>9</sup>

In a suit by the decree-holder under this rule he must establish that on the date of the attachment the judgment-debtor had a subsisting right to the property and the suit must be tried as if it were a suit by the judgment-debtor himself for possession.<sup>10</sup> Similarly, in a suit by a defeated claimant, he must establish that the *judgment-debtor* had no right to the property. It is not necessary for the plaintiff in such a suit to establish his *own* title to the property where it is shown that the *judgment-debtor* had no title to it and that at the time of the attachment the property was in the possession of the claimant.<sup>11</sup> In a suit by a defeated claimant the discharge of the *attachment order* cannot properly be asked for. The claimant's remedy is to establish his title by a declaratory decree and then to carry the decree to the Court by which the order of attachment was issued and such Court is bound to recognize the adjudication and govern itself accordingly.<sup>12</sup>

Where the same property is attached by two different persons holding different decrees against the same judgment-debtor and an objection preferred under Rule 58 is dismissed, the two separate attachments give rise to two separate causes of action.<sup>13</sup>

See also the undermentioned decisions,<sup>14</sup> and also Notes 2 and 24.

**8. Parties to the suit.** — When a suit is brought under this rule by an attaching decree-holder to establish his right to attach and bring to sale certain property, and in order to succeed it is necessary to avoid a transfer of the property on

('37) AIR 1937 Pesh 13 (16).

[See ('36) AIR 1936 Mad 971 (972). (The suit is not merely a continuation of the claim proceeding but what is essentially litigated is a question of title.)]

[But see ('19) AIR 1919 Lah 200 (201) : 1919 Pun Re No. 70. (Held that by virtue of S. 136 of the Companies Act, 1882, such a suit is not one in continuation of an execution proceeding.)]

7. ('20) AIR 1920 Mad 748 (753, 756) : 43 Mad 760.

('33) AIR 1933 Mad 328 (329).

('67) 8 Suth W R 73 (75).

('69) 11 Suth W R 482 (485).

('37) AIR 1937 Pesh 13 (16). (Points not raised in prior proceedings in the executing Court not barred by res judicata.)

('35) AIR 1935 Mad 596 (597).

('36) AIR 1936 Mad 971 (973).

[See ('38) AIR 1938 Rang 447 (447). (Property of company attached — Objection by transferee of property — Transfer by Board of Directors and not by general body of share-holders — Transferee's title not sufficient to entitle him to object under Rule 58 or to bring a suit under this rule.)]

[See also ('35) AIR 1935 Rang 161 (163).]

8. ('86) 12 Cal 696 (701).

('14) 22 Ind Cas 676 (677) : (1913) 1 Upp Bur Rul 181. (Evidence taken in claim not *per se* evidence in the suit — Admissible for limited purpose.)

[See also ('22) AIR 1922 Lah 58 (59). (Defeated claimant filing suit cannot after dismissal of suit ask for stay of sale from the Appellate Court.)]

('75) 24 Suth W R 70 (71). (Sale ought to be stayed by executing Court.)]

9. ('24) AIR 1924 Cal 744 (748) : 51 Cal 548.

('39) AIR 1939 Mad 328 (329).

10. ('10) 8 Ind Cas 639 (642) : 35 Bom 79.

11. ('36) AIR 1936 Lah 524 (527) : 17 Lah 668. (15 Cal 674 and 3 Cal L Jour 381, Followed.)

[See also ('39) AIR 1939 Sind 177 (177) : 1 L R (1939) Kar 539. (Suit by decree-holder under Rule 63 — Rules of evidence which require a plaintiff to prove his claim are not abrogated because he is suing a successful claimant.)]

12. ('81) 4 Mad 131 (133).

13. ('37) AIR 1937 Lah 220 (221). (Suit by defeated claimant dismissed—Appeal by him — Abatement of appeal with regard to one of the attaching decree-holders does not cause the whole appeal to abate.)

14. ('36) AIR 1936 Rang 2 (4). (Attachment of share of debtor in property inherited from mother — Claim by daughter as mortgagee from mother allowed — Suit on mortgage — Suit by creditor under O. 21 R. 63 alleging mortgage to be collusive is maintainable.)

('39) AIR 1939 Pat 430 (432). (In suit under this rule the justifiability or otherwise of the decree under execution is not a relevant question.)

('37) AIR 1937 Rang 581 (588). (Question under S. 52, O. P. C. must be decided by executing Court and not by separate suit — Hence such question cannot be raised in suit by attaching creditor under O. 21 R. 63.)

the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be brought in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor as provided in Section 53 of the Transfer of Property Act as amended in 1929 and the provisions of O. 1 R. 8, ante, would be applicable to such a suit.<sup>1</sup> But where the decree-holder's suit under this rule seeking to avoid a transfer in favour of the claimant is not based on such transfer having been made with intent to defeat or delay the creditors of the transferor, the suit need not be a representative suit.<sup>2</sup> The transferee and the judgment-debtors as transferors will be necessary defendants in a suit under this rule by a decree-holder attacking an alienation of property by the judgment-debtor in favour of the successful claimant.<sup>3</sup> It is not necessary to implead any transferee from the successful claimant after the order in the claim proceedings and before the institution of the suit, as such transferee must be held to be an alienee *pendente lite*.<sup>4</sup>

The right of suit of the decree-holder enures also to the benefit of the auction-purchaser. He can thus file a suit to declare that the mortgage subject to which the attachment and sale took place is not true and valid.<sup>5</sup>

Where a defeated claimant files a suit under this rule the judgment-debtor is a necessary party, especially if the objector seeks to establish his title both against the judgment-debtor and the decree-holder.<sup>6</sup> If the properties are sold away in court auction, it is not necessary to implead the decree-holder. It is enough if the auction-purchaser alone is impleaded.<sup>7</sup> The right of suit under this rule is not personal to the

#### Note 8

1. ('34) AIR 1934 Rang 332 (332) : 12 Rang 670.
- ('34) AIR 1934 Rang 302 (303) : 12 Rang 666.  
(But if suit does involve an avoidance of any transfer, suit need not be representative one.)
- ('36) AIR 1936 Cal 783 (784).
- ('36) AIR 1936 Rang 117 (118, 119) : 14 Rang 81.  
(Trial Court should see that such suit is brought in representative capacity — Objection as to form of suit not raised in trial Court—It cannot be raised for the first time in appeal.)  
[See also ('23) 71 Ind Cas 20 (22) (Pesh).
- ('38) AIR 1938 Oudh 83 (84). (It is very doubtful whether the mere fact that the suit is one under O. 21 R. 63 is sufficient to exclude the operation of S. 53 of the T. P. Act.)]
- [See however ('36) AIR 1936 Pesh 158 (160). (Procedure laid down in S. 53, sub-s. 1, para. 4 Transfer of Property Act is not binding on Courts in North West Frontier Province and therefore it is not necessary there that the decree-holder's suit in such cases should be a representative one.)]
- The following cases are not good law after the amendment of S. 53, T. P. Act, in 1929 :  
('19) AIR 1919 Mad 257 (262) : 42 Mad 143.  
('09) 1 Ind Cas 428 (429, 430) (Cal).  
('28) AIR 1928 Rang 1 (3) : 5 Rang 588.  
('31) AIR 1931 Lah 480 (481).  
('34) AIR 1934 Rang 200 (201).
2. ('38) AIR 1938 Bom 289 (290, 291) : I L R (1938) Bom 445.  
('37) AIR 1937 Bom 476 (477).  
('39) AIR 1939 Pat 138 (139) : 17 Pat 588.  
('40) AIR 1940 All 72 (74) : 1939 All L Jour 1020 (1022).

3. ('01) 1901 All W N 14 (14). (Obiter.)  
('34) AIR 1934 Rang 332 (333) : 12 Rang 670.  
('34) AIR 1934 Rang 302 (303) : 12 Rang 666.  
[But see ('06) 28 All 41 (43).  
('39) AIR 1939 Sind 177 (177) : I L R (1939) Kar 539. (In a suit under O. 21 R. 63, against the successful claimant, the judgment-debtors, his vendors through whom he holds, are not necessary parties.)]
4. ('15) AIR 1915 Mad 495 (498) : 38 Mad 535.  
('39) AIR 1939 Pat 138 (139) : 17 Pat 588.
5. ('31) AIR 1931 All 139 (140) : 52 All 1032.  
[See also ('22) 4 Nag L Jour 149 (158). (Auction-purchaser can resist suit on mortgage as nothing is duo despite order under O. 21 R. 63.)]
6. ('06) 28 All 41 (43).  
('39) AIR 1939 Sind 177 (177) : I L R (1939) Kar 539.  
('37) AIR 1937 Rang 249 (250). (Judgment-debtor's legal representatives are necessary parties.)  
[But see ('34) AIR 1934 Mad 587 (589). (Judgment-debtor is not a necessary party.)]
7. ('28) AIR 1923 Mad 58 (59).  
('35) AIR 1935 Pesh 29 (30). (Auction-purchaser is a necessary party.)  
('04) 27 Mad 94 (98).  
('28) AIR 1928 Nag 65 (66).  
('27) AIR 1927 Lah 631 (634) : 9 Lah 167.  
[See ('39) AIR 1939 Pat 321 (322). (Suit instituted impleading decree-holder and judgment-debtor — Execution sale pending the suit — Execution purchaser need not be joined as party.)]  
[But see ('98) 1 Oudh Cas 88 (84).  
('67) 8 Suth W R 422 (422).  
('36) AIR 1936 Pesh 189 (190).]

**O. 21 R. 63**  
**Notes 8-10**

claimant ; a transferee from the defeated claimant can also sue under this rule.<sup>8</sup>

See also the undermentioned cases.<sup>9</sup>

**9. Consequential relief, if and when should be asked.** — As has been seen in Note 2 above, this rule does not contain any limitation as regards the nature of the suit to be filed and does not exclude any particular prayer out of its scope.<sup>1</sup> The suit is of a comprehensive nature and the words "to establish the right" are wide enough to cover not only a mere declaratory suit but also one for consequential reliefs such as the recovery of the value of the property if it had been already sold<sup>2</sup> or for possession.<sup>3</sup> But the plaintiff is not *bound* to ask for a consequential relief. He may ask for a mere declaration and the suit cannot be dismissed as offending the proviso to Section 42 of the Specific Relief Act, 1877.<sup>4</sup> If the defeated claimant asks for a bare declaration and succeeds, a subsequent suit for possession is not barred under O. 2 R. 2.<sup>5</sup>

The Court can grant a temporary injunction to prevent the sale of the attached property in execution pending a suit by the defeated claimant under this rule.<sup>6</sup>

**10. Damages for wrongful attachment, if can be asked for under this Rule.** — A defeated claimant can, in a suit under this rule, claim damages for wrongful attachment,<sup>1</sup> or the value of the property if it had been already sold.<sup>2</sup> In order to sustain a claim for damages, it is not necessary for the claimant to allege and prove malice, or want of reasonable and probable cause on the part of the decree-holder in resisting the claim.<sup>3</sup>

8. ('04) 26 All 89 (91).

9. ('35) AIR 1935 Rang 489 (490). (Claim to attach property purchased in name of judgment-debtor's wife as really bought by judgment-debtor—Transferor is not necessary party to suit by decree-holder under O. 21 R. 63.)

('86) AIR 1936 Rang 56 (57). (Suit by decree-holder — Judgment-debtor is proper though not necessary party.)

**Note 9**

1. ('18) AIR 1918 Nag 233 (233).

('19) AIR 1919 Mad 257 (258) : 42 Mad 148.

('28) AIR 1928 Rang 34 (35) : 5 Rang 699.

2. ('17) AIR 1917 Mad 893 (894, 895) : 40 Mad 783.

('31) AIR 1931 Lah 483 (484) : 13 Lah 143.

('94) 17 Mad 389 (390).

3. ('74) 11 Bom H O R 174 (181).

('92) 16 Bom 608 (617).

4. ('06) 29 Mad 151 (152) (FB). (Overruling 16 Mad 140.)

('84) AIR 1934 Rang 332 (333) : 12 Rang 670.

('91) 14 Mad 28 (25).

('09) 2 Ind Cas 980 (980) (Mad).

('30) AIR 1930 All 395 (396). (On the ground of equitable considerations arising in this case a mere declaration was not granted.)

('80) 4 Bom 529 (535).

('27) AIR 1927 Lah 631 (633) : 9 Lah 167.

('19) AIR 1919 Lah 364 (365, 366).

(1900) 1900 Pun Re No. 111, page 482.

('91) 1891 Pun Re No. 29, page 168.

('23) AIR 1923 Pat 564 (572).

('18) AIR 1918 Pat 217 (218) : 3 Pat L Jour 182.

('12) 14 Ind Cas 510 (511) : 1912 Pun Re No. 10.

('16) AIR 1916 Low Bur 19 (20).

('81) AIR 1981 Rang 810 (811, 812) : 9 Rang 867.

('10) 8 Ind Cas 608 (609) (Low Bur).

('93-1900) 1893-1900 Low Bur Rul 481.

('06) 4 Low Bur Rul 263 (264).

('04) 4 Low Bur Rul 88 (88).

('29) AIR 1929 Rang 104 (104). (Held a defeated claimant is not entitled to file a suit under S. 42, Specific Relief Act.)

('26) AIR 1926 Rang 124 (125) : 4 Rang 22. (Do.)

('37) AIR 1937 Rang 249 (250).

('37) AIR 1937 Rang 138 (134).

('38) AIR 1938 Mad 741 (742).

[But see ('98) 1 Oudh Cas 272 (279). (But when the property is released or sold and comes into the possession of private individuals a suit for a mere declaration without consequential relief is one brought in contravention of S. 42, Specific Relief Act, and is not maintainable.)]

5. ('28) AIR 1928 Mad 840 (844).

('37) AIR 1937 Rang 249 (250).

('37) AIR 1937 Rang 138 (134).

6. ('98) AIR 1988 Cal 871 (872). (Where there is a substantial question in controversy between the parties the Court should grant the injunction.) [See however ('88) AIR 1988 Rang 21 (22). (Effect of Rangoon amendment of O. 39 R. 1 is that such temporary injunction cannot be granted.)]

**Note 10**

1. ('86) 12 Cal 696 (705).

2. ('81) 7 Cal 608 (612).

('17) AIR 1917 Mad 893 (894, 895) : 40 Mad 783 (FB).

3. ('90) 17 Cal 486 (442) : 17 Ind App 17 (FO).

('86) AIR 1986 Lah 524 (528). (Claimant need not prove his ownership of property in dispute—Possession is good as against wrongdoer.)

In a suit for damages for wrongful attachment of property, the plaintiff is not entitled to recover the costs incurred by him as objector in the execution proceedings.<sup>4</sup>

**O. 21 R. 63**  
**Notes 10-11**

**11. Suit not necessary if property is released from attachment.** — When the attachment is withdrawn by the decree-holder himself subsequent to the claim order, the object of a suit is gained and the defeated claimant is not obliged to bring a suit.<sup>1</sup> As pointed out by Sir Charles Sargent, C. J., in *Gopal Purushottam v. Bai Divali*<sup>2</sup>:

"When the plaintiff withdrew his attachment, the parties were restored to the *status quo ante*. The object of the claim which was preferred by the defendant was as contemplated by S. 278, Civil Procedure Code, to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act . . . . . there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and, therefore, no necessity for bringing a suit to set aside the order."

Where the attachment comes to an end,<sup>3</sup> as where the decree is *satisfied* or *set aside* or *reversed* or the decretal amount is paid into Court under Rule 55, or where the attachment is voluntarily withdrawn by the decree-holder himself,<sup>4</sup> or the attachment is raised owing to the default of the decree-holder under Rule 57 of this Order,<sup>5</sup> the parties are put back in the same position as they were in before execution proceedings were lodged, and the defeated claimant is not compelled to institute a suit within a year from the date of the claim order. When the attachment is raised the cause of action for the claim petition or for any suit founded upon an order in that claim also falls to the ground.<sup>6</sup>

But the withdrawal or raising of the attachment or the satisfaction of the decree should, according to the High Courts of Calcutta<sup>7</sup> and Madras<sup>8</sup> and the Judicial Commissioner's Court of Nagpur,<sup>9</sup> have taken place within the period of one year prescribed by Art. 11, Limitation Act. The High Court of Lahore<sup>10</sup> has, on the other

4. ('38) AIR 1938 Lah 384 (335, 336). (Nor is the plaintiff entitled to damages for personal worry.)

**Note 11**

1. ('24) AIR 1924 Cal 744 (749) : 51 Cal 548.

('30) AIR 1930 All 177 (178, 179).

('18) AIR 1918 Mad 450 (451).

('16) AIR 1916 Low Bur 25 (25). (Attaching creditor withdrawing attachment cannot file a suit under this rule — However he may have a remedy under the Specific Relief Act.)

('29) AIR 1929 Rang 228 (228). (But claimant's right of suit not taken away by withdrawal of attachment.)

[See ('26) AIR 1926 Lah 348 (348) : 7 Lah 235. (Decree-holder himself withdrawing attachment even prior to passing of order on objection application — Such a decree-holder cannot bring a suit under this rule.)]

2. ('94) 18 Bom 241 (243).

3. ('86) 40 Cal W N 146 (148). (Execution sale set aside — Attachment comes to an end.)

('36) AIR 1936 Lah 169 (170). (Attachment set aside on reversal of decree.)

('37) AIR 1937 Mad 44 (46). (Confirmed on Letters Patent Appeal in A I R 1939 Mad 456 (S B).)

4. ('24) AIR 1924 Cal 744 (750) : 51 Cal 548.

('04) 31 Cal 228 (231).

('06) 3 Cal L Jour 381 (384). (The case of compromise between the claimant and the decree-holder.)

('83) 9 Cal 10 (13).

('82) 8 Cal 279 (282).

('21) AIR 1921 Bom 35 (36) : 45 Bom 561.

('89) 13 Bom 72 (74).

('10) 8 Ind Cas 157 (158) : 34 Mad 538.

('86) 40 Cal W N 146 (148). (Attachment withdrawn owing to subsequent satisfaction of decree.)

[See ('20) AIR 1920 Mad 187 (190).]

[But see ('78) 1 All 541 (543).]

5. ('31) AIR 1931 All 608 (608) : 53 All 918.

('84) AIR 1934 All 267 (270, 271) : 56 All 537.

(This principle applies also between representatives of decree-holder and claimant.)

('11) 12 Ind Cas 65 (67) (Cal).

('70) 14 Suth W R 367 (368).

('26) 94 Ind Cas 120 (120) (Cal).

('22) AIR 1922 Lah 108 (111) : 3 Lah 7.

[See ('25) AIR 1925 Mad 1113 (1114).]

[See also ('36) AIR 1936 Pesh 41 (43). (Once the attachment ceases to exist within one year provided by law for filing suit under R. 68, no duty is cast on the objector to proceed further.)]

6. ('27) AIR 1927 Mad 893 (893).

('84) AIR 1934 All 267 (270) : 56 All 537.

7. ('24) AIR 1924 Cal 744 (751) : 51 Cal 548.

8. ('06) 29 Mad 225 (229, 230).

('87) AIR 1937 Mad 44 (46).

9. ('26) AIR 1926 Nag 423 (425) : 22 Nag L R 94.

10. ('31) AIR 1931 Lah 74 (76).

**O. 21 R. 63**  
**Notes 11-18**

hand, held that it makes no difference whether the attachment is raised within or beyond a year after the order. It is submitted that the former view is correct. As pointed by their Lordships of the Madras High Court in *Koyanna v. Dossy*, I. L. R. 29 Madras 225 :

"To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience."

Where, on a claim being preferred, the decree-holder voluntarily withdraws the attachment and there is no adverse order against him in the claim proceeding, he is, nevertheless, entitled under Section 42, Specific Relief Act, to sue for a declaration that the property is liable to attachment and sale in execution of his decree. Such a suit does not fall under this rule.<sup>11</sup>

It has been held by the Nagpur High Court<sup>12</sup> that where an order has been passed under O. 21 R. 62 directing the attached property to be sold subject to a mortgage, the order will become conclusive against the decree-holder unless set aside by a suit under this rule, although subsequent to the order the execution proceeding is dismissed for default and the attachment itself is raised.

**12. Claimant can pay money under protest.** — If an objector fails in his claim, he is not obliged to file a suit. He may prevent the sale of the property attached by paying the decree amount under protest and then sue the decree-holder for the recovery of the money so paid under compulsion.<sup>1</sup>

**13. Other remedies open to a claimant or objector.** — No appeal or review<sup>1</sup> lies from an order passed in a claim proceeding. The only remedy of the defeated party is to file a suit under this rule within the period of limitation provided by Article 11 of the Limitation Act.<sup>3</sup> In the absence of such a suit he cannot, either as plaintiff or as defendant, challenge the validity of the order in any matter or proceeding.<sup>3</sup> The mere

11. ('86) AIR 1936 Bom 160 (161, 162); 60 Bom 226.

12. ('39) AIR 1939 Nag 305 (308) : I L R (1939) Nag 665.

**Note 12**

1. ('13) 18 Ind Cas 949 (951) : 40 Cal 598 : 40 Ind App 56 (PC).

('38) AIR 1938 All 953 (954).

('81) 7 Cal 648 (653) : 8 Ind App 98 (PC).

('88) 15 Cal 656 (666).

('16) AIR 1916 Sind 22 (22) : 9 Sind L R 213. (Payment to avert attachment — Money cannot be recovered.)

('96) 22 Bom 473 (475). (But executing Court cannot order re-payment.)

**Note 13**

1. ('79) 1879 Pun Re No. 143, page 417 (FB).

('70) 13 Suth W R 121 (122). (No appeal lies.)

[But see ('67) 7 Suth W R 79 (80).]

2. ('08) 35 Cal 202 (206, 207) : 35 Ind App 22 (PC).

('25) AIR 1925 Nag 288 (289).

('35) AIR 1935 Lah 642 (642).

('86) AIR 1986 Sind 2 (3) : 30 Sind L R 288. (Neither appeal nor revision lies.)

3. ('28) AIR 1928 All 327 (329).

('76) 1 All 381 (386).

('84) 1884 All W N 25 (25).

('98) 22 Bom 640 (644, 645).

('14) AIR 1914 Bom 299 (300) : 38 Bom 681.

('80) 4 Bom 611 (617).

('88) 12 Bom 231 (235).

('22) AIR 1922 Cal 164 (164).

('28) AIR 1928 Cal 514 (516).

(1900) 27 Cal 714 (722).

('97) 24 Cal 563 (566).

('85) 11 Cal 673 (678).

('24) AIR 1924 Lah 867 (867).

('29) AIR 1929 Lah 865 (866) : 11 Lah 369.

('16) AIR 1916 Lah 377 (378) : 1915 Pun Re No. 101.

('09) 4 Ind Cas 970 (972) (Lah).

('16) AIR 1916 Lah 273 (274) : 1916 Pun Re No. 66.

('94) 17 Mad 17 (19).

('87) 10 Mad 367 (361).

('87) 10 Mad 53 (54).

('82) 4 Mad 302 (303).

('25) AIR 1925 Nag 390 (391).

('05) 8 Oudh Cas 306 (312).

('28) AIR 1928 Rang 156 (156).

('35) AIR 1935 Rang 161 (162). (Objector or claimant wanting to get rid of order must impeach validity of order directly as plaintiff and not indirectly as defendant.)

('39) AIR 1939 Cal 620 (622) : I L R (1939) 2 Cal 291. (Whether the attachment on the property is directed to continue either subject to or free from the mortgage or charge; the order is one

fact that a suit has been filed against him within one year or that he has filed his defence within one year of the claim order does not affect the conclusiveness of the order.<sup>4</sup> It has been held in the undermentioned case<sup>5</sup> that a defeated claimant cannot also obstruct the auction-purchaser in delivery proceedings under Rule 99 of this Order.

The dismissal of a claim is, however, no bar to the claimant applying to set aside the court-auction-sale after making the necessary deposit under Rule 89 of this Order as a person interested in the property sold.<sup>6</sup>

**14. Objector can plead invalidity of attachment.** — A defeated claimant or an objector suing under this rule is entitled to plead that there was no attachment or that the attachment effected was not legal. For instance, he can show that the executing Court had no jurisdiction to attach and therefore his rights are not affected in any way by the claim order.<sup>1</sup> In *Muthia Chetty v. Palaniappa Chetty*,<sup>2</sup> their Lordships of the Judicial Committee held that, for purposes of Article 11 of the Limitation Act, the property to which a claim is made must be property which has been *de facto attached*. "Unless there has been attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached; and without such an order, there is no *terminus a quo* for the running of limitation, and with this the limitation itself is non-existent."

But an objector cannot question the legality or validity of the decree against the judgment-debtor on the ground that it is colourable or collusive.<sup>3</sup>

**15. Limitation for suits under this Rule.** — Article 11, Schedule I of the Limitation Act, IX of 1908, prescribes the period of one year from the date of the order as the time within which a suit has to be brought under this rule. "The policy of the Act is to secure speedy settlement of questions of title raised in execution sales and for that reason a year is fixed as the time within which the suit is to be brought."<sup>1</sup> The Article applies to orders passed whether with or without investigation.<sup>2</sup> Where a claim is allowed, *inter alia*, on the ground that there was no proper attachment over

under O. 21 R. 62 and if it is not set aside by a suit under Rule 63, the summary order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies.) [See ('05) 2 Cal L Jour 599 (601). (Purchase subject to a declaration of mortgage lien under O. 21 R. 62—Subsequent attack on mortgage in suit by mortgagee within a year — No estoppel.)]

4. ('18) AIR 1918 Mad 693 (693).

('25) AIR 1925 Mad 368 (369).

5. ('12) 15 Ind Cas 688 (684) (Cal).

('85) 9 Bom 35 (38).

('70) 18 Suth W R 431 (431).

6. ('28) AIR 1928 Mad 487 (488, 489).

('26) AIR 1926 Nag 10 (18) : 21 Nag L R 102.

#### Note 14

1. ('27) AIR 1927 Mad 450 (455).

('38) 10 All 479 (484).

[But see (1865) 4 Suth W R 99 (99)].

2. ('28) AIR 1928 P O 139 (141) : 51 Mad 349 : 55 Ind App 256 (PC.) (Reversing AIR 1922 Mad 447).

3. ('85) 1885 Bom P J 212 (212).

('86) 10 Bom 659 (661).

[See also ('75) 24 Suth W R 394 (395). (Nor has he right to set up any irregularities in the execution as an answer to the execution creditor's

claim of title.)]

#### Note 15

1. ('88) 15 Cal 521 (526) : 15 Ind App 123 (PC).

('67) 7 Suth W R 456 (456). (Limitation runs from the date of the order.)

('79) 10 Bom II C R 19 (20). (Do.)

('74) 22 Suth W R 68 (68). (Do.)

('66) 3 Mad II C R 220 (221). (Do.)

('88) 1 C P L R 3 (4). (Do.)

('75) 7 N W P H C R 113 (115). (Do.)

('81) AIR 1931 Rang 183 (185). (Do.)

('91) 1 Mad L Jour 478 (479). (Order not dated—Extrinsic evidence can be adduced as to date.)

('81) 8 Cal L Rep 54 (55).

('69) 12 Suth W R 33 (34). (Held Article does not apply.)

('74) 21 Suth W R 133 (134).

('66) 3 Mad H C R 139 (140). (Case under the old Code.)

(1864) 1864 Suth W R Gap 371 (372). (Held S. 14 does not apply.)

('08) 81 Mad 431 (438). (Limitation for wrongful seizure of moveables.)

[See also ('17) AIR 1917 Mad 393 (395) : 40 Mad 738. (Limitation runs from date of the order.)]

2. ('18) AIR 1918 Mad 1054 (1054).

('82) AIR 1932 Lah 516 (517).

('27) AIR 1927 Lah 680 (681).



**O. 21 R. 63**  
**Notes 18-16**

the properties, Article 11 does not apply to a suit by the decree-holder to establish the title of his judgment-debtor.<sup>3</sup> See also discussion in Note 14 *ante*. In the case of a minor, however, the period of limitation is subject to be modified by virtue of Section 6 of the Limitation Act and he can file a suit within one year after he attains majority.<sup>4</sup> As to whether this Article applies to orders on claims preferred in respect of attachments before judgment, see Note 6, *ante*.

**16. Subject to the result of the suit the order is conclusive.** — As has been seen in Note 13 *ante*, an order passed in a claim proceeding is conclusive against the defeated party unless he brings a suit within one year from the date of the order. It is conclusive not only between the parties to the order<sup>1</sup> but binds also their representatives-in-interest.<sup>2</sup> Thus, the auction-purchaser is bound by an order against the decree-holder made under Rule 62.<sup>3</sup> Conversely, the auction-purchaser is also entitled to plead in bar to a suit by the defeated claimant that the order rejecting his claim has become conclusive against him.<sup>4</sup>

But the conclusiveness of the order is *subject to the result of the suit*. In other words, the order is only a *provisional* one and is liable to be set aside by the decision given in the suit filed under this rule.<sup>5</sup> The effect of such a suit is to keep the execution proceedings pending till the decision of the suit.<sup>6</sup> If the suit by the decree-holder succeeds,<sup>7</sup> or if the suit by the claimant fails,<sup>8</sup> the proceedings continue. If the suit by the decree-holder fails, or the suit by the claimant succeeds,<sup>9</sup> the proceeding fails simultaneously. If after a claim order, the successful claimant transfers the property in dispute to a third person, such transferee also takes it subject to the result of the suit by the decree-holder.<sup>10</sup> If the decree-holder succeeds in the suit, the attachment is revived and the transferee cannot assert his right against him.<sup>11</sup> In other words, the transfer is affected by the doctrine of *lis pendens*.<sup>12</sup> The same principle will apply where after the claim is rejected, the properties are sold in court-auction; the auction-

3. ('88) AIR 1938 Lah 449 (450). (Article 120 will apply.)

4. ('76) 1 Cal 226 (242) : 3 Ind App 7 (P C).

(1865) 3 Suth W R 8 (9).

('81) 7 Cal 187 (139).

('25) AIR 1925 Mad 379 (380).

**Note 16**

1. ('89) 17 Cal 260 (262).

('13) 20 Ind Cas 815 (816) (Cal).

('17) AIR 1917 Cal 669 (670) : 44 Cal 698.

[See also ('12) 16 Ind Cas 529 (529) (Mad). (Third person cannot take advantage of the order.)]

2. ('24) AIR 1924 Sind 97 (99) : 17 Sind L R 63.

('86) AIR 1936 Cal 590 (592).

3. ('19) AIR 1919 Lah 125 (126).

('10) 8 Ind Cas 117 (118) : 35 Mad 35.

('36) AIR 1936 Cal 590 (592).

('39) AIR 1939 Cal 620 (622) : I L R (1939) 2 Cal 291. (Mortgagee's application under R. 62 to have attachment continued subject to mortgage dismissed—Such order of dismissal if not set aside by suit under O. 21 R. 63 becomes final stopping mortgagee from asserting rights denied by that order.)

[But see ('11) 10 Ind Cas 918 (919) : 35 Bom 275.]

4. ('20) AIR 1920 Mad 191 (192).

5. ('21) AIR 1921 Mad 105 (106) : 44 Mad 268.

6. ('80) AIR 1980 Oudh 468 (471).

('74) 21 Suth W R 435 (435).

('80) AIR 1980 Oudh 265 (266) : 5 Luck 680.

(The words in the rule "the result of such suit" refer to the final result.)

[See ('82) 6 Mad 98 (99).]

7. ('21) AIR 1921 Cal 101 (103, 104).

('22) AIR 1922 Mad 176 (178) : 45 Mad 84.

('75) 23 Suth W R 183 (184).

('76) 1 All 355 (357).

8. ('80) AIR 1980 Oudh 265 (266) : 5 Luck 680.

9. ('84) 7 Mad 167 (170).

('80) AIR 1980 Oudh 468 (471).

10. ('96) 23 Cal 829 (834).

('21) AIR 1921 Cal 101 (103, 104).

11. ('18) AIR 1918 Oudh 275 (277).

('29) AIR 1929 Cal 524 (525) : 57 Cal 122.

('76) 1 All 355 (357, 359).

('22) AIR 1922 Mad 176 (178) : 45 Mad 84.

('74) 21 Suth W R 435 (435).

('21) AIR 1921 Cal 101 (103, 104).

('89) AIR 1989 Oudh 178 (179) : 14 Luck 548. (Transfer is void under Section 64.)

[See however ('80) AIR 1980 Rang 247 (248) : 8 Rang 491. (In the case of moveables fresh seizure is necessary.)]

12. ('15) AIR 1915 Mad 495 (497, 498) : 33 Mad 535 (545, 547).

('09) 1 Ind Cas 951 (951) : 31 All 367. (Alienation by judgment-debtor after a decree in a claim suit by the decree-holder.)

('89) AIR 1989 Oudh 178 (179) : 14 Luck 548. (Order releasing property from attachment in



purchaser's right in such a case is subject to be defeated by the claimant succeeding in the suit.<sup>13</sup>

**O. 21 R. 63**  
**Notes 16-17**

It has been seen in Note 23 to Rule 58 that where one of several decree-holders obtains an order in his favour disallowing a claim, it cannot be availed of by the other decree-holders who are not parties to the claim. But where the same property is attached by different decree-holders in execution, and on objection by a third party the attachments under all the decrees are raised, it has been held that the success obtained by a single decree-holder in a suit under this rule onures also to the benefit of the other decree-holders who have not filed suits.<sup>14</sup>

A 'suit' contemplated by this rule is a suit under the Civil Procedure Code which commences by the filing of a plaint. An application under Section 4 of the Provincial Insolvency Act is not a 'suit' for purposes of this rule.<sup>15</sup>

A decree is passed against a firm. In execution of the decree a certain property is attached. The attachment is raised on the objection of a person not coming within sub-rule (1) of O. 21 R. 50 that it is his property. Proceedings are then taken under sub-rule (2) of O. 21 R. 50 and leave is granted for the execution of the decree against such person as being a partner in the firm. The decree-holder is entitled to attach the same property although he has not instituted a suit under this rule in respect of the previous order allowing the objection to the attachment under O. 21 R. 58. The reason is that the previous order was only a bar to the attachment of the property in execution of the decree as it stood and cannot stand in the way of the decree-holder attaching the property after he has obtained an order under O. 21 R. 50, sub-rule (2), permitting him to proceed against the person as being a partner in the firm.<sup>16</sup>

See also Note 23 to Order 21 Rule 58.

**17. Property in respect of which the order is conclusive.** — The claim order is conclusive between the parties to the proceedings only as regards the *particular property* in dispute.<sup>1</sup> Thus, where a claim was allowed and the decree-holder filed a suit under this rule and after the dismissal thereof applied for the *arrest* of the judgment-debtor or for the attachment of *other properties* of the judgment-debtor more than three years after his original application for attachment, it was held that the application for arrest was barred by limitation as it could not be considered to be a continuance or revival of the previous proceedings for attachment.<sup>2</sup> Where, however, the decree-holder succeeds in the suit and applies thereafter for proceeding with the execution originally started by him *against the property*, the application must be deemed to be a continuation of the previous proceedings and is not barred.<sup>3</sup>

claim proceeding under O. 21 R. 58 — Transfer made after it and before disposal of suit under O. 21 R. 63 to set aside that order is affected by *lis pendens*.)

(37) AIR 1987 Rang 473 (474).

[See ('01) 28 All 60 (65).]

[But see ('86) 10 Bom 406 (407).]

13. ('27) AIR 1927 Lah 631 (633) : 9 Lah 167.

(38) AIR 1988 Pat 468 (471). (Property attached in execution — Claim under O. 21 R. 58 allowed — Title suit by decree-holder decreed and property auctioned — Claimant appealing from decree and Appellate Court upholding claim — Sale does not subsist against claimant.)

14. ('69) 12 Suth W R 221 (222).

15. ('37) 1987 Mad W N 1046 (1047).

16. ('85) AIR 1985 Pat 409 (411) : 14 Pat 857.

#### Note 17

1. ('17) AIR 1917 Cal 669 (670) : 44 Cal 698.

('90) 14 Bom 206 (209, 213).

('86) 12 Cal 453 (457).

('39) AIR 1939 All 657 (659).

[See also ('09) 1 Ind Cas 742 (743) : 1909 Pun Re No. 42.

2. ('83) 7 Bom 293 (296).

('90) 17 Cal 268 (271). (Other property.)

('78) 3 Cal 716 (720). (Do.)

3. ('96) 28 Cal 437 (440).

('84) AIR 1984 Pat 532 (533). (Subsequent application in respect of the same property is continuation of previous application and will not be barred under S. 48.)

('04) 28 Mad 50 (58) (F B). (10 Mad 22, Overruled.)

**O. 21 R. 63**  
**Notes 18-19**

**18. Effect of decision in claim cases as to possession.** — The claim order is conclusive as to the successful party's *right to possession*.<sup>1</sup> But the effect of the decision as to possession in other proceedings in which the question may again arise is not the matter to which the words "shall be conclusive" are directly addressed. Thus, if attachment is removed subsequent to the claim order and later another attachment is made, the question of possession is a question of possession at a different date.<sup>2</sup>

It has been held that where a claimant prefers a claim on the basis of his being in adverse possession of the property against the judgment-debtor and the claim is dismissed on the ground of his not being in possession at all, he will not be precluded, in a suit for possession by the auction-purchaser, from pleading that he has been in possession from a time anterior to the order against him, although he has not brought a suit under this rule.<sup>3</sup> The reason given is that in such a case, the suit under this rule would have been futile as it would have been dismissed on the ground that the title to the property was in the judgment-debtor.

See also Note 24 *infra*.

**19. Burden of proof in a suit under this Rule.** — In a suit brought under this rule the burden of establishing the right claimed is upon the plaintiff.<sup>1</sup> In *Jamahir v. Askaran*<sup>2</sup> it was observed by Sir Lawrence Jenkins, C. J., that where the suit is by the defeated claimant he must show affirmatively that not only the ostensible but the real title also is in him. The burden is not discharged by merely pointing to the innocent appearance of the instrument under which he claims. He must show that they are as good as they look. This principle has been accepted by the various High Courts and applied in a number of decisions.<sup>3</sup> But in *V. E. A. R. M. Firm v. Mauney*

**Note 18**

1. ('79) 14 Bom 372 (377).
- ('74) 21 Suth W R 133 (134).  
 [See also ('39) AIR 1939 Nag 23 (26). (Successful plaintiff in claim suit is entitled to mesne profits from auction-purchaser.)]
2. ('24) AIR 1924 Cal 744 (748) : 51 Cal 548.
3. ('39) AIR 1939 Mad 456 (461) : 1LR (1939) Mad 803 (S B). (Dissenting from 8 Mad 506—In such cases, the finding as to possession in the claim proceeding can only be taken as *prima facie* proof of want of possession.)

**Note 19**

1. ('39) AIR 1939 Pat 321 (322). (Suit by defeated claimant.)
- ('39) AIR 1939 Pat 81 (82). (Suit by decree-holder—Onus to prove that sale in claimant's favour is colourable and without consideration is on decree-holder.)
- ('39) AIR 1939 Lah 438 (439). (Suit by decree-holder—Onus is on him to prove that transfer under which defendant claims is bogus.)
2. ('16) AIR 1916 Cal 666 (667).
3. ('28) AIR 1928 All 476 (480).
- ('33) AIR 1933 Lah 537 (538). (Plaintiff should not only prove that there is an ostensible deed of title, but also that transaction is genuine.)
- ('33) AIR 1933 Lah 550 (551). (Dismissal of objection to execution on basis of gift—Suit by objector under O. 21 R. 63—Plaintiff should prove genuineness of gift even though defendant has not specifically pleaded that gift is collusive.)
- ('33) AIR 1933 Lah 555 (555).

- ('34) AIR 1934 Nag 253 (254).
- ('33) AIR 1933 Rang 211 (212).
- ('33) AIR 1933 Rang 129 (130).
- ('08) 80 All 321 (323).
- ('96) 18 All 369 (370).
- ('08) 5 All L Jour 358 (360).
- ('87) 1887 All W N 71 (71).
- ('99) 1899 All W N 220 (221).
- ('75) 7 N W P H C R 85 (87).
- ('93) 17 Bom 94 (99).
- ('88) 12 Bom 270 (272).
- ('82) 6 Bom 215 (223, 224) (F B).
- ('12) 19 Ind Cas 455 (456) (Cal).
- ('69) 11 Suth W R 422 (422, 423).
- ('69) 10 Suth W R 321 (321).
- ('69) 11 Suth W R 454 (454).
- ('69) 11 Suth W R 467 (468).
- ('71) 15 Suth W R O O 7 (9, 15).
- ('71) 15 Suth W R 155 (156).
- ('71) 15 Suth W R 202 (202).
- ('76) 25 Suth W R 79 (79).
- ('28) 107 Ind Cas 782 (782) (Lah).
- ('21) 60 Ind Cas 751 (758) (Lah).
- ('21) AIR 1921 Lah 97 (99).
- ('24) AIR 1924 Lah 707 (708).
- ('29) AIR 1929 Lah 455 (456).
- ('82) AIR 1982 Lah 174 (175) : 12 Lah 768.
- ('26) AIR 1926 Lah 25 (26).
- ('30) 81 Pun L R 894 (895).
- ('24) AIR 1924 Mad 770 (771).
- ('18) AIR 1918 Mad 274 (275) : 41 Mad 205.
- ('29) AIR 1929 Nag 121 (128).
- ('26) AIR 1926 Nag 398 (395).
- ('20) AIR 1920 Nag 83 (84).

*Ba Kyin*, A. I. R. 1927 Privy Council 237=I. L. R. 5 Rangoon 852, their Lordships of the Judicial Committee made the following observation :

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**Note 19**

"They (the defeated claimants-plaintiffs) being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach the property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case by showing utter inadequacy of consideration."

Their Lordships then proceeded to examine the various items of consideration and upheld the transaction in favour of the plaintiffs. Does this observation change the law as regards the onus of proof? As pointed out by their Lordships of the High Courts of Madras,<sup>4</sup> Patna<sup>5</sup> and Rangoon<sup>6</sup> and the Judicial Commissioner's Court of Nagpur,<sup>7</sup> the Judicial Committee did not consider the question of the burden of proof as such in the above case and the observation should be understood as applying only to the particular facts of the case before it. In *Appadurai v. Vellayan Chettiar*,<sup>8</sup> it was

- (20) AIR 1920 Nag 93 (93).  
(24) AIR 1924 Nag 240 (241). (*Obiter.*)  
(23) AIR 1923 Nag 334 (335).  
(27) AIR 1927 Oudh 440 (440).  
(16) AIR 1916 Oudh 27 (28) : 19 Oudh Cas 67.  
(19) AIR 1919 Pat 345 (349).  
(09) 2 Ind Cas 258 (259) : 12 Oudh Cas 74.  
(19) AIR 1919 Lah 299 (300).  
(13) 20 Ind Cas 355 (356) (Lah).  
(88) 1 C P L R 59 (62).  
(93) 6 C P L R 81 (81).  
(96) 9 C P L R 142 (143).  
(12) 14 Ind Cas 813 (813) (Low Bur). (The plaintiff is entitled to prove his case out of the defendant's own mouth.)  
(08) 2 Low Bur Rul 152 (157).  
(05) 4 Low Bur Rul 228 (229).  
(97) 2 Upp Bur Rul 270.  
(02-1908) 2 Upp Bur Rul Civ Pro 15.  
(93-1900) 1893-1900 Low Bur Rul 333.  
(68) 5 Bom II C R A C 76 (77).  
(27) AIR 1927 P C 237 (238) : 5 Rang 852 (P C).  
(37) AIR 1937 Rang 252 (252). (The presumption as to the correctness of the order is ordinarily sufficient to rebut or at least to considerably weaken the presumption that ostensible owner is the real purchaser.)  
(37) AIR 1937 Pat 76 (78). (Claim rejected on ground of claimant being benamidar of judgment-debtor—Suit by claimant under R. 63 — Onus to prove that he is not benamidar but *bona fide* purchaser is upon claimant.)  
(38) 40 Pun L R 705 (707).  
(39) AIR 1939 Cal 578 (579). (Onus is on claimant to show that he has right which was denied to him by adverse order against him in claim proceedings under O. 21 R. 58—He must prove that instruments under which he claims are as good as they look—It is not for defendant to prove that they are collusive.)  
(39) AIR 1939 Pat 462 (464).  
(35) AIR 1935 Pat 231 (235). (This view is based on the ground that a suit under O. 21 R. 63, C. P. C., is essentially a suit to set aside an order made adversely to the plaintiff in execution, which order must be presumed to be correct until set aside.)  
(36) AIR 1936 Mad 971 (973).  
(37) AIR 1937 Nag 1 (2) : ILR (1937) Nag 291.

- (Objection by transferee dismissed—Suit—Onus is on him to prove that transfer is *bona fide* and for consideration.)  
(37) AIR 1937 Nag 85 (86). (Do.)  
(39) AIR 1939 Nag 23 (24). (Plaintiff in claim suit basing his claim on mortgage decree obtained against member of joint Hindu family alleging that member was sued in representative capacity —Burden of proving this lies on him.)  
(86) AIR 1936 Lah 72 (74). (The decision in this case was affirmed on appeal by the Privy Council in A I R 1938 P C 290. But the Privy Council decision does not proceed on its acceptance of the above view as to onus of proof.)  
(37) AIR 1937 Lah 847 (848).  
[See ('38) AIR 1938 Lah 760 (762). (*Held* that the above rule as to onus of proof does not apply to cases where the objection to attachment has been raised by a mortgagee of the attached property as O. 21 Rr. 58 and 63 do not apply to such a case—The view about the non-applicability of Rr. 58 and 63 to such cases does not appear to be correct—See Note 1 to O. 21 R. 62 above.)]  
[See also ('35) 18 Nag L Jour 329 (331). (Onus of proving good faith is no doubt on plaintiff relying on sale deed—But the fact that his claim was disallowed by the executing Court does not add to the quantum of the onus resting on him.)]  
4. ('28) AIR 1928 Mad 1259 (1260).  
(34) AIR 1934 Mad 587 (589).  
(32) AIR 1932 Mad 302 (303) : 55 Mad 748.  
5. ('29) AIR 1929 Pat 579 (581) : 8 Pat 890.  
(35) AIR 1935 Pat 231 (235, 236). (Claim upheld by Court—Suit by creditor—Onus is on him to prove that property belongs to judgment-debtor —If claim is dismissed and suit is filed by him, onus is on him to show that property belongs to him and not to judgment-debtor — Ostensible owner — Claim dismissed — Suit by him—Evidence adduced by parties — Property in possession of judgment-debtor and buildings erected thereon by him—Question of onus does not arise —Judgment-debtor must be presumed to be real owner.)  
6. ('33) AIR 1933 Rang 129 (131).  
7. ('34) AIR 1934 Nag 253 (254).  
(38) AIR 1938 Nag 185 (185).  
8. ('32) AIR 1932 Mad 302 (303) : 55 Mad 748.

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Notes 19-20**

observed that in cases under this rule the burden of proving the validity of the alienation is on the plaintiff:

"The defendant however cannot escape the burden at some stage or other. If the plaintiff produces his deed and swears that it is genuine and for full consideration, and the defendants have nothing to say to the contrary, the plaintiff will succeed, and where the burden of the plaintiff is so light, it is scarcely worth arguing whether it is more correct to say that the burden is originally upon the defendants or upon the plaintiff. But where the defendant has something substantial to say to the contrary, the real burden must inevitably fall upon the plaintiff to establish the right which he claims."

See also the undermentioned decisions.<sup>9</sup>

In *Mohammad Ismail v. Hanuman Parshad*,<sup>10</sup> their Lordships of the Privy Council observed as follows:

"Apparently it has been the settled practice of the Indian Courts, when objections to an attachment in execution have been disallowed, and a suit has been filed by the objector under O. 21 R. 63 of the Code, to put the onus of proving the *bona fides* of any transaction upon which the objector relies, upon him in his capacity of plaintiff. This is a matter which may possibly require further consideration when the question of onus is really material."

In the case of a dismissal of a claim *without investigation* on the ground of delay, it has, however, been held that the burden is upon the *defendant* to show that the registered deed of transfer in favour of the plaintiff (defeated claimant) is fraudulent.<sup>11</sup>

Where a decree-holder who has attached property in the possession of his judgment-debtor is unsuccessful in the claim proceedings and therefore brings a declaratory suit under this rule, he can rely, in such suit, on the presumption drawn from possession that the property attached belongs to the judgment-debtor and the burden of proving the contrary is on the defendant.<sup>12</sup>

Where the facts are fully established and the inference from them is clear, the question of onus is not material.<sup>13</sup>

**20. Defence of fraudulent transfer by the judgment-debtor, if can be raised in the suit.**—In a suit by a defeated claimant under this rule, the decree-holder defendant can set up in defence that the transfer in favour of the claimant is voidable under Section 53 of the Transfer of Property Act. There is no bar to the setting up of such a plea in defence.<sup>1</sup>

[See also ('33) AIR 1933 All 198 (200): 55 All 266.

('33) AIR 1933 Rang 91 (92). (Sale executed for consideration one month before suit—Onus is on plaintiff to show that sale is fraudulent or collusive.)

('93) AIR 1933 Rang 129 (181).]

9. ('37) AIR 1937 Nag 9 (10). (Objection by purchaser to attachment of property purchased dismissed—Regular suit—Initial onus is on plaintiff—But if he proves purchase by duly registered sale deed reciting passing of consideration, onus is shifted on to defendant to prove that sale was fraudulent.)

('37) AIR 1937 Nag 143 (146): ILR (1939) Nag 266. (Suit by defeated claimant—Claimant producing registered sale deed and proving execution and valuable consideration and possession also—Burden is shifted to creditor to prove that sale is bogus.)

10. ('88) AIR 1938 P O 290 (291): I L R (1939) Kar 31 (P O).

11. ('31) AIR 1931 Mad 40 (41).

('28) AIR 1928 Pat 484 (486): 7 Pat 777.

('19) AIR 1919 Nag 122 (123).

(1900) 18 O P L R 69 (70).

[See however ('38) 40 Pun L R 705 (707).]

12. ('37) AIR 1937 Rang 362 (363).

13. ('88) AIR 1938 PC 290 (290, 291): ILR (1939) Kar 31 (P O).

#### NOTE 20

1. ('21) AIR 1921 All 298 (301).

('20) AIR 1920 Mad 748 (753): 43 Mad 760.

('17) AIR 1917 Mad 519 (522).

('18) AIR 1918 Mad 421 (422): 41 Mad 612 (FB).

('12) 14 Ind Cas 715 (716) (Cal).

('14) AIR 1914 Cal 380 (382).

('20) AIR 1920 Bom 10 (11).

('20) AIR 1920 Nag 88 (85).

('20) AIR 1920 Nag 80 (81, 88): 16 Nag L R 8.

[See also ('38) AIR 1938 Nag 249 (249). (Suit under Rule 63 by transferee of decree—Transfer may be impugned as being sham transaction or as a transfer made with a view to defraud creditors of transferor.)

('36) AIR 1936 Nag 166 (168): ILR (1936) Nag 69. (Objection to attachment by transferee—

**21. Jurisdiction.** — In a suit brought under this rule, where the sole question between the parties is whether the property attached is or is not liable to be attached and sold, the value of the suit for purposes of jurisdiction is the *amount of the decree*, where the value of the property *exceeds* that amount. If, however, the value of the property is *less* than the decree amount, then the value for purposes of jurisdiction is the *value of the property*.<sup>1</sup> It has been held that where the property has been sold in execution of the decree, before the suit, the value of the property will determine the value of the suit.<sup>2</sup>

If the judgment-debtor is added as a party and a declaration of title as against him also is prayed for, then the suit should be valued as on the value of the property attached.<sup>3</sup>

The rule says nothing of the nature of the suit or the Court in which the suit is to be brought; this question, therefore, depends on the nature of the claim and the right sought to be enforced. Article 20, Schedule II of the Provincial Small Cause Courts Act, excludes a suit under this rule from the cognizance of the Court of Small Causes. Under Article 23 of that Act suits under Article 11 of the Limitation Act are also excepted from the cognizance of the Courts of Small Causes. Hence a suit under this rule cannot be filed in a Provincial Small Cause Court.<sup>4</sup> An order passed in a claim

Decree-holder can rely on Section 53, T. P. Act, without instituting suit to set aside transfer.]]

**Note 21**

1. ('07) 30 Mad 335 (338) (F B).
- ('33) AIR 1933 All 249 (250) : 55 All 815.
- ('34) AIR 1934 Rang 802 (303) : 12 Rang 666. (But the suit involves avoidance of a transfer of property—Value of property is value of jurisdiction—Otherwise the lesser value.)
- ('34) AIR 1934 Rang 332 (333) : 12 Rang 670. (If a suit involves avoidance of transfer of property under S. 53 of the T. P. Act, then value of property is value of jurisdiction.)
- ('05) 27 All 440 (442, 443).
- ('09) 2 Ind Cas 621 (621) : 5 Low Bur Rul 23.
- ('15) AIR 1915 All 436 (437) : 38 All 72.
- ('18) AIR 1918 All 324 (325) : 40 All 505.
- ('87) 9 All 140 (141).
- ('78) 2 All 799 (800).
- ('74) 11 Bom H O R 186 (189).
- ('88) 15 Cal 104 (106).
- ('90) 1890 Pun Re No. 50, page 132.
- ('90) 1890 Pun Re No. 121, page 394.
- ('06) 1906 Pun Re No. 55, page 211.
- ('06) 1906 Pun Re No. 142, page 513.
- ('08) 1908 Pun Re No. 94, page 436 (FB).
- ('29) AIR 1929 Mad 828 (824).
- ('09) 2 Ind Cas 522 (522) (Mad).
- ('87) 10 Mad 152 (154).
- ('82) 4 Mad 389 (841).
- ('06) 2 Nag L R 87 (89).
- ('14) AIR 1914 Lah 856 (857).
- ('09) 4 Ind Cas 1018 (1014) (Lah).
- (1900) 1 Low Bur Rul 1 (3).
- ('33-1900) 1893-1900 Low Bur Rul 298.
- ('02) 2 Upp Bur Rul 19.
- ('39) 43 Cal W N 609 (610, 611).
- ('29) AIR 1929 Oudh 418 (414).
- [See ('88) AIR 1938 Mad 489 (442) : 56 Mad 716. (Suit within one year to avoid attachment—Value for purposes of jurisdiction is not market

value of land but value under S. 7, cl. 5, Court-fees Act.)]

[See also ('37) AIR 1937 Rang 101 (102). (Suit with reference to property attached under O. 21, R. 46 — Value of property attached is value of suit.)]

2. ('89) 43 Cal W N 609 (611). (The value of the suit to the plaintiff is the value of the property which he has lost by reason of the execution proceedings.)

[But see ('35) AIR 1935 Oudh 271 (272) : 11 Luck 1. (Value of property more than decretal amount—Value of decree is value of suit.)]

3. ('95) 17 All 69 (74).
- ('32) AIR 1932 Rang 20 (21).
- ('16) AIR 1916 Mad 858 (859) : 39 Mad 602.
- ('13) 18 Ind Cas 820 (822) : 1913 Pun Re No. 82.
- ('12) 17 Ind Cas 196 (197) : 1913 Pun Re No. 41.
4. ('81) 7 Cal 608 (611). (Whether a party is to sue in the Civil Court or in the Small Cause Court depends entirely upon the nature of the claim and the right which is sought to be enforced.)
- ('71) 3 N W P H C R 156n (160n). (No jurisdiction to entertain a suit to establish the title of the judgment-debtor.)
- ('72) 13 Suth W R 387 (389). (Or the title of the claimant.)
- ('70) 13 Suth W R 99 (100). (Do.)
- ('68) 10 Suth W R 141 (142). (Do.)
- ('90) 1890 Pun Re No. 51, page 133. (Do.)
- ('89) 1889 Pun Re No. 63, page 204. (Do.)
- ('05) 8 Oudh Cas 281 (282). (Do.)
- ('02) 5 Oudh Cas 190 (192). (Do.)
- '11) 9 Ind Cas 587 (588) (All). (Attachment of crops—Objection to attachment struck off—Suit by claimant for recovery of price of crops—Small Cause Court has no jurisdiction to entertain the suit.)

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Notes 21-23**

petition in the Presidency Small Cause Court is however final under Section 37 of the Presidency Small Cause Courts Act, XV of 1882, subject to the right of a new trial.<sup>5</sup> See also the undermentioned cases.<sup>6</sup>

Where the provisions of Rules 58 to 63 of this Order have been made applicable to suits in Revenue Courts, even in such cases a suit under this rule must be brought in a Court of competent jurisdiction and the Revenue Court, the jurisdiction of which is strictly limited, is not such a Court.<sup>7</sup>

**22. Valuation of suit for court-fees.** — A suit for a declaration as to the liability or non-liability of the property to be attached is a suit to set aside a summary order and is chargeable with a fixed court-fee under Schedule II, Article 17, clause (1) of the Court-Fees Act.<sup>1</sup> But if the defeated claimant also asks for consequential reliefs then such reliefs have also to be valued and court-fee paid thereon.<sup>2</sup> The test is what is the quantum of interest which the plaintiff wants to establish.<sup>3</sup>

**23. Insolvency of judgment-debtor.** — A suit under this rule by a decree-holder to set aside an order allowing a claim to an attachment effected before the

('85) 7 All 152 (159). (Suit for moveable property or its value held not cognizable.)

('89) 5 All 462 (463). (Do.)

('82) 4 All 416 (417). (Do.)

('85) 8 Bom 259 (259). (Suit to recover personal property cognizable.)

('80) 4 Bom 503 (505). (Suit by a decree-holder to establish his right to attach and sell moveable property as belonging to his judgment-debtor — Not cognizable.)

('86) 9 Mad 206 (208). (Suit for moveable property — Not cognizable.)

('69) 6 Bom H C R 27 (28). (Suit by decree-holder not cognizable by the Court of Small Causes.)

*But see the following cases :*

('15) AIR 1915 Mad 1164 (1171) : 39 Mad 219.

('70) 1870 Pun Re No. 84. (Suit to recover personal property or its value cognizable.)

(1865) 2 Suth W R 43 (44). (Do.)

('71) 3 N W P H C R 155 (156). (Claim suit brought to recover moveable property—Value of property less than Rs. 500—Suit can be maintained in Small Cause Court.)

('78) 2 Bom 365 (370).

('77) 3 Bom 179 (181).

('69) 5 Mad H C R 191 (192).

5. ('32) AIR 1932 Cal 661 (663) : 59 Cal 827.

('99) 26 Cal 778 (784).

('91) 18 Cal 296 (301).

[See also ('32) AIR 1932 Cal 67 (70) : 58 Cal 1251. (Decree amount and value of property exceeding Rs. 2,000 — Presidency Small Cause Courts Act, Ss. 18 and 37—No jurisdiction for claim suit.)]

6. ('86) AIR 1936 Mad 551 (552). (Madras Presidency Small Cause Court cannot entertain suit under O. 21 R. 68 by defeated party in claim proceeding in Madras City Civil Court.)

('37) AIR 1937 Bom 490 (491) : ILR (1937) Bom 807. (Suit by decree-holder under O. 21 R. 68, to establish right to attachment of property is not suit for declaration within the meaning of S. 19, cl. (s) of Presidency Small Cause Courts Act—Small Cause Court can entertain such suit.)

7. ('84) AIR 1934 PC 217 (219, 220) : 61 Ind App 371 : 15 Lah 886 (PC).

('39) AIR 1939 Mad 865 (867).

**Note 22**

1. ('05) 35 Cal 202 (206) : 35 Ind App 22 (PC).

('34) AIR 1934 Rang 332 (338) : 12 Rang 670.

('18) 22 Ind Cas 676 (676) : (1913) 1 Upp Bur Rul 181.

('22) AIR 1922 Cal 166 (167).

('20) AIR 1920 Cal 782 (782, 783).

('97) 1897 Pun Re No. 51, p. 225. (Dissenting from 1886 Pun Re No. 80.)

('76) 1 All 360 (362).

('78) 2 All 63 (64, 65).

('84) 6 All 341 (343).

('84) 6 All 466 (468).

('89) 11 All 365 (367).

('91) 13 All 389 (391).

('85) 9 Bom 20 (22).

('80) 4 Bom 515 (528).

('80) 4 Bom 535n (536n).

('86) 10 Bom 610 (616).

('93-1900) 1893-1900 Low Bur Rul 139.

('39) AIR 1939 Pat 571 (572) : 18 Pat 923. (In a suit under O. 21 R. 68, the fact that the plaintiff prays for an injunction cannot take the plaint out of the operation of Art. 17 (1), Court-fees Act. A single court-fee is sufficient.)

('37) AIR 1937 Nag 253 (254) : I L R (1937) Nag 342.

[But see ('86) 13 Cal 162 (164). (Seems to be of doubtful authority in view of 35 Cal 202 (PC) cited *supra*.)]

('74) 22 Suth W R 422 (422). (Not correct law.)]

2. ('18) AIR 1918 Pat 605 (606).

('94) 16 All 308 (313) (FB). (2 All 720 (FB), Overruled.)

('04) 31 Cal 511 (515).

('73) 19 Suth W R 17 (18).

[See also ('85) AIR 1985 Mad 1002 (1008). (Suit to set aside claim order as well as for declaration of title as mortgagee—Valuation for purposes of jurisdiction should be at amount of mortgage.)]

3. ('15) AIR 1915 Mad 591 (591).

insolvency of the judgment-debtor does not require the leave of the Insolvency Court under Section 28 of the Provincial Insolvency Act.<sup>1</sup>

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**Notes 23-26**

**24. Effect of attachment on adverse possession.** — An attachment does not arrest the running of limitation in favour of a person holding adversely to the judgment-debtor.<sup>1</sup> It has been held that the fact that such person prefers a claim under Rule 58 before the expiry of the statutory period of twelve years does not prevent him from pleading successfully that on the *date of the suit* he has acquired a right by prescription.<sup>2</sup> But the contrary view has been taken in the undermentioned decisions,<sup>3</sup> the reason given being that in such cases the rights of the parties should be determined as they were at the time of the *attachment*.

See also Note 18, *supra*.

**25. Costs.** — According to the High Courts of Calcutta<sup>1</sup> and Madras,<sup>2</sup> the Court cannot, in a suit under this rule, order the payment of costs incurred in the claim proceedings, in favour of the successful party. The High Court of Rangoon<sup>3</sup> has, on the other hand, held that the successful party in the suit is entitled to the costs incurred in the claim proceedings. The reason given is that the defeated party has no right of appeal against the order and the suit under this rule being in the nature of an appeal, success in the suit will entitle him also to the costs of the miscellaneous proceedings under Rule 58.

It has been held that where a claim preferred under Rule 58 is rejected with costs and a suit by the defeated claimant under this rule is decreed, the prior order in the claim proceeding, including the order as to costs, is superseded.<sup>4</sup>

**25a. Decree-holder's suit under this Rule, whether step-in-aid of execution.** — See the Authors' Commentaries on the Limitation Act, Article 182, Note 104 and the undermentioned cases.<sup>1</sup>

**26. Appeal.** — No appeal lies from an order on a claim or an objection preferred under Rule 58. See Note 24 to Rule 58. A decree passed in a suit under this

**Note 23**

1. ('29) AIR 1929 Mad 828 (326, 328).  
[See also ('28) AIR 1928 All 158 (159).]  
[But see ('22) AIR 1922 Nag 108 (109) : 19 Nag L R 126. (Held leave of Insolvency Court necessary.)  
('88) AIR 1988 Nag 217 (217).]

**Note 24**

1. ('26) AIR 1926 Mad 42 (48).  
('01) 11 Mad L Jour 844 (845).  
('39) AIR 1939 Mad 456 (458) : I L R (1939) Mad 808 (SB).
2. ('01) 11 Mad L Jour 844 (845).  
('26) AIR 1926 Mad 42 (42).  
('39) AIR 1939 Mad 456 (461, 462) : I L R (1939) Mad 808 (SB). (Though in suit under R. 63 rights as they stood at time of attachment have to be determined yet, suit is in substance declaratory suit and it would not be a reasonable exercise of discretion to grant a declaration, in such a case, of the decree-holder's right to attach because there would be nothing to be sold in such cases after attachment, the judgment-debtor's right having been extinguished between the date of the attachment and the date of the suit.)  
[See also ('87) AIR 1987 Mad 44 (46). (Confirmed

on Letters Patent Appeal in AIR 1989 Mad 456 (SB).]

3. ('88) AIR 1988 Mad 857 (858). (Suit by defeated claimant—Title by adverse possession perfected after attachment and before suit cannot be relied upon by him.)  
('94) 18 Bom 260 (263).  
('18) AIR 1918 Mad 572 (573).  
('11) 35 Bom 79 (89).

**Note 25**

1. ('09) 1 Ind Cas 428 (480) (Cal).
2. ('25) AIR 1925 Mad 233 (233).  
('68) 3 Mad H C R 341 (342).  
[See also ('84) 6 All 21 (22). (No relief asked for as to costs in the suit.)]
3. ('28) AIR 1928 Rang 248 (249) : 6 Rang 408.  
('83) AIR 1983 Rang 91 (91).  
('29) AIR 1929 Rang 128 (128).  
[But see ('11) 11 Ind Cas 828 (830) (Low Bur).]
4. ('88) AIR 1988 Nag 876 (877).

**Note 25a**

1. ('88) AIR 1988 Nag 534 (535). (Suit not step-in-aid of execution.)  
('89) AIR 1989 Rang 296 (299). (Suit under O. 21, R. 68 is a step-in-aid of execution but a plaint cannot be treated as an application within Article 182, clause 5.)



**O. 21 R. 63** rule is, however, appealable under Section 96.  
**Notes 26-27**

**27. Revision.** — See Note 25 to Rule 58, *ante*

### Local Amendments

#### CALCUTTA

Add the following as Rule 63A:

**O. 21 R. 63A**  
**(Calcutta)**

"63A. When an attachment of moveable property ceases, the Court may order the restoration of the attached property to the person in whose possession it was before the attachment."

#### LAHORE

Add the following Rule:

**O. 21 R. 63A**  
**(Lahore)**

"63A. (1) Where the property attached is a debt, the Court executing the decree shall investigate the claims of the judgment-debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court.

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of Section 47, and subject to the provisions of that Section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment-debtor and the garnishee and no separate suit relating thereto shall lie."

*Note.* The Court must investigate the claims of the judgment-debtor against the garnishee even if he denies the debt.<sup>1</sup>

The remedy of a party aggrieved by an order under Rule 63A is to appeal against the order<sup>2</sup> and a separate suit to set it aside is incompetent.<sup>3</sup>

See also the undermentioned cases.<sup>4</sup>

#### PATNA

Add the following heading and Rules 63A to 63H:

### GARNISHEE ORDERS

**O. 21 R. 63A**  
**(Patna)**

"63A. Where a debt (other than a debt secured by a mortgage or a debt recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under Rule 46 and the debtor prohibited under clause (i) of sub-rule (1) of Rule 46 (hereinafter called the garnishee) does not pay the amount of the debt into Court in accordance with Rule 46, sub-rule (3), the Court on the application of the decree-holder may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

**O. 21 R. 63B**  
**(Patna)**

63B. (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, and if he does not appear in answer to the notice issued under Rule 63A, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

#### O. 21 R. 63A (Lahore)

- (1) ('84) AIR 1934 Lah 560 (560). (Garnishee need not furnish copy of his petition to decree-holder — Court should not summarily dismiss claim.)
- (2) ('85) AIR 1935 Lah 26 (27). ('84) AIR 1934 Lah 560 (560).
- (3) ('85) AIR 1935 Lah 26 (27). (Defendant mortgaging his property to plaintiff and part of consideration left with plaintiff to be paid to decree-holder of defendant — On plaintiff failing to pay, amount attached by decree-holder — Objection of plaintiff rejected — Remedy is appeal — Separate suit is barred under O. 21 R. 63A.)

- (4) ('86) 17 Lah 467 (469). (Application by decree-holder for adjudication under R. 63A — Court-fee of Re. 1 is payable and not *ad valorem* fee.)
- (5) ('87) AIR 1937 Lah 255 (256). (Attachment of debt due to judgment-debtor — Judgment-debtor's claim against garnishee becoming barred during investigation by Court — Final order against garnishee after expiry of limitation can be passed.)
- (6) ('89) AIR 1939 Lah 305 (306). (Judgment-debtor not claiming any debt from co-operative society but claiming to be its share-holder — R. 63A does not apply.)



(2) If the garnishee appears in answer to the notice issued under Rule 63A and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

**O. 21 R. 63B**  
(Patna)

63C. Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt, and prove the same if necessary.

**O. 21 R. 63C**  
(Patna)

63D. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

**O. 21 R. 63D**  
(Patna)

63E. Payment made by, or levied by execution upon, the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed.

**O. 21 R. 63E**  
(Patna)

63F. The costs of any application for the attachment of a debt or under the foregoing rules and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree.

**O. 21 R. 63F**  
(Patna)

63G. Out of the amount recovered under the garnishee order the Court shall deduct a sum equal to the court-fee payable under the Indian Court-fees Act on a plaint in a suit for recovery of the money and credit the same to the Government.

**O. 21 R. 63G**  
(Patna)

63H. (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force and be subject to the same conditions as to appeals or otherwise as if it were a decree.

**O. 21 R. 63H**  
(Patna)

(2) Orders not covered by clause (1) shall be appealable as orders made in execution."

#### **RANGOON**

Add the following Rules 63A to 63G :

#### **GARNISHEE ORDERS**

63A. Where a debt has been attached under Rule 46, the debtor prohibited under Payment of debt into clause (i) of sub-rule (1) of Rule 46 (hereinafter called the Court, garnishee) may pay the amount of the debt due from him to the judgment-debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

**O. 21 R. 63A**  
(Rangoon)

63B. Where a debt has been attached under Rule 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree-holder, may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree together with the costs of execution. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

**O. 21 R. 63B**  
(Rangoon)

**O. 21 R. 63C  
(Rangoon)**

63C. (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution, and if he does not appear in answer to the notice issued under Rule 63B, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

(2) If the garnishee appears in answer to the notice issued under Rule 63B and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

*Note.* See the undermentioned decision on the above rule of the Rangoon High Court.<sup>1</sup>

**O. 21 R. 63D  
(Rangoon)**

63D. Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary.

**O. 21 R. 63E  
(Rangoon)**

63E. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

**O. 21 R. 63F  
(Rangoon)**

63F. Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear under these rules, for the amount paid or levied although such order or the judgment may be set aside or reversed.

**O. 21 R. 63G  
(Rangoon)**

63G. The costs of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree."

**SALE GENERALLY****O. 21 R. 64**

**R. 64. [S. 284.]** Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold,

Power to order property attached to be sold and proceeds to be paid to person entitled.

**O. 21 R. 63C (Rangoon)**

1. ('85) AIR 1985 Rang 211 (219). (Person named in policy to whom payment due under policy is to be made has no right under policy merely by his name being mentioned — He should get

administration or succession certificate — No certificate obtained — Such money in hands of insurance company cannot be attached as belonging to person mentioned in policy.)

and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

**O. 21 R. 64**  
**Notes 1-3**

[ Cf. R. S. C., O. 43 R. 2. ]

### Local Amendment

#### PATNA

For the words "attached by it" *substitute* the words "in respect of which it has made an order of attachment."

Insert the words "which is" between the words "and" and "liable."

### Synopsis

- |                                    |   |
|------------------------------------|---|
| 1. "Any Court executing a decree." | 6. Sale of property not belonging to the judgment-debtor. |
| 2. "May order."                    | 7. Such portion thereof as may be found necessary.        |
| 3. "Attached by it."               | 8. "Party entitled under the decree."                     |
| 4. Sale without attachment.        |   |
| 5. "Liable to sale."               |   |

1. "Any Court executing a decree." — As to the power of an executing Court to order the sale of property situated outside the local limits of its jurisdiction, see Section 38, Note 6 and the undermentioned case.<sup>1</sup>

Where the same property is under attachment in execution of decrees of several Courts, the sale thereof must be ordered by the Court of the *highest grade*. But a sale by a Court of inferior grade is not a nullity. See Section 63 and the Notes thereunder.

Rules 64 to 73 are applicable to the Chota Nagpur Tenancy Act. See Section 210, sub-section (3), clause (b) of that Act.

2. "May order." — The term "may" in this rule does not confer a *discretion* on the Court to order or refuse to order a sale; it is obligatory on it to do so when a valid application for such order and a valid attachment have been made.<sup>1</sup>

Where a sale in execution is set aside (for instance on the ground of fraud) and the purchaser who is not a party to the decree is dispossessed, he is entitled to compensation for the improvements made by him on the property. It is not necessary in such a case to inquire whether the auction-purchaser believed in good faith that he was entitled to the property, the order of the Court under which the sale was held being itself a sufficient protection. At any rate, the "good faith" required does not go beyond an honest belief (though it may be negligent) on the purchaser's part in the validity of his title. See General Clauses Act, Section 3 (20).<sup>2</sup>

As to the effect of a reversal, or the setting aside of a decree, on the title of the auction-purchaser at a sale in execution of such decree, see Note 13 to Section 144.

3. "Attached by it." — The rule contemplates that the property should be under attachment before its sale is ordered. Where a property has been attached, the attachment cannot be said to have come to an end by the mere fact that an order is passed releasing the property from the attachment, so long as the order is liable to be

#### Order 21 Rule 64 — Note 1

1. ('13) 18 Ind Cas 498 (499) (Mad). (Sale of properties outside jurisdiction — Judgment-debtor failing to take objection in time—Estoppel.)

#### Note 2

1. ('15) AIR 1915 Mad 885 (886).  
(86) 12 Cal 817 (822).  
2. ('11) 12 I.O. 444 (447, 448, 449): 36 Mad 194.

**O. 21 R. 64**  
**Notes 3-8**

set aside in appeal or otherwise. See Section 64, Note 9 and the undermentioned cases.<sup>1</sup>

Though the rule contains the words "attached by it" it has been held by the Madras High Court<sup>2</sup> that it does not forbid a sale where the attachment has been made by *another Court*.

**4. Sale without attachment.**—A property must be *attached* before it can be ordered to be sold under this rule.<sup>1</sup> If, however, it is sold in execution without there being a prior attachment, what is the effect? There is a conflict of decisions as to whether the sale in such a case is one without jurisdiction or whether the absence of attachment amounts only to an irregularity. As to this, see Section 51, Note 4 and the undermentioned cases.<sup>2</sup>

**5. "Liable to sale."**—A Court has no jurisdiction under this rule to order a sale unless the property is "liable to sale." The Court is therefore bound to hear objections to the saleability of a property before it orders its sale.<sup>1</sup> A decree for money though capable of being attached is not liable to sale.<sup>2</sup> (See O. 21 R. 53.) But a *debt* can be sold under this rule.<sup>3</sup> It has been held that a preliminary decree in a mortgage suit is attachable property of the judgment-debtor and that the procedure for realizing such a decree is for the Court to *sell* it under this rule.<sup>4</sup> (See Notes to O. 21 R. 53.)

Suppose, in execution of a decree held by *A* against *B*, certain property belonging to *B* is sold and subsequently *C*, the holder of another money decree against *B*, seeks to attach and sell the same property. *C* is not entitled to do so, because, when the property is sold under *A's* decree, the title to the property passes to the auction-purchaser and it ceases to be liable to sale under any other decree against *B*.<sup>5</sup> Suppose in the above illustration *C* had already attached the property at the time of its sale

[See also ('75) 23 Suth W R 398 (394).]

**Note 3**

1. ('18) AIR 1918 Oudh 275 (278). (Order raising attachment set aside by suit under O. 21 R. 63—Attachment is revived.)

[See ('88) 6 Mad 98 (99). (Sale pending appeal from decision which set aside the order raising attachment is valid.)]

2. ('29) AIR 1929 Mad 852 (853 to 856).

**Note 4**

1. ('30) AIR 1930 Mad 414 (417). (1862) 1 Hyde 158 (158).

2. *Case of Calcutta High Court that want of attachment affects jurisdiction to sell*: ('18) AIR 1918 Cal 89 (40): 45 Cal 780.

*Cases of Calcutta High Court that absence of attachment is only irregularity*:

('16) AIR 1916 Cal 465 (467, 468).

('18) AIR 1918 Cal 194 (196). (Sale without attachment with consent of judgment-debtor.)

*Lahore view*: sale of property without attachment is not nullity:

('87) AIR 1937 Lah 297 (298).

*Nagpur view*: want of attachment is only irregularity:

('22) AIR 1922 Nag 267 (271): 18 Nag L R 132.

('37) AIR 1937 Nag 149 (149): I L R (1939) Nag 450.

*Madras view*: absence of attachment is only irregularity:

('18) AIR 1918 Mad 1262 (1268).

('18) 18 Ind Cas 498 (499) (Mad).

*Rangoon view*: absence of attachment is only irregularity:

('34) AIR 1934 Rang 188 (189).

[See also ('81) AIR 1981 Cal 85 (86): 57 Cal 1206.

('91) 15 Bom 222 (228): 18 Ind App 22 (PC). (Property already under attachment—No second order for attachment necessary before sale.)]

**Note 5**

1. ('16) AIR 1916 Cal 258 (258).

[See ('35) AIR 1935 All 1016 (1018): 58 All 360.

(In this case it was held that objection on ground of non-liability to sale could be taken even after sale although in spite of notice the judgment-debtor had failed to appear and take objection before the sale.—The decision proceeds on the ground that an order for sale under this rule is not appealable and hence not final.—The reasoning of the decision is not clear.)]

[See also ('81) AIR 1981 Oudh 352 (358): 7 Luck 111. (Occupancy rights under S. 5, Oudh Rent Act—Based on compromise decree—Saleable in absence of objection by superior proprietor.)]

2. ('09) 1 Ind Cas 585 (586, 587): 34 Mad 442.

('92) 16 Bom 522 (524).

('98) 20 Cal 111 (115).

('79) 2 All 290 (291).

('88) 6 Mad 418 (419).

('32) AIR 1932 Pat 349 (350): 12 Pat 86.

3. ('17) AIR 1917 Low Bur 184 (185).

4. ('37) AIR 1937 All 652 (658): ILR (1937) All 823.

5. ('98) 25 Cal 179 (186): 24 Ind App 170 (PC).

under *A*'s decree and that this attachment was even prior to that under *A*'s decree; still *C* cannot sell the property but can only claim a rateable distribution of the sale proceeds under Section 73 of the Code.<sup>6</sup> See also the undermentioned cases.<sup>7</sup>

**O. 21 R. 64**  
**Notes 5-8**

**6. Sale of property not belonging to the judgment-debtor.** — In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested, for the illegal seizure of goods which do not belong to the judgment-debtor. But in India warrants for attachment are issued on the application of the creditor *who is bound to specify the property which he desires to attach* and its estimated value. Hence, the English doctrine that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt,<sup>1</sup> does not apply in India. Where the decree-holder is liable to pay damages to the third party whose goods he has illegally brought to sale in execution of his decree,<sup>2</sup> these damages will include not only the price realized at the sale but also the amount by which such price falls short of the market value of the property on the date of the attachment.<sup>3</sup> Where on the application of a decree-holder and through his mistake his own property is sold in execution of his decree, as that of the judgment-debtor, it has been held by the High Court of Madras<sup>4</sup> that the decree-holder will be estopped from claiming back the property from the auction-purchaser unless it is found that the latter was not in fact misled by such mistake. The High Court of Calcutta has held a contrary view.<sup>5</sup>

**7. Such portion thereof as may be found necessary.** — It is permissible under this rule to order the sale of a *portion* of the attached property.<sup>1</sup> Compare proviso to Rule 17, *ante*.

**8. "Party entitled under the decree."** — Under this rule, the sale proceeds should be paid to the "party entitled under the decree to receive the same." The decree-holder is such a person. But the Court is not *bound* to order the payment of

6. ('86) 12 Cal 817 (321).

[See also ('89) AIR 1989 Lah 880 (981, 982).

(Property first attached in execution of decree by *A*—Then property sold in execution of decree by *B*, another decree-holder, against same judgment-debtor—Auction-purchaser cannot object to attachment by *A* because at time of attachment he had no interest but can object to sale by *A* under the prior attachment and Court has inherent power to recognize such objection.)

('85) AIR 1935 Nag 171 (172); 31 Nag L R 301. (Attachment of property — Subsequent sale of property in execution of another decree—Execution purchaser though not entitled to object to prior attachment can object to sale and Court has inherent power to recognize such objection.)]

7. ('88) AIR 1988 All 10 (10). (Two applications for sale in execution of two decrees of different decree-holders—Sales — Sale should be ordered first in case of application which is prior — Existence of order for sale in execution of other decree should be notified.)

('85) AIR 1985 Mad 872 (873); 59 Mad 1. (*A* attaching property of *B* in execution — Prior agreement by *B* to sell property to *K* — Subse-

quent conveyance to *K* is not affected—Property cannot be sold in execution of *A*'s decree.)

#### Note 6

1. ('90) 17 Cal 436 (443); 17 Ind App 17 (PC). (Walker v. Olding (1863), 32 L J Ex. (NS) 142, Distinguished.)

2. ('90) 17 Cal 436 (443); 17 Ind App 17 (PC). See also Note 23 to S. 60; Note 4 to S. 62; Note 3 to Section 95.

[See also ('78) 3 Bom 74 (78). (Not a case of actual sale—But goods belonging to third party lost through theft while under illegal attachment—Decree-holder is liable to make good the loss—Measure of damages.)

('78) 3 Cal 806 (816); 5 Ind App 116 (PC). (Sale by sheriff under writ of *fiat facias*—Liability of sheriff.)]

3. ('90) 17 Cal 436 (443); 17 Ind App 17 (PC).

4. ('22) AIR 1922 Mad 68 (68).

5. ('28) AIR 1928 Cal 865 (867). (Relief should be given to the decree-holder on ground of mistake.)

See also Note 71 to Section 47, *ante*.

#### Note 7

1. ('09) 3 Ind Cas 81 (81) (Cal).

('75) 28 Suth W R 1 (4).

**O. 21 R. 64** the purchase-money to the decree-holder *before the confirmation of the sale*, though  
**Note 8** it may order such payment if it considers fit to do so.<sup>1</sup>

Where the Government has a claim against the judgment-debtor for court-fees under a decree in a pauper suit, it is entitled to be paid the amount of the court-fee out of the sale proceeds in preference to the decree-holder. The reason is that the claim for the court-fees is a Crown debt and is entitled to precedence over all other creditors. The Government in such a case is "a party entitled under the decree to receive" the money within the meaning of Rule 64; it need not attach the money before it can receive it.<sup>2</sup> (*Cf.* Order 33 Rule 10.)

**O. 21 R. 65**

**R. 65.** [S. 286.] Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Sales by whom conducted and how made.

[1877, S. 286; 1859, S. 248. See Rule 76.]

#### Local Amendments

#### NAGPUR

The following sentence shall be *added* :

"Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in, or within the precincts of the court-house, no such declaration shall be made without the leave of the Court."

#### RANGOON

*Substitute* the following rule :

"R. 65. (1) Sales shall be conducted by the Bailiff or Deputy Bailiff but the duty may be entrusted to a process-server when the property is moveable property not exceeding Rs. 50 in value, and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

(2) Subject to the terms of the proviso to Rule 43 and of Rule 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees; and some well-known place in the vicinity of the court-house or the public bazaar shall be selected for the purpose.

(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor, all property whether moveable or immovable attached in execution of the decree, shall be sold at the time and place selected. The day to be set apart, and the place selected for holding the sales, and any changes therein, shall be reported for the information of the High Court.

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission. When the proceeds of sale do not exceed Rs. 500—5 per cent. Where they exceed Rs. 500 and do not exceed Rs. 5,000—5 per cent. on

#### Note 8.

1. ('86) 12 Cal 252 (255).

2. ('06) 33 Cal 1040 (1044 to 1046).

the first Rs. 500 and 2 per cent. on the remainder. Where they exceed Rs. 5,000—at the above rate on the first Rs. 5,000 and one per cent. on the remainder.

The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution.

(5) Subject to the provisions of sub-rule (13) of Rule 45B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale proceeds.

(6) When a sale of immovable property is set aside under the provisions of Rule 92 (2) below, no commission shall be paid to the Bailiff for selling the property.

(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or in pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-rule (4) above.

(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I, and shall be paid into the treasury."

*Notes.* As regards the travelling allowance of Bailliaffs going out to sell property on the spot, see Rule 43 of the Burma Travelling Allowance Rules.

### Synopsis

- |  |  |
|--|--|
| 1. "Save as otherwise prescribed."<br>See Rule 76. | 3. Sale to be by public auction.       |
| 2. Sales, by whom to be conducted.                 | 4. Acceptance of bid. See O. 21 R. 84. |

1. "Save as otherwise prescribed." — See Rule 76 *infra*.

2. Sales by whom to be conducted. — Sales in execution are to be conducted by — (a) an officer of the Court, or

(b) any other person whom the Court may appoint.

It is not, however, every officer that can conduct an execution sale; but only an officer who has been appointed for the purpose can do it.<sup>1</sup> The rule enables the Court to appoint a person who is not an officer of the Court (*e. g.*, an auctioneer) to conduct an execution sale.<sup>2</sup> Where the Court has directed a bailiff to hold a sale, the mere fact that the bids were recorded by another person does not show that the sale was not conducted by the bailiff.<sup>3</sup>

3. Sale to be by public auction. — See Rule 76 *infra*. It has been held by the Bombay High Court that the Court may, for good reason, order that the bidders shall be confined to a particular class or classes of persons.<sup>1</sup>

4. Acceptance of bid. — See Order 21 Rule 84.

## R. 66. [S. 287.] (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales  
by public auction.

**Order 21 Rule 65 — Note 2**  
1. [See ('69) 12 Suth W R 238 (238). (This case was decided under the Code of 1859 when the words in the corresponding Section were different, *vis.*, "any other person whom the Court may appoint" — The words "whom the Court may appoint" were construed as applicable also

to officers of the Court—It is conceived that the law is the same even under the present rule though the words are different.)]

2. ('17) AIR 1917 Cal 740 (742): 44 Cal 789.

3. ('28) AIR 1928 Pat 615 (621): 8 Pat 122.

### Note 3

1. ('27) AIR 1927 Bom 143 (146).

**O. 21 R. 66**

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold;
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
- (c) any incumbrance to which the property is liable;
- (d) the amount for the recovery of which the sale is ordered; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

[ 1877, S. 287 ; 1859, S. 249. ]

#### Local Amendments

##### CALCUTTA

*After* the word "property" in clause (e) in sub-rule (2) *add* the following proviso:

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property but the proclamation shall include the estimate, if any, given by either or both of the parties."

##### LAHORE

*Add* the following words to clause (e) of sub-rule (2):

"provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property; but the proclamation shall include the estimate, if any, given by either or both of the parties."

*After* sub-rule (2) *add* the following as sub-rule (3) and *re-number* the existing sub-rules (3) and (4) as (4) and (5), respectively:

"(3) Where the property to be sold is moveable property which has been made over to a custodian under sub-clauses (a) or (c) of clause (1) of Rule 48 of this Order, the Court shall also issue a process by way of notice to the custodian, directing him to



produce the property at the place of sale, at a time to be specified therein with a warning that if he fails to comply with the directions, he shall be liable to action under Section 145 of the Code of Civil Procedure."

**O. 21 R. 66**

**MADRAS**

*Re-number* the existing clause (e) to sub-rule (2) as (f) and *add* the following as clause (e) :

"(e) the value of the property as stated (i) by the decree-holder and (ii) by the judgment-debtor."

**NAGPUR**

In clause (e) of sub-rule (2), *after* the word "property" *insert* the words :

"including the decree-holder's estimate of the approximate market price."

**N.-W. F. P.**

*Add* the following words to clause (e) of sub-rule (2) :

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property ; but the proclamation shall include the estimate, if any, given by either or both of the parties.<sup>1</sup>"

**PATNA**

*Omit* the words "shall be drawn up after notice to the decree-holder and the judgment-debtor and" from sub-rule (2), and *add* the following proviso after sub-clause (e) of sub-rule (2) :

"Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale-proclamation."<sup>2</sup>

**RANGOON**

*Add* the following at the end of sub-rule (2) :

"Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs. 250 in value."

*Synopsis*

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Object of proclamation.</li> <li>3. Nature of proceedings under this Rule.</li> <li>4. Delegation of the power to settle proclamation.</li> <li>5. "Such proclamation shall be drawn up after notice."</li> <li>6. "Such proclamation shall state the time and place of sale."</li> <li>7. "As fairly and accurately as possible."</li> <li>8. Contents of sale proclamation.</li> <li>9. Specification of property.</li> <li>10. Specification of revenue.</li> <li>11. Encumbrances to which property is liable.</li> <li>12. Amount to be recovered.</li> <li>13. Everything which the Court considers material, etc.—Clause (e).</li> </ol> | <ol style="list-style-type: none"> <li>14. Value of the property.</li> <li>15. Effect of an order under this Rule.</li> <li>16. Non-compliance with the provisions of this Rule.</li> <li>17. Verified statement to accompany application for order for sale—Sub-rule (3).</li> <li>18. "Court may summon any person," etc.—Sub-rule (4).</li> <li>19. Form of proclamation of sale. See Appendix E, Form No. 29.</li> <li>20. Appeal.</li> <li>21. Revision.</li> <li>22. Applicability of the rule of <i>res judicata</i> to proceedings under this Rule.</li> <li>23. Judgment-debtor dying pending execution.</li> <li>24. Limitation—Step-in-aid of execution.</li> </ol> |
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**O. 21 R. 66 (Local Amendments)**

1. (N.-W.F.P.). ('89) AIR 1989 Pesh 9 (12). (Decree-holder and judgment-debtor giving separate estimate of value of property — Failure to give both estimates in proclamation is material irregularity.)

2. (Patna). ('89) AIR 1989 Pat 90 (94) : 17 Pat 714. (Provisions of S. 16 read with S. 17 of Bihar Money-lender's Act (8 of 1988) are repugnant to the above proviso and as said Act was not reserved for assent of Governor-General or signification of pleasure of His Majesty, the above provisions are void.)

**O. 21 R. 66**  
**Notes 1-3**

*Other Topics (miscellaneous)*

Court sales—Duty of sale officer. See Note 11.  
 Failure to notify encumbrance—Whether irregularity. See Note 11.  
 Income—Specification, whether necessary. See Note 18.

Judgment-debtor with notice of proclamation — Subsequent objection by. See Note 16.  
 Mortgage decree-holder not mentioning his mortgage—Effect. See Note 11.

**1. Legislative changes. —**

1. The provision as to notice to the decree-holder and judgment-debtor in sub-rule (2) is new.
2. Sub-rule (3) is new.

**2. Object of proclamation. —** A proclamation of sale is meant for the information of intending purchasers and not of the judgment-debtor.<sup>1</sup>

**3. Nature of proceedings under this Rule. —** Are proceedings under this rule administrative or judicial in character? On this question, there is a conflict of decisions. Three views have been expressed on the matter —

(a) The proceedings under this rule are of an administrative and not of a judicial character. The leading case which lays down this view is *Sivagami Achi v. Subramania Ayyar*,<sup>1</sup> a decision under the old Code. The cases under the present Code which fall within this group have held that the view laid down in the above case is good law even under the present Code, notwithstanding the changes made therein.<sup>2</sup>

(b) The proceedings under this rule are of a judicial and not of an administrative character.<sup>3</sup> These cases proceed on the view that the alterations in the rule under the new Code have the effect of making the action of the Court under the present rule, a judicial one.

(c) So far as Rule 66 requires a decision as to matters which are purely administrative in nature such as fixing the upset price and details of the sale proclamation, the matter is administrative. In other words, where the order does not affect rights, liabilities or equities of the parties to the decree, it is not a judicial order.<sup>4</sup>

**Order 21 Rule 66 — Note 2**

1. ('69) 12 Suth W R 488 (489).
- ('72) 18 Suth W R 55 (56).

**Note 3**

1. ('04) 27 Mad 259 (261) (FB). (Order regarding estimated value of property, place of sale, the lots in which it is to be sold, and the amount for the recovery of which it is to be sold.)
2. ('24) AIR 1924 Mad 527 (528). (Order settling one of the terms of the sale proclamation, viz., the order in which the properties were to be sold.) ('28) AIR 1928 Bom 245 (246) : 52 Bom 444. (Order refusing to alter valuation of property to be sold entered in sale proclamation is administrative and not judicial.) ('17) AIR 1917 All 349 (349, 350) : 39 All 415. (Order estimating the value of a property.) ('24) AIR 1924 Mad 767 (768). (Incorrect valuation in sale proclamation.) ('27) AIR 1927 All 208 (209). (Estimate of the value.) ('35) AIR 1935 Mad 714 (714). (Party cannot have, as of right, properties sold in any particular order.)
3. ('17) AIR 1917 Pat 881 (881) : 2 Pat L Jour 180 (FB). (Order refusing to hold enquiry as to value but merely giving value given by the parties.)

('19) AIR 1919 Lah 233 (234). (Order refusing fresh proclamation after correcting valuation — Appeal lies.)

[See also ('24) AIR 1924 Mad 234 (235). (Obiter.)]

4. ('28) AIR 1928 Mad 1169 (1170). (Order fixing upset price is administrative.)

('29) AIR 1929 Mad 506 (508). (Property ordered to be sold in certain lots fixing market value of each lot and upset price—Does not affect rights of parties and is not a judicial order.)

('11) 10 Ind Cas 371 (371, 372) (Cal). (Order fixing value does not involve a judicial adjudication.)

('11) 11 Ind Cas 759 (760) (Cal). (Order entering both valuations by decree-holder and judgment-debtor—No enquiry as to correct valuation—Order does not determine any question judicially and no appeal lies.)

[See also ('29) AIR 1929 Lah 815 (816). (Objections (1) that sales should not have been ordered to be carried out by Collector, (2) that property should have been sold in lots, (3) that certain property should have been ordered to be sold first, (4) that Court should have ordered publication of proclamation in newspapers. Held, questions merely related to procedure and did not in themselves affect rights or liabilities of parties.)]

But where the order affects the rights, liabilities or equities of the parties it is a judicial and not an administrative order.<sup>5</sup>

**O. 21 R. 66**  
**Notes 3-5**

Although, apparently, there is a conflict of decisions as set forth above, if the views expressed in the various cases are taken into consideration, there does not seem to be any real conflict if the *actual decisions* are taken into account. The great majority of them fall within the principles stated in paragraph (c) above. Thus, in all the cases cited as holding that proceedings under this rule are administrative and not judicial (paragraph (a) above) the orders in question did not affect the rights of the parties.

It must also be noted that the opinion expressed in *Kaveri Bai Ammal v. B. Mehta and Sons*,<sup>6</sup> suggesting that under the new Code proceedings under Rule 66 are judicial and not administrative was *obiter*.

**4. Delegation of the power to settle proclamation.** — It is the duty of the Court to settle the proclamation of sale itself. It cannot depute a commissioner to do it and if it does so the sale will be invalid.<sup>1</sup>

**5. "Such proclamation shall be drawn up after notice."** — The sale proclamation should be settled only after notice to the judgment-debtor.<sup>1</sup> It is the duty of the decree-holder to apply for issue of notice under this rule and to take the necessary steps to have it served on the judgment-debtor.<sup>3</sup> But such notice is required only where a proclamation of sale has to be *drawn up*. It need not be given where a fresh proclamation is ordered under Rule 69 (2) on an adjournment of sale.<sup>3</sup>

The absence of a notice under this rule does not by itself vitiate an execution sale. The defect is only an *irregularity* which may entitle the judgment-debtor to have the sale set aside on satisfying the Court that he has sustained substantial injury by reason of the defect.<sup>4</sup> But where the Court has fixed a certain date for hearing the

5. [See ('28) AIR 1928 Mad 1169 (1170).

('29) AIR 1929 Mad 506 (508).]

[See also ('26) AIR 1926 Mad 834 (835). (Order directing properties to be sold in a particular order.)]

('25) AIR 1925 Cal 318 (319). (Determination of question arising upon application under R. 66 may also be ordered under S. 47 — The test in each case would be whether there had been a judicial adjudication binding on the parties in subsequent proceedings.)

('39) AIR 1939 Bom 526 (528). (Order whether the sale is to be held by the Court itself or by the Collector is a judicial order.)]

6. ('24) AIR 1924 Mad 234 (235).

**Note 4**

1. ('26) AIR 1926 Mad 755 (755) : 49 Mad 338.

**Note 5**

1. ('82) AIR 1932 All 55 (57). (Date fixed for appearance of judgment-debtor should be date when all necessary materials are before Court so that judgment-debtor could inspect them and gain necessary information.)

('35) AIR 1935 Mad 459 (462). (Insolvency of judgment-debtor — Notice to Official Receiver necessary, especially where the Official Receiver has been ordered to be made a party to execution proceedings and been treated as a judgment-debtor.)

2. ('11) 9 Ind Cas 558 (560, 561) : 38 Cal 432.

(His failure to do so amounts to "default" within R. 57.)

3. ('26) AIR 1926 Oudh 76 (76, 77).

[See also ('21) AIR 1921 Oudh 222(223):24 Oudh Cas 391. (Necessary particulars ascertained in previous execution proceedings — Fresh notice not absolutely necessary before preparing proclamation again.)]

4. ('27) AIR 1927 Lah 84 (84).

('29) AIR 1929 Nag 130(131):25 Nag L R 58. (Such defect is an irregularity within the meaning of O. 21 R. 90.)

('23) AIR 1923 Lah 592 (593) : 4 Lah 243.

('20) AIR 1920 Mad 481 (484).

('19) AIR 1919 Nag 19 (21) : 16 Nag L R 72.

('21) AIR 1921 Oudh 222 (223) : 24 Oudh Cas 391.

('35) AIR 1935 Lah 962 (962).

('38) AIR 1938 Lah 152 (154). (Auction price grossly inadequate — Substantial loss may be presumed.)

('39) AIR 1939 Pesh 9 (11). (Judgment-debtors sued not as partners but as individuals — Failure to serve notice on any of them is material irregularity.)

[See ('13) 18 Ind Cas 715 (716) Cal].

('39) AIR 1939 Cal 403(406) : 1 L R (1939) 1 Cal 493. (Court appointing guardian in execution proceedings to minor judgment-debtors — Guardian submitting report that he is not in position to contest execution case — Report accepted by

**O. 21 R. 66**  
**Notes 5-6**

parties as to the valuation to be entered in a sale proclamation but fixes the valuation before such date, the Court acts without jurisdiction.<sup>5</sup>

It has been held by the Lahore High Court that where notice has been given under Rule 66 and the execution proceedings are thus brought to the knowledge of the judgment-debtor, they are not vitiated by the absence of a notice under Rule 22.<sup>6</sup>

A notice under this rule is to be served in the same manner as a summons. (Order 48 Rule 2.)<sup>7</sup>

No notice is necessary before drawing up a sale proclamation in proceedings in execution of a rent decree under the Bengal Tenancy Act.<sup>8</sup>

Where a judgment-debtor applies to have the sale set aside on the ground that notice under this rule was not properly served upon him, the burden of proving it is on him.<sup>9</sup>

**6. "Such proclamation shall state the time and place of sale."** — *Time of sale.* — The omission to state in the proclamation the time of sale is a material irregularity within the meaning of Rule 90.<sup>1</sup> It is not enough merely to mention the *day* of sale; the *hour* of sale should also be stated.<sup>2</sup> Where a sale has been advertised to take place at a particular hour, but is actually held at an *earlier* hour, though on the same day, it has been held by the High Courts of Allahabad and Calcutta that no sale could be deemed to have taken place at all within the meaning of the Code.<sup>3</sup> According to the Chief Courts of the Punjab and Burma, however, such a sale is not a nullity but only an irregularity which, if material, would entitle the party interested to set aside the sale.<sup>4</sup> Where a sale was advertised to take place between 11 A. M. and 5 P. M. on a particular day, and actually took place at 3 P. M., it was held by the High Court of Bombay that there was no irregularity inasmuch as once the sale had begun, the Court could not be expected to keep it on till 5 P. M., even if the sale could be finished earlier.<sup>5</sup> Where a sale is advertised to take place at a particular hour but is held a few hours *later*, it has been held by the High Court of Rangoon that the delay of a few hours is not a material irregularity within the meaning of Rule 90.<sup>6</sup> Where the judgment-debtor agreed to an adjournment of the sale without fresh proclamation, the failure to mention the time of sale in the order ceases to be a material irregularity.<sup>7</sup>

In the absence of any rules to the contrary, a sale held on a public holiday is not illegal or irregular.<sup>8</sup>

*Place of sale.* — The omission to state the place of sale in the proclamation,<sup>9</sup>

Court — Omission by decree-holder to serve notices under O. 21 Rr. 22 and 66 on guardian thereafter does not amount to material irregularity.)]

[See also ('28) AIR 1928 All 74 (76): 49 All 880.]

[But see ('18) AIR 1918 Low Bur 114 (114). (Omission to give notice to judgment-debtor renders sale void.)]

5. ('28) AIR 1928 Pat 102 (102).

[See ('36) AIR 1936 Pat 443 (444).]

6. ('21) AIR 1921 Lah 884 (885).

[Compare ('30) AIR 1930 Cal 848 (849). (Proceedings under R. 66 without notice to the judgment-debtor cannot be taken advantage of for purposes of evading notice under R. 22.)]

7. [See ('25) AIR 1925 Cal 552 (554). (Personal service not possible—Affixture to house door or notice by registered post is enough.)]

('81) AIR 1981 All 159 (160). (Affixture to judgment-debtor's house held sufficient.)]

8. ('81) AIR 1981 Pat 267 (268): 10 Pat 189.

9. ('88) AIR 1988 Pat 640 (640).

**Note 6**

1. ('19) AIR 1919 Nag 128 (128, 129): 15 Nag L R 125.

('15) AIR 1915 Oudh 124 (126): 18 Oudh Cas 1.

('37) AIR 1937 All 407 (409).

2. ('97) 24 Cal 291 (298).

[See also ('27) AIR 1927 Rang 84 (85).]

3. ('85) 7 All 676 (677).

('89) 16 Cal 794 (798).

[But see ('69) 12 Suth W R 511 (512). (Held to be an irregularity.)]

4. ('15) AIR 1915 Lah 854 (855). (Sale held on a date earlier than that proclaimed.)

('07) 1907 Upp Bur O P O 9.

5. ('34) AIR 1934 Bom 848 (851): 58 Bom 564.

6. ('27) AIR 1927 Rang 84 (85).

7. ('88) AIR 1988 All 546 (549): 55 All 519.

8. ('81) 8 All 838 (834).

[But see (1865) 8 Suth W R Misc 24 (24).]

9. ('87) 9 All 511 (511, 512).

or the holding of a sale at a place different from that stated in the proclamation<sup>10</sup> is a material irregularity. The Code intends that a sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons ought to be shown for directing otherwise.<sup>11</sup>

**O. 21 R. 66**  
**Notes 6-9**

**7. "As fairly and accurately as possible."** — It is the duty of the Court to use all possible materials before it in drawing up a proclamation of sale which will give such information about the property to be sold as may be given and as fairly and as accurately as possible. Where the presiding Judge has not availed himself of the materials before him, they being such as would have enabled him to avoid the trouble afterwards occasioned, the purchaser who has, in fact, been misled would have a remedy either for a proportionate refund of the purchase-money or for a cancellation of the sale.<sup>1</sup>

**8. Contents of sale proclamation.** — See Notes 9 to 14 below.

Under the Bengal Tenancy Act (VIII of 1885) and the Orissa Tenancy Act (II of 1913), a sale proclamation should contain certain particulars in addition to those specified in this rule. See Sections 163 and 217 of the said Acts respectively.

**9. Specification of property.** — The Court is under a duty to ascertain definitely the property to be sold before entering it in the sale proclamation.<sup>1</sup> Where it erroneously directs the sale of the property of a stranger to the decree behind his back, he is entitled to sue to have the sale set aside.<sup>2</sup>

The rule requires that the property to be sold should be described in the sale proclamation as fairly and accurately as possible.<sup>3</sup> The description should be sufficient to identify the property.<sup>4</sup> Where two properties which have been amalgamated into

(27) AIR 1927 Rang 84 (85).

[See ('77) 1 All 400 (402). (Place of sale not stated with sufficient distinctness—Material irregularity.)]

(21) AIR 1921 Mad 484 (485, 486). (Sale not to be set aside unless judgment-debtor is proved to have sustained substantial injury by reason of the omission.)]

10. ('06) 1906 Pun Re No. 182, page 493.

[Compare ('67) 4 Bom H C R A C 164 (166). (Uncertainty in the place—In this case it was held that the uncertainty was not such as to entitle the judgment-debtor to have sale set aside.)]

11. ('88) 18 Bom 22 (25).

**Note 7**

1. ('16) AIR 1916 Low Bur 8 (5); 8 Low Bur Rul 427.

[See also ('01) 1901 All W N 167 (167).]

**Note 9**

1. ('80) 4 Bom 328 (326). (If the property sought to be sold is a debt and the alleged debtor notifies to the Court that no debt exists, the Court is bound to satisfy itself under R. 66 that the alleged debt exists before proceeding to its sale.)

See the following cases :

(09) 2 Ind Cas 362 (363) : 5 Low Bur Rul 18.

(87) 10 Mad 194 (196).

[See also ('28) AIR 1928 Oudh 491 (492). (Property not mentioned in mortgage deed or decree thereon cannot be included in proclamation.)]

(90) 14 Bom 369 (370). (Rule 1 of the Bombay High Court Rules under S. 287 of the old Code permits inquiry into the title of the judgment-

debtor in respect of moveable property only.)]

2. ('79) 4 Cal 142 (154) (F B).

3. [See ('08) 8 Cal W N 257 (262). (Judgment-debtor is entitled to have the property to be sold described in the proclamation with reasonable accuracy.)]

4. ('69) 12 Suth W R 488 (488).

Cases where description was held sufficient :

(29) AIR 1929 Cal 409 (412) : 55 Cal 902. (Misdescription in the sale-proclamation cannot be ground for holding that property did not pass under it if it can be gathered from the surrounding facts and circumstances that there could not be any doubt as to what was actually sold.)

(28) AIR 1928 Pat 615 (624) : 8 Pat 122. (It is not necessary for a decree-holder to particularize by name all the villages which appertain to the main village or holding — It is enough if the description is sufficient to identify the holding.)

(67) 8 Suth W R 415 (419). (Sale of Government promissory notes — Numbers, values, etc., to be specified—Held however in this case, no material injury was caused by the failure to specify them.)

(29) AIR 1929 Oudh 268 (264, 265). (Property described as share of mortgagor in *bhaiyachari* village.)

(76) 25 Suth W R 326 (327). (Wrong pargana mentioned — Property identified — Sale not vitiated.)

Cases in which description was held insufficient :

(05) 1905 Pun Re No. 47, page 168. (Khasra

**O. 21 R. 66****Note 9 :**

one premises are stated as two premises, the misdescription is not a material irregularity. if the boundaries of the lots are given in the sale proclamation and no one has been misled.<sup>5</sup> The proclamation should also specify the *judgment-debtor's interest* in the property.<sup>6</sup> (See O. 21 R. 13.) Where owing to the Court's failure to make use of the materials before it, the area actually sold is less than that mentioned in the sale proclamation, the auction-purchaser is entitled to sue to have the sale set aside or to claim a refund of a proportionate part of the purchase-money.<sup>7</sup> Where, subsequent to the issue of a sale proclamation, a portion of the property is released from attachment, and, consequently, only a portion of the property mentioned in the sale proclamation is to be actually sold, it is necessary to issue a fresh proclamation.<sup>8</sup>

Where a question arises as to what was sold to the purchaser at a court-sale, the order of attachment, the sale proclamation and the sale certificate should be looked at.<sup>9</sup> In a case of discrepancy between the sale proclamation and the certificate of sale, the former will prevail.<sup>10</sup> At the sale in execution of a mortgage decree, the mortgagee's interest also passes to the purchaser, though the sale proclamation may *expressly* refer only to the right, title and interest of the mortgagor.<sup>11</sup>

numbers stated—No indication as to what the properties were—Material irregularity.)

('05) 32 Cal 542 (546, 547, 548). (Non-specification of share of the property to be sold—Material irregularity.)

('87) 1887 All W N 50 (51). (Several shares in different pattis sold—Shares not specifically described—Material irregularity.)

5. ('38) AIR 1938 Cal 662 (663).

6. [See ('10) 7 Ind Cas 60 (62); 34 Mad 143. (Fraudulent misrepresentation of judgment-debtor's interest — Auction-purchaser held entitled to sue for setting aside sale.)]

7. ('16) AIR 1916 Low Bur 3 (5); 8 Low Bur Rul 427.

[See also ('36) AIR 1936 Mad 421 (422). (Decree-holder showing greater area in sale proclamation — Auction-purchaser can sue for damages for loss sustained irrespective of the question of fraud.)]

8. ('78) 3 Cal 544 (545, 546). (Omission to issue fresh proclamation is material irregularity.)

[But compare ('82) AIR 1932 All 664 (664). (In the case of zamindari property though the whole property has been proclaimed for sale a share in it may be sold without issuing a fresh proclamation.)]

9. *Cases bearing on the purchaser's rights under Court sale :*

('25) AIR 1925 Cal 1247 (1247). (Sale of estate with all moneys due from tenants in respect of arrears of rent—Arrears of rent include rent decrees.)

('81) 6 Cal 243 (246) (PO). (Sale of decree partly executed only enables purchaser to execute the unexecuted portion.)

('80) 5 Cal 144 (146). (Only in cases where it is manifest that judgment-debtor must have been sued as a representative, a sale in terms of the interest of the judgment-debtor can be held to convey the interest of others apparently not parties to the suit.)

('80) 6 Cal 218 (217, 218) (PO). (A obtaining a decree for possession and mesne profits of land comprised in a certain lease—B selling in execu-

tion of decree against A, A's interest in the lease—Purchaser does not get right to mesne profits.)

('79) 4 Cal 814 (815). (Sale of under-tenure for arrears of rent under S. 66 of Landlords and Tenants Act of 1869—Growing crops pass to the purchaser, except where it has been specifically excepted by sale notification.)

*Sale of property in hands of legal representative, for decree debt due by judgment-debtor — Latter's interest in the property passes to the purchaser :*

('78) 10 Beng L R 294 (300).

1868) Marsh 614 (614).

'75) 24 Suth W R 383 (384).

'75) 24 Suth W R 109 (109).

'75) 24 Suth W R 3 (4).

'17) AIR 1917 P C 121 (128) : 41 Mad 403 : 45 Ind App 54 (PO).

[See ('85) 7 All 38 (40, 41). (Property not mentioned in any of these does not pass.)]

('88) 9 Cal 641 (648). (Declaratory portion of the proclamation is not by itself sufficient to override the description of the property in the body of the document.)

('13) 21 Ind Cas 936 (937, 938) : 41 Cal 590 : 41 Ind App 88 (PO).

('26) AIR 1926 All 780 (782). (In case of ambiguity in sale proclamation, the decree should be looked at to see what was sold.)

('81) 3 All 647 (652) (FB.)]

[See also ('66) 6 Suth W R 228 (224).]

[But see ('72) 18 Suth W R 55 (56). (In this case the purchaser was held to have acquired under his purchase no title to the property of the minor, the property not having been described as the property of the minor.)]

10. ('77) 1 Cal L Rep 460 (468).

('74) 22 Suth W R 408 (408).

('88) AIR 1938 Mad 282 (282, 283). (Property not mentioned in sale proclamation mentioned in sale certificate — Purchaser does not get title to it as it is not sold to him.)

11. ('81) 5 Bom 5 (7). (Mortgagee is estopped from disputing that such is the effect of the sale.)

**10. Specification of revenue.** — Where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government, the revenue assessed upon the estate or part of the estate should be specified in the sale proclamation.<sup>1</sup>

An omission to state it<sup>2</sup> or an incorrect statement thereof<sup>3</sup> in the proclamation is a material irregularity within the meaning of Rule 90.

The term "part of an estate" in the rule means an *aliquot* part of an estate.<sup>4</sup>

**11. Encumbrances to which property is liable.** — The proclamation of sale should specify, as fairly and accurately as possible, the encumbrances to which the property to be sold is liable.<sup>1</sup> The amount due on the encumbrances notified should also be mentioned.<sup>2</sup> The fact that any of the alleged mortgages is admitted or disputed may also be stated.<sup>3</sup> But the decree-holder is not required to inspect and peruse all the mortgage documents mentioned in the encumbrance certificate and notify any specially onerous conditions that may be included therein, such as, that the property cannot be redeemed without paying off mortgages on *other* properties of the debtor.<sup>4</sup>

It is competent to the encumbrancer himself to apply to the Court under this rule praying that his encumbrance should be notified in the sale proclamation.<sup>5</sup> But he is not *bound* to do so and the mere fact that his incumbrance is not mentioned in the sale proclamation and that he is present at the time of the sale but does not warn intending bidders about his incumbrance will not debar him from enforcing his incumbrance.<sup>6</sup> A prior mortgagee who has been impleaded as a party to the suit on the puisne mortgage, in which the issue as to his priority was abandoned by him is not precluded from claiming under this rule that his mortgage should be notified in the sale proclamation.<sup>7</sup>

The rule authorizes the Court to notify the alleged encumbrances on the property. It does not empower it to order that the sale should be subject to the

('81) 5 Bom 2 (5).

[See also ('81) 5 Bom 614 (618). (Sale under money decree for mortgage debt.)]

**Note 10**

1. ('69) 12 Suth W R 488 (488, 489).

2. ('23) AIR 1928 P C 93 (93) (PC).

('83) 9 Cal 656 (661) : 10 Ind App 25 (PC).

(1900) 28 Mad 628 (629).

('98) 21 Mad 51 (53).

3. ('76) 8 Ind App 280 (289) (PC).

('15) AIR 1915 Mad 989 (991) : 21 Ind Cas 389 (391) : 88 Mad 387.

[See also ('28) AIR 1928 Mad 828 (824). (Error was so small in this case that it was held that no serious injury could have been caused to the judgment-debtor.)]

4. ('73) 19 Suth W R 434 (436).

**Note 11**

1. ('08) 30 Cal 599 (606, 607) (FB).

('18) AIR 1918 Bom 59 (63). (Fact that property is to be sold subject to mortgage should be distinctly stated.)

('32) AIR 1932 Nag 18 (20) : 27 Nag L R 389. (Fact that the property is in possession of a Mahomedan widow for her dower right and is sold subject to it, should be mentioned in the sale proclamation.)

('98) 20 Cal 599 (604). (Mention of encumbrance which does not exist is a material irregularity.)

('86) 8 All 116 (116, 117). (Proclamation notifying two charges over property, while in fact there

was one charge—Material irregularity.)

('96) 63 Cal 621 (624) : 164 Ind Cas 461 (462). (Arrears of rates are, under the Calcutta Municipal Act, a statutory charge on the property and therefore must be stated in the sale proclamation.)

('16) AIR 1916 Oudh 169 (172, 173).

[See also ('05) 9 Cal WN 300n (300n). (Clause (c) of this Section covers cases of puisne as well as prior encumbrances.)]

('33) AIR 1933 Lah 830 (831).]

2. ('17) AIR 1917 Cal 461 (462). (Omission to state the amount is a material irregularity.)

('81) 7 Cal 34 (41, 42).

[See also ('06) 3 Low Bur Rul 258 (260). (Sale subject to mortgage—Amount to be carefully stated.)]

('87) 10 Mad 57 (62). (Incorrect statement of amount due is material irregularity.)]

[See however ('34) AIR 1934 Mad 260 (262). (Reasonable particulars of encumbrances given—Exact amount need not be given.)]

3. ('19) AIR 1919 Upp Bur 18 (19) : 3 Upp Bur Rul 139.

('06) 3 Low Bur Rul 275 (277).

4. ('21) AIR 1921 Mad 209 (210).

5. ('26) AIR 1926 All 268 (269) : 48 All 260.

6. ('35) AIR 1935 Lah 527 (528).

7. ('29) AIR 1929 Oudh 88 (89) : 3 Luck 472. (Such issue is not one arising directly and substantially in the suit and its abandonment does



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**Note 11**

encumbrances<sup>8</sup> or to adjudicate upon the rights of the parties as to such incumbrances.<sup>9</sup> The notification of an encumbrance under this rule must be distinguished from an order under Rule 62 *ante*, that the property be sold subject to a certain encumbrance. In the former case there is no adjudication as to the binding nature of the alleged encumbrance, and the auction-purchaser is entitled to dispute the validity of the mortgage.<sup>10</sup> But in the latter case there is such an adjudication and the auction-purchaser cannot challenge the validity of the mortgage.<sup>11</sup> See Notes 1 and 2 to Rule 62. See also the undermentioned cases.<sup>12</sup> Where the *decree* itself directs the sale of the property subject to a certain encumbrance, the purchaser cannot challenge the validity of the encumbrance afterwards.<sup>13</sup>

The failure to notify encumbrances under this rule is a material irregularity which will vitiate the sale,<sup>14</sup> though a person who has *waived* the irregularity cannot subsequently object to it.<sup>15</sup> Even though the fact that the sale is subject to a mortgage is mentioned in the sale proclamation, the sale will still be vitiated, if through the conduct of the officers conducting the sale, the purchaser is misled into believing that the sale is free from encumbrances.<sup>16</sup> As to the remedies of a party when an encumbrance is wrongly mentioned in a sale proclamation, see Notes to Rules 90 to 92 *infra*, and the undermentioned case.<sup>17</sup>

The fact that a mortgage is not notified in the sale proclamation does not affect the binding nature of the mortgage as regards the property in the purchaser's hands.<sup>18</sup> Its enforceability does not depend upon the purchaser having notice of the mortgage. In the case of a *charge*, however, it will not as a general rule be binding on the purchaser if he has no notice of such charge.<sup>19</sup> See Section 100 of the Transfer of Property Act.

not amount to abandonment of the rights of the party under the prior mortgage.)

8. ('81) AIR 1931 Oudh 157 (159).

9. ('88) AIR 1938 All 287 (288).

('88) 1888 All W N 151 (152).

10. ('39) AIR 1939 Nag 305 (308) : ILR (1939) Nag 665.

('38) AIR 1938 All 542 (544). (Objection to sale proclamation—Order directing specification of maintenance charge in sale proclamation is summary and not conclusive.)

('35) AIR 1935 Rang 19 (20).

('37) AIR 1937 Oudh 493 (497) : 13 Luck 484.

('16) AIR 1916 Oudh 169 (173).

('36) AIR 1936 Cal 590 (592).

[See also ('36) AIR 1936 Mad 70 (72) : 59 Mad 312. (Sale proclamations do not conclude questions of title).]

11. ('39) AIR 1939 Nag 305 (309) : ILR (1939) Nag 665.

12. ('39) AIR 1938 Mad 879 (881, 882) : 57 Mad 195.

('35) AIR 1935 Oudh 23 (25, 26) : 10 Luck 848.

('35) AIR 1935 Rang 19 (20). (Property not sold subject to mortgage—Purchaser can dispute its validity.)

13. ('18) AIR 1918 Pat 421 (421).

14. ('02) 6 Cal W N 836 (837, 838).

('25) AIR 1925 Oudh 424 (424). (Announcement by sale officer is not enough.)

[See also ('39) AIR 1939 Nag 179 (188) : ILR (1939) Nag 857. (Irregularity on account of omission to mention mortgage in sale procla-

mation cannot be cured by mortgagee's statement in witness-box that he would not enforce it.)]

[But see ('88) AIR 1938 All 546 (548) : 55 All 519. (Omission to mention incumbrances in proclamation cannot be by itself injurious to judgment-debtor.)]

15. ('29) AIR 1929 Lah 673 (674). (Person bidding at sale knowing that proclamation did not specify mortgage in his own favour is estopped from objecting to irregularity.)

16. ('09) 1 Ind Cas 122 (128) : 36 Cal 823 : 36 Ind App 82 (PC). (The sale proclamation was in English and the purchaser did not know English.)

17. ('99) 23 Bom 759 (760, 761). (Suit for setting aside sale not maintainable—Suit for damages for slander of title or suit for declaration and injunction staying sale maintainable.)

18. ('14) AIR 1914 Oudh 426 (430).

('14) AIR 1914 Oudh 137 (140). (Only half lien notified—Auction purchaser cannot plead notification in suit for whole lien.)

('18) AIR 1918 Oudh 167 (168).

('06) 3 Low Bur Rul 275 (278).

('35) AIR 1935 Lah 527 (528).

[See also ('39) AIR 1939 Nag 179 (182) : ILR (1939) Nag 857. (Purchaser subsequently discovering mortgage and applying under Rule 90, *infra* to set aside sale—Mortgagee stating as witness in such proceedings that he had no intention of enforcing his mortgage is not estopped from doing so.)]

19. [See ('11) 12 Ind Cas 855 (857) (Low Bur). (Charge not mentioned in sale proclamation



But a mortgagee may be estopped by his conduct from setting up the mortgage against a *bona fide* purchaser. Thus, a decree-holder on whom a duty is cast by this rule to give full and true information, so far as it is known to him, will be estopped from setting up, as against the auction-purchaser, any mortgage *in his own favour*, which he has not mentioned in his application under this rule, and which does not appear in the sale proclamation,<sup>20</sup> provided the auction-purchaser has actually bought without notice of the mortgage.<sup>21</sup> But the omission of a decree-holder to have a mortgage in his own favour notified in the sale proclamation will not debar him from enforcing his mortgage as against a subsequent encumbrancer who is not in any way connected with the execution proceedings or otherwise prejudiced by the omission in the sale proclamation.<sup>22</sup>

As to whether registration constitutes notice for the purpose of such estoppel, see the undermentioned cases.<sup>23</sup> (See also Transfer of Property Act, Section 3.) There is, however, no estoppel where the decree-holder has mentioned the mortgage in his application for an order for sale but through some mistake of the Court officers, it is not inserted in the sale proclamation.<sup>24</sup> The above rule of estoppel also applies to a *judgment-debtor*, as, for instance, where in a suit for rent the mortgagee of the holding has also been impleaded as a defendant and he does not take steps to have his mortgage announced in the sale proclamation.<sup>25</sup>

Estoppel arises not only by failure of a party in his duty to have his mortgage entered in the sale proclamation, but also by any other conduct on the part of the person putting forward the mortgage which has misled the purchaser into believing that the alleged mortgage did not exist.<sup>26</sup> The rule of estoppel applies not only to setting up a mortgage against the auction-purchaser but also to *other* claims against him.<sup>27</sup>

but announced by charge holder at sale — Purchaser is bound.]]

20. ('99) 21 All 809 (310).

('99) 23 Bom 119 (121). (*Obiter*.)

('98) 22 Bom 686 (692).

('88) 12 Bom 678 (682, 683).

('81) 5 Bom 614 (618).

('76) 1 Bom 814 (818).

('20) AIR 1920 Cal 354 (357) : 47 Cal 446.

('01) 5 Cal W N 497 (502, 503).

('84) 10 Cal 609 (611).

('76) 1 Cal 837 (853).

('92) 15 Mad 303 (304).

('08) 11 Oudh Cas 206 (208).

('22) AIR 1922 Upp Bur 1 (3) : 4 Upp Bur Rul 62.

('69) 3 Beng LR 407 (408).

[See also ('92) 15 Mad 412 (413, 414). (Decree-holder not proclaiming mortgage in favour of third party but within his knowledge — Mortgage subsequently assigned to him — He is estopped from enforcing it against purchaser.)]

[But see ('81) AIR 1981 All 549 (549) : 53 All 631. (It is not necessary for subsequent mortgagee to declare prior encumbrances in favour of third persons or himself.)]

21. ('26) AIR 1926 Oudh 830 (831). (Mortgagee in possession of mortgaged property — His possession is sufficient notice of encumbrance.)

('96) 20 Bom 290 (292). (Registration was held to be notice.)

22. ('85) 18 Nag L Jour 274 (278).

23. *Cases holding that registration is notice and*

*therefore there is no estoppel where the mortgage is registered :*

('96) 20 Bom 290 (292).

('77) 1877 Bom P J 4 (4).

('77) 1877 Bom P J 83 (83).

('87) 9 All 690 (702).

*Case holding that decree-holder is estopped though the mortgage was a registered one :*

('69) 12 Suth W R 303 (304). (This case is no longer good law in view of the amendment of S. 3, T. P. Act.)

24. ('21) AIR 1921 All 113 (116) : 43 All 703.

('26) AIR 1926 Oudh 830 (831).

[See also ('82) AIR 1982 Lah 56 (57).

('87) 9 All 690 (702).]

25. ('15) AIR 1915 Oudh 185 (187).

26. ('70) 2 N W P H O R 315 (319). (Giving evasive answer to intending purchaser.)

('07) 4 All L Jour 709 (711). (Bidding at sale without notifying his own lien — But compare 9 All 413.)

[See also ('85) 9 Bom 86 (91, 93). (Meroacquiescence on the part of a stranger whose property is attached and sold does not estop him from claiming the property as his own, for though the law gives him the opportunity he is not bound to object.)]

[Compare ('87) 9 All 690 (702). (Encumbrance mentioned in sale proclamation—Decree-holder not estopped merely because he does not personally announce the encumbrance at the sale.)]

27. ('84) 7 Mad 107 (110). (Setting up prior title to the property.)

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**Notes 11-13**

An attachment is not an incumbrance within the meaning of this rule and hence need not be notified in the sale proclamation.<sup>28</sup>

**12. Amount to be recovered.** — The amount for the recovery of which the sale is ordered should be entered in the proclamation of sale. The amount so entered should not be one exceeding that granted by the decree. Thus, where the decree does not grant interest, the proclamation of sale should not include it.<sup>1</sup> Where the decree awards future interest, the interest should be calculated up to the date fixed for the sale.<sup>2</sup> The fact that in the application for execution under O. 21 R. 11 (2) *ante*, interest is calculated only up to the date of *application* is no bar to the interest being calculated in the sale proclamation up to the date fixed for sale.<sup>3</sup>

Where, at an execution sale, the decree-holder himself purchases the property and is placed in possession, and the sale is subsequently set aside and a fresh proclamation of sale ordered, it has been held that the mesne profits which the judgment-debtor is entitled to recover from the decree-holder for the period of his possession may be deducted from the decretal amount entered in the sale proclamation and that the matter is one to be decided in execution proceedings.<sup>4</sup> (*Vide* Section 144, Note 34, *ante*.)

When a sale is adjourned under Rule 69 *infra*, and a fresh proclamation of sale is waived by the judgment-debtor, the sale on the adjourned date for the amount entered in the original proclamation is not irregular, although the decree was partly satisfied when the adjournment was obtained. The reason is that where a sale is adjourned and the judgment-debtor waives a fresh proclamation, the amount due on the date to which the sale is adjourned is never shown in the proclamation.<sup>5</sup>

An incorrect statement in the sale proclamation as to the amount due under the decree does not affect the *jurisdiction* of the Court to sell the property and the sale held under a proclamation containing such incorrect statement is not *illegal*.<sup>6</sup>

But when objection is taken to the correctness of the amount entered in the sale proclamation, the sale should not be held before the objection is disposed of.<sup>7</sup>

**13. Everything which the Court considers material, etc. — Clause (e).** — This clause does not mean that the Court is to give a detailed account of *all* matters connected with the property.<sup>1</sup> Thus, it has been held that it is not necessary to specify the income from the property ordered to be sold.<sup>2</sup> But it is a material circumstance for the bidders to know that the property to be sold is the subject-matter of a pending suit by a defeated claimant.<sup>3</sup> For other instances, see the undermentioned cases.<sup>4</sup>

(19) 20 Ind Cas 753 (754) (Cal). (Rent decree — Execution — Sale of holding — Advertisement as mokarari (permanent) — Landlords cannot subsequently deny it.)

28. ('87) AIR 1987 Pat 50 (51, 52).

**Note 12**

1. ('78) 3 Cal 602 (610) : 5 Ind App 78 (P O).
2. ('82) AIR 1982 Cal 555 (557). (If the sale is adjourned further interest upto the date fixed again can also be realized at the time of the sale.)
3. ('82) AIR 1982 Cal 555 (557).
4. ('14) AIR 1914 Low Bur 178 (179).
5. ('28) AIR 1928 Pat 615 (621) : 8 Pat 122.
6. ('22) AIR 1922 Cal 321 (327) : 49 Cal 45.  
[See also ('28) AIR 1928 Pat 615 (621) : 8 Pat 122.]
- ('11) 12 Ind Cas 97 (97) (Mdd). (Such incorrect

statement creates no estoppel against the judgment-creditor unless the judgment-debtor is prejudiced.)

7. ('28) AIR 1928 All 503 (504).

**Note 13**

1. ('99) 1899 Pun Re No. 30, p. 158.
2. ('28) AIR 1928 Lah 918 (918).
- ('17) AIR 1917 Lah 136 (138).
- ('80) AIR 1980 Lah 692 (694).
- ('28) AIR 1928 Mad 398 (398).
- [But compare ('01) 4 Oudh Cas 329 (332). (Profits of land to be stated.)]
3. ('82) AIR 1982 Mad 119 (119) : 55 Mad 205.  
[See also ('10) 8 Ind Cas 610 (610) (Low Bur). (Pendency of suit attacking validity of decree under which sale is ordered, may be notified.)]
4. ('05) 27 All 684 (687) (FB). (Fact that the property is held by occupancy tenure.)
- ('82) AIR 1982 Nag 18 (20) : 27 Nag L R 389.

Where a landlord brings to sale the holding of his tenant in execution of his decree against the tenant, his failure to specify the *ordinary* incidents of the tenure will not estop him from claiming to enforce them against the auction-purchaser, but he will be estopped from enforcing any *unusual incidents* of the tenure, unless he has notified them in the sale proclamation.<sup>5</sup> The reason is that, in the former case the auction-purchaser may be presumed to have notice of the incidents, while in the latter case he cannot be held to have such notice. See Note 11 above.

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**Notes 13-14**

**14. Value of the property.** — There is a conflict of decisions as to whether under this rule a Court is under a duty to state its own estimate of the value of the property to be sold in the sale proclamation. The High Courts of Madras<sup>1</sup> and Allahabad<sup>2</sup> have held that the Court is under no such obligation. On the other hand, it has been held by the High Courts of Patna,<sup>3</sup> Calcutta<sup>4</sup> and Rangoon<sup>5</sup> and the Chief Court of Lower Burma<sup>6</sup> that it is the duty of the Court to enter in the sale

(Widow's right to possession of property for dower debt to be stated.)

(1900) 5 Cal W N 497 (502). (Sale of tenure — Arrears of rent should be stated.)

('29) AIR 1929 Bom 465 (466) : 53 Bom 777. (Sale of joint family property in decree against father for debt binding on family — Fact that minor son's interest was also intended to be sold may be notified.)

('69) 12 Suth W R 79 (79). (The fact that the property is under another attachment and is liable to be sold in satisfaction of another decree may be mentioned.)

('38) 42 Cal W N 661 (663). (Sale of mining rights — Boundaries of the area stated but not the extent of the area and the nature of coal deposits — No sufficient description.)

('87) AIR 1937 Nag 140 (143). (Decree-holder should specify claim of third party in possession of the property to be sold.)

('38) AIR 1938 Mad 720 (720). (It is incumbent on the Court to see that all the particulars required under O. 21 R. 66 are given properly, so that an intending bidder may know exactly what he is going in for.)

('32) AIR 1932 Bom 210 (212). (Undivided share of a member of a joint family attached during partition proceedings and ordered to be sold — Subsequently final decree for partition passed — Court must take notice of partition and proclaim for sale ascertained share of the member.)

('80) 4 Bom 828 (826). (Attachment of debt due to judgment-debtor — Court receiving notice that the debt is discharged — Court should hold inquiry as to existence of debt.)

*Unnecessary particulars :*

('25) AIR 1925 Oudh 150 (150). (Plan of property not necessary.)

(1865) 2 Suth W R 60 (61). (Sale of decree — Omission to mention amount decreed.)

('01) 28 Cal 73 (77). (Upset price not necessary.)

('81) 7 Cal 728 (725). (Sale of tenure — Amount of rent ought to be stated — But omission is not material irregularity.)

5. ('08) 30 Cal 218 (215, 217).

**Note 14**

1. ('28) AIR 1928 Mad 503 (504) : 51 Mad 655.

('27) AIR 1927 Mad 1009 (1009).

[See also ('27) AIR 1927 Mad 943 (943). (Court considering report of certain persons as sufficient commits no error).]

2. ('32) AIR 1932 All 664 (664).

3. ('17) AIR 1917 Pat 381 (382) : 2 Pat L Jour 180 (FB).

('19) AIR 1919 Pat 373 (374) : 4 Pat L Jour 37. (No valuation other than that fixed by Court should be inserted in proclamation.)

('23) AIR 1923 Pat 445 (446). (Do.)

[See also ('18) AIR 1918 Pat 536 (536) : 3 Pat L Jour 580. (Direction that value be put at twenty times the revenue is not proper).]

4. ('32) AIR 1932 Cal 141 (142).

('33) AIR 1933 Cal 511 (513) : 60 Cal 581.

('34) AIR 1934 Cal 205 (207). (Court should settle value of property sought to be sold as accurately as possible from materials available on record even if judgment-debtor does not appear).

('30) AIR 1930 Cal 781 (781, 782).

('22) AIR 1922 Cal 93 (94).

('24) AIR 1924 Cal 589 (592).

('31) AIR 1931 Cal 520 (520) : 58 Cal 577. (In the circumstances of a particular case Court may state different valuations as given by parties.)

[See also ('32) AIR 1932 Cal 576 (578, 579).

('08) 12 Cal W N 542 (544, 545).

('04) 8 Cal W N 257 (262). (Judgment-debtor has a right to have a reasonably just and true valuation placed upon his property).

('10) 6 Ind Cas 180 (181) (Cal.).]

[But see ('04) 31 Cal 922 (926). (Court is not required to make an investigation into the question of the value of the property, to record evidence and to come to a decision on the point).]

5. ('37) AIR 1937 Rang 157 (158). (Setting out in the proclamation of sale the valuation of the properties as given by the decree-holder without a previous enquiry as to the valuation would be a material irregularity in the publication of the sale).

6. ('14) AIR 1914 Low Bur 178 (179). (Omission to state value is sufficient reason to stay sale.)

**O. 21 R. 66**  
**Note 14**

proclamation its own estimate of the value of the property. The Bombay High Court<sup>7</sup> has held in a recent decision that it is not necessary in every case to value the property to be sold and to state the value in the sale proclamation; but the Court may, if it thinks fit, do so. But, in the undermentioned case<sup>8</sup> it was held by the same High Court that the Court is bound to hold an inquiry as to the value of the property and state the value in the sale proclamation. Opinion in the Nagpur Judicial Commissioner's Court is divided.<sup>9</sup> Though, as seen above, the Calcutta High Court holds that it is the duty of the Court to enter in the sale proclamation its own valuation of the property to be sold, it has also been held by that Court that in *exceptional cases*, the Court will be justified in not attempting to give a valuation of its own and in confining itself to stating the values given by the parties.<sup>10</sup> In any view, the omission of the Court to give an estimate of value is a mere irregularity and does not by itself vitiate the sale.<sup>11</sup>

Under the rule as amended by the High Courts of Calcutta, Lahore, Madras, Nagpur, N.-W. F. Province and Patna, the Court is not bound to give its own estimate of the value of the property, but is only required to state the value given by the parties. (See Local Amendments.) In view of this, the decisions of the High Courts of Calcutta and Patna and the Judicial Commissioner's Court of Nagpur passed before the above amendments, holding that the Court was under a duty to state its own estimate of the value of the property should be treated as no longer law.

An undervaluation in a sale proclamation which is calculated to mislead possible bidders and prevent them from offering adequate prices or from bidding at all is a material irregularity within the meaning of Rule 90 *infra*,<sup>12</sup> but the judgment-debtor may by his conduct be estopped from raising this objection.<sup>13</sup>

The Court need not make an elaborate enquiry before fixing the value of the property.<sup>14</sup> The fact that the highest bid offered at the auction is far below the value

7. ('39) AIR 1939 Bom 182 (183) : I L R (1939) Bom 389.

8. ('35) AIR 1935 Bom 331 (332).

9. ('30) AIR 1930 Nag 191 (192, 193). (Court should state its valuation.)

('28) AIR 1928 Nag 281 (282). (Court's valuation not necessary.)

10. ('32) AIR 1932 Cal 576 (578, 579).

('38) AIR 1938 Cal 511 (513) : 60 Cal 581. (Exceptional circumstances to be pointed out by Court in its order.)

('31) AIR 1931 Cal 520 (520) : 58 Cal 577.

('24) AIR 1924 Cal 589 (592).

[See also ('26) AIR 1926 Cal 610 (611)].

11. ('81) AIR 1931 Cal 490 (491) : 58 Cal 813. (But in a particular case omission may amount to material irregularity.)

('30) AIR 1930 Lah 685 (686, 687).

('22) AIR 1922 Cal 93 (94). (If it has a material effect upon the number of bidders and upon price it may amount to material irregularity).

12. ('98) 20 All 412 (417, 418) : 25 Ind App 146 (PO).

('33) AIR 1933 All 546 (550) : 55 All 519.

('29) AIR 1929 Cal 818 (819) : 57 Cal 67.

('17) AIR 1917 Pat 72 (73, 74).

('19) AIR 1919 Cal 350 (351).

('18) AIR 1918 Pat 266 (267).

('17) AIR 1917 Cal 461 (462).

('24) AIR 1924 Mad 767 (768).

(1900) 28 Mad 568 (570).

('18) 19 Mad Cas 296 (299) : 40 Cal 685 : 40 Ind App 140 (PO).

('12) 18 Ind Cas 337 (341) (Cal).

('11) 10 Ind Cas 475 (476) (Cal).

('11) 9 Ind Cas 698 (701) (Cal).

('28) AIR 1928 Cal 328 (331). (But sale will not be set aside unless substantial loss is shown to have been caused by the undervaluation).

('20) AIR 1920 Cal 518 (519). (Do).

('38) AIR 1938 Mad 720 (720).

('84) AIR 1934 Pat 540 (541). (Mere inclusion of two valuations in sale proclamation does not vitiate sale unless substantial loss is proved).

('35) AIR 1935 Bom 459 (462).

('85) AIR 1935 Bom 881 (882).

[See also ('10) 6 Ind Cas 135 (186) (Cal). (Held that the decree-holder was guilty of fraud in offering bids through benamidar in excess of the value stated in proclamation.)

('38) 42 Cal W N 661 (668). (Two contradictory statements as to value calculated to confuse and perplex any possible purchaser—Proclamation of sale is not according to law.)

[Compare ('11) 11 Ind Cas 295 (297) (Cal). (Mere undervaluation does not prove fraud)].

[But see ('08) 12 Cal W N 757 (758, 759). (Undervaluation in proclamation is irregularity but not material irregularity.)]

13. ('88) AIR 1938 All 546 (550) : 55 All 519. (Judgment-debtor failing to object to undervaluation even notices under this rule.)

14. ('32) AIR 1932 Cal 141 (142). (But the value of the property must be stated as fairly and accurately as possible.)

stated in the proclamation is no evidence of fraud or material irregularity in publishing or conducting the sale.<sup>15</sup> Where the highest bid offered at the auction falls below the value stated in the proclamation, the Court has no power to dismiss the execution petition.<sup>16</sup> In fixing the value of the property, *abwabs* (illegal cesses) should not be taken into consideration.<sup>17</sup> A right to have a lease of a mill for 20 years should not be valued by capitalising the annual rent for 20 years.<sup>18</sup> It is not a correct method of valuing heavily encumbered properties by taking their value in an unencumbered state and simply deducting from them the amount of the encumbrances.<sup>19</sup>

It is the duty of the Court to group the lands (to be sold in execution) in small and convenient plots and offer them for sale so that it may be possible for men of ordinary means, especially the ryots in the locality, to purchase them at a fair value.<sup>20</sup>

**15. Effect of an order under this Rule.** — There is a material difference between an order under Rule 63 and an order under the present rule. In the former case, if the party affected does not sue within 12 months to set it aside, it becomes conclusive against the person against whom it is made. In the latter case, it has no such effect.<sup>1</sup>

Where property is sold to a *bona fide* third party purchaser in execution of a decree in force at the time, a subsequent reversal, variation or amendment of the decree does not affect the validity of the sale.<sup>2</sup>

Where the property of a stranger is attached and sold, his failure to object thereto does not affect his rights inasmuch as, though the Code enables third parties to come in and object, they are not *bound* to do so.<sup>3</sup> See also Note 11 above.

**16. Non-compliance with the provisions of this Rule.** — Non-compliance with the provisions of this rule renders a court sale liable to be set aside on the ground of material irregularity.<sup>1</sup> If objection is raised by the judgment-debtor to anything stated in the sale proclamation, it is irregular for the Court to order the sale to be held

(17) AIR 1917 Pat 381 (382) : 2 Pat L Jour 130 (FB).

[See also ('39) AIR 1939 Cal 369 (375) : I L R (1939) 1 Cal 530. (Still value inserted in sale proclamation is an index of the value of such property.)]

[But see ('22) AIR 1922 Pat 550 (551) : 1 Pat 214. (Very elaborate enquiry should be made as to the true value of property.)]

15. ('22) AIR 1922 Pat 550 (551, 552) : 1 Pat 214.

16. ('26) AIR 1926 Pat 140 (141).

(26) AIR 1926 Pat 146 (146). (Auction-purchaser cannot be compelled to bid higher than or up to the proclaimed price.)

17. ('02) 7 Cal W N 439 (439, 440).

18. ('34) AIR 1934 Lah 146 (146).

19. ('35) AIR 1935 Cal 614 (618).

20. ('38) AIR 1938 Mad 720 (720).

#### Note 15

1. ('27) AIR 1927 Bom 234 (235, 236).

(36) AIR 1936 Cal 590 (592). (Property purchased with notice of mortgage notified in sale proclamation—Purchaser can challenge the mortgage.)

(38) AIR 1938 All 542 (544).

(16) AIR 1916 Oudh 169 (178). (Order under this rule is not conclusive.)

2. ('30) AIR 1930 All 578 (579).

3. ('85) 9 Bom 86 (91, 93).

#### Note 16

1. ('06) 3 Low Bur Rul 275 (277).

(32) AIR 1932 All 55 (57). (Want of verified statement, etc.)

(23) AIR 1923 Lah 213 (216). (Omission to state time and place.)

(02) 29 Cal 73 (99) (FB). (Misdescription of property is material irregularity.)

(25) AIR 1925 All 459 (462, 464) : 47 All 479. (Do.)

(37) AIR 1937 All 407 (409). (Omission to issue sale proclamation—Sale can be set aside if substantial injury is caused.)

(38) 42 Cal W N 661 (663). (Sufficient particulars of property not given—Value of property stated in such a way as to confuse possible purchaser—Proclamation is not according to law.)

[See ('28) AIR 1923 Pat 102 (102). (No jurisdiction to fix valuation for entering in sale proclamation, before day fixed for hearing parties as to proper valuation. See also Note 14 to O. 21 R. 90.)

(84) AIR 1934 Rang 188 (189). (No proclamation—Sale is not *ipso facto* vitiated.)]

[See also ('69) 12 Suth W R 488 (489). (Proof of substantial injury necessary.)

(84) AIR 1934 Pat 540 (541). (Two valuations given—Irregularity will vitiate proceeding only when there is substantial injury.)]

**O. 21 R. 66**  
**Note 16**

pending disposal of the objection.<sup>2</sup> But the irregularity due to the non-compliance with the provisions of this rule can be waived and the person who has waived the irregularity is estopped from subsequently raising any objection in respect thereof.<sup>3</sup> Thus, a judgment-debtor, who in spite of a notice under this rule, or in spite of knowledge of the contents of a sale proclamation does not object at the proper time, cannot subsequently raise the objection.<sup>4</sup> But the judgment-debtor is not estopped where he was not aware of the facts to which he was bound to object and where his failure to do so was due to a mistake for which he could not be held to blame.<sup>5</sup> A person may be held to waive irregularities in the sale proclamation by bidding at the sale.<sup>6</sup> But where the objection is to the *want of jurisdiction* to sell, there can be no estoppel by waiver.<sup>7</sup> Thus, a failure to object on the ground that notice under O. 21,

2. ('23) AIR 1923 All 503 (504). (Objection to amount stated in proclamation.)

('18) AIR 1918 Cal 490 (490). (The proclamation may be issued before disposing of objections filed by judgment-debtor.)

[See ('38) AIR 1938 Lah 65 (68). (Objection of judgment-debtor dismissed on ground that he can proceed under O. 21 R. 90—It being found that remedy under Rule 90 is not available to judgment-debtor, the property being held to be moveable property, he is entitled to an adjudication on the objection taken by him at an earlier stage.)]

3. ('89) 12 Mad 19 (25) : 15 Ind App 171 (PC).

('33) AIR 1933 All 546 (550) : 55 All 519.

4. ('89) 12 Mad 19 (25) : 15 Ind App 171 (PC). (Objection to description of property—Following 9 Cal 656 (PC).)

('34) AIR 1934 Bom 348 (349) : 58 Bom 564. (Misdescription of property in proclamation.)

('34) AIR 1934 Cal 205 (208).

('30) AIR 1930 All 865 (866). (Misdescription of property not challenged at proper time.)

('14) AIR 1914 Mad 312 (317). (Do.)

('15) AIR 1915 Mad 989 (992) : 38 Mad 887. (Valuation and statement of *peishcush*.)

('28) AIR 1928 Cal 328 (331). (Objection as to valuation.)

('25) AIR 1925 Cal 552 (555). (Do.)

('24) AIR 1924 Pat 111 (112) : 2 Pat 916. (Do.)

('28) AIR 1923 Pat 184 (185). (Objection to notification of encumbrances.)

('30) AIR 1930 Lah 685 (686). (Objection as to want of application under R. 66 (3).)

('12) 16 Ind Cas 235 (236) (Cal).

('29) AIR 1929 All 704 (704).

('35) AIR 1935 Cal 614 (618). (Objection after sale on ground of misdescription or undervaluation.)

('35) AIR 1935 Mad 150 (151). (Judgment-debtor giving up objections to sale proclamation and getting adjournment of sale is estopped from raising them again.)

('36) 40 Cal W N 428 (432). (Sale proclamation—Notice to judgment-debtor—Omission to raise objection—Subsequent objection that properties not comprised in mortgage are included is not maintainable.)

('36) AIR 1936 Pat 568 (570) : 15 Pat 345. (Sale of personal properties of mortgagor judgment-debtor—Judgment-debtor getting adjournment of sale waiving fresh proclamation—He cannot

afterwards raise objection that there was no personal decree under which property could be sold.)

('36) AIR 1936 Bom 315 (317).

[See also ('76) 3 Ind App 230 (240) (PC). (Petition for postponement of sale with a statement that the order of attachment and sale proclamation may be maintained is waiver.)

('81) 7 Cal 618 (615). (Merely applying for postponement of sale is no waiver.)

('34) AIR 1934 Mad 260 (261). (Properties described as undivided share—Subsequent division among judgment-debtor and his brothers—Judgment-debtor not applying for amendment of sale proclamation cannot object.)

('38) AIR 1938 P C 230 (231) : 32 Sind L R 879 (PC). (Application for postponement of sale waiving necessity for a fresh proclamation—Defects in old proclamation regarded as waived—But there is no waiver of the right to object to any irregularities in the attachment.)

('89) AIR 1939 Bom 526 (528). (Failure of judgment-debtor to object that he was an agriculturist and that proceedings should be transferred to Collector—Judgment-debtor cannot subsequently raise objection.)

[But see ('27) AIR 1927 Rang 84 (85). (No estoppel in case of omission to state place and time of sale.)

('30) AIR 1930 Nag 191 (193). (No estoppel against statute—Judgment-debtor not estopped from applying under O. 21 R. 90 for setting aside sale simply because he did not appear in obedience to the notice served upon him under R. 66 for settling the terms of the proclamation.)]

5. ('15) AIR 1915 Mad 989 (992, 993) : 38 Mad 987.

[See also ('08) 8 Cal W N 257 (268). (Case under old Code.)]

6. ('29) AIR 1929 Lah 678 (674). (Mortgagee bidding at sale knowing that proclamation did not specify mortgage in his favour.)

[See also ('82) 8 Cal 932 (933).]

7. ('81) AIR 1981 Oudh 898 (400). (Ancestral property—Sale of—Civil Court has no jurisdiction—Want of objection cannot operate as estoppel.)

[See however ('06) 28 All 278 (276). (Court deciding that property is not ancestral—Decision cannot be questioned subsequently.)]

Rule 22 was not given does not estop the judgment-debtor from questioning the sale under Rule 90 *infra*.<sup>8</sup>

**O. 21 R. 66**  
**Notes 16-20**

**17. Verified statement to accompany application for order for sale — Sub-rule (3).** — An application for an order for sale should be accompanied by a verified statement as required by this sub-rule.<sup>1</sup> Omission to file a verified statement amounts only to an irregularity and does not by itself vitiate the sale.<sup>2</sup> The verification need not be made by the decree-holder himself, but may be made by a person acquainted with the facts of the case.<sup>3</sup> (See also Order 6 Rule 15.)

**18. "Court may summon any person," etc. — Sub-rule (4).** — A claim preferred in the course of an investigation under Rule 66 in relation to immovable property *ordered by the decree to be sold* cannot be treated as a claim under Rule 58, because the latter rule applies only in cases where the property is attached.<sup>1</sup>

**19. Form of proclamation of sale.** — See Appendix E, Form No. 29.

**20. Appeal.** — An order under this rule is not one of the appealable orders under Section 104 or O. 43 R. 1.<sup>1</sup> Hence, the question arises whether orders under this rule are appealable as decrees under Section 47 read with Section 2. This question depends on two further questions, *viz.* —

(a) whether proceedings under this rule are of an administrative or a judicial character, and

(b) whether orders under this rule amount to a determination of a question within Section 47.

The answer to these questions must depend on the particular order in question in each case. Thus, where an order under this rule does not affect the rights, liabilities or equities of the parties to the decree, it is not a *judicial* order; nor does it amount to the determination of a question within Section 47 and hence no appeal lies from such an order.<sup>2</sup> On this principle *no* appeal lies from the following orders under this rule —

(a) An order about the value of the property to be entered in the sale proclamation.<sup>3</sup>

8. ('38) AIR 1933 Pesh 71 (72).

**Note 17**

1. ('32) AIR 1932 All 62 (63).

2. ('17) AIR 1917 Lah 136 (138).

('28) AIR 1928 Nag 14 (15).

[See ('32) AIR 1932 All 484 (484). (Omission to file verified statement and encumbrance certificate with application under O. 21 R. 11.) ('39) AIR 1939 Pesh 9 (11). (It is a material irregularity within O. 21 R. 90.)]

[See also ('06) 28 All 244 (245). (Omission to verify inventory of property to be attached in application for execution.)]

[But see ('29) AIR 1929 Nag 305 (306).]

3. ('20) AIR 1920 Pat 686 (687). (Verification by karpardaz of decree-holder sufficient.)

**Note 18**

1. ('90) 14 Bom 369 (370).

**Note 20**

1. ('20) AIR 1920 Pat 686 (688).

2. ('28) AIR 1928 Mad 1169 (1170).

('29) AIR 1929 Mad 506 (508).

('29) AIR 1929 Lah 815 (816).

('11) 10 Ind Cas 371 (371, 372) (Cal).

('14) AIR 1914 Cal 488 (489).

('17) AIR 1917 Low Bur 121 (122); 8 Low Bur Rul 350. (No appeal against order under Rule 66 (4).)

('25) AIR 1925 Pat 500 (503); 4 Pat 731.

('85) AIR 1935 Mad 714 (714).

('39) AIR 1939 F C 74 (80) (FC). (Order estimating value of property is not a judicial adjudication of a question under Section 47.)

See also the cases cited in foot-notes (3) to (9), below.

[See also ('04) 27 Mad 259 (261) (F B). (None of the proceedings under S. 287, old Code, is an 'order' within S. 244 and as such appealable as a decree — 23 Mad 568, Overruled.)

('20) AIR 1920 Pat 636 (638). (Order under this rule is not decree.)]

3. ('32) AIR 1932 All 136 (137).

('32) AIR 1932 All 696 (696).

('27) AIR 1927 All 208 (209). (Order can be assailed in an application under O. 21 R. 90.)

('17) AIR 1917 All 349 (350); 39 All 415.



**O. 21 R. 66**  
**Note 20**

- (b) An order as to the sale of the properties in particular lots.<sup>4</sup>
- (c) An order as to service of notice prescribed by the rule.<sup>5</sup>
- (d) An order for the entry of certain encumbrances in the sale proclamation.<sup>6</sup>
- (e) An order fixing the place of sale.<sup>7</sup>
- (f) An order fixing the upset price.<sup>8</sup>

For other instances, see the undermentioned cases.<sup>9</sup>

But, where the Court in addition to deciding matters which are purely administrative in nature, such as fixing the upset price and the details of the sale proclamation, decides questions affecting the *rights of the parties*, the order will be a judicial order and will also amount to a determination of a question within Section 47 and an appeal will lie from that order.<sup>10</sup> Thus, where there are several judgment-debtors under a mortgage decree, an order that the properties of some of them should be sold first and the properties of the others should be sold only in the case of a deficiency occurring on such a sale, may be appealable as a decree as it determines the rights of the co-judgment-debtors *inter se*.<sup>11</sup> Similarly, an order relating to the boundaries or the area of the property to be sold comes within Section 47 and is appealable as a decree.<sup>12</sup> It has been held that an order as to whether a sale is to be held by the Court itself or by the Collector on the ground of the judgment-debtor

(‘28) AIR 1928 Bom 245 (246, 247) : 52 Bom 444.

(‘26) AIR 1926 Cal 610 (611).

(‘19) AIR 1919 Cal 1094 (1095).

(‘14) AIR 1914 Cal 488 (489). (Order accepting valuation of property.)

(‘11) 10 Ind Cas 371 (371, 372) (Cal).

(‘11) 11 Ind Cas 759 (760) (Cal).

(‘12) 17 Ind Cas 88 (89) (Cal).

(‘04) 27 Mad 259 (261) (F B).

(‘29) AIR 1929 Mad 506 (508).

(‘24) AIR 1924 Mad 767 (768).

(‘18) AIR 1918 Mad 1264 (1264). (Order fixing market value of the property.)

(‘16) AIR 1916 Pat 90 (90) : 2 Pat L Jour 13.

(‘20) AIR 1920 Pat 249 (250) : 5 Pat L Jour 270.

(‘25) AIR 1925 Pat 588 (590). (Order declining to re-open valuation.)

(‘30) AIR 1930 Oudh 81 (81, 82) : 5 Luck 481. (Order rejecting objection to mis-statement of value of property.)

(‘34) AIR 1934 Cal 761 (762). (Order disallowing objection that valuation was too low.)

(‘39) AIR 1939 F C 74 (80) (FC).

(‘39) AIR 1939 Bom 182 (183) : ILR (1939) Bom 389.

(‘37) AIR 1937 Rang 157 (158).

*The following decisions to the contrary are not good law :*

(‘16) AIR 1916 All 287 (289).

(‘10) 6 Ind Cas 180 (181) (Cal).

(‘08) 8 Cal W N 257 (262).

(‘08) 30 Cal 617 (618).

(‘19) AIR 1919 Lah 233 (234).

[See (‘25) AIR 1925 Cal 818 (819).]

4. (‘04) 27 Mad 259 (261) (F B).

(‘82) AIR 1982 All 186 (187).

(‘29) AIR 1929 Mad 506 (508).

(‘24) AIR 1924 Mad 527 (529).

(‘29) AIR 1929 Lah 815 (816).

5. (‘26) AIR 1926 Cal 1184 (1184).

(‘34) AIR 1934 Cal 761 (762).

6. (‘94) 1894 Bom P J 48.

[*Contra* (‘86) 1886 All W N 167 (168).]

7. (‘04) 27 Mad 259 (261) (F B).

8. (‘23) AIR 1923 Mad 619 (620, 621).

(‘28) AIR 1928 Mad 1169 (1170).

(‘18) AIR 1918 Mad 1264 (1264).

(‘29) AIR 1929 Mad 506 (508).

9. (‘04) 27 Mad 259 (261) (F B). (Order fixing the amount for which the sale is to be held—No appeal lies.)

(‘21) AIR 1921 Cal 629 (630, 631). (Order directing proclamation to issue pending enquiry into judgment-debtor's objections—No appeal lies.)

(‘18) AIR 1918 Cal 601 (601). (Refusal to enter that the judgment-debtor had acquired the interest of a prior mortgagee mentioned in the sale proclamation—No appeal lies.)

10. (‘28) AIR 1928 Mad 1169 (1170).

(‘28) AIR 1928 Pat 134 (134). (Question if Court could sell property subject to encumbrances—Appeal lies.)

(‘26) AIR 1926 Cal 610 (611). (Order under Rule 66 may in certain circumstances amount to an order under Section 47, C. P. C.)

[See also (‘24) AIR 1924 Pat 628 (628).]

[*But compare* (‘08) 18 Mad L Jour 568 (569). (Order purporting to be passed under R. 66, but without jurisdiction, cannot, on that ground, be deemed to have been passed under some other Section and consequently appealable.)]

11. (‘18) 19 Ind Cas 448 (448, 449) (Mad).

(‘24) AIR 1924 Mad 865 (866).

(‘26) AIR 1926 Mad 884 (885).

[See also (‘29) AIR 1929 Mad 506 (507, 508).

(‘82) AIR 1982 All 186 (187).]

12. (‘25) AIR 1925 Cal 818 (819).

(‘38) AIR 1938 Lah 888 (884). (Area.)



being an agriculturist is a *judicial* order which is open to appeal.<sup>13</sup> It has been held in some cases that irregularities in *drawing up* the sale proclamation are not irregularities in *publishing or conducting* the sale within O. 21 R. 90, and hence, an application by a judgment-debtor to set aside an execution sale on the ground of such irregularities comes within Section 47 and not under O. 21 R. 90, and that therefore an order determining such an application is one under Section 47 and appealable as a decree.<sup>14</sup>

A question of waiver of irregularities in the sale proclamation by the judgment-debtor on which the trial Court had found against him but which was not raised before the High Court on appeal, cannot be raised by him before the Privy Council.<sup>15</sup> (See Notes to Order 41 Rules 1 and 2.)

**21. Revision.** — It has been held by the High Court of Patna<sup>1</sup> that the action of the Court under this rule is a *judicial* one and hence subject to the revisional jurisdiction of the High Court. It was further held by that Court that the High Court could interfere under Section 107 of the Government of India Act of 1915 even if the action of the lower Court in such cases be held to be *administrative*.<sup>2</sup> But the High Court will not ordinarily interfere in revision in a discretionary matter<sup>3</sup> or where the applicant for revision has not been in any way damnified by the order complained against.<sup>4</sup>

**22. Applicability of the rule of *res judicata* to proceedings under this Rule.** — The principle of *res judicata* applies to execution proceedings.<sup>1</sup> (See Section 11, Note 23.) The question whether the principle applies to proceedings under this rule depends on whether the proceedings are administrative or judicial, for unless they are held to be judicial, the principle of *res judicata* cannot apply to them. (See Section 11, Note 100.) The answer to this question depends on the particular order in question in each case. In so far as an order merely settles the details to be entered in a sale proclamation, the proceeding is only administrative or ministerial and such an order cannot operate as *res judicata*,<sup>2</sup> nor is such an order a *final* order so as to operate as *res judicata*.<sup>3</sup> But if in proceedings under the rule, a final order affecting the rights of the parties is passed, such an order will be a final order of a judicial character and as such will operate as *res judicata*.<sup>4</sup>

13. ('39) AIR 1939 Bom 526 (528).

14. ('08) 32 Bom 572 (574).

('25) AIR 1925 Mad 1142 (1142). (Second appeal lies—Following AIR 1920 Mad 481.)

[See also ('80) AIR 1930 Mad 489 (489). (Second appeal lies.)]

15. ('07) 34 Cal 709 (710) : 84 Ind App 164 (PC). (Question being one of fact.)

**Note 21**

1. ('17) AIR 1917 Pat 381 (381, 382) : 2 Pat L Jour 130 (FB).

[See also ('28) AIR 1928 Pat 102 (102). (Fixing valuation before day fixed for hearing parties on the question is revisable.)]

[Compare ('16) AIR 1916 Mad 682 (682). (Under-valuation is not material irregularity within Section 115.)]

2. ('17) AIR 1917 Pat 381 (382) : 2 Pat L Jour 130 (FB).

3. ('32) AIR 1932 Cal 576 (578, 579).

4. ('06) 3 Low Bur Rul 275 (278).

**Note 22**

1. ('22) AIR 1922 All 27 (28) : 44 All 350.

2. ('24) AIR 1924 All 480 (480). (Order merely cancelling description of judgment-debtors as mortgagors—No finding as to validity of alleged mortgage—There is no *res judicata* on the question of the validity of mortgage.)

3. ('25) AIR 1925 Pat 500 (502) : 4 Pat 731 (FB). (Order refusing to notify a lease — No *res judicata*.)

[See also ('39) AIR 1939 All 657 (659). (Mortgagee's application to notify his charge in sale proclamation dismissed on ground that the mortgage is discharged—Order is not one under Order 21 Rule 62 and is not conclusive.)]

4. ('24) AIR 1924 Pat 628 (628, 629). (Decision that applicant was *pro forma* defendant and as such was not entitled to notice under Rule 66 operates as *res judicata*.)

('33) AIR 1933 All 192 (195). (Property of judgment-debtor stated by decree-holder to be ancestral and so found by Collector — Execution transferred to Collector—Contention by decree-holder that property not ancestral—*Res judicata*.)

**O. 21 R. 66**  
**Note 22**

The principle of *constructive res judicata* (Section 11, Explanation 4) also applies to execution proceedings.<sup>5</sup> (See Section 11 Note 23.) But it must be shown that the party sought to be barred has had clear notice of the nature of the claim made against him. (See Section 11 Note 23.) Thus, it has been held by a Full Bench of the Madras High Court<sup>6</sup> that where a notice is for the settlement of the terms of a sale proclamation, the judgment-debtor's legal representative cannot be deemed, by absenting himself, to have attended and raised the question as to whether the property was that of the judgment-debtor or belonged to himself. Further, where the last execution case was dismissed for default, the judgment-debtor cannot be held to be barred by *constructive res judicata* from raising a contention which he failed to raise in such execution case.<sup>7</sup>

The principle of *res judicata* will not apply if the Court had *no jurisdiction* to pass the order in question, as, for instance, where the order was by a Civil Court for the sale of ancestral property of the judgment-debtor, which, under the law, could be sold only by the Collector.<sup>8</sup> But, where in such a case the judgment-debtor to whom a notice is sent under this rule fails to appear and the Court upon the materials before it *decides that the property is non-ancestral* and orders its sale, the judgment-debtor cannot subsequently raise the objection as to jurisdiction,<sup>9</sup> for a decision as to jurisdiction is as much *res judicata* as a decision on any other point. (See Section 11 Note 73.)

A decision in the course of execution proceedings operates as *res judicata* even in a subsequent *suit* between the parties.<sup>10</sup>

The principle of Section 11, Explanation 5 does not apply so as to preclude a Court executing a mortgage decree from directing that the properties should be sold in a particular order, merely because the Court trying the suit was asked to embody an order to this effect in its decree but did not do so.<sup>11</sup> The reason is, it is conceived, that in such a case, the decree does not decide that the properties should be sold in any particular order and the executing Court has, in the exercise of its power to sell "the mortgaged property or a sufficient portion thereof," (see O. 34 Rr. 4 and 5) a discretion to direct the sale of the properties in any order it thinks fit. (Cf. also Section 11, Note 125.)

A decree-holder ought not to be allowed to take up inconsistent positions to the prejudice of the judgment-debtor. Thus, where in execution of a mortgage decree the decree-holder has caused to be sold properties not comprised in the mortgage and has all along been acting on the basis that the properties sold were comprised in the mortgage, he cannot be allowed to contend that they were *not* comprised in the mortgage and to bring to sale the properties that were comprised in the mortgage.<sup>12</sup>

(<sup>10</sup>) 5 Ind Cas 210 (210) (All). (Mortgage decree — Order directing that a portion of the property which had been sold to a third person should be sold after the other portion is *res judicata*.)

5. (<sup>22</sup>) AIR 1922 All 27 (28) : 44 All 350.

[Contra (<sup>25</sup>) AIR 1925 Pat 588 (590). (This view is not sound—See Section 11, Note 23.)]

6. (<sup>24</sup>) AIR 1924 Mad 1 (6) : 46 Mad 768 (FB).

[See also (<sup>99</sup>) 26 Cal 727 (732).

(<sup>85</sup>) AIR 1935 All 1016 (1018) : 58 All 860. (Objection by judgment-debtor that he was agriculturist and that the property (house) was not liable to attachment and sale can be raised even after sale.)]

[But see (<sup>25</sup>) AIR 1925 Nag 320 (320) : 21 Nag L R 28.]]

7. (<sup>25</sup>) AIR 1925 Pat 588 (590).

8. (<sup>81</sup>) AIR 1981 Oudh 898 (400).

9. (<sup>06</sup>) 28 All 273 (276).

10. Section 11, Note 23.

11. (<sup>26</sup>) AIR 1926 Mad 884 (885). (Following AIR 1924 Mad 509.)

[See also (<sup>08</sup>) 81 Mad 419 (424) (FB).]

[Compare also (<sup>29</sup>) AIR 1929 Oudh 88 (89) : 3 Luck 472. (Suit by puisne mortgagee — Prior mortgagee joined but priority not attacked — Prior mortgagee withdrawing issue as to priority is not precluded from claiming that his mortgage should be mentioned in the sale proclamation.)]

12. (<sup>09</sup>) 8 Ind Cas 22 (23) (All).

**23. Judgment-debtor dying pending execution.** — Where a decree-holder attaches the undivided interest of his judgment-debtor in (Hindu) joint family property, the latter's death before sale does not affect the decree-holder's right to proceed against his interest in the property in the hands of the surviving coparceners.<sup>1</sup> (See also Section 64 Note 10.) Where a judgment-debtor dies before the proclamation of sale is drawn up and the proclamation is drawn up without notice to his legal representatives, the sale held on the basis of such proclamation is void.<sup>2</sup> (See Notes under O. 21 R. 22.) But when a sale proclamation has been legally drawn up after notice to the judgment-debtors, and one of the judgment-debtors dies thereafter, it is not necessary that a fresh proclamation should be drawn up after notice to the legal representatives of the deceased judgment-debtor.<sup>3</sup>

**O. 21 R. 66**  
**Notes 23-24**

**24. Limitation—Step-in-aid of execution.**—An application for a proclamation of sale in respect of property under attachment is an application to take a step-in-aid of execution.<sup>1</sup> See also the undermentioned cases.<sup>2</sup>

**R. 67.** [S. 289.] (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

**O. 21 R. 67**

**Mode of making  
proclamation.**

(2) Where the Court so directs, such proclamation shall also be published in the *Official Gazette* or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

[1877, S. 289; 1859, S. 249.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "local official Gazette."

**Note 23**

1. ('85) 7 All 781 (782). (Following 5 Cal 148 (PO).)
2. ('28) AIR 1928 All 74 (76) : 49 All 890.
3. ('89) AIR 1933 All 654 (655).

**Note 24**

1. ('84) 10 Cal 851 (855) (FB).
2. ('88) 15 Cal 863 (865). (Application to allow the sale of mortgaged and attached property, subject to mortgage of third person is application to take step-in-aid of execution.)
- (17) AIR 1917 Pat 698 (698, 699) : 3 Pat L Jour
5. (Oral application to have a date fixed for settlement of terms of proclamation is application to take step-in-aid of execution.)
- (38) AIR 1933 Mad 488 (489). (Payment of *batta* for auction-sale of property is a step-in-aid of

execution.)

- (90) 17 Cal 53 (57). (Application for sale is application to take step-in-aid of execution.)
- (91) 15 Bom 405 (407). (Do.)
- (96) 23 Cal 374 (387). (Application paying process fees for service of a sale proclamation is step-in-aid.)
- (1900) 22 All 358 (359). (Mere payment of process fee for issue of notice under R. 66 without any application is not a step-in-aid of execution.)
- (26) AIR 1926 Cal 879 (880). (Issue of notice under Rule 66 is not a step-in-aid of execution because it is not issued on the application of the decree-holder but by the Court itself.)
- ('01) 24 Mad 695 (702). (Application for sale made more than three years from the last similar application is time-barred.)

**O. 21 R. 67**  
**Notes 1a-4**

**MADRAS****Local Amendments**

Add the following as sub-rule (4):

"(4) Unless the Court so directs it shall not be necessary to send a copy of the proclamation to the judgment-debtor."

**PATNA**

Add the following words at the end of sub-rule (1) after deleting the full stop at the end of the sub-rule:

"and may, if the Court so directs, on the application of the decree-holder, be proclaimed and published simultaneously with the order of attachment."

*Synopsis***1a. Object of the Rule.****1. Mode of making the proclamation.****2. Publication in the gazette or newspaper.****3. Division of property into lots — Sub-rule (3).****4. Non-compliance with the Rule.**

**1a. Object of the Rule.**—The provisions of Rules 67 and 68 have been designed for the protection of judgment-debtors and for the purpose of ensuring that the properties of such persons shall not be put to sale unless due publicity is given to the fact that a sale is to be held and a proper opportunity is afforded to bidders to attend the sale after proper notice has been given.<sup>1</sup>

**1. Mode of making the proclamation.** — The proclamation of sale should be made and published in the manner provided for by sub-rule (2) of Rule 54. See Notes to Rule 54 and the undermentioned cases.<sup>1</sup>

This rule applies to proceedings under the Orissa Tenancy Act, II of 1913, (see Sections 217 and 219) but not to proceedings under the Bengal Tenancy Act (VIII of 1885), (see Section 163, sub-section (3) as amended by Act IV of 1928, Section 102, clause (c).

**2. Publication in the gazette or newspaper.** — The Court has a *discretion* under this rule to direct the publication either in the gazette or in a local newspaper or in both.<sup>1</sup> The want of correspondence between the advertisement in the gazette, and the schedule of the attached property in the sale proclamation, constitutes an *irregularity* which might be cured if the sale was regular in other respects.<sup>2</sup>

**3. Division of property into lots—Sub-rule (3).**—Sub-rule (3) is new and dispenses with the necessity of making separate proclamations for each separate lot, where the property is divided into separate lots for being sold.<sup>1</sup> If, however, the Court thinks that proper notice cannot otherwise be given, as for instance, where the lots are situate at such a distance from each other that there is no certainty of communication to persons interested in one of such lots of what is publicly done in the other, the Court can direct the issue of a separate proclamation for each lot.<sup>2</sup>

**4. Non-compliance with the Rule.** — As already noticed under Rule 54 and Notes thereunder, an omission to comply with the requirements of sub-rule (2) thereof

**Order 21 Rule 67 — Note 1a**

1. ('88) AIR 1938 Cal 699 (700).

**Note 1**

1. ('81) 7 Cal 466 (469). (Proclamation to be affixed in some conspicuous part of the property.) ('81) 7 Cal 84 (41). (Do.)

**Note 2**

1. ('19) AIR 1919 Lah 260 (261). ('97) 1 Cal W N clv (clvi). ('68) 10 Suth W R 854 (854). (Case under the old

Code.)

[See also ('82) AIR 1932 Cal 627 (629). (No interval needed between publication in newspaper and sale as required under R. 68 below.)]

2. ('18) 21 Ind Cas 938 (938); 41 Cal 590; 41 Ind App 38 (PC).

**Note 3**

1. ('80) AIR 1930 Lah 685 (687).

('88) 12 Bom 368 (370).

2. ('88) 12 Bom 368 (370).

constitutes a *material irregularity* which would be a ground for setting aside the sale under Rule 90 provided substantial injury is also proved.<sup>1</sup> The High Court of Madras has held, in the undermentioned case,<sup>2</sup> that where the proclamation of sale was not published in the village where the lands were situate and the process-server intimated at the village that the sale would be held at a place and by an officer different from those fixed in the proclamation, the procedure was not merely irregular but *illegal*. See also Rule 90, *infra*.

**O. 21 R. 67**  
**Note 4**

**R. 68.** [S. 290.] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale.

**O. 21 R. 68**

[1877, S. 290.]

#### Local Amendments

##### ALLAHABAD

For the words "fifteen days" read the words "seven days."

##### LAHORE

For the word "thirty" read "fifteen" and for the word "fifteen" read "one week."

##### N.-W.F.P.

For the word "thirty" read "fifteen" and for the word "fifteen" read "seven."

##### OUDH

For the words "fifteen days" read the words "seven days."

#### Synopsis

##### 1. Time of sale. | 2. Non-compliance with the Rule.

**1. Time of sale.** — The rule provides that there should be an interval of thirty days in the case of immovable property and fifteen days in the case of moveable property between the date of sale and the date of affixing the copy of the proclamation in the court-house. The fifteen days rule does not, however, apply to a sale of moveables subject to speedy and natural decay (see proviso to Rule 43). It is also open to the judgment-debtor to consent to have the sale before the prescribed time. But such consent should be express and in *writing*.<sup>1</sup>

('08) 12 Cal W N 757 (760).

('11) 9 Ind Cas 698 (701) (Cal).

##### Note 4

1. ('38) AIR 1938 All 747 (747): 55 All 182. (Failure to publish sale proclamation by beat of drum where it is possible is material irregularity.)

('28) AIR 1928 Lah 671 (671). (Failure to affix copy of proclamation on conspicuous part of property—Material irregularity.)

('95) 22 Cal 871 (876). (Do.)

('85) 11 Cal 74 (76). (Several properties attached—Separate proclamations necessary.)

('82) 1882 All W N 58 (58). (Omission to proclaim on the property.)

('69) 12 South W R 488 (489).

('01) 6 Cal W N 44 (46). (Publication of proclamation half a mile away from the property.)

('91) 18 Cal 422 (426). (Revenue paying land—Copy not affixed in Collector's office—Sale not void without proof of substantial injury.)

('82) 8 Cal 982 (982, 988.)

('85) 11 Cal 658 (661).

('88) AIR 1988 Cal 699 (701). (The sale is not a nullity.)

[See also ('28) AIR 1928 Lah 213 (216). (Direct evidence to connect omission with loss necessary.)]

2. ('21) AIR 1921 Mad 583 (584, 585): 44 Mad 35. **Order 21 Rule 68 — Note 1**

1. ('85) 1885 All W N 804 (804).

**O. 21 R. 68**  
**Notes 1-2**

Suppose a sale takes place after thirty days from the date on which a copy of the sale proclamation was affixed on the court-house but before thirty days from the date on which a copy was affixed on the property to be sold. (It will be noted that under Rule 67 read with Rule 54 *ante*, affixing on both the places is necessary.) The question arises whether such a sale is in accordance with law. On this question there was a conflict of decisions under the old Code.<sup>2</sup> But, under the present Code, Rule 54 has been amended and it has been made clear that the affixing on the court-house is to be *after* a copy of the sale proclamation has been affixed on the property to be sold. Hence, under the present Code, the sale must be held after thirty days not only from the affixing of a copy of the proclamation of sale on the court-house but also from its being affixed on the property.

See Sections 68 and 69 of the Rangoon Small Cause Courts Act, VII of 1920, and Section 163, sub-section (4) of the Bengal Tenancy Act for special provisions as to time of sale under the said Acts.

**2. Non-compliance with the Rule.** — Omission to comply with the requirement of this rule is a material irregularity.<sup>1</sup> But this alone will not render the execution sale a nullity. It will not be set aside unless substantial injury is proved to have resulted therefrom.<sup>2</sup>

**O. 21 R. 69**

**R. 69.** [S. 291.] (1) The Court<sup>2</sup> may, in its discretion, adjourn<sup>3</sup> any sale hereunder to a specified day and hour,<sup>7</sup> and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment :

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation<sup>8</sup> under rule 67 shall be made, unless the judgment-debtor consents to waive<sup>9</sup> it.

('80) 5 Cal 259 (263). (Application by judgment-debtor that a portion of the property may be sold is not consent.)

2. ('81) 7 Cal 34 (39, 40). (Sale must be after thirty days from affixing notice on property.)

('82) 4 All 300 (301). (Sale within thirty days from proclamation of sale on property — No material irregularity.)

**Note 2**

1. ('83) AIR 1933 Lah 186 (186). (Sale within thirty days.)

2. ('94) 21 Cal 66 (69, 70) : 20 Ind App 176 (PO). ('88) AIR 1933 Lah 186 (186). (Substantial injury proved — Sale set aside.)

('85) 1885 All W N 804 (304). (Do.)

('04) 81 Cal 385 (392). (Limitation for setting aside sale runs from date of sale.)

('82) 11 Cal L Rep 308 (304).

('90) 14 Mad 227 (228).

('88) AIR 1938 Cal 699 (701).

('23) AIR 1923 Pat 45 (48) : 2 Pat 207.

('24) AIR 1924 Nag 293 (294).

('82) 8 Cal 932 (938).

('81) 7 Cal 84 (40).

*The following cases before the decision of the Privy Council in 21 Cal 66 cannot be considered good law :*

('85) 11 Cal 200 (209) (FB).

('87) 14 Cal 1 (8).

('90) 17 Cal 769 (782).

('85) 7 All 289 (289). (Infringement of the rule is an illegality vitiating sale.)

('87) 9 All 511 (511). (Infringement of this rule held more than irregularity and *ipso facto* fatal to a sale.)

('89) 11 All 888 (888). (Brodhurst, J., dissenting — See page 845.)

('80) 5 Cal 878 (881) (FB).

(3) Every sale shall be stopped<sup>10</sup> if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered<sup>11</sup> to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

[*Cf.* Rules 55 and 89.]

### Local Amendments

#### ALLAHABAD

For sub-rule (2) substitute the following :

"Where a sale has been once adjourned under sub-rule (1), a fresh proclamation under Rule 67 shall be made, unless the judgment-debtor consents to waive it :

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary :

Provided also that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

#### BOMBAY

In sub-rule (2) "thirty days" shall be substituted for "seven days."

#### CALCUTTA

*Substitute* the words "one calendar month" for the words "seven days" in sub-rule (2).

#### LAHORE

In sub-rule (2) "thirty days" shall be substituted for "seven days."

#### MADRAS

In sub-rule (2) for the words "seven days" *substitute* the words "thirty days."

#### NAGPUR

In sub-rule (2) for the words "seven days" *substitute* the words "fifteen days."

#### N.-W. F. P.

In sub-rule (2) for the word "seven" *substitute* the word "thirty" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

#### ODDH

In sub-rule (2) for the word "seven" read the word "fourteen", and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under Rule 66."

#### PATNA

In sub-rule (2) for the word "seven" *read* "fourteen" and *add* the following proviso :

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

#### RANGOON

In sub-rule (2) for the words "seven days" the words "thirty days" shall be substituted.

### Synopsis

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Court, meaning of.</li> <li>3. "May, in its discretion, adjourn any sale."               <ol style="list-style-type: none"> <li>3a. Who can apply for adjournment.</li> <li>3b. Imposition of terms on adjournment.</li> </ol> </li> </ol> | <ol style="list-style-type: none"> <li>4. Any sale.</li> <li>5. Adjournment of sale of mortgaged property. See Notes 4 and 11.</li> <li>6. Adjournment after partial sale.</li> <li>7. Omission to adjourn the sale to a specified day and hour.</li> </ol> |
|---|---|

**O. 21 R. 69**  
**Notes 1-3**

8. Fresh proclamation, when necessary.
9. Waiver of proclamation.
10. Stoppage of sale on deposit of debt and costs.
11. Who can tender the amount.
12. Sale on a date other than the one to which it is adjourned.
13. Withdrawal of bid.
14. Rateable distribution.
15. Limitation — Acknowledgment.

*Other Topics (miscellaneous)*

Appcal. See Note 3. Proviso. See Note 3.

**1. Legislative changes. —**

- (1) The words "under this Chapter" have been omitted under the present rule. The effect of the omission is to make the rule applicable also to sales under mortgage decrees. See Note 4.
- (2) The words "other than a sale by the Collector" have also been omitted as a separate provision has been made in Rule 70, *infra*.

**2. Court, meaning of. —** The "Court" means the Court executing the decree and not a Court to which such Court is subordinate.<sup>1</sup>

**3. "May, in its discretion, adjourn any sale." —** Under this rule the Court may, in its discretion, adjourn a sale to a specified day.<sup>1</sup> No hard and fast rule can be laid down as to when the Court should grant an adjournment. It depends upon the circumstances of each case. See the undermentioned cases.<sup>2</sup>

The High Courts of Allahabad<sup>3</sup> (dissenting from earlier decisions<sup>4</sup>) and Madras<sup>5</sup> have held that an execution sale after it has been stayed by the Appellate Court and before the order of stay is communicated to the officer holding the sale is not a nullity and that it would, at the worst, be an irregularity which will not *per se* invalidate the sale without proof of substantial injury. The Calcutta High Court has held a contrary view in the undermentioned case,<sup>6</sup> dissenting from an earlier decision of the same Court.<sup>7</sup> According to the Lahore High Court, where an executing Court makes an order postponing the sale but the sale is effected before the order reaches the officer

**Order 21 Rule 69 — Note 2**

1. ('16) AIR 1916 Pat 897 (398).
- ('09) 4 Ind Cas 378 (373) (Cal).
- ('78) 5 N W P H O R 177 (177).
- ('78) 1 Cal L Rep 584 (535).

**Note 3**

1. ('24) AIR 1924 Mad 284 (235).
- ('70) 5 Mad H C R 410 (412).
- ('88) 1888 All W N 71 (72). (Not appealable.)
- ('85) 11 Cal 244 (248) : 12 Ind App 7 (P O).
- ('29) AIR 1929 All 948 (949) : 52 All 115. (R. 69 deals with adjournment on date of sale — Per Pullan, J.)
- [See also ('91) 14 Mad 227 (228). (Adjournment without sufficient ground irregular.)]
2. ('04) 81 Cal 373 (377, 378). (May be adjourned to have a better sale.)
- ('78) 20 Suth W R 180 (181). (Or if it will benefit the judgment-debtor by enabling him to satisfy the decree.)
- ('69) 12 Suth W R 66 (67) (Do.)
- ('96) 23 Cal 351 (355, 356). (Sale stayed on the issue of a temporary injunction by another Court.)
- ('74) 22 Suth W R 481 (481). (May be adjourned by consent.)
- ('84) 8 Bom 532 (533). (Stranger in possession impeaching the decree — No ground for staying

sale.)

- ('81) 7 Cal 733 (735). (Pendency of administration suit—No ground.)
- ('66) 1 Agra 11 (12). (Higher price available by private sale—No ground.)
- ('70) 13 Suth W R 281 (282). (Day fixed for sale being very near to the latest sale day for the payment of the Government revenue not sufficient.)
- ('70) 2 N W P H O R 1 (2). (Sale postponed under S. 243 of the Code of 1859.)
- ('34) AIR 1934 Cal 781 (782) : 61 Cal 568. (Execution sale of part of judgment-debtor's share in property cannot be stayed only on the ground that injunction staying sale of the other part has been issued.)
3. ('27) AIR 1927 All 401 (404, 405) : 50 All 41 (F B). (But a stay order will operate against a decree-holder purchaser.)
4. ('21) AIR 1921 All 102 (108).
- '90) 12 All 96 (98).
- '80) 2 All 686 (687).
- '72) 4 N W P H O R 185 (186).
- '74) 6 N W P H O R 354 (356).
5. ('09) 3 Ind Cas 82 (84) : 38 Mad 74.
6. ('06) 88 Cal 927 (934, 935).
7. ('97) 1 Cal W N 226 (227, 228).



conducting the sale, the sale is illegal and not merely irregular.<sup>8</sup>

The officer conducting the sale is also empowered under this rule to adjourn the sale except where the sale is held within the precincts of the court-house, in which case leave of Court is necessary.<sup>9</sup>

**3a. Who can apply for adjournment.** — The rule does not specifically provide that a party to the proceeding alone can apply for adjournment under this rule. The rule being general in terms, there is nothing to prevent the Court from adjourning the sale on information from a third party or even on the application of such third party.<sup>1</sup>

**3b. Imposition of terms on adjournment.** — The Court granting an adjournment of the sale has power to impose terms on the applicant as a condition of the adjournment.<sup>1</sup>

**4. Any sale.** — This rule applies to the adjournment of any sale including a sale under a mortgage decree.<sup>1</sup>

**5. Adjournment of sale of mortgaged property.** — See Notes 4 and 11.

**6. Adjournment after partial sale.** — The provisions of this rule do not apply to a *continuous* sale. Thus, it does not apply where the sale is ordered to be continued from day to day and the property is kept on hammer in the hope of getting higher bids than those offered on the first day; no fresh proclamation is necessary in such a case even though the sale is adjourned and continued for more than seven days.<sup>1</sup> Similarly, where a sale was included in the sale list for a particular day and as the sales could not be finished on that day the nazir in charge continued them on the following day in accordance with the procedure prescribed by the Rules and Circular Orders of the High Court, it was held that there was no adjournment of the sale within the meaning of this rule.<sup>2</sup>

**7. Omission to adjourn the sale to a specified day and hour.** — Where an execution sale is adjourned, the Court must specify the *day* and the *hour* to which it is adjourned.<sup>1</sup> Omission to do so may amount to a material irregularity.<sup>2</sup> It was held

8. ('85) AIR 1935 Lah 694 (695, 696).

9. (1900) 12 Mad L Jour 97 (99).

('18) 20 Ind Cas 192 (193) (Low Bur).

('28) AIR 1928 Lah 249 (249).

[See also ('23) AIR 1928 Pat 572 (574).

('32) AIR 1932 All 869 (869). (Officer must record reasons—Omission is material irregularity.)]

[See however ('85) 8 Mad 6 (7). (Sale under Madras Rent Act — Officer not entitled to adjourn.)]

#### Note 3a

1. ('35) AIR 1935 Mad 295 (296).

#### Note 3b

1. ('35) AIR 1935 Mad 295 (296).

#### Note 4

1. ('04) 31 Cal 373 (377, 378).

('04) 31 Cal 868 (867, 868).

('02) 25 Mad 244 (255, 266, 276) (F B).

[See ('28) AIR 1928 Rang 154 (154).]

#### Note 6

1. ('27) AIR 1927 Pat 312 (318) : 6 Pat 432.

('10) 8 Ind Cas 564 (565) (Mad).

('90) 17 Cal 152 (154).

('72) 17 Suth W R 210 (210).

[See also ('28) AIR 1928 Lah 699 (700).

('66) 4 Bom H C R A O 164 (166).]

2. ('37) AIR 1937 Pat 386 (387) : 16 Pat 408.

#### Note 7

1. ('80) AIR 1930 All 542 (543).

('38) AIR 1933 Cal 662 (663).

('27) AIR 1927 All 241 (241) : 49 All 402.

('70) 2 N W P H C R 143 (144).

('04) 3 Cal W N 686 (688) : 31 Cal 815.

('96) 20 Mad 159 (161).

('28) AIR 1928 Mad 823 (825). (Date fixed—Court may reasonably infer the hour to be the same as on the prior date.)

[See ('76) 25 Suth W R 328 (329).]

2. ('04) 31 Cal 815 (818).

('12) 13 Ind Cas 337 (343) (Cal).

('01) 6 Cal W N 48 (50, 51).

('97) 24 Cal 291 (292, 298).

('97) 20 Mad 159 (161).

('32) AIR 1932 All 369 (369). (Officer conducting sale failing to record reasons for adjournment—Material irregularity.)

**O. 21 R. 69**  
**Notes 7-9**

in the undermentioned case<sup>3</sup> that the failure to mention the exact hour ceased to be a material irregularity where the judgment-debtor had agreed that there should be no fresh proclamation of sale.

See also the undermentioned case.<sup>4</sup>

It has been held by the High Court of Allahabad<sup>5</sup> that the specification of the day and hour is only necessary where the *Court* adjourns the sale and not when the *officer* conducting the sale adjourns it.

**8. Fresh proclamation, when necessary.** — Fresh proclamation is necessary when the sale is adjourned for a longer period than seven days.<sup>1</sup> It is, however, open to the judgment-debtor to *wave* a fresh proclamation. See Note 9 below.

The omission to issue a fresh proclamation as required by the rule amounts to a mere *irregularity* and the sale will not be set aside in the absence of proof of substantial injury.<sup>2</sup>

**9. Waiver of proclamation.** — The judgment-debtor can waive the benefit of a fresh proclamation under this rule and, if he does so, he cannot, later on, object to the sale being irregular on that ground.<sup>1</sup> Such waiver does not, however, estop him from objecting to *other irregularities*,<sup>2</sup> as for instance, the omission to specify the day and the hour of the sale,<sup>3</sup> or the omission to proclaim properly.<sup>4</sup> The waiver of a fresh proclamation implies a waiver of objection to any defect appearing on the face of the

('37) 1937 Mad W N 1223 (1223). (Failure to specify hour.)

('38) AIR 1938 Nag 107 (108) : ILR (1938) Nag 436. (Sale held till 1 p.m. and adjourned to "an hour or so" without stating reasons for adjournment — Sale held again from 2-30 p. m. to 4 p. m. — Non-specification of exact hour to which sale is adjourned and failure to give reasons for adjournment *held* not such material irregularities as go to the root of the matter.) [See ('38) AIR 1938 Cal 662 (663).]

3. ('38) AIR 1938 All 546 (549) : 55 All 519.

4. ('34) AIR 1934 Nag 250 (251).

5. ('35) AIR 1935 All 182 (182).

**Note 8**

1. ('07) 29 All 196 (202) : 34 Ind App 37 (P O).

('76) 25 Suth W R 328 (329).

(1865) 3 Suth W R Misc 11 (11, 12). (In cases of indefinite postponement fresh proclamation necessary.)

('78) 3 Cal 542 (543).

('85) 11 Cal 658 (660). (Series of short adjournments amounting in the aggregate to more than seven days—Fresh proclamation necessary.)

('01) 6 Cal W N 44 (46). (Do.)

('72) 18 Suth W R 347 (347). (Adjournment for a day—No fresh proclamation necessary.)

('66) 6 Suth W R Misc 84 (84).

('29) AIR 1929 Oudh 285 (287) : 4 Luck 685. (Sale adjourned *sine die*.)

('18) AIR 1918 Pat 686 (686, 687). (Do.)

('13) 20 Ind Cas 192 (193) (Low Bur). (Adjournment for two days—No fresh proclamation required.)

[See ('88) 1988 Nag L Jour 10 (12). (Collector's sale—Acceptance of bid by Collector necessary—Collector accepting bid beyond 7 days but within 15 days—Acceptance is valid—No fresh proclamation is necessary as period of 7 days has been extended to 15 days by Nagpur High

Court.)]

[See also ('23) AIR 1923 Rang 154 (154). (The case was not of adjournment but one of stay of sale pending further orders.)

('78) 3 Cal 544 (546). (Fresh proclamation necessary if portion of property is released after issue of proclamation.)]

2. ('14) AIR 1914 Oudh 164 (165).

('28) AIR 1928 Oudh 98 (99) : 2 Luck 490.

('11) 12 Ind Cas 174 (175) : 38 Ind App 200 : 39 Cal 26 (PO).

('72) 17 Suth W R 389 (389).

('28) AIR 1928 Pat 616 (621) : 8 Pat 122.

'85) 11 Cal 658 (660, 661).

'29) AIR 1929 Mad 624 (624).

[But see ('86) 1886 Pun Re No. 45, p. 45.]

**Note 9**

1. ('73) 19 Suth W R 227 (229).

('75) 23 Suth W R 256 (257).

('76) 25 Suth W R 34 (34).

('18) AIR 1918 Cal 293 (293, 294).

('05) 2 Cal L Jour 584 (588, 589).

('29) AIR 1929 Mad 517 (520). (Waiver by judgment-debtor's pleader.)

('80) AIR 1980 Mad 414 (417).

('26) AIR 1926 Cal 577 (577, 578).

[See also ('10) 5 Ind Cas 489 (490) (Cal). (Petition by judgment-debtor for adjournment with agreement to waive — Not granted and sale held—The agreement cannot operate as waiver of objection to sale.)

('94) 17 Mad 304 (305). (Do.)]

2. ('11) 11 Ind Cas 488 (489, 440) (Cal).

('07) 6 Cal L Jour 111 (118). (Fraud.)

3. ('01) 6 Cal W N 48 (51, 54).

4. ('02) 6 Cal W N 42 (43, 44).

[See also ('07) 6 Cal L Jour 62 (69, 70). (Objection that the writ of attachment and the previous proclamation had been fraudulently suppressed at decree-holder's instance.)]

sale proclamation but does not imply a waiver of the right to object to any irregularities in the attachment.<sup>5</sup>

**O. 21 R. 69**  
**Notes 9-13**

A waiver of proclamation by *one* of several judgment-debtors does not bind the other judgment-debtors.<sup>6</sup> Nor does the waiver of a fresh proclamation by the judgment-debtor prevent an attaching decree-holder from objecting to the sale on the ground of want of a fresh proclamation.<sup>7</sup>

The guardian *ad litem* of a minor judgment-debtor can waive a fresh proclamation on behalf of the minor under this rule.<sup>8</sup>

**10. Stoppage of sale on deposit of debt and costs.** — Any sale including a sale under a mortgage decree can be stopped by the deposit of the decretal amount and the costs before the property is *actually knocked down* to the bidder.<sup>1</sup> But the words "debt and costs" mean the *entire amount* and not "the balance of the decree-debt and costs which would remain if, by a legal fiction, the sale of previous lots (not yet completed by the payment of the whole of the purchase-money) were taken as completed by treating the whole of the purchase-money as being actually paid up."<sup>2</sup>

Under sub-rule (3) it is the *officer conducting the sale* who has to be satisfied that the requisite amount has been paid into Court.<sup>3</sup>

**11. Who can tender the amount.** — The judgment-debtor or a transferee of the property from the judgment-debtor is entitled to tender the amount under this rule.<sup>1</sup> Where the sale is in execution of a mortgage decree any person holding the equity of redemption,<sup>2</sup> such as a purchaser in execution of a decree on a puisne mortgage,<sup>3</sup> can tender the amount and have the sale stopped.

A payment made to prevent a sale in execution of a decree is not a *voluntary* payment, whether made by the debtor or by a third person claiming the property.<sup>4</sup>

**12. Sale on a date other than the one to which it is adjourned.** — The High Court of Calcutta has held in the undermentioned case<sup>1</sup> that if the execution sale does not take place on the adjourned date but is held on a subsequent date to which the sale has not been adjourned, it amounts to a material *irregularity*. But in a later decision<sup>2</sup> the same High Court has held that if the sale takes place on a day never fixed for it and of which the judgment-debtor has no notice, the sale is a *nullity*.

**13. Withdrawal of bid.** — A bid may be withdrawn before the property is actually knocked down to the bidder.<sup>1</sup> The death of the bidder revokes the bid.<sup>2</sup>

5. ('88) AIR 1938 P C 280 (281, 282) : 82 Sind L R 879.

6. ('91) 18 Cal 496 (498, 499).

7. ('01) 24 Mad 311 (315).

8. ('10) 6 Ind Cas 813 (815) : 37 Cal 897.

('34) AIR 1934 Mad 260 (262).

('01) 28 Cal 78 (76, 77).

#### Note 10

1. ('04) 31 Cal 873 (877).

('20) AIR 1920 All 136 (136) : 42 All 517.

('97) 19 All 205 (208). (*Obiter.*)

('18) 18 Ind Cas 357 (358) (Cal).

('04) 31 Cal 863 (869, 870) (FB).

('08) 31 Mad 354 (358).

('98) 30 All 354 (356).

2. ('15) AIR 1915 Mad 750 (750).

3. ('85) AIR 1935 Lah 694 (695). (Collector's sale—Sale conducted by Revenue Assistant—Notice to the Collector's clerk as to payment into Court is not sufficient.)

#### Note 11

1. ('88) 10 All 1 (4).

2. ('06) 28 All 28 (29).

3. ('07) 11 Cal W N 495 (497).

4. ('72) 18 Suth W R 503 (503, 504).

('67) 10 Suth W R P C 29 (30) (P C).

#### Note 12

1. ('21) AIR 1921 Cal 597 (598).

[See also ('72) 17 Suth W R 339 (339).

('88) AIR 1938 Cal 699 (701). (Sale not held on date fixed for it—No adjournment order passed—Subsequent sale is not nullity but merely irregular.)]

('39) AIR 1939 Cal 369 (374) : ILR (1939) 1 Cal 530. (Order of Court directing property to be sold at monthly sale commencing from 5th August—Sale held by Nazir on 12th after postponing it from day to day—Sale is valid.)]

2. ('25) AIR 1925 Cal 201 (202).

#### Note 13

1. ('90) 14 Mad 235 (236).

('15) AIR 1915 Cal 815 (816).

('18) 19 Ind Cas 904 (905) (Cal).

2. ('20) AIR 1920 Mad 911 (915) : 42 Mad 776.

**O. 21 R. 69**  
**Notes 14-18**

**14. Rateable distribution.** — Moneys paid into Court to stop a sale are assets available for rateable distribution.<sup>1</sup> See Section 73 Note 4, *ante*.

**18. Limitation — Acknowledgment.** — A petition for adjournment of sale asking for time to pay the decretal amount signed by the judgment-debtor's pleader constitutes an acknowledgment of the decree-debt within the meaning of Section 19 of the Limitation Act.<sup>1</sup>

**O. 21 R. 70**

**R. 70.** [S. 287, last para.] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

[1877, S. 287, last para. See Ss. 54, 68 to 72 and Third Schedule.]

**1. Execution of decrees by the Collector.** — The execution of decrees by the Collector is provided for by Sections 68 to 72 and Schedule III. This rule makes the provisions of Rules 66 to 69 inapplicable to a sale held by the Collector to whom the execution of a decree has been transferred.<sup>1</sup>

**O. 21 R. 71**

**R. 71.** [S. 293.] Any deficiency of price which may happen on a re-sale<sup>3</sup> by reason of the purchaser's default,<sup>7</sup> and all expenses attending such re-sale, shall be certified<sup>4</sup> to the Court<sup>10</sup> or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor,<sup>6</sup> be recoverable from the defaulting purchaser<sup>8</sup> under the provisions<sup>5</sup> relating to the execution of a decree for the payment of money.

[1877, S. 293; 1859, S. 254, last para. See Rr. 77, 84 and 86 and Ss. 68 to 71.]

### *Synopsis*

1. Application of the Rule.
2. Failure of execution sale due to auction-purchaser's default — Rights of decree-holder and judgment-debtor.
3. Re-sale.
4. Power to order recovery of deficiency.
5. Procedure under the Rule.

6. Who may apply under this Rule.
7. By reason of the purchaser's default.
8. Where defaulting purchaser is merely an agent.
9. Liability for interest on deficiency.
10. Certificate.
11. Rateable distribution.

#### **Note 14**

1. ('82) 6 Bom 588 (589). (Decision under the Code of 1882.)

#### **Note 15**

1. ('96) 28 Cal 374 (387).

- (‘98) 22 Bom 722 (727).  
(‘82) 8 Cal 716 (718).

#### **Order 21 Rule 70 — Note 1**

1. ('29) AIR 1929 Oudh 235 (237, 238); 4 Luck 636.

12. Nature of defaulting purchaser's liability for deficiency. See Note 13.  
13. Suit for deficiency on re-sale — Whether maintainable.

14. Insolvency proceedings.  
15. Suit, if lies to set aside order under this Rule.  
16. Appeal.

O. 21 R. 71  
Notes 1-3

**1. Application of the Rule.**— The rule extends to all auction sales in execution, whether of moveable or immovable property.<sup>1</sup> It is a salutary provision intended to minimise the hardship resulting from the purchaser's default, and Courts should give effect to it unless the defaulting purchaser would be substantially prejudiced.<sup>2</sup> The rule applied to sales by the Collector under the Bengal Public Demands Recovery Act, I of 1895<sup>3</sup> (see Section 8 of the Act); and applies to sales under the Agra Tenancy Act, III of 1926 (see Section 169 thereof); and to sales of immovables under the Chota Nagpur Tenancy Act, VI of 1920 (see Rule 54 Notes).

**2. Failure of execution sale due to auction-purchaser's default — Rights of decree-holder and judgment-debtor.**— Where an execution sale fails owing to the auction-purchaser's default, the decree-holder is entitled to a re-sale of the property.<sup>1</sup> See O. 21, Rr. 77, 84 and 86. Where the price bid at the second sale is less than that bid at the first sale, the purchaser at the first sale is liable to make good the difference, and the present rule entitles the decree-holder or the judgment-debtor to apply to the Court to enforce such liability. But the decree-holder is not *bound* to proceed against the defaulting purchaser. He may recover from the *judgment-debtor* the judgment-debt or the balance of it that may be due, and leave him to pursue his remedies against the auction-purchaser under this rule.<sup>2</sup> The judgment-debtor may also, instead of proceeding against the auction-purchaser to recover the deficiency in price, apply under Rule 90 to set aside the second sale if he can make out a case under that rule.<sup>3</sup> See also Note 13, *infra*.

**3. Re-sale.**— The rule applies to all re-sales made in consequence of the default of the auction-purchaser, not only in the payment of the 25 per cent. of the purchase-money under Rule 84 or in the payment of the balance under Rule 85,<sup>1</sup> but also in the payment of the poundage fee.<sup>2</sup> But the re-sale must be of the *same property*<sup>3</sup> and under the *same decree*.<sup>4</sup> The property must also be sold under the *same description*, and any substantial difference of description will disentitle the decree-holder or the judgment-debtor to recover the deficiency under this rule.<sup>5</sup> Thus, no

**Order 21 Rule 71 — Note 1**

1. ('81) 7 Cal 337 (339).
2. ('19) AIR 1919 Mad 1014 (1020) : 41 Mad 474 (FB). (Per Wallis, C. J.)  
(25) AIR 1925 Mad 631 (633). (Compare observations in 14 Ind Cas 777 (779) (Bom), and of Walsh, J. in A I R 1922 All 200.)
3. ('19) AIR 1919 Pat 102 (105). (Act I of 1895 has been repealed by Act III of 1913 (Bengal) and Act IV of 1914, Bihar & Orissa.)

**Note 2**

1. ('09) 3 Ind Cas 286 (287) (Cal). (Decree-holder auction-purchaser's default in paying poundage fee.)
2. ('74) 18 Beng L R 114 (118). (Distinguishing 7 Suth W R 110.)  
(78) 2 Bom 562 (563, 564).  
[See also ('82) 8 Cal 291 (294).  
(81) 8 Cal L Rep 41 (42).]
3. ('88) 9 Cal 98 (99).

**Note 3**

1. ('22) AIR 1922 All 200 (201): 44 All 266 (FB).  
(81) 5 Bom 575 (577).  
(66) 6 Suth W R Misc 126 (126, 127). (Re-sale on refusal to pay purchase-money.)  
(98) 2 Cal W N 411 (412).  
(81) 7 Cal 337 (339).  
(88) 9 Cal 98 (99). (Default in payment of 25 per cent.)  
(89) 12 Mad 454 (458). (Do.)  
(19) AIR 1919 Pat 102 (105). (Default in proper payment of 25 per cent.)  
[See ('83) 6 Mad 197 (198).]  
[But see ('08) 30 All 273 (278). (*Held* in A I R 1922 All 200 not to be good law under the new Code.)]
2. ('09) 3 Ind Cas 286 (287) (Cal).
3. ('89) 16 Cal 535 (538).  
(98) 25 Cal 99 (102).
4. ('71) 16 Suth W R 14 (15).
5. ('89) 16 Cal 535 (538).

**O. 21 R. 71**  
**Note 3**

deficiency can be recovered where—

- (1) encumbrances, not notified at the first sale were mentioned in the sale proclamation at the re-sale;<sup>6</sup>
- (2) property described as that of A at the first sale was described as that of B at the re-sale.<sup>7</sup>

But the rule that the re-sale must be of the same property as that put up for sale at the first sale, does not apply where the property has changed during the interval owing to natural causes or the change in the wording of the sale proclamation has been due to the purchaser's own default and conduct.<sup>8</sup>

Will a difference in the sale proclamations of the two sales which does not *substantially prejudice* the purchaser at the first sale absolve him from liability under Rule 71? As to this question, it was observed by Wallis, C. J., in *Venkatachalamayya v. Nilakanta*<sup>9</sup> that Rule 71 is a salutary provision which should be given effect to, unless the defaulting purchaser would be *substantially prejudiced*. The remarks of Kumaraswamy Sastry, J., in his judgment in the same case lend support to the same view. From the trend of the remarks made in the undermentioned cases, the High Courts of Calcutta<sup>10</sup> and Bombay<sup>11</sup> seem to take a contrary view and to hold that substantial differences of descriptions in the proclamations of the two sales will entitle the defaulting purchaser to exemption under this rule, though he may *not* have been substantially prejudiced by the differences.

It has also been held by the Calcutta High Court<sup>12</sup> that where a property was misdescribed in the proclamation of the first sale and the decree-holder was aware of the misdescription, he ought not to have had the property again proclaimed for sale under a description which he knew to be wrong and having done that, he could not make the defaulting purchaser answerable for the deficiency.

The re-sale contemplated by this rule is a re-sale held according to law. Hence, an auction-purchaser who fails to pay the deposit required by Rule 84 is not liable for the deficiency on re-sale unless the re-sale is held "forthwith" within the meaning of that rule.<sup>13</sup> But it has been held that Rule 84 does not apply to a re-sale on the purchaser's default in paying the poundage fee and that such re-sale need not be held "forthwith."<sup>14</sup>

Suppose at a re-sale held on the purchaser's default, no bidders are forthcoming. Is there a re-sale within the meaning of the rule and can the purchaser at the first sale be proceeded against for the price bid by him at that sale? On this question it has been held by the Madras High Court<sup>15</sup> that there is a "re-sale" when the property is put up again for sale and that the defaulting purchaser should not be absolved from liability for want of bidders at the re-sale. The Bombay High Court has, however,

(98) 25 Cal 99 (102). (Property though wrongly described, correctly sold at the first sale — Property sold under the same wrong description at the second sale—Decree-holder held not entitled to difference.)

(12) 14 Ind Cas 777 (779) : 86 Bom 829.

6. ('89) 16 Cal 535 (538, 539).

7. ('12) 14 Ind Cas 777 (778, 779) : 86 Bom 829.

8. ('19) AIR 1919 Mad 1014 (1028) : 41 Mad 474. (Affirmed on appeal to the Privy Council in AIR 1925 P C 61.)

[See also ('89) 16 Cal 535 (538). (*Obiter*.)]

9. ('19) AIR 1919 Mad 1014 (1020) : 41 Mad 474.

[See also ('25) AIR 1925 Mad 631 (633).]

10. ('89) 16 Cal 535 (538).

(98) 25 Cal 99 (102).

11. ('12) 14 Ind Cas 777 (779) : 86 Bom 829.

[But see ('81) AIR 1981 Bom 367 (368).]

12. ('98) 25 Cal 99 (102).

13. ('28) AIR 1928 Lah 249 (249).

(16) AIR 1916 Lah 445 (446).

(25) AIR 1925 Oudh 897 (898) : 28 Oudh Cas 327.

(29) AIR 1929 Lah 744 (745).

(87) AIR 1987 Lah 924 (925).

[See ('80) AIR 1980 Mad 761 (762) : 58 Mad 900 (F B). ('Forthwith' means 'as expeditiously as circumstances permit'.)]

[But see ('87) AIR 1987 All 556 (558). (Re-sale after fresh proclamation—Purchaser not relieved of his liability under R. 71.)]

14. ('09) 8 Ind Cas 286 (287) (Cal).

15. ('26) AIR 1926 Mad 739 (740).

held that there is no re-sale of property if it is not knocked down to any bidder at the second sale and that Rule 71 cannot apply to such a case.<sup>18</sup>

**O. 21 R. 71**  
**Notes 3-7**

**4. Power to order recovery of deficiency.** — The power of ordering the recovery of deficiency is vested in the Court. The officer conducting the sale has no power to order the recovery of the deficiency.<sup>1</sup> Even in cases where the execution of a decree has been transferred to a Collector and the property has been sold by him, the Civil Court has jurisdiction to order the recovery of deficiency under this rule.<sup>2</sup> See Section 70, Note 2.

**5. Procedure under the Rule.** — The Court may pass an order that the defaulting purchaser is liable for the deficiency, but there is nothing in the rule which compels the decree-holder or the judgment-debtor to obtain such an order before asking for execution against the auction-purchaser. The opinion expressed in the undermentioned case<sup>1</sup> that, without such an order execution cannot issue against the auction-purchaser, seems to be not warranted by the terms of the rule. The rule does not expressly provide for *notice* to the defaulting purchaser; but it is the duty of the Court, under general principles of law, to give him notice and hear and decide on his objections before it orders execution to issue against him.<sup>2</sup>

The proceedings under the rule are not more summary than proceedings to set aside an execution sale.<sup>3</sup>

An order against the auction-purchaser under this rule can be passed only when re-sale *has taken place*. The Court has no power to order that a property should be re-sold and that the defaulting purchaser should pay the deficiency in price which may occur.<sup>4</sup> An order under this rule to the effect that the defaulting purchaser is liable for the deficiency, passed in favour of the decree-holder, can be executed by the judgment-debtor, because the rule enables either of them to apply under it.<sup>5</sup>

**6. Who may apply under this Rule.** — This rule entitles either the judgment-debtor or the decree-holder to apply for the recovery of deficiency from the auction-purchaser.<sup>1</sup> By the term "decree-holder" is meant the decree-holder by whom the property was brought to sale. Other decree-holders are not included in the term although they may be entitled to rateable distribution under Section 73.<sup>2</sup> The decree-holder is entitled to enforce the defaulting purchaser's liability for the *whole* amount of the deficiency and is not bound to confine his application to the decretal amount that may remain outstanding.<sup>3</sup> Where an order has been passed in favour of the decree-holder to the effect that the auction-purchaser was liable for the deficiency but the decree-holder realizes the balance of the decretal amount from the judgment-debtor and does not enforce the order passed in his favour, the judgment-debtor can execute the same against the auction-purchaser.<sup>4</sup> See also Note 10 below.

**7. By reason of the purchaser's default.** — The "default" referred to in this rule includes default in paying the purchase-money, the deposit required by

16. ('86) 1886 Bom P J 268.

**Note 4**

1. ('31) AIR 1931 Bom 367 (368).

2. ('81) AIR 1931 Bom 367 (368).

**Note 5**

1. ('73) 20 Suth W R 80 (88). (Per Phear, J.)

2. ('19) AIR 1919 Mad 1014 (1024): 41 Mad 474.  
(Per Kumaraswami Sastri, J.)

('73) 20 Suth W R 80 (88). (Per Phear, J.)

3. ('19) AIR 1919 Mad 1014 (1024): 41 Mad 474.

(Per Kumaraswami Sastri, J.)

4. ('29) AIR 1929 Lah 744 (745.)

5. ('81) AIR 1931 All 667 (668).

**Note 6**

1. ('39) AIR 1939 Nag 269 (273).

2. ('26) AIR 1926 Mad 872 (874): 49 Mad 570.

('86) AIR 1936 Ondh 277 (278, 279): 12 Luck 720.

3. ('26) AIR 1926 Mad 872 (873): 49 Mad 570.

4. ('81) AIR 1931 All 667 (668).

**O. 21 R. 71**  
**Notes 7-10**

Rule 84<sup>1</sup> or the poundage fee (see Note 3). The default must be that of a *purchaser*. Thus, a bid lapses on a higher bid being made and where the highest bidder dies before the acceptance of his bid, the next highest bidder cannot be treated as the highest bidder for the purposes of this rule.<sup>2</sup> Similarly, a bid can be withdrawn at any time before the property is knocked down to the bidder.<sup>3</sup> So also, it has been held that a bid lapses by too much delay in the acceptance thereof.<sup>4</sup> But a bid cannot be withdrawn after the property is knocked down to the bidder.<sup>5</sup> As to whether the Court's acceptance of the highest bid is necessary to complete the sale, see Notes to Rule 84.

In an application under this rule, it is open to the auction-purchaser to raise any objections to the first sale which can be urged in an application to set aside a sale under Order 21,<sup>6</sup> because in such a case it is conceived his failure to complete the sale would be justified.

Irregularities in connection with the re-sale which are not shown to have been responsible for the comparative lowness of the price realized at the re-sale, cannot be pleaded in defence to an application under this rule.<sup>7</sup>

**8. Where defaulting purchaser is merely an agent.** — A person who bids at a sale merely as an agent of another person is not liable under this rule.<sup>1</sup> See Contract Act, Section 230. But he will be liable if he bids without informing the officer conducting the sale that he is acting as agent of another. See Contract Act, Section 230. In such a case the mere fact that the *judgment-debtor* knows that the bidder is acting as agent of another will not absolve him from liability. The reason is that in court-sales, the contract is between the bidder and the *Court*, which acts by virtue of a statutory authority and not as the agent of either the decree-holder or of the judgment-debtor.<sup>2</sup> Where a person professes to bid as agent of another without the latter's authority, the latter is not liable under this rule,<sup>3</sup> while the alleged agent is liable for damages.<sup>4</sup> See Section 235 of the Contract Act.

**9. Liability for interest on deficiency.** — The defaulting purchaser is not liable to pay interest on the deficiency in price.<sup>1</sup>

**10. Certificate.** — A *certificate* issued under this rule has the force and effect of a decree.<sup>1</sup> But the deficiency may be recovered even though the certificate referred to in the rule has not been issued.<sup>2</sup> An order passed to the effect that the auction-purchaser is liable for the deficiency has the effect of a decree and can be attached as such, under O. 21 R. 53.<sup>3</sup> See also Note 16, *infra*.

**Note 7**

1. ('83) AIR 1933 Nag 123 (125); 29 Nag L R 52.
2. ('20) AIR 1920 Mad 911 (919) : 42 Mad 776.
3. ('25) AIR 1925 Cal 557 (558).
- [But compare ('28) AIR 1928 Lah 249 (249).]
4. ('25) AIR 1925 Cal 557 (558).
5. ('15) AIR 1915 Cal 815 (816).
6. ('19) AIR 1919 Mad 1014 (1024) : 41 Mad 474.  
(Per Kumaraswami Sastri, J.)
- ('29) AIR 1929 Oudh 294 (295) : 4 Luck 684.  
(Fraudulent suppression of encumbrances at both the sales—Purchaser not liable under R. 71.)
- [See also ('31) AIR 1931 Bom 367 (368).]
7. ('25) AIR 1925 Mad 681 (683).

**Note 8**

1. ('78) 20 Suth W R 397 (398). (Confirming judgment of Phear, J. in 20 Suth W R 80.)
- ('89) 12 Mad 454 (457).
- [See ('39) AIR 1939 Nag 269 (279). (Bid made on behalf of temple by its managing trustee —

Default in payment of deposit — Trustee is not personally liable for deficit.)]

2. ('24) AIR 1924 Mad 476 (477).
3. ('67) 7 Suth W R 110 (111).
4. ('78) 20 Suth W R 397 (398).

**Note 9**

1. ('68) 9 Suth W R 500 (501).
- ('24) AIR 1924 Mad 476 (478). (Interest payable only from date of order under this rule and not from the date of sale to the date of the order.)
- ('19) AIR 1919 Pat 102 (107).

**Note 10**

1. ('19) AIR 1919 Pat 102 (105).
- ('97) 19 All 22 (24).
- ('22) AIR 1922 All 200 (202) : 44 All 266 (FB).
2. ('97) 19 All 22 (25).
- ('38) AIR 1938 Nag 123 (125) : 29 Nag L R 52.  
(Certificate issued not in proper form.)
- [See ('95) 18 Mad 489 (442).]
3. ('26) AIR 1926 All 379 (381, 382).



**11. Rateable distribution.** — Money realized from the defaulting purchaser under this rule amounts to "assets" within the meaning of Section 73, and is liable to rateable distribution.<sup>1</sup>

**O. 21 R. 71**  
**Notes 11-14**

**12. Nature of defaulting purchaser's liability for deficiency.** — See Note 13 below.

**13. Suit for deficiency on re-sale — Whether maintainable.** — It has been seen in Note 62 to Section 9 *ante*, that where two remedies are available under the law, one must not be taken as operating in derogation of the other, but that this general rule is subject to the qualification that where a right is *created by statute* and a method of enforcing the right, or of redressing the grievance caused in the exercise or enforcement of the right is pointed by the statute creating such right, the general remedy of suit will be impliedly barred. The question, therefore, whether the right to claim deficiency from a defaulting purchaser can be enforced by suit depends upon the question whether such right is a *common law right* or a *right created by the statute*. It was held in the undermentioned case<sup>1</sup> of the Bombay High Court that the right to recover the deficiency under this rule is one *created by the statute* relating to the procedure, but the question in that case did not arise as to the maintainability of a separate suit to recover such deficiency. In a later case,<sup>2</sup> however, the same High Court has expressed the opinion that but for this rule a suit would have to be filed to recover such deficiency and that this rule enables the party aggrieved to make an *application* for that purpose. It would seem to follow from this that the remedy under this rule is only an alternative remedy which does not bar a separate suit. In *Amir Baksh v. Venkatachala*,<sup>3</sup> an opinion was expressed by the Madras High Court that a suit will not be maintainable in such a case. There was no discussion, however, of the principles and the question that actually arose in the case was not whether a suit would lie. But in the undermentioned case<sup>4</sup> Wallis, C. J., observed as follows: "By his failure to complete his purchase the purchaser commits a breach of *contract* and is answerable in damages to the Court or the persons on whose behalf it sells, *viz.*, the decree-holder and the judgment-debtor." In *Sitaram v. Janaki Ram*,<sup>5</sup> Mr. Justice Walsh of the Allahabad High Court expressed the view that the liability of the defaulting purchaser is *not a contractual liability* and that no suit would lie to enforce it. The Patna<sup>6</sup> and the Calcutta<sup>7</sup> High Courts have held that right to claim the deficiency is a common law right to recover the damages for a legal wrong done by the purchaser, that Rule 71 provides only a summary remedy for enforcing that right but that it does not bar the general remedy of suit. It is submitted that this last view is correct.

**14. Insolvency proceedings.** — The provisions of this rule apply to sales by the *Court* under the Provincial Insolvency Act, so that where a re-sale is held owing to the first purchaser's default and a deficiency occurs on such re-sale, the deficiency is recoverable in execution.<sup>1</sup> But the rule does not apply to sales by the *receiver* under that Act.<sup>2</sup>

#### Note 11

1. ('26) AIR 1926 Mad 872 (873): 49 Mad 570.

#### Note 13

1. ('12) 14 Ind Cas 777 (779): 36 Bom 329.
2. ('21) AIR 1921 Bom 229 (230): 45 Bom 223.
3. ('95) 18 Mad 439 (442).
4. ('19) AIR 1919 Mad 1014 (1020): 41 Mad 474.
5. ('22) AIR 1922 All 200 (208): 44 All 266 (FB).
6. ('19) AIR 1919 Pat 102 (106).
7. ('08) 7 Cal W N 111 (112). (Sale under Bengal

Patni Regulation VIII of 1819.)

[See also ('89) 16 Cal 535 (538, 539). (Case not falling under R. 71 as property had undergone changes due to natural causes—Suit maintainable—*Obiter*.)]

#### Note 14

1. ('21) AIR 1921 Nag 25 (26): 17 Nag L R 49.
2. ('17) AIR 1917 All 74 (75, 76): 39 All 267. (Receiver may proceed against defaulter by way of a suit—Per Walsh, J.)

**O. 21 R. 71**  
**Notes 15-16**

**15. Suit, if lies to set aside order under this Rule.** — It has been seen that the position under this rule is, as if a decree has been passed against the defaulting purchaser for the amount of the deficiency which the decree-holder or judgment-debtor is entitled to execute under the provisions of the Code relating to the execution of money decrees. Hence, it follows that the remedy of a party aggrieved by an order under this rule is by way of appeal (see Note 16), and not by means of a separate suit to set aside the order.<sup>1</sup>

**16. Appeal.** — It is settled law that an appeal lies against an order deciding an application by a decree-holder or judgment-debtor under this rule against a defaulting auction-purchaser for the recovery of deficiency in price.<sup>1</sup> The reason is that inasmuch as this rule declares that the deficiency in price shall be recoverable from the defaulting purchaser under the provisions relating to the execution of decrees for the payment of money, the rule relating to appeals must be applied *mutatis mutandis* equally with any other of those rules.<sup>2</sup>

It has been held by the High Court of Bombay<sup>3</sup> that no second appeal lies from an order determining an application under this rule, where the amount of deficiency does not exceed Rs. 500. The reason given is that no second appeal would have been maintainable if a decree had been actually passed for the deficiency in such a case and an order had been made determining an application for the execution of such decree. But the Calcutta High Court<sup>4</sup> has taken a contrary view. It is submitted that the Bombay view is correct.

\* As to the *forum* of appeal, see the undermentioned case.<sup>5</sup>

**O. 21 R. 72**

**Decree-holder not to bid for or buy property without permission.**

**R. 72. [S. 294.] (1)** No holder of a decree in execution of which property is sold shall, without the express permission<sup>2</sup> of the Court, bid for or purchase the property.

**Note 15**

1. ('27) AIR 1927 Nag 112 (112) : 23 Nag LR 14. (Dissenting from 12 Ind Cas 360 (Nag).)
- ('22) AIR 1922 All 200 (203) : 44 All 266 (FB). (Walsh, J., *semble*.)
- ('25) AIR 1925 Oudh 860 (861) : 29 Oudh Cas 18.
- [Compare ('97) 19 All 22 (24). (This case should be deemed as overruled by AIR 1922 All 200.)]

**Note 16**

1. ('22) AIR 1922 All 200 (202) : 44 All 266 (FB). ('75-78) 1 All 181 (190) (FB).
- ('12) 14 Ind Cas 777 (779) : 36 Bom 829.
- ('98) 2 Cal W N 411 (412).
- ('98) 25 Cal 99 (100).
- ('89) 16 Cal 535 (538).
- ('67) 7 Suth W R 110 (111).
- ('66) 6 Suth W R Misc 126 (127).
- (1865) 8 Suth W R 8 (8).
- ('28) AIR 1928 Lah 249 (249).
- ('95) 18 Mad 489 (448).
- ('27) AIR 1927 Nag 112 (112) : 23 Nag L R 14.
- ('25) AIR 1925 Oudh 897 (897) : 28 Oudh Cas 327.
- ('89) 12 Mad 454 (457).

[Compare ('20) AIR 1920 Mad 911 (914, 916) : 42 Mad 776. (Order directing re-sale to be made at the risk of a certain person who denies he purchased the property at the first sale is not appealable.)]

[Compare also ('15) AIR 1915 Cal 815 (816). (Order refusing to allow decree-holder to withdraw bid is not appealable.)]

*The following decisions of the Allahabad High Court must be regarded as not good law :*

- ('91) 18 All 569 (571).
- ('92) 1892 All W N 74 (76) : 14 All 201.
- ('90) 1890 All W N 89 (89).
- ('90) 1890 All W N 85 (86).
2. ('79) 1 All 181 (188) (FB).
- ('22) AIR 1922 All 200 (202) : 44 All 266 (FB).
- [See also ('26) AIR 1926 Mad 872 (878, 874, 875) : 49 Mad 570.]
3. ('21) AIR 1921 Bom 229 (230) : 45 Bom 223.
4. ('97) 2 Cal W N 411 (412).
5. ('25) AIR 1925 Oudh 897 (897) : 28 Oudh Cas 327. (Oudh Civil Courts Act, Section 18—Claim under Rule 71, only for Rs. 300 but value of suit exceeding Rs. 5000—Appeal lies to the Judicial Commissioner and not to the District Judge.)

(2) Where a decree-holder purchases with such permission,<sup>3</sup> **O. 21 R. 72**

Where decree-holder purchases, amount of decree may be taken as payment.

the purchase-money and the amount due on the decree<sup>6</sup> may, subject to the provisions of section 73, be set off<sup>5</sup> against one another, and the Court executing the decree shall enter up

satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, by himself or through another person,<sup>8</sup> without such permission,<sup>7</sup> the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale;<sup>9</sup> and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

[1877, S. 294. Cf. O. 21 R. 84.]

#### Local Amendments

##### ALLAHABAD

In sub-rule (2) for the words "with such permission" read the words "the property sold," and re-number this sub-rule "72," and delete sub-rules (1) and (3).

N.-W. F. P.

(1). For sub-rule (1), substitute the following :

"72. (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may on application of the judgment-debtor and for sufficient cause debar him from so bidding or purchasing."

(2). In sub-rule (2) for the words "with such permission" substitute the words "the property."

(3). Cancel sub-rule (3).

##### HUDH

(1). For sub-rule (1) substitute the following :

"72 (1) The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment-debtor may, by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property; and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just."

(2). In sub-rule (2) for the words "with such permission" read the words "the property sold."

(3). Delete sub-rule (3).

##### PATNA

(1). Substitute the following for sub-rule (1) :

"(1) No holder of a decree in execution of which property is sold shall be precluded from bidding for or purchasing the property unless an express order to that effect is made by the Court."

(2). In sub-rule (2) for the words "with such permission" substitute the words "the property."

(3). Substitute the following for sub-rule (3) :

"(3) Where notwithstanding an order made under sub-rule (1) a decree-holder

**O. 21 R. 72**  
**Notes 1-2**

purchases the property by himself or through another person the Court shall, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the cost of such application and order and any deficiency of price which may happen on the re-sale and all expenses attending it shall be in the discretion of the Court."

**RANGOON**

(1). In sub-rule (2) for the words "with such permission" the words "the property," shall be substituted.

(2). Sub-rules (1) and (3) shall be cancelled, and the figure and brackets "(2)" occurring at the beginning of sub-rule (2) shall be deleted.

*Synopsis***1. Legislative changes.****1a. Applicability of the Rule.****2. Permission to bid.**

3. "Where decree-holder purchases with such permission.

4. Leave obtained by misrepresentation.

5. Setting off decretal amount against purchase-money and rateable distribution.

6. Amount due on the decree.

**7. Purchase without permission.****8. By himself or through another person.**

9. The Court may, if it thinks fit, set aside the sale.

10. Separate suit, if lies to set aside sale without permission.

11. Judgment-debtor, if can raise the question of no permission in suit for possession by decree-holder.

12. Interest.

13. Appeal.

14. Limitation and step-in-aid of execution.

*Other Topics (miscellaneous)*

Benamt sales. See Note 8.

Granting of leave subject to conditions. See Note 2.

Persons entitled to object. See Notes 7, 8 and 9.  
Persons prohibited under this Rule. See Notes 2 and 8.

**1. Legislative changes. —**

(1) The words "subject to the provisions of section 73" in sub-rule (2) did not appear in the corresponding Section of the old Code. See Note 5 below.

(2) The words "if he so desires" which occurred in the old Code, have now been omitted.

**1a. Applicability of the Rule. —** The holder of a decree for rent under the Bengal Tenancy Act, VIII of 1885,<sup>1</sup> or the Orissa Tenancy Act, II of 1913,<sup>2</sup> need not obtain permission of the Court under this rule. As to proceedings under the Chota Nagpur Tenancy Act, see Notes under Rule 54, *ante*.

**2. Permission to bid. —** A decree-holder cannot, under this rule, purchase property sold in execution of his own decree, without the express permission of the executing Court.<sup>1</sup> But the prohibition under this rule applies only to the *decree-holder* and not to the judgment-debtor,<sup>3</sup> or to a holder of a decree other than that under which the sale is to take place.<sup>3</sup> An assignee of the decree under an oral assignment has no *locus standi* to apply for execution and he is not the holder of a decree within the meaning of Rule 72; hence, he need not obtain the permission of the Court under this rule.<sup>4</sup> The decree-holder cannot get round the condition imposed by this rule, by

**Order 21 Rule 72 — Note 1a**

1. See S. 173 (1) of the Bengal Tenancy Act.

2. See S. 227 (1) of the Orissa Tenancy Act.

**Note 2**

1. ('69) 3 Beng L R A O 320 (322).

('80) 5 Cal 308 (310). (A sale without permission is invalid.)

('86) 165 Ind Cas 554 (554) (Pesh). (Rule as amended by N.-W. F. P. Court allows decree-holder to bid

unless debarred by the Court.)

[See also ('27) AIR 1927 All 681 (681, 682) : 50 All 178. (Suit by liquidator of company—Decree in favour of liquidator—Execution—Permission to bid to be given by executing Court and not by Judge winding up).]

2. ('24) AIR 1924 Pat 547 (549) : 8 Pat 458.

3. ('24) AIR 1924 Rang 81 (82).

4. (1900) 4 Cal W N 474 (479).

bidding jointly with a stranger,<sup>5</sup> or by availing himself of the bid of another.<sup>6</sup>

Leave to bid should be very cautiously granted.<sup>7</sup> In granting such leave, the Court can impose any fit and proper conditions for the purpose of safeguarding the interests of the judgment-debtor.<sup>8</sup> But the conditions imposed should not be too stringent,<sup>9</sup> and should not be construed too narrowly.<sup>10</sup> "The main question for the Court to consider is, whether it is to the advantage of every one concerned, in order to obtain the highest price, that the plaintiff should be allowed to bid or not."<sup>11</sup> The executing Court can refuse to accept the bid when the condition attached to the permission to bid is not fulfilled but it cannot for that reason dismiss the execution application.<sup>12</sup>

The principle of this rule governs also sales held by the Collector under the Code.<sup>13</sup> But where the Collector is empowered, under rules, to grant only permission to bid, but not to order a set-off, the decree-holder desiring a set-off should apply to the Court under this rule.<sup>14</sup>

Leave granted under this rule is binding on a superior Court acting under Section 63 of the Code.<sup>15</sup> Consequently, sale proceeds validly set off against the decretal amount cannot be ordered to be refunded and sent to the superior Court. See Note 8 to Section 63, *ante*.

Where a decree-holder filed a petition asking for permission to bid, and no order

5. ('12) 15 Ind Cas 888 (889) : 16 Oudh Cas 86. (Permission to bid granted on condition that the decree-holder not to bid less than the decretal amount—Decree-holder cannot evade the condition by joining with stranger.)

6. [See ('18) AIR 1918 Oudh 439 (440) : 21 Oudh Cas 212. (B, auction-purchaser, failing to deposit 25% of purchase money—A, on his own behalf making the deposit and subsequently paying the remaining amount — Sale to A is irregular and cannot be confirmed though ratified by B.)]

7. ('89) 16 Cal 182 (187). (The Court must be satisfied that no purchaser at an adequate price can be found and that the sale proclamation has been duly published.)

('81) 7 Cal 546 (347). (Where a decree-holder was joint in family with the manager of an infant defendant whose property was to be sold, the decree-holder should not be granted leave.)

[See also ('25) AIR 1925 Cal 1189 (1144). (Decree-holder a trustee of property of judgment-debtor — His purchase of it in auction set aside in a suit as invalid.)]

8. ('12) 15 Ind Cas 888 (889) : 16 Oudh Cas 86. (E.g., that his lowest bid should be the amount of the decree.)

('33) AIR 1933 Rang 151 (152). (Decree-holder allowed to bid up to decretal amount—Condition must be read to mean exactly what it says—Decree-holder need not offer decretal amount and cost of sale.)

('26) AIR 1926 Pat 335 (336). (Breach of such condition by the decree-holder in his bidding cannot invalidate sale to a third party making the highest bid.)

('37) 168 Ind Cas 258 (259) : 68 Cal 84. (The power to impose a condition follows from the power to refuse permission.)

[But see ('29) AIR 1929 All 85 (85). (Court

has no power to impose a condition as to minimum bid — A case after Allahabad High Court amendment, under which no leave to bid is needed. See Local Amendments.)]

9. ('24) AIR 1924 Bom 515 (516). (Fixing too heavy an upset price for the decree-holder, *viz.*, at Rs. 40,000 when bid never arose above Rupees 5000.)

('26) AIR 1926 Pat 140 (141). (Court cannot fix a too heavy upset price when the highest bid is far below.)

10. ('29) AIR 1929 Oudh 26 (28) : 4 Luck 93. (Sale in several lots — Leave to bid for not less than decree amount — Decree-holder not bound to bid each lot for such amount.)

11. ('28) AIR 1928 Mad 635 (636) : 46 Mad 583. (Non-disclosure of the fact by the decree-holder that in a previous auction the property was valued at a high figure and that there was no dispute about title of judgment-debtor, *held* not to affect the question of leave to bid.)

12. ('37) 168 Ind Cas 258 (259) : 68 Cal 84. (When bid is not accepted, the executing Court can either put up the property then and there again for sale or can ask the decree-holder to take steps for the issue of a fresh sale proclamation.)

13. ('87) 1887 All W N 214 (215).

[See also ('86) AIR 1936 Bom 189 (191) : 60 Bom 688. (Collector forbidden by Rules in Bombay to grant leave to bid in case of minor judgment-debtor—Civil Court can grant permission.)]

14. ('20) AIR 1920 Bom 861 (362) : 44 Bom 346. (Collector forbidden by Rules in Bombay from granting leave to set off.)

('18) AIR 1918 Bom 216 (217) : 42 Bom 621. (Where under Rules in Bombay the Collector was given power to grant leave to bid, *held* that the Civil Court had no such power.)

15. ('81) AIR 1931 Bom 350 (353, 354) : 55 Bom 478.

**O. 21 R. 72**  
**Notes 2-5**

was passed thereon, but the decree-holder was allowed to bid throughout the course of the sale, it was held by the High Court of Patna<sup>16</sup> that it can be taken that the Court gave the required permission inasmuch as the failure to pass an order in writing was a mistake of the Court.

Where the decree-holder is the receiver of the property sold in execution, permission obtained under O. 21 R. 72 without informing the Court that he is such receiver is not enough. A sale in his favour under such circumstances is liable to be set aside.<sup>17</sup> Where permission was given to a decree-holder to bid under this rule but subsequently he was appointed receiver of the property, it was held that the permission would not entitle him to buy the property when he had thus been appointed receiver of the property and that the sale in his favour should be set aside.<sup>18</sup>

Where permission to bid is granted but the decree-holder did not bid up to amount of upset price fixed by the Court, the Court cannot dismiss the execution on that ground inasmuch as the decree-holder cannot be compelled to bid for any particular amount.<sup>19</sup>

**3. "Where decree-holder purchases with such permission."** — Leave to bid puts a decree-holder in the same position as an independent purchaser and the judgment-debtor is not entitled to demand a higher standard of fairness from the former than from the latter.<sup>1</sup> A decree-holder-purchaser accordingly is not bound to disclose circumstances within his knowledge and bearing on the sale any more than an independent purchaser.<sup>2</sup> The principle is the same with regard to the decree-holder-purchaser in a mortgage suit also. He does not stand in any fiduciary position to the mortgagor.<sup>3</sup> He is entitled to credit the judgment-debtor only with the purchase-money at the auction and not the real market value of the property and may proceed to execute for the balance, if any, of the decree-amount.<sup>4</sup>

**4. Leave obtained by misrepresentation.** — The Court has an inherent power to refuse to allow a sale to be confirmed if it is satisfied that the Court has been misled in granting leave to the decree-holder to bid.<sup>1</sup> But allegations of fraud of this character must be specific and the issue must be decided on a trial.<sup>2</sup>

**5. Setting off decretal amount against purchase-money and rateable distribution.** — For the sake of convenience, sub-rule (2) allows the decree-holder, ordinarily, to set off the purchase-money against his decree instead of paying the

16. ('27) AIR 1927 Pat 312 (312) : 6 Pat 482.

17. ('32) AIR 1932 Cal 672 (673, 674) : 59 Cal 956. (Following *Nugent v. Nugent*, (1908) 1 Ch 546.)

18. ('85) AIR 1935 Mad 421 (422). (Receiver being in fiduciary position should not be permitted to buy as his interest as buyer would conflict with his duties as receiver.)

19. ('84) AIR 1934 Pat 845 (846).

[See also ('97) 168 Ind Cas 258 (259) : 68 Cal 184.]

**Note 3**

1. (1900) 28 Mad 227 (233) : 27 Ind App 17 (P C).

('33) AIR 1933 Oudh 124 (126) : 8 Luck 233.

(1900) 4 Cal W N 474 (476).

[But see ('81) 7 Cal 846 (847). (The observation in this case that a decree-holder purchaser is bound to exercise the most scrupulous fairness has been held by the Privy Council in 28 Mad 227 to be too sweeping in its terms.)]

2. (1900) 28 Mad 227 (237) : 27 Ind App 17 (P C).

(Non-disclosure of an agreement that decree-holder on purchase will convey property to third person for a specified amount and of an arrangement to dissuade bidders held not fraud under O. 21 R. 90.)

('09) 1 Ind Cas 158 (160) : 36 Cal 226 (Do.)

3. ('89) 16 Cal 682 (692) : 16 Ind App 107 (P C).

('89) 16 Cal 182 (186).

('92) 19 Cal 4 (7).

[See also ('99) 26 Bom 88 (102).]

4. ('96) 18 All 31 (33).

('89) 16 Cal 182 (185).

('92) 19 Cal 4 (7). (11 Cal 781, Dissented from.)

[But see ('85) 11 Cal 718 (780).]

**Note 4**

1. ('22) AIR 1922 Pat 511 (514) : 1 Pat 235.

(Leave obtained on mis-statement of a material fact.)

('28) AIR 1928 Mad 635 (636) : 46 Mad 588.

2. (1900) 28 Mad 227 (233) : 27 Ind App 17 (P C).

money into Court and drawing it out again.<sup>1</sup> But this fact does not alter the substantial nature of the transaction, and the nominal receipt of the sale-proceeds, in cases where set-off is allowed, must be held to amount to the holding of assets by the Court, where the rights of rival decree-holders to share in such proceeds are concerned.<sup>3</sup> Sub-rule (2) accordingly provides that the right to set off is subject to any claims for rateable distribution under Section 73 of the Code.<sup>3</sup> The claims for rateable distribution in such cases must, however, have been made before the conclusion of the sale inasmuch as on the date of the sale, the assets would be deemed to have been realized by the Court.<sup>4</sup> If, however, the amount of the bid exceeds the decree-amount, the claims under Section 73 may be made before the realization of the excess amount by the Court.<sup>6</sup> The existence of other decree-holders who are entitled to rateable distribution does not oblige the decree-holder-purchaser to bring into Court the entire purchase-money. He is only bound to pay into Court the proportionate amounts due to the other decree-holders.<sup>8</sup> In the undermentioned case<sup>7</sup> it was held that it was irregular for a Court to allow a decree-holder-purchaser to set off the decretal amount for the purchase-money when the property had been attached by another decree-holder also. This view does not seem to be sound. Where the decree-holder-purchaser who is liable to share rateably with rival decree-holders in the sale proceeds fails to furnish the proportionate amount to the Court for distribution, a refund may be enforced by a

**O. 21 R. 78**  
**Note 5**

**Note 5**

1. ('38) 40 Pun L R 544 (544).
- (35) AIR 1935 Mad 893 (894) : 59 Mad 342. (The decree-holder who has been permitted to purchase is entitled as of right to set off the decretal amount against the purchase-money.)
2. ('31) AIR 1931 Bom 252 (254, 255).
- ('82) 6 Bom 570 (571).
- ('88) 11 Mad 356 (358).
- ('86) 12 Cal 499 (504).
- ('37) AIR 1937 Nag 383 (384) : I L R (1937) Nag 466.
- [See also ('36) AIR 1936 Mad 797 (799): 59 Mad 1028. (Set-off allowed to decree-holder-purchaser—Application for rateable distribution by another decree-holder — Former may have re-sale or deposit so much price as is due to rival decree-holder on rateable distribution.)]
3. ('33) AIR 1933 All 666 (668).
- ('18) AIR 1918 Cal 400 (401).
- ('35) AIR 1935 Bom 176 (177) : 59 Bom 310. (Decree-holder-purchaser allowed to set off decree amount against purchase money — Application for execution of decree against same judgment-debtor by other decree-holders pending in inferior Courts before sale — Application by these to former Court for rateable distribution after sale order allowing rateable distribution held proper.)
- ('20) AIR 1920 Mad 781 (781).
- ('82) 5 Mad 128 (124).
- ('36) AIR 1936 Mad 437 (438).
- ('36) AIR 1936 Mad 797 (798) : 59 Mad 1028. (Decree-holder allowed to set off decretal amount—Higher Court's power to call for sale proceeds under S. 68 is not ousted.)
- [See also ('92) 16 Bom 91 (102).]
4. ('25) AIR 1925 Oudh 287 (288). (Assets deemed to be realized on date of sale though order to set off made later.)
- ('33) AIR 1933 Mad 804 (805) : 57 Mad 38.

- (Dissenting from A I R 1920 Mad 731.)
- ('31) AIR 1931 Mad 103 (105). (Where the amount of bid is equivalent to or less than decretal amount assets deemed to be realized on date of sale though set-off ordered before sale.)
- ('31) AIR 1931 Bom 252 (254, 255). (Assets deemed to be realised on date of sale though set-off ordered before sale — Per Broomfield, J. —Order for a set-off can be properly made only after sale — An order before sale is futile and misleading.)
- ('37) AIR 1937 Cal 55 (56).
- ('35) AIR 1935 Mad 893 (894, 895) : 59 Mad 342.
- [See also ('30) AIR 1930 Cal 761 (762). (Application under S. 73 may be in a Court of a higher grade.)]
- ('35) AIR 1935 Lah 690 (691). (Decretal amount must be deemed to have been realized on date of sale.)]
- [See however ('36) AIR 1936 Pesh 164 (166). (Assets must be deemed as received by Court on date of confirmation of sale.)]
- ('36) AIR 1936 Mad 437 (439). (There can be no set-off except subject to the right of rateable distribution and in such cases the assets cannot be deemed to have been realized by the Court till the amount has actually been deposited under orders of the Court.)]
5. [See ('31) AIR 1931 Mad 103 (105).]
6. ('35) AIR 1935 Mad 893 (895) : 59 Mad 342. (Decree-holder-purchaser need pay only amounts due to such of the other decree-holders as have applied for execution before the sale.)
7. ('37) AIR 1937 Pat 50 (53). (There is material irregularity within O. 21 R. 90.)
- [See also ('36) AIR 1936 Mad 437 (438). (No set-off is granted when there are rival decree-holders proceeding simultaneously against the same judgment-debtor in execution.)]



**O. 21 R. 72**  
**Notes 5-8**

summary process in execution instead of in a separate suit.<sup>8</sup> *A* and *B* two creditors of *C* had both applied for execution and *A* was allowed to purchase and set off his decree amount towards the purchase money. The Court subsequently discovered the fact that *B* had applied for execution even before the sale, but found that *A* was unable or unwilling to pay the purchase money into Court. It was held that the proper order to be passed in such a case was to set aside the sale or order re-sale.<sup>9</sup>

Under this rule, no order of Court is necessary prior to sale granting permission to set-off.<sup>10</sup> An application for set-off may be made even after fifteen days of sale.<sup>11</sup> Where permission has been given to the decree-holder to bid and set off, the set-off takes place automatically on the sale being held and the decree-holder purchasing at such sale. An order of the Court setting off the two amounts is not necessary.<sup>12</sup>

Where permission to bid has been granted on condition that there should be no set-off, the Court cannot subsequently allow a set-off.<sup>13</sup> Similarly, where the Court has granted permission to set off and the decree-holder has bid at the sale relying on such permission, the Court cannot go back upon its previous order and call on the decree-holder to pay the purchase money.<sup>14</sup>

As to the exemption from making the deposit into Court of purchase-money by a decree-holder-purchaser, see Order 21 Rules 84 and 85 and Notes thereon.

**6. Amount due on the decree.** — Where a decree-holder is allowed to purchase the property ordered to be sold on condition that he would purchase it in full satisfaction of the decree, he is not entitled to recover from the judgment-debtor any money that he, as a decree-holder, has to pay by way of poundage.<sup>1</sup>

**7. Purchase without permission.** — Although the leave of the Court is a condition precedent to the decree-holder bidding for, or purchasing the property, a purchase by him without such permission is not *ipso facto* void. It is valid until set aside in the manner provided by sub-rule (3).<sup>1</sup> A stranger or a person other than such as is specified in sub-rule (3) has no right to apply to have such a sale set aside.<sup>2</sup>

**8. By himself or through another person.** — A purchase by the decree-holder through another person on his behalf is not void, but is only voidable at the

8. ('18) AIR 1918 Cal 400 (401).

('88) 11 Mad 356 (359).

('81) AIR 1981 Pat 359 (861) ; 10 Pat 830.

('81) AIR 1981 Pat 405 (407, 408). (82 Mad 384 ; 6 Bom 570, Followed.)

('87) AIR 1987 Nag 388 (384) : I L R (1987) Nag 466.

9. ('93) AIR 1933 All 337 (338, 339).

10. ('29) AIR 1929 Lah 492 (493).

('85) AIR 1985 Lah 690 (691). (The decretal amount is set off against the purchase price automatically by operation of law—The Court executing the decree has only to enter up satisfaction of the decree in whole or in part after the setting off has taken place.)

11. [See (1900) 8 Oudh Cas 240 (241).]

12. ('85) AIR 1985 Lah 690 (691).

13. ('08) 82 Bom 379 (381).

14. ('85) AIR 1985 Mad 907 (908). (Decree-holder permitted to bid and to set off decree amount against purchase-money — Decree-holder purchasing property—In the meanwhile, judgment-debtor adjudicated insolvent and after sale Official Receiver applying that the decree-holder should be ordered to pay to him the purchase-

money — *Held* that this could not be done — *Held also* that the sale in favour of the decree-holder was a nullity.)

**Note 6**

1. ('29) AIR 1929 All 266 (266).

**Note 7**

1. ('22) AIR 1922 P O 336 (338) : 1 Pat 733 : 49 Ind App 812 (P C). (Refusal of leave on application is on same footing as want of any application for leave.)

('82) 1882 All W N 26 (26). (Such a sale would be valid as against a trespasser.)

('16) AIR 1916 Bom 61 (65) : 41 Bom 357. (Want of permission only an irregularity.)

('85) 11 Cal 731 (732). (Do.)

('07) 31 Bom 61 (64).

('87) 11 Bom 588 (590).

('81) 5 Bom 575 (577).

('09) 1 Ind Cas 645 (646) (Cal).

('70) 14 Suth W R 405 (408).

('08) 13 Mad L Jour 231 (235).

('91) 14 Mad 498 (501).

[See however ('80) 5 Cal 308 (310). (Sale without express leave is invalid.)]

2. ('12) 17 Ind Cas 126 (126) (Mad).



instance of the judgment-debtor or any other person interested in the sale.<sup>1</sup> But where a decree-holder was *refused* permission to bid, a purchase by him *benami* in the name of another was held to be an *abuse of process of Court*, and the sale was held invalid.<sup>2</sup> Similarly, a purchase by the decree-holder in the name of another for a price lower than that at which the decree-holder was allowed permission to bid, was held liable to be set aside for fraud.<sup>3</sup> A purchase by the decree-holder's undivided son<sup>4</sup> or undivided brother<sup>5</sup> is presumably with joint funds and as such the purchase is for the decree-holder. A purchase by the decree-holder's pleader for himself is not invalid.<sup>6</sup>

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**Notes 8-11**

**9. The Court may, if it thinks fit, set aside the sale.**— A purchase by the decree-holder in contravention of this rule being only voidable, it is within the discretion of the Court to set aside the sale on an application under sub-rule (3).<sup>1</sup> Where the conduct of the decree-holder in purchasing the property amounts to fraud,<sup>2</sup> or to an abuse of the process of the Court,<sup>3</sup> the sale will be set aside. Where the purchase has been *benami* and for an inadequate price, the burden of proving that the sale is to be upheld is clearly on the decree-holder and it will not be a valid ground of objection that the judgment-debtor did not plead fraud or substantial injury.<sup>4</sup> In order that a sale may be set aside under this rule on account of the decree-holder's failure to obtain permission to bid, it is not necessary to find that the judgment-debtor sustained substantial loss by the sale.<sup>5</sup>

An application to set aside a sale, under sub-rule (3), can only be made by the judgment-debtor or any other person whose interests are affected by the sale. A decree-holder entitled to rateable distribution is a person whose interests are so affected but the sons of a judgment-debtor who were not parties to the suit and on whom the decree would not be binding are not persons interested in the sale.<sup>6</sup> The fact of the confirmation of the sale is no bar for setting it aside under sub-rule (3).<sup>7</sup>

See also Note 8 above.

**10. Separate suit, if lies, to set aside sale without permission.** — See Note 62 to Section 47 *supra* and the cases cited thereunder.

**11. Judgment-debtor, if can raise the question of no permission in suit for possession by decree-holder.** — It has been held by the High Court of Madras<sup>1</sup> that in a suit for possession by the decree-holder-purchaser who has taken the property in auction in contravention of the provisions of this rule, the judgment-debtor may raise the question of want of leave by way of answer to the plaintiff's claim under

**Note 8**

1. ('20) AIR 1920 Bom 90 (92) : 44 Bom 352.
- (98) 22 Bom 624 (628).
- (88) 1888 Bom P J 205, Re No. 110 (110).
- [See ('28) AIR 1928 Cal 802 (802).
- ('09) 1 Ind Cas 221 (224, 225) : 82 Mad 242.]
2. ('84) 10 Cal 757 (760). (Suit by decree-holder-purchaser for possession successfully resisted on ground of the abuse of the process of the Court.)
3. ('01) 5 Cal W N 265 (269).
- ('09) 32 Mad 242 (253).
- [See ('12) 15 Ind Cas 888 (890) : 16 Oudh Cas 86. (Decree-holder bidding jointly with stranger for lower price than allowed by Court.)]
4. ('80) 5 Bom 180 (181).
5. ('84) 1884 Bom P J 74, Re No. 82 (82).
6. ('29) AIR 1929 Oudh 285 (287) : 4 Luck 685.

(Semble: Pleader so purchasing may be guilty of misconduct under rules.)

**Note 9**

1. ('85) 11 Cal 731 (732).
- [See ('08) 18 Mad L Jour 231 (235). (*Bona fide* purchaser from the decree-holder-purchaser — Restitution impracticable — Sale cannot be set aside.)]
2. ('09) 82 Mad 242 (253) : 1 Ind Cas 221 (227).
3. ('84) 10 Cal 757 (760).
4. ('09) 1 Ind Cas 221 (227) : 82 Mad 242.
5. ('21) AIR 1921 Mad 402 (402).
6. ('08) 18 Mad L Jour 231 (234).
7. ('09) 1 Ind Cas 221 (226) : 82 Mad 242.

**Note 11**

1. ('09) 82 Mad 242 (244, 245, 252). (Abdur Rahim, J., dissenting.)

**O. 21 R. 72  
Notes 11-14**

the sale, neither Section 47 nor the want of an application under sub-rule (3) being a bar thereto.

**12. Interest.** — A decree is not satisfied until the sale in execution of it is confirmed,<sup>1</sup> and the decree-holder is entitled to claim interest, if the decree awards it, between the date of sale and the date of its confirmation.<sup>2</sup>

**13. Appeal.** — Under O. 43 R. 1 (j), an appeal lies from an order setting aside or refusing to set aside a sale under this rule.<sup>1</sup> But there is no right of second appeal.<sup>2</sup> But an order granting,<sup>3</sup> or refusing,<sup>4</sup> *leave to bid* to the decree-holder is not appealable.

**14. Limitation and step-in-aid of execution.** — The effect of a decree-holder purchasing at an execution sale without the leave of the Court is to render the sale voidable and not void. Consequently, a suit to set aside the sale under Article 12 (a) of the Limitation Act must be brought within one year of confirmation of sale.<sup>1</sup>

On the question whether an application for leave to bid is a step-in-aid of execution, see Article 182 clause (5) of the Limitation Act and the undermentioned cases.<sup>2</sup>

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### Local Amendment

**BOMBAY**

After Rule 72 the following shall be *inserted*, namely :

**O. 21 R. 72A  
(Bombay)**

"72A. If leave to bid is granted to the mortgagee of immovable property, a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid."

*Note.* — Rule 72A framed by the Bombay High Court, as it originally stood, embodied a mandatory provision for fixing, in the case of a mortgagee-decree-holder applying for leave to bid, a reserve price of not less than the amount of the principal, interest and costs due under the decree. It was accordingly held<sup>1</sup> that an execution sale to the mortgagee-decree-holder without fixing the reserve price aforesaid and for less than the decree-amount was vitiated by material irregularity. The rule has since been amended giving power to the Court if it thinks fit, to dispense with the condition relating to the reserve price.

It has been held that Rule 72A has no application to the original side of the High Court of Bombay and a mortgagee-decree-holder purchasing for less than his decree-amount is entitled to recover the balance from the mortgagor or otherwise.<sup>2</sup>

**Note 12**

1. ('09) 1 Ind Cas 106 (107) : 33 Bom 311.
2. ('19) AIR 1919 All 258 (254) : 41 All 526.

**Note 13**

1. ('15) AIR 1915 All 54 (55).
- ('83) 1883 All W N 104 (104).
- ('86) 18 Cal 174 (174).
- [See ('84) 10 Cal 368 (371). (*Obiter.*)]
2. ('94) 21 Cal 789 (791).
- ('15) AIR 1915 All 54 (55).
3. ('88) 1888 All W N 104 (104).
- ('29) AIR 1929 Mad 908 (906).
4. ('11) 11 Ind Cas 545 (545) : 38 Cal 717 : 38 Ind App 126 (P O).
- ('86) 18 Cal 174 (174).

**Note 14**

1. ('27) AIR 1927 Mad 1135 (1136).
2. (1900) 22 All 399 (401). (Yes.)
- ('91) 13 All 211 (213). (Yes.)
- ('97) 21 Bom 381 (382, 383). (Yes.)
- ('12) 14 Ind Cas 468 (469) : 1912 Pun Re No. 60. (Yes—Application after auction-sale postponed.)
- ('17) AIR 1917 Cal 422 (424). (No.)
- ('96) 23 Cal 690 (692). (No.)
- ('96) 23 Cal 196 (197). (No.)

**O. 21 R. 72A (Bombay)**

1. ('80) AIR 1980 Bom 290 (291) : 54 Bom 348.
2. ('28) AIR 1928 Bom 128 (128) : 52 Bom 459. (Even if Rule 72A should apply to original side the confirmation of sale for lesser amount being unchallenged, *held* that balance could be otherwise recovered.)

**R. 73.** [S. 292.] No officer or other person having any **O. 21 R. 73**  
 Restriction on bidding duty to perform in connection with any sale  
 or purchase by officers. shall, either directly or indirectly, bid for,  
 acquire or attempt to acquire any interest in the property sold.

[1877, S. 292.]

### Synopsis

1. Legislative changes.
2. "No officer or other person."
3. Transfer of Property Act, Section 136.

1. **Legislative changes.** — The words "or other person" are new.

2. **"No officer or other person."** — The introduction of the words "or other person" in the present rule extends the scope of the prohibition in the rule to all those, besides officers, who have anything to do with the machinery of the sale or have, directly or indirectly, any interest in the result of the sale.<sup>1</sup> A pleader engaged by a party to a suit<sup>2</sup> or the pleader's clerk<sup>3</sup> cannot be said to have a duty to perform in connexion with the sale and is not therefore within the prohibition, and the introduction of the words "or other person" in the present Code does not change the law in this respect.<sup>4</sup> Judicial opinion has, however, been uniform that the conduct of a pleader engaged in the suit, in purchasing the property for himself, is open to grave censure, especially when the purchase is detrimental to the interests of his client.<sup>5</sup> In fact, the pleader will be guilty of professional misconduct in such cases.<sup>6</sup> A receiver appointed by the Court under O. 40 R. 1 cannot purchase at an auction sale, as a decree-holder, property of which he is the receiver.<sup>7</sup> See also Note 3 below.

3. **Transfer of Property Act, Section 136.** — Under Section 136 of the Transfer of Property Act (IV of 1882), as it originally stood, "no Judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions."<sup>1</sup> The Section as it now stands is wider in its scope and prohibits such a purchase, whether the claim is within the jurisdiction of the Court with which the Judge, pleader or other persons referred to is connected or of any other Court.<sup>2</sup>

#### Order 21 Rule 73 — Note 2

1. ('27) AIR 1927 All 76 (77) : 49 All 292.
2. ('86) 10 Mad 111 (112).  
('92) 15 Mad 889 (898). (But onus lies on a pleader to prove that the transaction is *bona fide*).
3. ('27) AIR 1927 All 76 (77) : 49 All 292.
4. ('29) AIR 1929 Oudh 235 (237) : 4 Luck 635.  
[But see ('29) AIR 1929 Nag 305 (309, 310, 311.)]
5. ('70) 2 N W P H C R 46 (47).  
('70) 18 Suth W R 209 (214). (Judgment-debtor's pleader joining decree-holder in purchasing at court sale).
6. ('72) 17 Suth W R 480 (488). (Do).
7. ('96) 23 Cal 805 (817).

('12) 17 Ind Cas 589 (540) (All) (FB).

See also cases in foot notes 3 and 4.

6. ('12) 17 Ind Cas 589 (539, 540) (All) (FB).  
(R. 25 of Chap. 15, High Court Rules and R. 37 of Chap. 21 of Civil Courts Rules).  
('70) 2 N W P H C R 46 (47). (Circular Orders of the N.-W. F. P.).

7. ('82) AIR 1932 Cal 672 (673) : 59 Cal 956.

('35) AIR 1935 Mad 421 (422). (Decree-holder obtaining permission to bid subsequently appointed as receiver—Decree-holder cannot bid).

#### Note 3

1. ('88) 11 Mad 498 (499).

('88) 11 Mad 56 (61).

2. [See ('18) 19 Ind Cas 129 (129, 137) : 40 Cal 650 (FB)].

**O. 21 R. 74****SALE OF MOVEABLE PROPERTY**

Sale of agricul-  
tural produce.

- R. 74.** [New.] (1) Where the property to be sold is agricultural produce, the sale shall be held, —
- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or,
  - (b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited:

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

- (2) Where, on the produce being put up for sale, —

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and
- (b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

[See Rule 75 and Section 61.]

**1. Place of sale.** — This rule makes special provision for the sale of agricultural produce. In other cases of moveable properties attached in execution, sales should ordinarily be held in some place within the jurisdiction of the Court ordering the sale.<sup>1</sup> Where certain ornaments were attached in Belgaum and the judgment-debtor urged that they should be directed to be sold at Bombay on the ground that they would probably fetch a better price and it was found by the Court that a fair price could be had on the spot, it was held that there was no good and sufficient reason to depart from the usual practice.<sup>2</sup>

**O. 21 R. 75**

**R. 75.** [New.] (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

Special provisions relating to growing crops.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

[See Rule 74.]

### Local Amendments

#### CALCUTTA

In sub-rule (2) after the words "where the crop from its nature does not admit of being stored," *insert*:

"or can be sold to greater advantage in an unripe state (*e. g.*, as green wheat)."

In sub-rule (2) *cancel* the word "and" between the words "tending" and cutting" and *substitute* the word "or."

#### LAHORE

In sub-rule (2) after the word "stored" the following words were inserted :

"or can be sold to great advantage in an unripe state."

#### MADRAS

In sub-rule (1), *after* the words "yet been stored" and *before* the words "the day of the sale," *add* the words "unless the Court decides to proceed under the provisions of sub-rule (2) hereunder."

In sub-rule (2), *after* the words "being stored" and *before* the words "it may be sold" *insert* the words "or can be sold to greater advantage in an unripe state," and *after* the words "and gathered" and *before* the words "and the purchaser," *insert* the words "or in such unripe state."

#### NAGPUR

In sub-rule (2) *after* the words "being stored" *insert* the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state."

#### N.-W. F. P.

In sub-rule (2) *after* the words "being stored" *add* the words "or can be sold to greater advantage in an unripe state."

#### OUDH

In sub-rule (2) *after* the words "being stored" *insert* the words "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state."

#### PATNA

*Substitute* the following for Rule 75 :

"Where the property to be sold is a growing crop which can be sold to greater advantage in an unripe or unreaped state, it may be sold unreaped, and the purchaser shall be entitled to enter on the land to do all that is necessary for the purpose of tending and reaping it. In all other cases the day of sale shall be so fixed as to admit of the crop ripening and being reaped before the sale."

**R. 76.** [S. 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, **O. 21 R. 76**

Negotiable instruments and  
shares in corporations.

the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

[1877, S. 296; 1859, S. 248. See Rule 80.]

**O. 21 R. 76  
Note 1**

1. "**May.**" — The rule is only permissive. A Court is not *bound* to authorize the sale of negotiable instrument or a share in a corporation through a broker.<sup>1</sup>

**O. 21 R. 77****R. 77. [S. 297.]** (1) Where moveable property is sold by

**Sale by public auction.** public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

. [1877, S. 297; 1859, S. 251. See Rules 71 and 88.]

*Synopsis*

- |                               |  |
|-------------------------------|--|
| 1. Sale of moveable property. | 3. Re-sale and applicability of Rule 71. |
| 2. Payment of price.          | 4. Sub-rule (3).                         |

**1. Sale of moveable property.** — A sale of arms by a nazir of the Court in execution of a decree is a sale by a public servant in the discharge of his duty and is therefore excluded from the operation of the Arms Act (XI of 1878) by Section 1, clause (b) of that Act.<sup>1</sup>

**2. Payment of price.** — Though sales should be conducted strictly according to this rule, still where, in execution of a decree for a large amount the decree-holder purchased some moveable property of small value without the leave of the Court and filed into Court a receipt setting off the amount towards his decree, it was held in the undermentioned case<sup>1</sup> that it might be treated as a cash payment.

This rule gives the officer conducting the sale a discretion to allow the purchase-money to be paid at a reasonable time after the sale.<sup>3</sup>

Under sub-rule (2), the sale becomes absolute as soon as the purchase-money is paid to the officer or other person holding the sale and no order of Court is necessary as in the case of a sale of immovable property.<sup>3</sup>

**3. Re-sale and applicability of Rule 71.** — A purchaser who has defaulted in the payment of price is liable under Rule 71, for any loss which may happen on a re-sale.<sup>1</sup>

**Order 21 Rule 76 — Note 1**

1. ('67) 8 Suth W R 415 (419, 420).

**Order 21 Rule 77 — Note 1**

1. ('85) 9 Bom 518 (519).

**Note 2**

1. ('71) 15 Suth W R 868 (868).  
2. ('72) 4 N W P H O R 87 (89).  
3. ('89) AIR 1989 Nag 269 (270, 271).

**Note 3**

1. ('81) 7 Cal 887 (889).

**4. Sub-Rule (3).**— Sub-rule (3) is new and is framed on the analogy of Rule 88 which relates to sale of immovable properties.

**O. 21 R. 77  
Note 4**

**R. 78.** [S. 298.] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

**O. 21 R. 78**

*Irregularity not to vitiate sale, but any person injured may sue.*

[1877, S. 298; 1859, S. 252. See R. 77. *Cf.* R. 90.]

### *Synopsis*

1. Irregularity in publishing and conducting sale of moveable property.
2. Person injured may, however, sue for compensation.
3. Money-decree is not moveable property.

### *Other Topics (miscellaneous)*

"At the hand of any other person." See Notes 1 and 2.

Scope of the Rule. See Note 1.

What are not irregularities. See Note 2.

### **1. Irregularity in publishing and conducting sale of moveable property. —**

Rule 77, *ante*, provides that on payment of the purchase-money the sale of *moveable* property shall become absolute.<sup>1</sup> This rule provides that a sale of *moveable* property in execution of a decree cannot be set aside on the ground of irregularity in publishing or conducting the sale.<sup>2</sup> But it does not provide that a sale of moveable property shall in no case be set aside. Thus, if there is an *express* assertion in the proclamation of sale that the goods sold are the property of the judgment-debtor, then the purchaser, if he has not got that for which he paid the price, is entitled to have the sale set aside and to recover the purchase-money from the hands of the Sheriff or the execution creditor.<sup>3</sup> Where a judgment-debtor died after the issue of the sale proclamation and before sale and the sale was held without bringing on record his legal representatives, it was held that it was not a case of mere irregularity but that the sale was void and could be set aside under Section 47.<sup>4</sup> On this question, however, there is a conflict of decisions, for which see Note 12 to Section 50, *ante*.

In a sale of moveable property in execution of a decree, there is no warranty of title and all that is sold is the right, title and interest of the judgment-debtor. The right, title and interest of the real owner remain unaffected and he is, therefore, entitled to recover the property or damages.<sup>5</sup>

### **Order 21 Rule 78 — Note 1**

1. ('30) AIR 1930 Lah 286 (286). (An order confirming a sale is not appealable as O. 43 R. 1 does not apply.)

2. ('27) AIR 1927 All 41 (48).

('29) 119 Ind Cas 285 (285) (All).

('02) 6 Cal W N 5 (6). (A decree upon a mortgage cannot be regarded as an immovable property.)

('30) AIR 1930 Lah 286 (286).

('19) AIR 1919 Lah 176 (176) : 1919 Pun Re No. 12.

3. ('78) 2 Bom 258 (266). (Though there is no provision corresponding to R. 98 purchase-money in case of moveable property also can be recovered back under general principles of law.)

[See ('09) 3 Ind Cas 672 (677, 679) : 5 Low Bur Rul 58 (FB). (In the absence of such assertion or fraud purchaser cannot recover price from decree-holder.)]

4. ('99) 22 Mad 119 (128).

5. ('26) AIR 1926 Rang 214 (215) : 4 Rang 202.

('74) 6 N W P H C R 252 (259).

**D. 21 R. 78**  
**Notes 2-3**

**2. Person injured may, however, sue for compensation.** — Any person sustaining any injury by reason of an irregularity in conducting or publishing the sale may sue the person by whom the injury was caused, for compensation.<sup>1</sup>

Though this rule would enable a judgment-debtor also to sue for compensation, it must be read with Section 47 which bars a separate suit regarding any question arising between the parties in execution.<sup>2</sup>

**3. Money decree is not moveable property.** — A money decree is not moveable property within the meaning of this rule and therefore where such a decree is sold contrary to the procedure laid down in Rule 53 *ante*, the sale can be set aside on the ground of irregularities in the conduct of the sale.<sup>1</sup>

**O. 21 R. 79**

**R. 79.** [Ss. 299, 300, 301.] (1) Where the property sold

Delivery of moveable property, debts and shares.

is moveable property of which actual seizure has been made, it shall be delivered to the

purchaser.

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer

(187) 2 Agra H O R 375 (376).

(188) 9 Suth W R 118 (119).

(1870) 14 Suth W R 120 (120). (Suit against decree-holder for value liable even though he had sold in good faith.)

[See also (1875) 7 N W P H O R 288 (291). (Need not sue within one year).]

**Note 2**

1. (1892-'03) 2 Upp Bur Rul Civ Pro 9. (Lien of a third party on the moveables destroyed by sale — Decree-holder liable to him for loss.)

(1884) AIR 1984 Oudh 94 (95). (Sale officer dishonestly sending away decree-holder to prevent raising bid — Decree-holder may sue for damages.)

(1820) AIR 1920 Nag 84 (85). (Goods sold not

answering to description — Suit by purchaser against decree-holder for damages — *Held* entitled.)

(1830) AIR 1930 Lah 286 (286).

(1865) 2 Suth W R 60 (61). (Omission to mention value is not irregularity.)

(1867) 8 Suth W R 415 (420). (Omission to mention number, value, etc., of Government Promissory Notes is not such irregularity as would affect sale.)

[See (1866) 6 Suth W R Civ Ref 14 (14). (Omission to serve notification of sale is not irregularity — No damages can be awarded.)]

2. (1886) 1886 Pun Re No. 14, page 26.

**Note 3**

1. (1824) AIR 1924 Rang 21 (21) : 1 Rang 860.



of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

**O. 21 R. 79**  
**Notes 1-3**

[1877, S. 299; 1859, Ss. 261, 266. See Rr. 43, 51 and 80. Cf. Rules 95 and 56.]

### *Synopsis*

1. **Delivery of debts.**

2. **Shares.**

3. **Forms.** See appendix E, Form Nos. 32, 33 and 34.

1. **Delivery of debts.** — Where a debt is sold, the method of delivery is, as provided in sub-rule (3), by a *prohibitory order* of the Court resembling that made on attachment and the purchaser cannot apply for possession under Rule 95, *infra*.<sup>1</sup>

2. **Shares.** — In the case of sale of shares in a company, when an order is issued under sub-rule (3) there is nothing further to be done by the transferee or by the Court and the company cannot permit the transfer of the shares to anybody else.<sup>1</sup>

What passes to the purchaser of shares at a court-sale is the right to the property and not an absolute *right to have the transfers registered*. Therefore the company has still a discretion to recognize such purchasers or not, as in the case of private purchasers.<sup>2</sup>

3. **Forms.** — See Appendix E, Form Nos. 32, 33 and 34.

**R. 80.** [S. 302.] (1) Where the execution of a document or the endorsement of the party in whose name

**O. 21 R. 80**

Transfer of negotiable instruments and shares.

a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely:—

A. B. by C. D., Judge of the Court of (*or as the case may be*), in a suit by E. F. against A. B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest

**Order 21 Rule 79 — Note 1**

1. ('82) AIR 1932 Mad 288 (284).

[See also ('17) AIR 1917 Low Bur 184 (185).]

**Note 2**

1. ('28) AIR 1928 Mad 241 (244, 245) : 45

Mad 587.

2. ('16) AIR 1916 Bom 147 (150) : 41 Bom 76.

('28) AIR 1928 Mad 241 (242) : 45 Mad 587.

[But see ('66) 1 Ind Jur (N S) 258.]

**O. 21 R. 80**  
**Note 1**

or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

[1877, S. 302; 1859, S. 267. See Rr. 34 and 51.]

**1. Execution of deed of transfer.**—This rule is only permissive and, therefore, in order to effectuate the transfer of ownership of a share or of a negotiable instrument, a deed of transfer of the share or an endorsement of the negotiable instrument is not required by law.<sup>1</sup>

This rule also empowers a Court to cancel a previous endorsement made by the judgment-debtor in order to enable the auction-purchaser of a promissory note to realize the amount due under it.<sup>2</sup>

**O. 21 R. 81**

**R. 81.** [S. 303.] In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

Vesting order in case  
of other property.

[1877, S. 303. See Rr. 74 to 77, 79 and 80. Cf. Rr. 92 and 94.]

**1. Rights of mortgagee against purchaser.** — A mortgagee of moveable property cannot follow the property in the hands of an auction-purchaser.<sup>1</sup>

#### Local Amendment

#### RANGOON

The following shall be *inserted* as Rule 81A:

**O. 21 R. 81A**  
**(Rangoon)**

"81A. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act."

#### SALE OF IMMOVABLE PROPERTY

**O. 21 R. 82**

**R. 82.** [S. 304.] Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

What Courts may  
order sales.

[1877, S. 304. See Ss. 7 (a) (iii), 8 and O. 50 R. 1 (a) (ii), and O. 51 R. 1.]

**Order 21 Rule 80 — Note 1**

1. ('28) AIR 1928 Mad 571 (578).  
(10) 8 Ind Cas 17 (17) (Mad).

2. ('11) 12 Ind Cas 913 (913) (Low Bur).

**Order 21 Rule 81 — Note 1**

1. ('25) AIR 1925 Rang 303 (303).

**1. What Courts may order sales.** — As to sale of immovable property in execution of small cause decrees, see Note 10 to Section 39 and the undermentioned cases.<sup>1</sup>

**O. 21 R. 82  
Note 1**

As to execution against property outside a Court's jurisdiction, see Note 8 to Section 17, Note 6 to Section 38, and Note 7 to Section 39.

## **R. 83.** [S. 305.] (1) Where an order for the sale of

**O. 21 R. 83**

Postponement of sale to enable judgment-debtor to raise amount of decree.

immovable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment-debtor, the Court may, on his application, postpone the sale<sup>2</sup> of the property comprised in the order for sale on such terms and for such period as it thinks proper,<sup>3</sup> to enable him to raise the amount.

(2) In such case the Court shall grant a certificate<sup>4</sup> to the judgment-debtor authorizing him<sup>2</sup> within a period to be mentioned therein, and notwithstanding anything contained in section 64,<sup>6</sup> to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court<sup>5</sup> :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.<sup>7</sup>

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage<sup>10</sup> of, or charge on, such property.

[ 1877, S. 305; 1859, S. 243. ]

### *Synopsis*

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Postponement of sale.</li> <li>3. "For such period as it thinks proper."</li> <li>4. "Shall grant a certificate."</li> <li>5. "Shall be paid into Court."</li> <li>6. Effect of private sale.</li> </ol> | <ol style="list-style-type: none"> <li>7. Confirmation of sale by Court.</li> <li>8. Permission under Section 29 of the Guardians and Wards Act.</li> <li>9. Rateable distribution.</li> <li>10. Mortgage decrees — Sub-rule (3).</li> <li>11. Appeal and revision.</li> </ol> |
|---|--|

#### **Order 21 Rule 82 — Note 1**

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. ('72) 17 Suth W R 809 (811) (F.B.). (Purchaser of immovable property in execution of a small</li> </ol> | <ol style="list-style-type: none"> <li>cause decree acquires no title.) ('84) 7 Mad 592 (594, 595).</li> </ol> |
|---|--|

**O. 21 R. 83**  
**Notes 1-5**

*Other Topics (miscellaneous)*

"Authorizing him." See Notes 2 and 6.

"Notwithstanding anything contained in S. 64." See Note 6.

Scope of rule. See Note 2.

"The amount of the decree may be raised." See Note 2.

**1. Legislative changes. —**

(1) The words "save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72" in the first proviso to sub-rule (2) have been newly added. See also similar saving clauses in Rule 84, sub-rule (2) and Rule 85, *infra*.

(2) Sub-rule (3) is new. See Note 10, *infra*.

**2. Postponement of sale. —** A Court has to exercise its discretion in making an order for postponement of the sale to enable the judgment-debtor to raise money by private alienations.<sup>1</sup> It will not be exercising its discretion properly in making an order for postponement, where the judgment-debtor has had sufficient time to pay the decree amount,<sup>2</sup> or where there is no sufficient reason to believe that the amount due under the decree could be raised by any of the methods mentioned in the rule.<sup>3</sup> Where the sale *has taken place* in execution of the decree, the executing Court has no power to grant an application under this rule and is bound to confirm the sale subject to the provisions of Rule 92, *infra*.<sup>4</sup>

This rule only authorizes the Court to grant time to the judgment-debtor and does not give any authority to the Court to grant a lease or mortgage.<sup>5</sup>

This rule and Rules 84 to 88 (inclusive) are applicable to proceedings under the Chota-Nagpur Tenancy Act<sup>6</sup> but not to proceedings under the Acts noted below.<sup>7</sup>

**3. "For such period as it thinks proper." —** The postponement of the sale should be for a reasonable period and not unreasonably long.<sup>1</sup>

**4. "Shall grant a certificate." —** A mere order of the Court postponing the sale of the property and permitting the judgment-debtor to alienate the property privately is not sufficient to entitle the judgment-debtor to do so. The issue of a certificate to him under sub-rule (2) is an essential step in the procedure, and in the absence of such a certificate the transferee can get no title.<sup>1</sup>

**5. "Shall be paid into Court." —** Payment to the decree-holder's pleader under the orders of the Court is payment into Court, the pleader in such a case becoming the agent of the Court.<sup>1</sup> See also the undermentioned case.<sup>3</sup>

**Order 21 Rule 83 — Note 2**

1. ('25) AIR 1925 Rang 271 (272) : 3 Rang 182.

(1864) 1 Suth W R Misc 15 (15).

2. ('21) AIR 1921 Lah 884 (885).

3. ('66) 1 Agra Misc App 11 (12).

('91) 14 Mad 277 (280, 284). (Cannot be postponed unless whole amount of decree can be raised.)

(1900) 3 Oudh Cas 42 (47).

('24) AIR 1924 Lah 182 (185).

(1864) 1864 Suth W R Gap Misc 5 (5).

[See ('71) 15 Suth W R 477 (478).]

4. ('07) 1907 Pun Re No. 92, p. 489.

('25) AIR 1925 Rang 271 (272) : 3 Rang 182. (Executing Court refusing stay—Appeal—Meanwhile sale held — Appellate Court stayed confirmation of sale — Order *held* to be without jurisdiction.) [See also ('10) 7 Ind Cas 718 (719) : 1910 Pun Re No. 72.]

5. (1864) 1864 Suth W R Gap Misc 5 (5).

6. See S. 210 (8)(b) of Bengal Act, VI of 1908, as

amended by Bihar and Orissa Act, VI of 1920, S. 50 (1).

7. Bengal Tenancy Act (VIII of 1885): see S. 148 (a) thereto; Orissa Tenancy Act (II of 1913): see S. 198 (a) thereto; Madras Estates Land Act (I of 1908): see S. 192 (a) thereto.

**Note 3**

1. ('91) 14 Mad 277 (280).

('70) 5 Mad H C R 272 (273).

('71) 15 Suth W R 822 (823). (Twenty years unreasonably long—Six months time is reasonable.)

('72) 17 Suth W R 193 (194).

('74) 21 Suth W R 146 (146).

**Note 4**

1. ('82) 1882 All W N 248 (244). (Transferee cannot maintain suit for possession.)

('84) AIR 1984 Mad 727 (729) : 58 Mad 892.

**Note 5**

1. ('18) 21 Ind Cas 210 (211) (Cal).

2. ('85) AIR 1985 Lah 481 (481). (Part of purchase-money paid to decree-holder as per order

**6. Effect of private sale.** — This rule qualifies the prohibition in Section 64 and on compliance with the conditions of this rule a private alienation, notwithstanding Section 64, becomes absolute even against all claims enforceable under the attachment.<sup>1</sup> Where, on 15th January 1911, a Court granted a certificate to a judgment-debtor under this rule for private sale of his properties, and on 24th January 1911 the properties were attached in execution of another decree, and on the 31st of January the Court confirmed the sale, it was held that the purchaser got an absolute title and the subsequent attachment was of no avail.<sup>2</sup> But the Madras High Court has held in the undermentioned case<sup>3</sup> that sub-rule (2) refers only to attachments in existence at the date of the certificate and does not apply to *subsequent* attachments so that an alienation made after such an attachment will not be protected.

In authorizing a sale under this rule, a Court cannot empower a judgment-debtor to transfer any higher interest than he has and bind the interests of others in the property.<sup>4</sup> A private alienation made after obtaining the sanction of the Court cannot affect a prior encumbrance already existing on the properties.<sup>5</sup>

An alienation effected by a judgment-debtor by virtue of a certificate granted under this rule is a private alienation, even though it does not become absolute unless it is confirmed by the Court and therefore it cannot be said that it is not liable to pre-emption under the provisions of the Punjab Pre-emption Act (I of 1913).<sup>6</sup>

**7. Confirmation of sale by Court.**—A sale effected privately is not a completed transaction until it is sanctioned and confirmed by the Court.<sup>1</sup> Until this is done, it would not be operative against claims enforceable under the attachment, but would be defeasible to that extent.<sup>2</sup> Where the sanction for private sale has been granted by two Courts executing different decrees, it is enough if the sale is confirmed by one Court.<sup>3</sup>

It is not necessary that any formal application should be made for the purpose of obtaining the Court's confirmation of a private transfer, nor is there any provision under which a formal order declaring such confirmation should be recorded.<sup>4</sup> It has been held in the undermentioned case<sup>5</sup> that it is extremely doubtful whether a private sale under this rule comes within the purview of Rule 92 *infra*, and that, even if Rule 92 governs this rule, there is no legal bar to the confirmation of a sale before the expiry of thirty days from the date of sale.

Where the approval of the Court has been obtained by misrepresentation or by the withholding of the material information, the Court will treat such misrepresentation

of Court and balance paid to judgment-debtor—  
Purchaser cannot be ordered to pay over again the amount paid to the decree-holder but may be required to pay the amount paid to the judgment-debtor.)

**Note 6**

1. ('06) 80 Bom 337 (340).
2. ('18) 21 Ind Cas 210 (211) (Cal).
3. ('34) AIR 1934 Mad 727 (728) : 58 Mad 392. (Distinguishing 21 Ind Cas 210 on the ground that probably in that case the alienation had taken place before the subsequent attachment.)
4. ('02) 26 Bom 379 (388, 384).  
(20) AIR 1920 Mad 281 (282).
5. ('24) AIR 1924 Lah 132 (135).  
(12) 16 Ind Cas 102 (108) (All).
6. ('19) AIR 1919 Lah 868 (869).

**Note 7**

1. ('34) AIR 1934 Pesh 76 (76).  
(82) 1882 All W N 243 (244).
2. ('34) AIR 1934 Mad 727 (729) : 58 Mad 392. (Property attached in execution of another decree against judgment-debtor after issue of certificate — Alienation after such attachment will be ineffective against the attachment but the Court can, when application is made to it for confirmation of the alienation, order the refund of the consideration which has been paid into Court by the alienor.)
3. ('06) 80 Bom 337 (340).
4. ('95) 19 Bom 539 (544). (In this case the certificate was given by a Court of higher grade — Held that it had concurrent jurisdiction to do so.)
5. ('18) 21 Ind Cas 210 (211) (Cal).
6. ('18) 21 Ind Cas 210 (211) (Cal).

**O. 21 R. 83**  
**Notes 7-11**

or withholding of information as a fraud and will refuse to give effect to the private transfer as against claims enforceable under the attachment.<sup>6</sup>

**8. Permission under Section 29 of the Guardians and Wards Act.** — Where the judgment-debtor is a minor for whom a guardian has been appointed under the Guardians and Wards Act, 1890, the certificate of the executing Court is not sufficient to validate a transfer under this rule; it is also necessary that the guardian should obtain the sanction of the Court that appointed him as guardian.<sup>1</sup> The reason is that the matter for inquiry under this rule is the protection of the execution-creditor, while under Section 29 of the Guardians and Wards Act the matter to be considered is the benefit of the minor and therefore compliance with this rule should not render unnecessary the fulfilment of the requirements of Section 29 of the Guardians and Wards Act.

**9. Rateable distribution.** — Money paid into Court under sub-rule (2) is money paid under a pending execution application and is therefore liable to rateable distribution under Section 73 *ante*.<sup>1</sup> Where property is attached at the instance of several decree-holders, permission should not be granted under this rule to satisfy one of the decrees.<sup>2</sup>

**10. Mortgage decrees — Sub-Rule (3).** — This rule does not apply to cases in which property is directed to be sold in execution of a decree on a mortgage.<sup>1</sup> The reason is that the creditor's right of sale rests on the mortgage decree, and not on the *attachment* in execution. The undermentioned cases<sup>2</sup> under the old Code holding that Section 305 corresponding to this rule applied to mortgage decrees also are no longer law under this Code, in view of the specific enactment of sub-rule (3).

**11. Appeal and revision.** — No appeal lies against an order under this rule postponing or refusing to postpone a sale.<sup>1</sup> Such an order is, however, open to revision.<sup>2</sup>

**O. 21 R. 84**

**R. 84. [S. 306.] (1)** On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

**Deposit by purchaser  
and re-sale on default.**

6. ('05) 29 Bom 615 (620, 621). (Principle of (1884) 27 Ch D 424, followed.)

**Note 8**

1. ('09) 81 All 378 (378).
- ('99) 28 Bom 287 (290).
- ('22) AIR 1922 Cal 150 (151) : 49 Cal 911.

**Note 9**

1. ('19) AIR 1919 Mad 647 (648) : 41 Mad 616.
- ('88) 1888 Bom P J 62.
2. ('19) AIR 1919 Mad 647 (648) : 41 Mad 616.

**Note 10**

1. ('04) 81 Cal 378 (378).
- ('78) 8 Cal 335 (336).
- ('21) AIR 1921 Lah 384 (385).
- ('24) AIR 1924 Mad 284 (285).
- ('96) 6 Mad L Jour 187 (188).
2. ('01) 25 Bom 104 (106, 107). (Provisions of Ss. 304 to 319 (old) i. e. Rr. 92 to 96 and S. 66

applied to sales of immoveable property subject to mortgage decrees.)

- (1900) 3 Oudh Cas 42 (47).
- ('05) 2 All L Jour 353 (355). (So assumed.)

**Note 11**

1. ('28) 109 Ind Cas 524 (525) (Lah).
- ('24) AIR 1924 Mad 284 (285).
- ('25) AIR 1925 Rang 271 (272) : 3 Rang 132.
- ('37) AIR 1937 Pesh 64 (64).
- [See (1864) 1 Suth W R Misc 11 (11).]
- [But see (1865) 2 Suth W R Misc 49 (50).
- (1900) 3 Oudh Cas 42 (48, 44). (Is a question under S. 244 (now S. 47) and therefore appealable.)]
2. ('25) AIR 1925 Rang 271 (273) : 3 Rang 132.
- [See however ('87) AIR 1987 Pesh 64 (64).
- (Order refusing to postpone sale is not 'decision of case' within S. 115 and no revision lies.)]

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

**O. 21 R. 84**  
**Notes 1-2**

[1877, S. 306 ; 1859, S. 253. *Cf.* Rule 77. See Rr. 71, 85 and 86.]

### Local Amendment

#### OUDDH

To sub-rule (2), *add* the following:

"The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets."

### Synopsis

- |  |  |
|--|--|
| 1. "Declared to be purchaser."                               | 4. Non-payment of deposit — Effect of. |
| 2. Acceptance by Court, if necessary for completion of sale. | 5. Re-sale.                            |
| 3. Deposit, payment of.                                      | 6. Sub-rule (2).                       |
|  | 7. Interest.                           |
|  | 8. Appeal.                             |

### Other Topics (*miscellaneous*)

"Shall pay immediately." See Note 4. "The property shall forthwith be re-sold." See Note 5.

**1. "Declared to be purchaser."**—The person to be declared purchaser under this rule is the bidder whose bid has been accepted.<sup>1</sup> There is no sale till the bid has been accepted by the competent authority.<sup>3</sup>

A bidder can withdraw his bid at any time before the property is knocked down to him.<sup>3</sup> A bid lapses by a higher bid being made<sup>4</sup> or by extraordinary delay in accepting it.<sup>5</sup> As to whether the acceptance is to be by the Court or the officer conducting the sale, see Note 2 below.

A person declared to be purchaser under this rule has, even before the confirmation of sale in his favour, sufficient interest in the property to prevent a forfeiture or preserve the title from destruction. Thus, where the property sold is the right of the judgment-debtor to obtain a re-conveyance of certain properties on paying a certain sum by a certain date, the person declared to be the purchaser under this rule can make a valid tender of such sum so as to prevent a forfeiture under the clause.<sup>6</sup>

**2. Acceptance by Court, if necessary for completion of sale.**—There is a conflict of opinion on this question and three different views have been expressed :

(a) A court-sale is not complete till the highest bid is accepted by the Court, though the officer conducting the sale may have knocked down the property in favour of a particular person as being the highest bidder.<sup>1</sup>

#### Order 21 Rule 84 — Note 1

1. ('18) AIR 1918 Oudh 489 (440) : 21 Oudh Cas 212. (Bid of one cannot be treated as that of another and deposit received from latter — Sale to latter irregular and bad.)
2. ('12) 17 Ind Cas 788 (784) : 35 All 65.
3. ('30) AIR 1930 Lah 41 (42).
4. ('28) AIR 1928 Nag 111 (112).
5. ('91) 14 Mad 285 (286).
6. ('25) AIR 1925 Cal 557 (558).
7. ('20) AIR 1920 Mad 911 (918) : 42 Mad 776.
8. ('25) AIR 1925 Cal 557 (558).
9. ('19) AIR 1919 Mad 1014 (1024) : 41 Mad 474.

#### Note 2

1. ('25) AIR 1925 Mad 318 (319). (Court can refuse bid of highest bidder though accepted by sale officer.)
2. ('32) AIR 1932 Lah 525 (526). (Auction sale in execution ordered for 5th May — Report called for 7th May — Presiding officer signing last bid on 5th May—Judgment-debtor's application of 5th June to set aside sale held within time.)
3. ('85) AIR 1985 All 204 (205). (Bidder applying before acceptance of Court for not enforcing sale on ground that she has bid under misapprehension — Court may allow application and order return of 25 per cent.)

**O. 21 R. 84**  
**Notes 2-4**

(b) The sale is complete as soon as the property is knocked down to the highest bidder by the officer conducting the sale.<sup>2</sup>

(c) The Court has a *quasi* revisional jurisdiction in the matter.<sup>3</sup> According to this view the sale is complete *as against the purchaser* as soon as the property is knocked down to him, and he cannot withdraw his bid thereafter, although the Court may, in its discretion, refuse to accept his bid and order a re-sale.

It has been held that in a Collector's sale the acceptance of the bid by the Collector is necessary for the completion of the sale.<sup>4</sup>

**3. Deposit, payment of.** — The payment of deposit under this rule cannot be insisted on before the property has been knocked down to the bidder.<sup>1</sup> But the officer conducting the sale may, if the circumstances justify such a course and in order to satisfy himself that he is a *bona fide* bidder, ask any bidder if he has the deposit money ready.<sup>2</sup> The deposit under this rule should be paid though no demand is made for it.<sup>3</sup>

**4. Non-payment of deposit — Effect of.** — The deposit under this rule must be made immediately after the purchaser is declared and must cover 25 per cent. of the purchase-money.<sup>1</sup> The officer conducting the sale has no authority to extend the time for the payment of the deposit.<sup>2</sup>

The failure to pay the deposit immediately as required by the rule does not render the sale void but only amounts to irregularity within O. 21 R. 90.<sup>3</sup> But a Court has no power to sell a property to a purchaser who does not pay for it. Thus, where a decree-holder-purchaser does not pay the balance of the purchase-money after deducting

('23) AIR 1923 Cal 316 (316). (Court can refuse bid though same has been accepted by sale officer.)

('31) AIR 1931 Cal 583 (584) : 58 Cal 788. (Do.)

('12) 13 Ind Cas 597 (597) (Cal). (Do.)

('26) AIR 1926 Cal 827 (828). (Do.)

('23) AIR 1923 Pat 525 (527) : 2 Pat 548. (Court can refuse bid of highest bidder though the same has been accepted by officer conducting sale, and though deposit has been accepted by sale officer—Same rule applies whether sale is held in Court precincts or outside.)

('28) AIR 1928 Lah 699 (700). (Court may accept bid though refused by sale officer.)

('29) AIR 1929 Lah 673 (676). (Till acceptance by Court, purchaser not bound to pay deposit.)

('29) AIR 1929 Rang 12 (18) : 6 Rang 609. (Bid can be withdrawn at any time before acceptance by Court.)

('35) AIR 1935 Oudh 131 (132) : 10 Luck 557.

2. ('31) AIR 1931 Lah 78 (78). (Date of sale is date on which property was knocked down to the highest bidder.)

('33) AIR 1933 Nag 123 (124) : 29 Nag L R 52. (Sale not held at headquarters—Sale complete as soon as a property is knocked down to highest bidder.)

('29) AIR 1929 Rang 311 (318) : 7 Rang 425. (Bid cannot be withdrawn after sale officer has accepted the same.)

('39) AIR 1939 Nag 269 (271). (Officer conducting sale can declare highest bidder to be purchaser—He need not ask Judge to declare who is purchaser.)

('36) AIR 1936 Lah 555 (557). (It is not open to the Court thereafter to offer the property to any

person who may be prepared to purchase it for higher amount.)

[See also ('32) AIR 1932 Lah 525 (526). (In the circumstances of the case, held that date of sale was date of acceptance by Court.)

('09) 1 Ind Cas 12 (12) (Lah). (Where the sale officer refers, though wrongly, the case to the Court for orders, the sale is not complete on the day of the auction.)

3. ('15) AIR 1915 Cal 815 (816).

('32) AIR 1932 Rang 17 (19) : 9 Rang 608. (It will make a difference if there is a rule of practice that officer conducting sale shall not be entitled to accept bid.)

4. ('88) 1988 Nag L Jour 10 (12).

**Note 3**

1. (1863) 9 Moo Ind App 328 (344) (PC).

('08) 3 Low Bur Rul 225 (226).

2. (1863) 9 Moo Ind App 328 (344) (PC).

[See also (1864) 1864 Suth W R Gap Misc 3 (3). (Sham bidder would be liable for contempt of Court and also under S. 228, Penal Code.)]

3. ('08) 3 Low Bur Rul 225 (226, 227).

[See also ('39) AIR 1939 Nag 269 (272). (Officer holding sale need not wait for the payment.)]

**Note 4**

1. ('15) AIR 1915 Oudh 140 (141).

2. ('15) AIR 1915 Oudh 140 (141).

See also ('16) AIR 1916 All 186 (189, 190.)]

3. ('06) 28 All 238 (239).

('16) AIR 1916 All 186 (189, 190).

('33) AIR 1933 Oudh 845 (846) : 8 Luck 781.

('89) 16 Cal 33 (33).

('81) 5 Cal L Rep 181 (184, 187). (Irregularity may be waived.)



the decretal amount, the sale to him is void even though it may be confirmed by the Court.<sup>4</sup>

An auction-purchaser who had not paid the deposit under the rule at all, professed to transfer the property to another and on the latter paying the purchase-money the Court confirmed the sale in his favour. It was held by the Judicial Commissioner's Court of Oudh<sup>5</sup> that the Court had no power to recognize the transferee from an auction-purchaser who had not paid the deposit at all.

It is submitted that the remark in the undermentioned case<sup>6</sup> that the date of sale is the *date of deposit* is not correct. The date of sale is the date on which the bid is accepted by the proper authority.<sup>7</sup> See Notes 1 and 2 above.

**5. Re-sale.** — On the failure of a purchaser to deposit 25 per cent. of the purchase-money under this rule, the property should be re-sold.<sup>1</sup> The re-sale should be held "forthwith";<sup>2</sup> otherwise the defaulting purchaser will not be liable under Rule 71 for the deficiency in price that may occur on such re-sale.<sup>3</sup> In the undermentioned Full Bench case,<sup>4</sup> the Madras High Court has held that "forthwith" in this rule means "as expeditiously as circumstances permit." The same view has also been held by the Nagpur High Court.<sup>5</sup>

Rule 87 *infra* does not apply to a re-sale under this rule and a fresh proclamation is not necessary for such a re-sale.<sup>6</sup> But, if in the circumstances of a particular case, the issue of a fresh sale proclamation is to the advantage of the defaulting purchaser, the fact that such proclamation is issued does not make the re-sale one not held "forthwith" within the meaning of this rule.<sup>7</sup>

The officer conducting the re-sale is not bound to commence it from the next highest bid below that made by the defaulter.<sup>8</sup> As to the procedure to be followed when objection is taken to the re-sale on the ground that the deposit was tendered but refused by the sale officer, see the undermentioned case.<sup>9</sup>

(29) AIR 1929 Lah 492 (493).

(28) 110 Ind Cas 773 (774) (Lah).

(91) 14 Mad 227 (228).

(24) AIR 1924 Rang 81 (82).

(08) 3 Low Bur Rul 225 (226, 227).

(38) AIR 1938 Pesh 36 (37).

[See also (28) AIR 1928 Lah 699 (700).

(22) AIR 1922 All 200 (201) : 44 All 266 (FB).

(Order 21 R. 71 applies to re-sales for failure to pay deposit under R. 84 — This case should be held to overrule 5 All 316 and 30 All 273.)

(81) 5 Bom 575 (577). (Order 21 R. 71 applies to re-sales for failure to deposit under R. 84.)]

4. (11) 9 Ind Cas 66 (67) (Cal).

5. (15) AIR 1915 Oudh 140 (141).

6. (19) AIR 1919 Lah 309 (310).

7. [See (35) AIR 1935 Pesh 160 (161). (The fact that deposit was not made does not affect the date on which the sale took place for the purposes of Article 166.)]

#### Note 5

1. (67) 7 Suth W R 110 (110).

2. (89) 16 Cal 33 (33).

3. (28) AIR 1928 Lah 249 (249).

(08) 30 All 273 (278).

(29) AIR 1929 Lah 744 (745).

(16) AIR 1916 Lah 445 (446).

(37) AIR 1937 Lah 924 (925). (Delay of more than 17 months.)

[But see (37) AIR 1937 All 556 (558).]

4. (30) AIR 1930 Mad 761 (762) : 53 Mad 900 (FB).

[See also (19) AIR 1919 Pat 102 (104). (Sale held on the next day owing to the late hour—Held sale was held "forthwith" within the meaning of the rule.)]

5. (39) AIR 1939 Nag 269 (273). (Officer conducting sale can hold re-sale the same day as the default in payment of deposit if circumstances permit and if it is proper to do so—He need not wait for the payment of the deposit.)

6. (16) AIR 1916 Lah 445 (446).

(98) 2 Cal W N 411 (412).

(89) 12 Mad 454 (458).

7. (30) AIR 1930 Mad 761 (762) : 53 Mad 900 (FB).

[See also (37) AIR 1937 All 556 (557, 558).

(Where a decree-holder auction-purchaser fails to pay the 25 per cent. of the purchase-money and the property is sold again, such second sale is 'a re-sale' within the meaning of O. 21 R. 84 C. P. C., even though held six months after the first sale and on issue of fresh proclamation.)]

8. (1864) 1 Suth W R Misc 11 (12).

9. (83) 6 Mad 197 (199).

**O. 21 R. 84**  
**Notes 6-8**

**6. Sub-rule (2).** — Sub-rule (2) is new.<sup>1</sup> It provides for the exemption of the decree-holder-purchaser with the Court's permission from making the deposit under this rule. The decree-holder-purchaser is not exempt in *every* case from making the deposit: the rule only gives the *Court* the power to exempt him from making the deposit. Hence, the deposit *must* be made<sup>2</sup> unless dispensed with by the Court.<sup>3</sup> The dispensation may be express or implied.<sup>4</sup>

An order dispensing with the deposit of 25 per cent. of the purchase-money may be made *after* the auction.<sup>5</sup> Where the decree-holder's application for being allowed to set off his decree-amount towards the purchase-money is pending, a failure to deposit the 25 per cent. does not render the sale a nullity.<sup>6</sup>

**7. Interest.** — Notwithstanding the deposit of 25 per cent. of the purchase-money under this rule, the decree-holder is entitled to interest on the *entire* decretal amount till the confirmation of the sale, because the decree-holder is not bound to withdraw the money before the sale is confirmed.<sup>1</sup>

**8. Appeal.** — An order of the Court directing the property to be re-sold on default of the auction-purchaser to deposit the 25 per cent. of the purchase-money under this rule is not appealable.<sup>1</sup> It has been held that in this respect it makes no difference that the auction-purchaser is the decree-holder.<sup>2</sup>

**O. 21 R. 85**

**R. 85.** [S. 307.] The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

[1877, S. 307; 1859, S. 254. See R. 84.]

**Note 6**

1. Under the old Code, even the decree-holder purchasing with the permission of the Court was not exempt from making the deposit — See the following cases:

- ('09) 1 Ind Cas 12 (12) (Lah).
- ('80) 5 Cal L Rep 181 (187).
- ('71) 16 Suth W R 46 (46).
- (1864) 1864 Suth W R Gap Misc 80 (80).

2. ('29) AIR 1929 Lah 492 (498).

('84) AIR 1984 Pesh 25 (27).

('86) 165 Ind Cas 554 (555) (Pesh).

[See however ('85) AIR 1985 Mad 898 (894): 59 Mad 842. (O. 21 R. 84 sub-rule (2) must be construed in such a way as to be consistent with R. 72 sub-rule (2) and with the proviso to R. 85 of the same Order—Otherwise it will lead to the anomaly that where a decree-holder is entitled to set off, the Court as regards the 25 per cent. may at its option require him to deposit it, but as regards the balance of the purchase money, it has no such option and cannot compel him to bring it into Court.)]

[But see ('81) AIR 1981 Lah 78 (78). (When permission is accorded under O. 21 R. 72 to a decree-holder to bid for or purchase the property such permission impliedly dispenses with

the deposit of the requisite 25 per cent.)]

3. ('29) AIR 1929 Lah 492 (498).

4. ('29) AIR 1929 Lah 492 (498). (Dispensation was inferred from the circumstances under which the permission to bid was granted.)

[See ('86) 165 Ind Cas 554 (555) (Pesh). (In N.-W. F. Province, no permission is necessary for the decree-holder to bid at an auction in view of O. 21 R. 72, O. P. Code, as applicable to that Province. It cannot be inferred however from this that the Court has under R. 84 (2) impliedly dispensed with the requirement of that rule which requires a deposit of 25 per cent. of the bid which is accepted.)]

5. ('85) AIR 1985 Pesh 128 (128). (If auction-purchaser delays in applying under sub-rule (2) the deposit should not be dispensed with.)

6. ('84) AIR 1984 Pat 329 (330).

**Note 7**

1. ('14) AIR 1914 Cal 210 (212).

**Note 8**

1. ('39) AIR 1939 Lah 210 (211). (Reversing on Letters Patent Appeal, AIR 1939 Lah 46.)

2. ('39) AIR 1939 Lah 210 (211). (Order does not fall under S. 47—Reversing on Letters Patent Appeal, AIR 1939 Lah 46.)

## Local Amendments

O. 21 R. 85  
Notes 1-4

## MADRAS

Between the words "purchase-money payable" and "shall be paid" *add* the following words:

"and the amount required for the general stamp for the certificate under Rule 94."

## NAGPUR

The following Explanation shall be *added* :

"*Explanation.* — When an amount is tendered on any day after 1 P. M. but paid into Court on the next working day between 11 A. M. and 1 P. M. the payment shall be deemed to have been made on the day on which the tender is made."

## PATNA

For the portion beginning with the words "the full amount" and ending with the words "sale of the property," *substitute* the following:

"The purchaser shall pay into Court the full amount of the purchase-money and shall also tender the stamp necessary for the certificate referred to in Rule 94 before the Court closes on the fifteenth day from the sale of the property."

## Synopsis

- |  |   |
|--|---|
| 1. Applicability of the Rule.                            | 4. Proviso.   |
| 2. "On the fifteenth day from the sale."                 | 5. Extension of time for payment—Material irregularity. |
| 3. Where Court or office is closed on the fifteenth day. |   |

**1. Applicability of the Rule.** — Where on an execution sale being confirmed in appeal, the purchaser who had withdrawn the purchase-money on the sale being set aside in the lower Court, is ordered to re-pay it, the time limit of fifteen days provided by this rule does not apply.<sup>1</sup>

**2. "On the fifteenth day from the sale."** — In calculating the period of fifteen days, the day of sale should be excluded.<sup>1</sup>

Payment into Government Treasury is equivalent to payment into Court for the purposes of this rule.<sup>2</sup> But where the money is sent through the Post Office, it will not be sufficient compliance with this rule if it does not reach the Court in time, for the Post Office is not an agent of the Court.<sup>3</sup>

Where a purchaser tendered the balance of the purchase-money on the last day with the *chalan* to the officer of the Court for the signature of the Judge and the *chalan* was returned only the next day when the amount was duly paid, it was held that there was sufficient compliance with the provisions of this rule.<sup>4</sup>

**3. Where Court or office is closed on the fifteenth day.** — If the Court and the office are closed on the fifteenth day from the sale on account of holiday, the purchaser can deposit the balance of purchase-money on the next re-opening day.<sup>1</sup>

**4. Proviso.** — Where a decree-holder is given permission to bid at the sale and set off the amount towards his decree, then if the amount of the bid *minus* the

## Order 21 Rule 85 — Note 1

1. ('18) AIR 1918 Mad 672 (678).  
[See ('88) 1988 Nag L Jour 207 (209). (Order 21, R. 85 has no application to a case where the purchaser had duly deposited the price but had withdrawn it on the sale being set aside.)]

## Note 2

1. ('68) 3 Agra 204 (205).  
2. ('84) 7 Mad 211 (318).  
3. ('98) 22 Bom 415 (416).

4. ('92) AIR 1992 Pat 842 (848) : 13 Pat L Tim 559 (560).

('84) AIR 1984 All 817 (817).

## Note 3

1. ('03) 13 Mad L Jour 271 (272).  
('29) AIR 1929 Nag 305 (310). (Under S. 10, General Clauses Act.)  
('96) 20 Bom 745 (746). (But if office is open on that day and money could be paid in, it must be done.)

**O. 21 R. 85**  
**Notes 4-5**

poundage is less than the decree-amount, the whole of the amount must be deemed to have been received *eo instanti* the sale is made, and there is no necessity for the purchaser to pay into Court any amount.<sup>1</sup> But if the amount of the bid is greater than the decree-amount, he may be excused from depositing the twenty-five per cent. on the date of sale, but will have to deposit the balance within fifteen days from the sale.<sup>2</sup> Where a decree-holder is permitted to bid subject to certain conditions and those conditions are not fulfilled, the Court can, either under Rule 86, *infra* or under its inherent powers, refuse to confirm the sale and may order a re-sale.<sup>3</sup>

A brought the properties of X to sale in court auction. B who had attached the same properties in execution of his decree for Rs. 14,000 against X purchased the properties for Rs. 31,000 and deposited 25 per cent. under Rule 85. He also applied that his decree amount should be allowed to be set-off against the balance of the purchase-money. He was allowed to do so, and he therefore deposited Rs. 10,000 on the fifteenth day. It was held that there was no failure to deposit the balance within the meaning of this rule.<sup>4</sup>

**8. Extension of time for payment — Material irregularity.** — The time for the payment of the balance of the purchase-money under this rule can be extended with the *consent* of all the parties concerned.<sup>1</sup> In the absence of such consent, the Court ought not to extend the time or accept a deposit made beyond time.<sup>2</sup> But where the Court does so extend the time, it is only an irregularity within the meaning of Rule 90, *infra* and does not render the sale a nullity.<sup>3</sup> If in such a case the sale is confirmed and the money is drawn by the decree-holder without objection, the judgment-debtor must be taken to have waived the irregularity, and the sale cannot be set aside by reason of such irregularity.<sup>4</sup>

**Local Amendment**

**BOMBAY**

The following shall be *added* as Rule 85A :

**O. 21 R. 85A**  
**(Bombay)**

"85A. In cases where execution has been transferred to the Collector, for the purposes of Rules 84 and 85, the purchaser shall be deemed to be entitled to a set-off under Rule 72 if he produces a certificate to that effect from the Court executing the decree."

**O. 21 R. 86**

**R. 86.** [S. 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the

**Note 4**

1. ('81) AIR 1981 Mad 108 (105).
2. ('93) 16 Mad 20 (22). (Order setting aside a sale in such cases is without jurisdiction.) (1900) 8 Oudh Cas 240 (241).
3. ('81) AIR 1981 Mad 108 (105).
4. ('22) AIR 1922 Pat 511 (514) : 1 Pat 285.
5. ('38) AIR 1938 Rang 104 (105).

**Note 5**

1. ('37) AIR 1927 Lah 887 (888).
2. [See ('85) AIR 1985 All 248 (244) : 57 All 658. (The Court has no jurisdiction to extend the time when default is made in depositing the

balance of the purchase-money within 15 days as required by R. 85 of O. 21.)]

3. ('28) AIR 1928 Mad 48 (49).
4. ('31) AIR 1981 Lah 15 (16). (Court extended time in view of objections to sale—Court refused to set aside sale.)
5. ('24) AIR 1924 Rang 81 (82). (No loss caused to judgment-debtor.)
6. ('66) 6 Suth W R Misc 82 (88). (Under Code of 1859 —No substantial injury—Acceptance of payment by Court after the period—Not an irregularity under S. 256, now R. 90.)
7. ('32) AIR 1982 Cal 126 (180) : 59 Cal 117.
8. ('28) AIR 1928 Mad 48 (49).

property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

[1877, S. 308; 1859, S. 254. See Rr. 71, 84 and 15. Cf. R. 77.]

**O. 21 R. 86**  
**Notes 1-2**

### Local Amendment

#### PATNA

*Insert the words "or tender of stamp" between the words "payment" and "within".*

### Synopsis

- |                           |                           |
|---------------------------|---------------------------|
| 1. Scope of the Rule.     | 3. Deficiency in re-sale. |
| 2. Forfeiture of deposit. | 4. Appeal.                |

**1. Scope of the Rule.** — Where the auction-purchaser fails to pay into Court the balance of purchase-money as required by Rule 85, it is the imperative duty of the Court to have the property re-sold.<sup>1</sup> The discretion under this rule is confined to *forfeiture* and not to the *re-sale* of the property.<sup>2</sup> Anyone who is interested in having the property re-sold may move the Court to do so; there is nothing to justify the view that the decree-holder alone can move the Court in the matter.<sup>3</sup>

The provisions of this rule do not apply to sales held in execution of decrees passed by the High Court of Calcutta in the exercise of its original jurisdiction, inasmuch as that Court has framed rules, under Section 129, regulating its own procedure.<sup>4</sup>

**2. Forfeiture of deposit.** — Under Section 308 of the old Code, it was held that that Section was imperative and that on default by the purchaser at a court-sale to deposit the purchase-money within fifteen days from the sale, the deposit made on the date of sale must be forfeited.<sup>1</sup> The word "shall" in the old Section has been replaced by the words "may, if the Court thinks fit." Therefore, under this rule, the Court has got a discretion to forfeit the initial deposit or not.<sup>2</sup> Where there is no question of re-sale, as where after the default by the purchaser the judgment-debtor pays off the decree-amount, it is not a proper case for ordering the forfeiture of the deposit.<sup>3</sup>

Where an auction-purchaser deposits a sum in excess of the twenty-five per cent. on the date of sale, the Court has jurisdiction to forfeit only the twenty-five per cent.<sup>4</sup>

#### Order 21 Rule 86 — Note 1

1. ('32) AIR 1932 All 392 (392, 393).
- ('19) AIR 1919 Pat 369 (370, 371).
- ('38) AIR 1938 Lah 198 (199, 200) : I L R (1938) Lah 97.
- ('39) AIR 1939 Mad 57 (58).
- [But see ('26) AIR 1926 All 509 (509). (Submitted, erroneous.)]
2. ('85) AIR 1935 All 243 (244) : 57 All 658.
- ('38) AIR 1938 Lah 198 (199) : I L R (1938) Lah 97.
- ('39) AIR 1939 Mad 57 (58).
3. ('32) AIR 1932 All 392 (393).
- [See however ('38) AIR 1938 Rang 104 (105). (This rule does not provide for any application by any interested party in the matter.)]
4. ('80) AIR 1930 Cal 324 (324, 325) : 57 Cal 106.
- [See also ('94) 21 Cal 566 (567). (Non-payment in time—Practice is to order interest on purchase money.)]

#### Note 2

1. (1900) 2 Bom L R 901 (906). (Even though

decree-holder-purchaser and judgment-debtor adjust the matter.)

[See also ('02) 25 Mad 535 (537). (Even though decree-holder and judgment-debtor do not ask for re-sale.)]

2. ('10) 6 Ind Cas 564 (565) : 32 All 380. (Purchaser did not pay on notice of judgment-debtor's application to set aside sale — Sale set aside — Deposit not forfeited.)
- ('21) AIR 1921 Nag 120 (121) : 17 Nag L R 15.
- ('38) AIR 1938 Mad 905 (905). (Failure to pay costs of general stamp for sale certificate as required by rules along with the purchase-money — Forfeiture of deposit on account of such failure — It was held that in the circumstances of the case forfeiture should not be ordered.)
- ('37) AIR 1937 Sind 311 (312).
3. ('34) AIR 1934 Oudh 429 (429).
4. ('10) 6 Ind Cas 564 (565) : 32 All 380.
- ('87) AIR 1937 Sind 311 (312).
- ('38) AIR 1938 Mad 905 (905).

**O. 21 R. 86**  
**Notes 3-4**

**3. Deficiency in re-sale.** — Where there is any deficiency in the amount of purchase-money on a re-sale, the loss is recoverable from the defaulting purchaser under the provisions of Rule 71, *ante*.<sup>1</sup>

**4. Appeal.** — No appeal lies against an order of forfeiture of the deposit of twenty-five per cent.<sup>1</sup> or against an order directing a re-sale.<sup>2</sup>

**O. 21 R. 87**

**Notification on  
re-sale.**

**R. 87.** [S. 309.] Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

[1877, S. 309; 1859, S. 255. See Rr. 66 to 68 and 86.]

#### Local Amendment

#### MADRAS

For the words "of the purchase-money" substitute the words "of the amounts mentioned in Rule 85."

**1. Notification on re-sale.**—This rule applies only to a re-sale under Rule 86 and does not apply to a case where property is re-sold under Rule 84, *ante*.<sup>1</sup>

Omission to mention the date of re-sale in its proper place in the sale proclamation is a material irregularity vitiating the sale.<sup>2</sup>

**O. 21 R. 88**

**Bid of co-sharer to  
have preference.**

**R. 88.** [S. 310.] Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

[1877, S. 310; 1861, S. 14. *Cf.* R. 77 (3).]

#### Synopsis

- |                                  |   |
|----------------------------------|---|
| 1. Scope and object of the Rule. | 4. Duty of officer conducting the sale. |
| 2. Co-sharer.                    | 5. Suit for pre-emption.                |
| 3. "Bid the same sum."           | 6. Appeal.                              |

#### Other Topics (miscellaneous)

Actual bid — Necessity of. See Note 3.

"Share of undivided immovable property." See Note 1.

#### Note 3

1. ('22) AIR 1922 All 200 (201); 44 All 266 (FB).
- ('81) 5 Bom 575 (577).
- ('81) 7 Cal 837 (839).
- ('19) AIR 1919 Pat 102 (106).

[See also ('25) AIR 1925 P C 61 (63) (P C). (De-  
cree-holder's application to attach deposit must  
be tried according to law.)]

#### Note 4

1. ('91) 1891 Pun Re No. 120, page 588.
  2. ('20) AIR 1920 All 258 (258).
  - ('26) AIR 1926 All 509 (509).
- Order 21 Rule 87 — Note 1**
1. ('98) 2 Cal W N 411 (412).
  - ('89) 12 Mad 454 (458).
  - ('87) AIR 1937 All 556 (559).
  2. ('25) AIR 1925 Mad 681 (688).

**1. Scope and object of the Rule.** — The object of this rule is to enable co-sharers in undivided immovable property to keep out strangers if they so desire.<sup>1</sup> The rule provides, in substance, that a co-sharer of the immovable property of which a share is sold, is entitled to pre-empt that share when the highest bid is made by a person who is not a co-sharer.<sup>2</sup>

This rule does not apply when the property sold is not a share of undivided immovable property, but the right and interest of a mortgagee in such a share.<sup>3</sup> Nor does it apply to land sold in execution of the decree of a Revenue Court.<sup>4</sup>

This rule is applicable to sales under the Chota Nagpur Tenancy Act (see Rule 83 Notes), and is unaffected by the Agra Pre-emption Act, II of 1922 (see Section 6), or by the Punjab Pre-emption Act, I of 1913 [see Section 2 (2)].

**2. Co-sharer.** — There is no right of pre-emption in the case of involuntary sales except as provided in this rule and therefore a usufructuary mortgagee, not being a co-sharer, is not entitled to claim the benefit of this rule.<sup>1</sup> A defeasible title to a share in immovable property acquired by a person does not give him the right to pre-empt another share in the same property as a co-sharer.<sup>2</sup>

Where several properties are sold in *one lot*, and a person who is a co-sharer in one of such properties only makes a bid, this rule does not apply.<sup>3</sup>

**3. "Bid the same sum."** — In order to enable a co-sharer to claim the benefit of this rule, it is not enough if he merely asserts his claim and offers to pay, at the time the sale is knocked down, the sum equal to that bid by the stranger purchaser; but he must make a distinct bid in the ordinary manner of offering bids.<sup>1</sup>

**4. Duty of officer conducting the sale.** — It is the duty of the officer conducting the sale to take notice of a claim of pre-emption made by a co-sharer under this rule and to receive the purchase-money, subject of course to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim.<sup>1</sup> In the undermentioned case<sup>2</sup> where *several* properties had been ordered to be sold in one lot and a person claimed pre-emption in respect of *one* of such properties only, it was held that the sale officer had no jurisdiction to determine such claim and that if he did so, the proceedings could be questioned by the Civil Court.

Where the claimant has deposited the purchase-money and fulfilled the conditions of sale so far as he is concerned, the sale is not defeasible by reason of the failure of the bidder to complete the deposit of the purchase-money.<sup>3</sup>

**5. Suit for pre-emption.** — Where a claim to preference is made under this rule by a co-sharer as against a stranger and the Court declares one of them to be the

#### Order 21 Rule 88 — Note 1

1. ('14) AIR 1914 All 426 (427).
2. ('14) AIR 1914 All 426 (427). (Cannot pre-empt as against another co-sharer.)
- ('16) AIR 1916 Oudh 128 (124).
- ('74) 6 N W P H C R 243 (245, 246).
- ('70) 2 N W P H C R 200 (202). (Where a co-sharer purchases in the name of a benamidar, another co-sharer is entitled to pre-empt the benamidar.)
3. ('81) 8 All 15 (17).
4. ('76) 1 All 277 (279).

#### Note 2

1. ('19) AIR 1919 Mad 1178 (1175) : 41 Mad 582 (F B).
- ('75) 7 N W P H C R 281 (288).
2. ('18) 18 Ind Cas 959 (960) : 35 All 296.

[See also ('09) 9 Ind Cas 782 (784) : 32 All 45.]

3. ('33) AIR 1933 Oudh 401 (402, 403) : 9 Luck 77.

#### Note 3

1. ('88) 1888 All W N 208 (209).
- ('81) 3 All 827 (828).
- ('80) 2 All 850 (851).
- ('93) 1898 All W N 115 (115).
- (1863) Marsh 555.
- [See also ('81) 1881 Bom P J 50 (51).
- ('68) 10 Suth W R 165 (166).]

#### Note 4

1. ('74) 6 N W P H C R 272 (275).
2. ('83) AIR 1983 Oudh 401 (402, 408) : 9 Luck 77.
3. ('74) 6 N W P H C R 272 (275, 276).
- ('74) 6 N W P H C R 289 (290).

**O. 21 R. 88**  
**Notes 5-6**

purchaser and confirms the sale, a suit by the person against whom the order is made to set it aside will, it is conceived, be barred by general principles of *res judicata*. The High Court of Allahabad seems to be of the opinion that a confirmation of an execution sale can be made only under Rule 92, that therefore, a confirmation of the sale under this rule is also one under Rule 92, and that a suit would consequently be barred by sub-rule (3) of that rule.<sup>1</sup>

**6. Appeal.** — No appeal lies against an order under this rule confirming the sale in favour of a co-sharer.<sup>1</sup>

**O. 21 R. 89****R. 89. [S. 310A.]** (1) Where immoveable property has

**Application to set aside sale on deposit.**

been sold in execution of a decree,<sup>3</sup> any person,<sup>10</sup> either owning such property or holding an interest therein<sup>12</sup> by virtue of a title acquired before such sale,<sup>11</sup> may apply<sup>17</sup> to have the sale set aside on his depositing<sup>16</sup> in Court,<sup>9</sup>—

(a) for payment to the purchaser, a sum equal to five per cent.<sup>21</sup> of the purchase-money, and

(b) for payment to the decree-holder,<sup>23</sup> the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount<sup>22</sup> which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.<sup>24</sup>

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

**Local Amendments****ALLAHABAD**

In sub-rule (1) of this rule for the words "any person . . . before such sale," read the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property."

**CALCUTTA**

In sub-rule (1), *cancel* the words "either owning such property or holding an interest therein by virtue of a title acquired before such a sale" and *substitute* the words "whose interest is affected by such sale, (provided that such interest has not been voluntarily acquired by him after such sale)."

**Note 5**

1. ('28) AIR 1928 All 186 (187); 45 All 208 (FB).  
(Sale held by Collector under rules framed under S. 70, exactly corresponding to R. 92 of O. 21.)  
[See also ('76) 1 All 272 (273, 274). (But he

should sue for a declaration that the claimant has no right to pre-empt.))  
[But see ('75) 7 N W P H C R 97 (98).]

**Note 6**

1. ('81)-8 All 674 (675).



**LAHORE**

In sub-rule (1) of this rule *for* the words "any person . . . acquired before such sale," *substitute* the words "any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person."

**MADRAS**

In sub-rule (1), *for* the words "any person, either owning . . . before such sale," *substitute* the words "the judgment-debtor, or any person deriving title from the judgment-debtor, or any person holding an interest in the property."

At the end of sub-rule (1), *insert* the following proviso :

"Provided that where the immovable property sold is liable to discharge a portion of the decree-debt, the payment under clause (b) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay."

**NAGPUR**

In sub-rule (1), *for* the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," *substitute* the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person."<sup>1</sup>

**N.-W. F. P.**

In sub-rule (1), *for* the words "either owning . . . before such sale," *substitute* the following words :

"either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person."

**ODDH**

In sub-rule (1), *for* the words "any person . . . before such sale," *read* the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property."

**PATNA**

In sub-rule (1), *for* the words "any person, either owning . . . before such sale," *substitute* the words "the judgment-debtor or any person deriving title through the judgment-debtor, or any person holding an interest in the property at the date of the application under this rule."

*Synopsis*

1. Legislative changes.
2. Scope and object of the Rule.
  3. Applicability of this Rule to sales under mortgage decrees.
  4. Sales under decrees on award.
  5. Sales by receiver.
  6. Sales under Rent Acts.
  7. Applicability of Order 9 to proceedings under this Rule.
8. Immovable property.
9. Court, meaning of.
10. Who may apply under this Rule.
  11. "By virtue of a title acquired before such sale."
  12. "Any person owning such property or holding an interest therein."
  13. Transferee before court-sale.
  14. Transferee after court-sale.
  15. Other persons interested.
16. Deposit in Court.
17. Deposit and application.
18. Failure to deposit full amount.
19. Mistake in calculating the amount to be deposited.
20. Conditional deposit.
21. A sum equal to five per cent.
22. Less any amount received.
23. "For payment to the decree-holder."
24. Sub-rule (2).
25. Setting aside sale in respect of portion of property sold. See Note 22.
26. Necessary parties to application. See Notes to O. 21 R. 92.
27. Notice. See Notes to O. 21 R. 92.
28. Limitation.
29. Appeal.
30. Revision.
31. Deposit — Suit for refund and contribution.

**O. 21 R. 89 (Nagpur)**

1. ('87) AIR 1987 Nag 161 (161). (The amended rule entitles a transferee of the property after the execution sale to apply for setting aside the sale under this rule.)

**O. 21 R. 89**  
**Notes 1-2**

*Other Topics (miscellaneous)*

"A decree." See Note 8.  
 Application dismissed for default — Appeal. See Note 29.  
 "Apply to have the sale set aside." See Note 17.  
 Claimant under R. 58 — Whether can apply under this rule. See Note 12.  
 Deposit by co-judgment-debtor — Whether the other judgment-debtor can take advantage of it. See Note 22.

Persons entitled to apply. See Notes 11 to 15.  
 Persons not entitled to apply. See Note 15.  
 Sale by separate lots — Application to set aside one lot only—Effect. See Note 22.  
 "The amount specified in the proclamation of sale." See Note 18.  
 Time for deposit. See Note 28.

**1. Legislative changes. —**

(1) The words "sold in execution of a decree" in sub-rule (1) have been substituted for the words "sold under this Chapter." See Note 3 below.

(2) The words "any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale," in sub-rule (1) have been substituted for the words "any person whose immovable property has been sold under this Chapter." See Notes 10 to 15, *infra*.

(3) The words "unless he withdraws his application" and the words "or prosecute" in sub-rule (2) are new. See Note 24, *infra*.

Section 310A was introduced in the old Code for the first time by Act V of 1894. It was held in the undermentioned cases<sup>1</sup> that Section 310A was applicable to execution proceedings pending on the date Act V of 1894 came into force.

• **2. Scope and object of the Rule.**—The provisions of this rule are in the nature of an indulgence to the judgment-debtor; they give him a last chance of getting the sale set aside before confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction-purchaser for the loss of bargain.<sup>1</sup> The object of the rule is "not merely or not specifically to preserve the immovable property in the hands of the judgment-debtor, but to ensure, so far as may be possible, that immovable properties shall not, at court-sales, be sold at inadequate prices."<sup>2</sup>

It has been already mentioned in Note 2 to O. 21 R. 2 that once a court-sale has been duly effected in favour of a third person, it is not competent to the decree-holder and the judgment-debtor to get rid of it by merely asserting that the decree has been adjusted or satisfied out of Court. The only means by which the sale can be avoided is by an application under this rule accompanied by the required deposit in Court; where no such application is made within the time limited, it is obligatory on the Court under Rule 92, to pass an order confirming the sale, notwithstanding the circumstance that the decree-holder had admitted satisfaction of the decree.<sup>3</sup> But if the decree-holder and the auction-purchaser agree and the decree is otherwise adjusted to the satisfaction of the decree-holder, the Court can set aside the sale under its *inherent powers* notwithstanding that the procedure prescribed by this rule has

**Order 21 Rule 89 — Note 1**

1. ('95) 22 Cal 767 (788) (FB). (Overruling 21 Cal 940.)  
 ('95) 18 Mad 477 (478).

**Note 2**

1. ('16) AIR 1916 Mad 717 (717); 39 Mad 429.  
 ('88) AIR 1988 All 155 (156); 55 All 123.  
 ('88) AIR 1988 All 292 (293); 55 All 200.  
 ('26) AIR 1926 All 204 (207); 48 All 188.  
 ('99) 26 Cal 449 (452) (FB). (Per referring order of Maclean, C. J.)  
 ('17) AIR 1917 Mad 176 (176).

- ('29) AIR 1929 Cal 574 (574); 56 Cal 477.  
 ('18) AIR 1918 All 192 (193); 40 All 425.  
 ('12) 18 Ind Cas 184 (185); 34 All 186.  
 ('11) 9 Ind Cas 745 (746) (Oudh).  
 2. ('16) AIR 1916 Bom 57 (58); 40 Bom 557.  
 ('19) AIR 1919 All 72 (74); 42 All 7.  
 3. ('81) AIR 1981 PC 88 (85, 86); 58 Ind App 50:  
 27 Nag L R 95 (PC). (Approving 10 Ind Cas 148  
 and overruling AIR 1922 Nag 248.)  
 ('82) AIR 1982 Lah 288 (289).  
 ('26) AIR 1926 Nag 398 (800).  
 ('28) AIR 1928 Nag 186 (148).

not been followed.<sup>4</sup> This rule has no application to a sale under O. 21 R. 32 to compensate a decree-holder for the disobedience by the judgment-debtor of a decree against him for restitution of conjugal rights.<sup>5</sup>

Under this rule, the Court is *bound* to set aside a sale when once the proper amount has been deposited in time by the person entitled to make the application.<sup>6</sup>

**3. Applicability of this Rule to sales under mortgage decrees.**—The words “sold under this Chapter” in Section 310A of the old Code gave rise to a conflict of opinion on the question whether that Section was applicable to sales under mortgage decrees. The High Courts of Allahabad, Bombay and Madras and the Judicial Commissioner’s Court of Oudh held that though the mortgaged properties were sold by virtue of a power given by the Transfer of Property Act, still the properties were sold under Chapter XIX (Execution of Decrees) of the Code and that Section 310A therefore applied to such sales.<sup>1</sup> The High Court of Calcutta, however, held a contrary view.<sup>2</sup> This conflict has now been set at rest by the substitution of the words “sold in execution of a decree” for the words “sold under this Chapter” and by the incorporation in the Code of provisions relating to mortgage decrees. It is now clear that the rule applies to sales in execution of mortgage decrees also.<sup>3</sup>

The High Court of Calcutta has held that this rule applies to sales in execution of mortgage decrees passed on its original side.<sup>4</sup>

**4. Sales under decrees on award.**—Where an award in a pending suit directs the sale of certain immovable properties, and a decree is passed in terms of the award, this rule applies to a sale held in pursuance of the terms of such award.<sup>1</sup> The reason is that the sale is one in execution of the *decree*.

**5. Sales by receiver.**—A sale by the Official Receiver is not governed by this rule.<sup>1</sup> Nor does this rule apply to a sale by the Official Referee in a partnership suit, for the purpose of realizing the assets of the partnership.<sup>2</sup>

**6. Sales under Rent Acts.**—This rule does not apply to sales under the Bengal Landlord and Tenant Procedure Act (VIII of 1869)<sup>1</sup> or to sales under the Public Demands Recovery Act<sup>2</sup> or to proceedings under the Madras Estates Land Act, I of 1908 (see Section 192A) or to proceedings under the Bengal Patni Regulation, VIII of 1819 [see Section 14A (b)].<sup>3</sup>

4. ('16) AIR 1916 Cal 64 (65, 66).

('33) AIR 1933 Mad 753 (754, 755).

('25) AIR 1925 Oudh 128 (129).

('28) AIR 1928 Pat 40 (43).

5. ('83) AIR 1933 Cal 96 (97): 56 Cal L Jour 140 (143).

6. ('35) AIR 1935 Mad 842 (847): 58 Mad 972 (FB). (Rule 89 involves no inquiry at all but Rule 90 does and that inquiry may result in the dismissal of the application.)

**Note 3**

1. ('02) 25 Mad 244 (257, 264, 266) (FB).

('09) 2 Ind Cas 400 (401): 31 All 346.

('97) 19 All 205 (208).

('01) 25 Bom 104 (106).

(1900) 10 Mad L Jour 228 (229).

('99) 22 Mad 286 (288).

('98) 21 Mad 416 (418). (Assumed to apply.)

('98) 1 Oudh Cas 198 (197).

2. ('98) 25 Cal 708 (708, 710) (FB). (Overruling 23 Cal 682.)

3. ('21) AIR 1921 Cal 169 (170): 48 Cal 69.

[See ('20) AIR 1920 Oudh 204 (207).]

4. ('29) AIR 1929 Cal 574 (574): 56 Cal 477. (Applicable so far as practicable.)

('21) AIR 1921 Cal 169 (170): 48 Cal 69.

('30) AIR 1930 Cal 685 (686): 57 Cal 676. (Dissented from in AIR 1931 Cal 688.)

('37) 41 Cal W N 998 (999): ILR (1937) 2 Cal 606. (Principles laid down in this rule apply to such sales.)

[See ('31) AIR 1931 Cal 688 (690): 58 Cal 510. (Loss of interest and costs need not be deposited in addition to the five per cent.)]

[But see ('17) AIR 1917 Cal 51 (52). (Dissented from in AIR 1921 Cal 169.)]

**Note 4**

1. ('28) AIR 1928 Cal 582 (583, 584).

**Note 5**

1. ('28) AIR 1928 Rang 60 (61): 5 Rang 768. (Not governed by Order 21.)

2. ('21) AIR 1921 Mad 484 (486, 487).

**Note 6**

1. [See ('27) AIR 1927 Cal 752 (753).]

2. ('14) AIR 1914 Cal 554 (556).

3. [See ('35) 39 Cal W N 516 (517, 518).]

**O. 21 R. 89**  
**Notes 6-8**

The Bengal Tenancy Act (VIII of 1885) contains a provision in Section 174 almost similar to this rule prescribing the procedure for setting aside sales in cases where a tenure or holding has been sold for arrears of rent. Under that Section, as it originally stood, the judgment-debtor alone was entitled to apply. Therefore, it was held that the application of a person other than the judgment-debtor came under the scope of this rule, provided he was otherwise entitled to apply under this rule.<sup>4</sup> This Act was amended by the Bengal Legislative Council by Act I of 1907, Section 54 which provided that Section 310A of the Code of 1882 (corresponding to this rule) shall not apply to sales under the Bengal Tenancy Act.<sup>5</sup> It has been further amended by the Bengal Council in 1928, providing that the judgment-debtor or any person whose interests are affected by the sale may apply. The Legislative Council of Eastern Bengal and Assam, to which territory also the Bengal Tenancy Act applies, has not amended this Act. Therefore, in cases arising in that Province the application of a person other than the judgment-debtor is governed by this rule.<sup>6</sup> See also the undermentioned cases.<sup>7</sup>

It was held that S. 310A applied to sales under the Landlord and Tenant Act (Bengal Act X of 1859).<sup>8</sup>

Similar provision is made in respect of sales of a tenure or holding for an arrear of rent under the Orissa Tenancy Act, II of 1913 (Section 228). Where the sale is in execution of a decree for an amount which is not really *rent*, there is no bar to the applicability of this rule.<sup>9</sup>

**7. Applicability of Order 9 to proceedings under this Rule.** — An application to set aside a sale under this rule is a proceeding in execution and consequently the provisions of Order 9 do not apply to it.<sup>1</sup> In the undermentioned case<sup>2</sup> a second application to set aside the sale after the dismissal for default of the first application, was treated as one for review.

**8. Immovable property.** — A simple mortgage bond<sup>1</sup> or a decree for sale in

4. ('96) 23 Cal 393 (396).

('03) 8 Cal W N 55 (57).

('96) 1 Cal W N 114 (117, 118).

('98) 2 Cal W N clviii.

[See ('16) AIR 1916 Pat 307 (308). (Not a rent decree within the meaning of S. 170, Bengal Tenancy Act—Therefore R. 89 applies.)]

5. ('08) 35 Cal 548 (544).

6. ('19) AIR 1919 Cal 468 (468).

('09) 4 Ind Cas 474 (474) (Cal).

7. ('33) AIR 1938 Cal 622 (624) : 60 Cal 636.

('34) AIR 1934 Pat 336 (339) : 13 Pat 641.

('37) AIR 1937 Pat 537 (540). (Sale in execution of rent decree—Transferee from judgment-debtor depositing in Court 5 per cent. for payment to stranger auction-purchaser on last day of limitation—In lieu of depositing in Court under S. 174 (1), Bengal Tenancy Act, transferee filing petition that payment made out of Court—Landlord decree-holder assenting to same—Court held was bound to affirm sale unless money actually deposited in Court within limitation.)

('38) AIR 1938 Pat 593 (594). (Court possessing jurisdiction to pass order under S. 174—Order cannot be said to be without jurisdiction merely because Court has inadvertently omitted to notice that certain transfer fee has not been paid.)

('37) AIR 1937 Pat 635 (639). (Decree-holder admitting that he has received amount due to

him outside Court within thirty days—Deposit within same period by judgment-debtor of compensation money due to auction-purchaser—Sale must be set aside.)

('35) AIR 1935 Cal 91 (92) : 62 Cal 149. (The deposit should be made at the time of filing of the application for setting aside the sale and not before the hearing of the application.)

('35) 39 Cal W N 913 (915). (The deposit can only be dispensed with under two conditions, firstly that the Court is satisfied that no deposit is necessary; and secondly that the reasons for so holding are recorded in writing. Where those conditions are not fulfilled the order setting aside the sale is liable to be set aside.)

8. ('11) 11 Ind Cas 207 (210, 211) : 38 Cal 892. [But see ('97) 2 Cal W N 127 (127). (The Code of Civil Procedure applies up to the sale and not after it.)]

9. ('33) AIR 1933 Cal 285 (286).

**Note 7**

1. ('26) AIR 1926 Bom 377 (378) : 50 Bom 457. (Refusal to restore under S. 151 as there was no sufficient ground for non-appearance.)

2. ('11) 12 Ind Cas 351 (351, 352) (Mad). (Whether O. 9 R. 9 applies is doubtful.)

**Note 8**

1. ('24) AIR 1924 All 796 (798) : 46 All 917.

enforcement of a mortgage<sup>3</sup> is not immovable property within the meaning of this rule. But the interest of a mortgagee in a usufructuary mortgage is immovable property for the purposes of this rule.<sup>3</sup> See also Notes to Order 21 Rule 54, *ante*.

**O. 21 R. 89**  
**Notes 8-11**

Where a judgment-debtor was the owner of a house and of the land on which it stood, and the superstructure alone was sold in execution of a decree, it was held that it was immovable property and that therefore an application would lie under this rule to set aside the sale.<sup>4</sup>

See also Note 12 and Section 16 *ante*.

**9. Court, meaning of.** — The "Court" mentioned in this rule is the Civil Court and not the Court of the Collector or of the Mamlatdar to which execution has been transferred under Section 68, *ante*. Therefore, a deposit made in such Court is not a valid deposit.<sup>1</sup> But where an applicant deposits the amount required in the office of the Collector who had sold the property, and intimation is sent to the Civil Court that the money had been transferred to the Civil Court account, within thirty days of the date of the sale, the deposit is good and the provisions of this rule are complied with.<sup>2</sup>

The High Court of Bombay has, by virtue of its rule-making powers, framed a new Rule 91A which provides that where a decree has been sent for execution to a Collector and the sale has been held by him or his subordinate, an application and a deposit made under this rule, if made to the Collector or his subordinate, must be deemed to have been made to or in the 'Court' within the meaning of this rule, and that the sale can be set aside on the basis of such an application and deposit.<sup>3</sup>

**10. Who may apply under this Rule.** — Where an application is made by a person to set aside a sale under this rule on the allegation that he is a person entitled to apply and such allegation is challenged by the opposite party, the question must be determined by the Court.<sup>1</sup>

Under Section 310A of the old Code, "any person whose immovable property had been sold" was entitled to apply. The amending words in this rule, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," have widened the scope of this rule by allowing persons who are not parties to the suit to apply to have a sale set aside.<sup>2</sup>

As to persons who are entitled to apply under this rule, see Notes 11 to 15 below.

**11. "By virtue of a title acquired before such sale."** — The words "by virtue of a title acquired before such sale" apply to the words "owning such property" as well as to the words "holding an interest therein."<sup>1</sup>

2. ('11) 12 Ind Cas 924 (924) (All).

3. ('30) AIR 1930 All 110 (111) : 52 All 232.

('22) AIR 1922 Oudh 146 (147) : 25 Oudh Cas 78.

4. (1900) 3 Oudh Cas 236 (237).

**Note 9**

1. ('27) AIR 1927 All 754 (754).

('18) AIR 1918 All 192 (193) : 40 All 425.

2. ('31) AIR 1931 All 308 (304).

3. ('29) AIR 1929 Bom 189 (190).

[See ('88) AIR 1988 Bom 209 (209). (But if no application is made to the Collector, R. 91A never comes into operation. There is nothing to compel an applicant to make his application to the Collector rather than to the Civil Court.)]

*The following cases decided before framing of R. 91A holding that such applications are not valid are no longer law in Bombay :*

('24) AIR 1924 Bom 495 (498, 499) : 48 Bom 638.

('20) AIR 1920 Bom 130 (130) : 44 Bom 50.

('21) AIR 1921 Bom 209 (209) : 45 Bom 1132.

**Note 10**

1. ('96) 23 Cal 393 (396).

('23) AIR 1923 Pat 353 (353).

2. ('19) AIR 1919 Pat 501 (501, 502) : 4 Pat L Jour 340.

('19) AIR 1919 Cal 468 (469).

('11) 11 Ind Cas 196 (196) (Cal).

('21) AIR 1921 Mad 157 (159, 161) : 44 Mad 554 (FB).

**Note 11**

1. ('21) AIR 1921 Mad 157 (160, 161, 163, 164) : 44 Mad 554 (FB).

('26) AIR 1926 Nag 10 (13, 14) : 21 Nag L R 102.

**O. 21 R. 89**  
**Note 12**

**12. "Any person owning such property or holding an interest therein."**

A judgment-debtor who has not sold his property is clearly entitled to apply under this rule for setting aside the sale of his property. A purchaser from a mortgagor, judgment-debtor, who is bound by the decree, is also entitled to apply under this rule.<sup>1</sup> An interim receiver appointed under Section 20 of the Provincial Insolvency Act (V of 1920) after the execution sale of the insolvent's properties has no power to apply under this rule, as he cannot be said to be the owner "*by virtue of a title acquired before such sale.*"<sup>2</sup> But where the interim receiver has been expressly authorized by the Court to make an application under this rule, he can do so. In such a case, the application will be deemed to be made on behalf of the owner of the property.<sup>3</sup>

A mortgagee of the property sold in execution of a decree is a person who has an interest therein by virtue of which he is competent to apply.<sup>4</sup> Under the old Code it was held that he was not a person whose immovable property has been sold, as his interest in the mortgaged property could not pass by the sale.<sup>5</sup> Under this rule, the word 'property' means *tangible* property (whether or not persons other than the judgment-debtor have any interest in it), and does not mean merely the right, title and interest of the judgment-debtor alone.<sup>6</sup> Therefore, a mortgagee or lessee whose interests are not affected by the sale is also entitled to apply.<sup>7</sup>

Can a person who has purchased the property from the judgment-debtor before *attachment* or a person who claims by a title paramount to that of the judgment-debtor, apply to set aside a sale? It was held under the old Code that he could not, on the ground that the property was *not sold as his*.<sup>8</sup> Under the present Code there is a conflict of opinion, some cases holding that he can apply,<sup>9</sup> others that he cannot.<sup>10</sup> It is submitted that the latter view unduly restricts the scope of this rule.

Under the rule as amended by the Lahore High Court it is enough if the applicant claims interest at the time of *making the application*. He need not prove

**Note 12**

1. ('95) 1895 Bom P J 311 (313).
- ('98) 21 Mad 416 (417). (Subsequent mortgagee defendant.)
- ('28) AIR 1928 Pat 490 (491) : 2 Pat 715.
- ('15) AIR 1915 Sind 9 (10) : 9 Sind L R 86. (Second mortgagee pending suit.)
2. ('26) AIR 1926 Mad 357 (357).
3. ('37) AIR 1937 Mad 589 (590).
4. ('02) 29 Cal 1 (4, 10, 14, 24) (F B). (Overruling 5 Cal W N 68.)
- ('11) 10 Ind Cas 863 (864) : 33 All 481. (Holder of the decree for money in execution of which property is sold, though holder of the mortgages, is not competent to make an application under this rule.)
- ('12) 18 Ind Cas 144 (146) (Cal). (Mortgagee, after he obtains mortgage decree, does not lose his interest in the property.)
- ('97) 2 Cal W N cclviii.
- ('98) 21 Mad 416 (417) : 8 Mad L Jour 54.
- ('11) 12 Ind Cas 738 (738) (Lah).
- ('25) AIR 1925 Oudh 429 (431) : 28 Oudh Cas 221.
- ('86) AIR 1936 Oudh 128 (129) : 11 Luck 708.
5. ('08) 26 Mad 832 (838). (Second mortgagee not party to the suit.)
6. ('28) AIR 1928 Mad 1191 (1191) : 51 Mad 770.
- ('86) AIR 1936 Oudh 128 (129) : 11 Luck 708.
7. ('28) AIR 1928 Mad 1191 (1192) : 51 Mad 770.

- (Lessee—Sale subject to lessee's right.)
- ('28) AIR 1928 All 127 (127, 128). (Usufructuary mortgagee.)
- ('15) AIR 1915 All 76 (77, 78). (Prior mortgagee.)
- ('20) AIR 1920 Mad 290 (291). (Property sold subject to mortgage.)
- ('36) AIR 1936 Oudh 128 (129) : 11 Luck 708. (Simple mortgagee.)
8. ('99) 23 Bom 450 (451, 453).
- ('08) 7 Cal W N 243 (244).
- ('08) 12 Cal W N 151 (152, 158).
- ('97) 1 Cal W N 114 (117).
- [See ('08) 26 Mad 865 (866). (Donee, prior to attachment.)
- ('08) 30 Cal 425 (427). (Mahomedan co-heir who has not been made a party is not bound by the decree and cannot apply.)]
9. ('28) AIR 1928 Mad 487 (488, 489). (The fact that he unsuccessfully preferred a claim under R. 58 will not preclude him from applying under this rule.)
- ('27) AIR 1927 Mad 827 (828).
10. ('11) 10 Ind Cas 880 (888) (Cal).
- ('28) AIR 1928 Mad 659 (660).
- [See ('38) AIR 1938 Pat 238 (234). (O. 21 R. 89 does not confer right to make deposit on person who purchased property so far back from date of sale that his interest is not affected by sale —Obiter.)]

that he had an interest in the property before the sale.<sup>11</sup> The same is the law in the North-West Frontier Province.<sup>12</sup>

**O. 21 R. 89**  
**Notes 12-14**

**13. Transferee before court-sale.** — A transferee from the judgment-debtor of immovable property sold in execution of a decree for money, after the attachment but before the court sale, is the owner of the property and can apply to set aside the sale.<sup>1</sup> Though, under Section 64 *ante*, the transfer may be void as against the claim under the attachment, that Section does not invalidate the transfer for all purposes. Under the old Code it was held that a judgment-debtor who has sold the property after attachment was also entitled to apply to set aside the sale.<sup>2</sup>

**14. Transferee after court-sale.** — Where the judgment-debtor transfers his property to a third person after the execution sale, but before confirmation thereof, the transferee is not a person who holds an interest in such property "*by virtue of a title acquired before such sale.*" He is, therefore, not entitled to apply under this rule to set aside the sale of such property in execution of a decree.<sup>1</sup> But, can the judgment-debtor in such cases apply under this rule? Where the transfer is by way of a mortgage it is, of course, clear that the judgment-debtor would still be the owner of the equity of redemption and, therefore, will be entitled to apply.<sup>2</sup> Even where the transfer is by way of an *absolute sale*, it has been held by all the Courts except the Judicial Commissioner's Court of Oudh that he can apply.<sup>3</sup> The reason is that, in such cases, the judgment-debtor must be deemed to own the property for the purpose of the proceedings under this rule. The Judicial Commissioner's Court of Oudh has, however, held that he is not so entitled to apply.<sup>4</sup> It is submitted that this view is not correct. It has been held by the High Court of Allahabad in the undermentioned case<sup>5</sup> that where, after the court-sale, the judgment-debtor executes a mortgage of the properties and the mortgagee and the judgment-debtor apply to set aside the sale, each depositing a portion of the amount, the two applications may be treated as one made by the judgment-debtor, notwithstanding that the mortgagee is not independently entitled to apply.

11. ('35) AIR 1935 Lah 51 (52).  
[See also ('36) AIR 1936 Lah 561 (562). (Person who has obtained a mortgage of the property after attachment can come forward under O. 21, R. 89, as amended by the Lahore High Court, and by making the necessary payments save the property and prevent its sale from taking place.)]

12. ('34) AIR 1934 Pesh 25 (26).

**Note 13**

1. ('06) 30 Bom 575 (577).  
(16) AIR 1916 Bom 57 (57) : 40 Bom 557.  
(17) AIR 1917 Cal 281 (283).  
(11) 12 Ind Cas 733 (733) (Lah).  
(27) AIR 1927 Mad 445 (446). (A I R 1923 Mad 659, Dissented from.)  
(32) AIR 1932 Nag 21 (22) : 27 Nag L R 309. (AIR 1926 Nag 10, Distinguished.)  
(05) 8 Oudh Cas 189 (190).  
[See ('09) 4 Ind Cas 474 (474) (Cal).]  
[See however ('28) AIR 1923 Mad 659 (660). (Person under a contract for sale of immovable property is not entitled to apply under this rule.)]  
2. ('01) 25 Bom 631 (634).

**Note 14**

1. ('22) AIR 1922 Cal 271 (273) : 49 Cal 454.  
(96) 1 Cal W N 279 (280).

- (26) AIR 1926 All 204 (208, 210, 211) : 48 All 188. (Overruling 13 Ind Cas 134).  
(19) AIR 1919 All 72 (73) : 42 All 7.  
(21) AIR 1921 Mad 157 (160, 161, 163) : 44 Mad 554 (F B). (The following cases are, in view of this decision, no longer law — 18 Ind Cas 579; AIR 1920 Mad 410; 30 Mad 507; AIR 1914 Mad 46; 30 Mad 214.)  
(20) AIR 1920 Mad 322 (324) (F B). (Mortgagee.)  
(27) AIR 1927 Mad 151 (152).  
(24) AIR 1924 Mad 470 (472).  
(19) AIR 1919 Pat 465 (466).  
(22) AIR 1922 Lah 302 (302).  
(38) AIR 1938 Sind 177 (179).  
(37) AIR 1937 Oudh 108 (109, 110).  
2. ('25) AIR 1925 Oudh 349 (350).  
3. ('26) AIR 1926 All 204 (208, 210, 211) : 48 All 188 (F B).  
(16) AIR 1916 Bom 57 (57) : 40 Bom 557.  
(21) AIR 1921 Mad 157 (160, 161, 163) : 44 Mad 554 (F B).  
(19) AIR 1919 Mad 717 (717) : 42 Mad 508.  
(19) AIR 1919 Pat 501 (502) : 4 Pat L Jour 340.  
(19) AIR 1919 Pat 465 (466).  
(38) AIR 1938 Sind 177 (179).  
4. ('11) 9 Ind Cas 745 (746) : 14 Oudh Cas 83.  
5. ('27) AIR 1927 All 561 (562) : 49 All 839.



**O. 21 R. 89**  
**Notes 15-16**

**15. Other persons interested.** — Apart from the class of persons already mentioned in Notes 11 to 14 above, the following persons are also entitled to apply under this rule :

- (1) A beneficial owner, in cases where the property has been sold in execution of a decree against his *benamidar*.<sup>1</sup>
- (2) A *benamidar* transferee from the judgment-debtor.<sup>2</sup>
- (3) A co-sharer in the property sold.<sup>3</sup>
- (4) Where the share of a member of a joint Hindu family is sold, the other members having an interest in the properties.<sup>4</sup>
- (5) Where property is sold in execution of a decree against a Hindu widow, the reversioner to the estate.<sup>5</sup> It is not necessary to have an interest *de presenti*.
- (6) An under-raiyat<sup>6</sup> or a *dar mokararidar*.<sup>7</sup>
- (7) Where the holding is sold in execution of a decree for arrears of rent due thereon a purchaser of a portion thereof.<sup>8</sup> Where the holding is, however, *non-transferable* there is a conflict of opinion.<sup>9</sup>

The following persons are not entitled to apply under this rule :

- (1) The holder of a money decree who has attached the property sold, is not a person who has an "interest in the property by virtue of a title acquired before such sale."<sup>10</sup>
- (2) A person having no title to the property and not in possession thereof, is not entitled to apply,<sup>11</sup> but a trespasser who has entered into possession before the court-sale holds an interest therein by virtue of a title acquired before such sale, even though his title has not been *perfected* or completed by prescription.<sup>12</sup>
- (3) A person in whose favour there is merely an agreement to sell the property cannot apply to have the sale set aside.<sup>13</sup>

See also the undermentioned case.<sup>14</sup>

**16. Deposit in Court.** — The deposit made under this rule by an applicant must be of such a nature as to be payable at once to the parties. Therefore a deposit,

**Note 15**

1. ('08) Cal L Jour 305 (307, 308).
2. ('02) 29 Cal 1 (5, 15) (F B).
- ( '97) 1 Cal W N 135 (136).
3. ('08) 30 All 192 (196).
- ( '97) 1 Cal W N 114 (118).
- [But see ('11) 6 Ind Cas 810 (812) : 38 Cal 1. (Per Das, J.)]
4. ('28) AIR 1928 Mad 899 (400) : 51 Mad 246.
5. ('13) 21 Ind Cas 207 (208, 209) (Cal).
- ( '19) AIR 1919 Pat 127 (127) : 4 Pat L Jour 360.
6. ('07) 11 Cal W N 742 (743).
- ( '19) AIR 1919 Cal 468 (468). (Section 170, Eastern Bengal and Assam Tenancy Act, does not exclude the operation of this rule.)
- [But see ('02) 29 Cal 459 (461). (Dissented from in 11 Cal W N 742.)]
7. ('05) 32 Cal 107 (110).
8. ('04) 8 Cal W N 232 (233).
- ( '04) 8 Cal W N 55 (57).
- ( '10) 5 Ind Cas 561 (562) (Cal).
9. ('27) AIR 1927 Cal 817 (818) : 55 Cal 108. (Can apply.)

- ( '08) 7 Cal L Jour 282 (284). (Do.)
- ( '15) AIR 1915 Cal 356 (357). (Has no *locus standi*.)
- ( '24) AIR 1924 Pat 513 (515). (Do.)
- ( '15) AIR 1915 Cal 590 (590). (Do.—Mortgagee.)
10. ('15) AIR 1915 All 160 (160).
- ( '31) AIR 1931 Bom 277 (278) : 55 Bom 239.
- ( '02) 6 Cal W N 57 (58).
11. ('17) AIR 1917 Pat 159 (160) : 2 Pat L Jour 676. (Person expecting to gain possession only as the result of pending litigation.)
- ( '26) AIR 1926 Nag 10 (13, 14) : 21 Nag L R 102. (Title of a third person negatived in claim proceedings and suit under O. 21 R. 68.)
- ( '06) 28 All 84 (85, 86).
12. ('24) AIR 1924 Mad 723 (726). (Per Venkatasubba Rao, J.)
13. ('99) 23 Bom 181 (184).
- ( '23) AIR 1923 Mad 659 (660).
14. ('36) AIR 1936 Pat 119 (121). (Person in whose favour decree for specific performance of contract of sale has been passed against a



in order to be valid, must be in *cash* and not by Government promissory notes or cheque.<sup>1</sup> A tender by a person who is neither an attorney nor a *vakil* nor a *muktear* for the applicant, does not comply with the provisions of this rule and is consequently invalid.<sup>2</sup> But if the lodgment schedule was signed by the proper person, the fact that the actual payment into the treasury is not made by his recognized agent is immaterial.<sup>3</sup>

It has been held that the deposit mentioned in this rule is not a condition precedent to the *entertainment* of the application although it is a condition precedent to the setting aside of the sale.<sup>4</sup>

As to time for deposit, see Note 28, *infra*.

See also Note 22, *infra*.

**17. Deposit and application.** — An *application* for setting aside a sale is necessary before the Court can be called upon to act under this rule.<sup>1</sup> A mere deposit of the amount without an application in time, is not enough, and the sale cannot be set aside.<sup>2</sup> A mere lodgment schedule cannot be treated as an application within the meaning of this rule.<sup>3</sup> It has been held by the High Court of Calcutta<sup>4</sup> that where a judgment-debtor pays the requisite amount by a *challan* and prays that the execution may be closed, a separate application is not essential and that the *challan* which sets out the purpose is a sufficient compliance with this rule. An application for permission to deposit in Court the decree-amount and a sum equal to 5 per cent. of the purchase-money is an application to set aside the sale, even though there is no *express prayer* in the application to set aside the sale.<sup>5</sup> It has also been held that an application for *challan* or an application with a memo of deposit and its receipt is a proceeding within the meaning of Section 153 and can be amended by the inclusion of a prayer for setting aside a sale although the application for amendment is made beyond the period of limitation for an application to set aside the sale.<sup>6</sup>

The application may be *oral* or *written*.<sup>7</sup> It will not be rendered invalid by the

tenant of the property sold but who has not executed his decree cannot apply under this rule.)

**Note 16**

1. ('87) 14 Cal 321 (323).
- ('15) AIR 1915 Low Bur 97 (97).
- ('85) 39 Cal W N 829 (831, 833). (Rule contemplates deposit in cash—But there can be no cash deposit where nothing is due under the decree by reason of previous payments.)
2. ('31) AIR 1931 All 449 (450).
- ('12) 13 Ind Cas 404 (405) (All).
- ('17) AIR 1917 Mad 739 (740).
- ('37) AIR 1937 Oudh 108 (110). (Application by judgment-debtor to set aside sale — Tender by would-be purchaser who acquired interest after auction sale—Tender is not valid.)
3. ('24) AIR 1924 Mad 488 (488).
4. ('36) AIR 1936 Pat 119 (120).

**Note 17**

1. ('25) AIR 1925 Mad 639 (640).
- ('17) AIR 1917 Mad 662 (662).
2. ('11) 9 Ind Cas 33 (38) : 38 Cal 355 : 38 Ind App 18 : 1911 Pun Re No. 21 (PC).
- ('12) 13 Ind Cas 404 (405) (All).
- ('19) AIR 1919 Bom 130 (131) : 43 Bom 785.
- ('25) AIR 1925 Mad 639 (640).
- ('22) AIR 1922 Mad 83 (83).
- ('17) AIR 1917 Mad 225 (225).

('25) AIR 1925 Oudh 411 (412).

('39) 18 Pat 210 (213).

('40) AIR 1940 Pat 87 (88) : 5 Cut L Tim 27 (28). (Application cannot be implied from the fact of deposit.)

[But see ('05) 7 Bom L R 263 (264).]

3. ('26) AIR 1926 Mad 620 (621).

('22) AIR 1922 Mad 83 (83).

4. ('98) 25 Cal 216 (218, 222). (Section 174, Bengal Tenancy Act.)

[See also ('39) AIR 1939 Cal 153 (154). (Challans by which amount is deposited may be regarded as sufficient application.)]

5. ('33) AIR 1933 Lah 210 (210, 211).

('28) AIR 1928 Nag 111 (111).

('39) AIR 1939 All 241 (241) : ILR (1939) All 403. (Following 63 Ind Cas 140.)

6. ('37) AIR 1937 Mad 342 (343).

7. ('12) 13 Ind Cas 404 (405) (All).

('21) 63 Ind Cas 140 (141) (All). (Application must be deemed to be one for setting aside sale.)

('25) AIR 1925 Mad 909 (910).

('17) AIR 1917 Mad 225 (225).

('14) AIR 1914 Mad 209 (209). (Not necessary to be signed by applicant or his pleader.)

('25) AIR 1925 Mad 639 (640).

('17) AIR 1917 Mad 662 (662).

('25) AIR 1925 Oudh 411 (412).

**O. 21 R. 89**  
**Notes 17-18**

absence of a formal prayer for setting aside the sale.<sup>8</sup> Where the application does not disclose the nature of the interest of the applicant, the Court should not reject the application, but should direct the applicant to supply the necessary particulars.<sup>9</sup>

See also the undermentioned case.<sup>10</sup>

**18. Failure to deposit full amount.** — It has been already mentioned in Note 2 *ante*, that this rule is in the nature of a concession shown to the judgment-debtor. The applicant must, therefore, strictly comply with the requirements thereof and a sale will not be set aside unless the *entire amount* specified in sub-rule (1) is deposited within 30 days from the date of the sale.<sup>1</sup> Thus, a *part payment* coupled with an undertaking to pay the balance cannot be considered as a valid deposit.<sup>2</sup> But if the conditions of this rule are complied with, the failure to pay an additional amount to cover the poundage fee is a mere irregularity which will not prevent the Court from entertaining the application.<sup>3</sup>

An execution sale cannot be set aside under this rule on deposit of a part of the amount specified in the proclamation of sale, even though the decree-holder consents not to claim any further sum so far as that execution application is concerned.<sup>4</sup> Where, however, the amount mentioned in the proclamation of sale is deposited, the fact that the proclamation of sale was incorrectly drawn up and did not specify the full amount for the recovery of which the sale was ordered, will not render the deposit invalid.<sup>5</sup> A contrary view has been expressed in the undermentioned case.<sup>6</sup>

Sub-rule (3) does not mean that the applicant should deposit also costs and interests not covered by the proclamation, and a Court cannot refuse to set aside a sale merely because such costs and interests are not also deposited within time.<sup>7</sup> Nor can it refuse to set aside a sale merely because the amount due under another decree, the holder of which has applied for rateable distribution, has not been deposited.<sup>8</sup>

A decree against a father and son ordered the sale of the father's interest and the son's interest was to be sold only if there was a balance due after the sale of the father's interest. The father's interest was sold and then for the balance, the son's interest was also sold. The son thereupon deposited the balance for which his properties were sold and applied under this rule. It was held that he was not bound to deposit the whole of the decree amount and that his application was valid.<sup>9</sup>

See also Note 22, *infra*.

8. ('17) AIR 1917 Mad 225 (225, 226). (Amendment of petition by adding a formal prayer allowed.)

('23) AIR 1923 Pat 159 (161).

9. ('25) AIR 1925 Nag 17 (18).

10. ('39) AIR 1939 All 241 (241): ILR (1939) All 403. (Rule only requires two things, *vis.*, an application and a deposit. The rule does not require three things, *vis.*, an application, tender and deposit.)

#### Notes 18

1. ('11) 9 Ind Cas 987 (988) (Mad).

('25) AIR 1925 Nag 80 (80).

('24) AIR 1924 Nag 216 (218). (Failure to deposit five per cent.)

('28) AIR 1928 Rang 286 (286) 6 Rang 490. (Four rupees deficit paid one day late—Though shortage did not vitiate not being substantial, delay vitiates application.)

('18) AIR 1918 Pat 82 (88): 4 Pat L Jour 55. (In a case under S. 174 of the Bengal Tenancy Act

whole amount of *decree* must be deposited.)

('99) 28 Bom 531 (535).

('88) 1988 Mad W N 15 (16).

2. ('22) AIR 1922 Bom 193 (194): 46 Bom 171.

3. ('31) AIR 1931 All 756 (757): 53 All 959. (Failure to affix stamps by way of poundage fees.)

('97) 20 Mad 158 (159).

('88) AIR 1938 Cal 523 (523). (After the sale is set aside the judgment-debtor can be made to reimburse the auction-purchaser for any costs and the poundage fee he has properly paid in connexion with the sale.)

4. ('29) AIR 1929 Bom 215 (217).

[See also ('91) 18 Cal 481 (483, 484). (Sec. 174, Bengal Tenancy Act.)]

5. ('23) AIR 1923 All 315 (317).

('35) AIR 1935 Lah 423 (425).

6. ('34) AIR 1934 Lah 790 (791).

7. ('80) AIR 1980 Oudh 9 (10).

8. See the cases cited in Note 23 Foot note (1).

9. ('83) AIR 1933 Mad 54 (55).

**19. Mistake in calculating the amount to be deposited.** — Where the original deposit is deficient and it appears that the deficiency is due to a wrong calculation made by an officer of the Court and the applicant makes good the deficiency as soon as it is pointed out, though after thirty days have elapsed, is the deposit valid? It has been held that if the mistake is the act of the prescribed officer acting in accordance with the prescribed rules of the Court, then it will not affect the party.<sup>1</sup> Otherwise no relief can be given to a party even though he is misled by an officer of the Court.<sup>2</sup>

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In the undermentioned case<sup>3</sup> it was held that a trifling mistake as to four annas in making the deposit should be overlooked on the principle *de minimis non curat lex* — the law pays no regard to trifling matters.

**20. Conditional deposit.** — In order that a deposit under this rule may be valid, it must be *unconditional*.<sup>1</sup> If the applicant prevents the money from being available to the decree-holder *forthwith and unconditionally*, the deposit is bad and will not entitle him to have the sale set aside.<sup>2</sup> Since this rule is inconsistent with the notion that a payment into Court may be made under protest or subject to conditions, the Court has no power to order that the decree-holder should draw out the money only on his executing a security bond.<sup>3</sup> If, as soon as an objection to the conditional deposit is taken, the applicant withdraws his condition, the money becomes available for payment to the decree-holder before he has made any attempt to withdraw it and therefore the deposit is not invalid.<sup>4</sup>

Where a deposit is properly made under this rule, but subsequently an application is made that the money may be retained in Court pending the result of an application under O. 9 R. 13, the subsequent condition cannot invalidate the deposit which was originally good.<sup>5</sup>

**21. A sum equal to five per cent.** — Sub-rule (1) clause (a) provides that the deposit should include a sum equal to five per cent. of the purchase-money for payment to the purchaser, and a sale cannot be set aside unless the five per cent. is also deposited.<sup>1</sup> That amount is intended partly as a *solatium* to the purchaser for the loss

**Note 19**

1. ('30) AIR 1930 Cal 302 (304).
- ('34) AIR 1934 Pat 246 (246). (Shortage in deposit — Mistake due to officer of Court.)
- ('33) AIR 1933 Pat 515 (516, 517).
- ('30) AIR 1930 Cal 249 (250).
- ('14) AIR 1914 Cal 656 (657).
- ('10) 7 Ind Cas 52 (53, 54) (Cal).
- ('98) 25 Cal 609 (611).
- ('91) 18 Cal 255 (258).
- ('07) 11 Cal W N 116 (119).
- ('98) 22 Mad 286 (288). (Court directed that judgment-debtor need not pay five per cent.—Shortage does not affect.)
- ('98) 1 Oudh Cas 193 (196).
2. ('99) 26 Cal 449 (458, 459, 460) (F B).
- ('16) AIR 1916 Pat 290 (292) : 1 Pat L Jour 459. (26 Cal 449, Relied on.)
3. ('87) AIR 1987 Pat 409 (410). (Deficit of four annas in deposit in favour of auction-purchaser in challan of deposit — Judgment-debtor mistakenly depositing deficit in name of decree-holder — Application to set aside sale *held* should be allowed notwithstanding the mistake.)

**Note 20**

1. ('21) AIR 1921 Bom 169 (171, 172) : 45 Bom 1094.
- ('28) AIR 1928 Pat 193 (194) : 7 Pat 30.
- ('88) AIR 1938 Sind 177 (182).
- ('35) AIR 1935 Mad 842 (844, 847) : 58 Mad 972 (F B).
- [See ('27) AIR 1927 All 561 (562) : 49 All 839. (Where applicant said that if sale is not set aside money may be returned to him, it is not a conditional deposit.)]
- [See also ('23) AIR 1923 All 503 (504).]
2. ('82) AIR 1982 Cal 216 (217, 218).
- [See ('97) 1 Cal W N 132 (133). (The decision is under S. 174, Bengal Tenancy Act.)]
3. ('30) AIR 1930 Mad 921 (923, 924) : 53 Mad 943.
4. ('11) 10 Ind Cas 880 (881) (Cal).
- ('23) AIR 1923 Pat 418 (420) : 2 Pat 584.
- ('28) AIR 1928 Pat 159 (160, 161). (10 Ind Cas 880, Followed.)
5. ('04) 8 Cal W N 355 (356).

**Note 21**

1. ('34) AIR 1934 Pesh 25 (26).
- ('24) AIR 1924 Nag 216 (218).

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**Notes 21-22**

of that which is, perhaps, a good bargain.<sup>2</sup> A decree-holder-purchaser is as much entitled to that *solatium* as an outside purchaser.<sup>3</sup> To hold otherwise would be to read into the rule after the word 'purchaser' the words 'if such purchaser be not the decree-holder.'<sup>4</sup> But a mere deposit of the five per cent. without the decree amount is not a valid deposit.<sup>5</sup>

Where one of two joint decree-holders obtains permission to bid for himself alone and not on behalf of the other, and purchases the property and thereafter the sale is set aside under this rule, the compensation amount of five *per cent.* should go exclusively to him and not to the other decree-holder.<sup>6</sup>

**22. Less any amount received.** — The amount that can be deducted under clause (b) of sub-rule (1) need not have been received by the decree-holder *before* the sale.<sup>1</sup> Nor need such amount have been paid to him *through the Court*.<sup>2</sup>

If, after the proclamation of sale is drawn up, the decree-holder and the judgment-debtor adjust the decree in full or in part, the adjustment is tantamount to a receipt of the amount by the decree-holder and it is not necessary that that amount should be deposited when applying to set aside a sale under this rule.<sup>3</sup> The expression "any amount which may have been received by the decree-holder" in sub-rule (1), clause (b) means money actually received by the decree-holder and does not include payment of the sale proceeds into Court,<sup>4</sup> which is not available to the decree-holder until the sale is confirmed.

*Illustration*

Certain properties divided into two lots, A and B, were ordered to be sold to realize a sum of Rs. 843-9-9. Properties A and B fetched Rs. 420 and Rs. 584 respectively at the sale. The judgment-debtor paid into Court Rs. 452-13-0 and applied to have the sale of lot B set aside. This amount would have sufficed to satisfy the requirements of the rule if the Rs. 420 for which lot A was sold could be deducted from the decretal amount and if the five per cent. could be

[See ('16) AIR 1916 Pat 290 (292) : 1 Pat L Jour 459. (Case under S. 174, Bengal Tenancy Act.)]

2. ('99) 26 Cal 449 (451, 452, 457) (F B).
3. ('95) 1895 All W N 140 (140).
- ('88) AIR 1938 All 292 (293) : 55 All 200.
- ('99) 26 Cal 449 (451, 452, 457, 460) (F B).
- ('99) 22 Mad 286 (288, 289).
4. ('99) 26 Cal 449 (452, 457) (F B).
5. ('83) AIR 1938 Mad 598 (606) : 56 Mad 808.
6. ('27) AIR 1927 Pat 288 (289) : 6 Pat 386.

**Note 22**

1. ('85) 89 Cal W N 829 (831).
- ('37) 41 Cal W N 998 (999) : I L R (1937) 2 Cal 606.
2. ('85) 89 Cal W N 829 (831).
- ('37) 41 Cal W N 998 (999) : I L R (1937) 2 Cal 606.
3. ('13) 18 Ind Cas 579 (580) (Mad).
- ('38) AIR 1938 All 510 (511) : 55 All 697. (Amount specified in proclamation paid to decree-holder out of Court and five per cent. of purchase-money deposited in Court—Application is good.)
- ('84) AIR 1934 Nag 21 (23, 26) : 81 Nag L R 67. (Application under R. 89 accompanied by five per cent. of the purchase-money and receipt from decree-holder on full satisfaction — Sale should be set aside.)
- ('12) 14 Ind Cas 326 (326, 327) (Mad).
- ('11) 12 Ind Cas 169 (169) (Mad).
- ('08) 6 Oudh Cas 68 (71).
- ('87) 41 Cal W N 998 (1000) : ILR (1937) 2 Cal 606.

('88) AIR 1938 Cal 252 (253). (The auction-purchaser has no right to restore the sale on the ground that the alleged satisfaction of the decree was untrue because such application could only be made by the decree-holder.)

('85) AIR 1935 Mad 1050 (1051, 1052). (Judgment-debtor depositing five per cent. under Rule 89(1) (a) and executing mortgage—Provisions of O. 21 R. 89 held complied with and sale should be set aside.)

('85)-88 Cal W N 829 (831). (Amount must have been received by the decree-holder — This is a question of fact which has got to be found by the Court and it is open to the Court to accept an admission by the decree-holder himself.)

4. ('23) AIR 1923 Bom 299 (299, 300).

('99) 28 Bom 723 (725).

('97) 1 Cal W N 708 (704, 705).

('16) AIR 1916 Mad 1028 (1029).

('80) AIR 1980 Pat 318 (319) : 9 Pat 310.

('88) AIR 1988 Nag 54 (55) : ILR (1988) Nag 456.

[See also ('37) AIR 1937 Mad 270 (271, 272) : ILR (1937) Mad 828. (Judgment-debtor privately selling property to auction-purchaser and applying that the purchase-money deposited by purchaser should be treated as deposit under this rule and sale set aside — Purchaser consenting to this course—Still this cannot be done as the purchase-money in Court cannot be dealt with by the purchaser till the sale is set aside.)]

[But see ('80) AIR 1980 All 848 (844, 845) : 58 All 152.]]

calculated on the purchase money of lot B alone. It was held that as the decree-holder had not actually received the sum of Rs. 420 the deposit was not full and the sale could not be set aside.<sup>5</sup>

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On the same principle a judgment-debtor is not entitled to take advantage of any deposit made by his co-judgment-debtor which was made not conjointly with him, but independently of him.<sup>6</sup>

But where money is deposited by the judgment-debtor in Court and it is available to the decree-holder *without any obstacle of law*, then does that money amount to receipt by the decree-holder? According to the High Court of Allahabad it does. Thus, where the judgment-debtor deposited Rs. 5000 in Court towards the decree on the date of sale, and subsequently on the same date the properties were sold and the judgment-debtor thereafter deposited under this rule Rs. 71,000 which, together with the Rs. 5000 already deposited was the decree-amount, it was held that the amount of Rs. 5000 must be held to be "received" by the decree-holder, and the deposit of the balance was proper.<sup>7</sup> According to the High Court of Madras,<sup>8</sup> on the other hand, "received" does not mean "virtually received" or "constructively received" and an amount which has been deposited in Court cannot be said to have been "received" within the meaning of this rule. A similar view has also been held by the Sind Judicial Commissioner's Court.<sup>9</sup>

Where a sale proclamation specified the entire amount due under the decree and also contained a direction that certain items were to be sold for only a part of the decree amount and after sale the persons interested in such items applied to set aside the sale on their depositing the amount for which their property was sold together with the five per cent. due to the purchaser, it was held that the deposit was valid.<sup>10</sup> The reason is that in such a case the words "amount specified in the sale proclamation" can only mean the amount which is to be realized by the sale of the particular properties.

**23. "For payment to the decree-holder."** — The word 'decree-holder' in this rule means the decree-holder *for the satisfaction of whose decree the sale was ordered* and does not include other decree-holders who may be entitled to claim rateable distribution under Section 73. Therefore, it is not necessary for the applicant to deposit into Court the amounts due to the other decree-holders claiming rateable distribution.<sup>1</sup> There is a conflict of decisions as to whether money deposited under this rule will be 'assets' available for rateable distribution among the other decree-holders of the judgment-debtor. The undermentioned decisions<sup>2</sup> have held that such money will not be 'assets' available for rateable distribution under Section 73, the reason being that the money has been paid for a specific purpose. But the contrary view has been held in the undermentioned decisions.<sup>3</sup> In view of the discussion in Note 4 to Section 73 *ante*, it is submitted that the latter view is more correct. Where a decree

5. ('99) 28 Bom 728 (725).

[See also ('38) AIR 1938 All 155 (156); 55 All 128.]

6. ('22) AIR 1922 Mad 54 (54).

('16) AIR 1916 Mad 717 (718) : 39 Mad 429.

('19) AIR 1919 Mad 188 (184).

('11) 9 Ind Cas 987 (988) (Mad).

[See ('27) AIR 1927 All 561 (562) : 49 All 889.

(Where judgment-debtor and his mortgagees deposited separately it was treated as one.)]

[But see ('14) AIR 1914 Mad 8 (8; 9).]

7. ('88) AIR 1938 All 292 (298) : 55 All 200.

8. ('33) AIR 1933 Mad 263 (264).

9. ('38) AIR 1938 Sind 177 (181).

10. ('26) AIR 1926 Mad 765 (766, 767).

**Note 23**

1. ('18) 19 Ind Cas 475 (476, 477) : 37 Bom 387.

('33) AIR 1933 Lah 226 (226) : 14 Lah 55.

('07) 81 Bom 207 (217).

('96) 1 Cal W N 195 (196).

('12) 17 Ind Cas 920 (921) (Mad).

2. ('18) 18 Ind Cas 839 (840) : 40 Cal 619.

('03) 30 Cal 262 (263, 264).

('97) 1 Cal W N 695 (696).

('18) AIR 1918 Mad 704 (704).

('85) AIR 1935 Mad 1050 (1051).

3. ('82) AIR 1932 Nag 156 (157) : 28 Nag J. R 179.

('33) AIR 1933 Nag 347 (348, 349).

('33) AIR 1933 Pat 303 (304, 305) : 12 Pat 772.

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is attached by two persons who are both substituted for the decree-holder-defendant and a sale held in execution of the attached decree at the instance of one of them is set aside under this rule, both of them will be regarded as the "decree-holder" and will be entitled to the amount deposited.<sup>4</sup> Where the property of a judgment-debtor is attached in execution of several decrees and a sale in execution of one of the decrees is set aside by a deposit, the sale does not put an end to the attachment made at the instance of the other decree-holders.<sup>5</sup>

Where, in a mortgage suit, a decree for sale in favour of the plaintiff was passed subject to the payment of a certain prior charge in favour of a defendant out of the sale proceeds, and the sale in execution was set aside under this rule by one of the subsequent mortgagees, the decree-holder was held entitled to draw the whole amount without any deduction being made on account of the prior charge.<sup>6</sup> The reason is that there were no sale proceeds out of which the prior charge was to be paid, as the sale was set aside.

Upon a sale being set aside under this rule, the decree-holder is not entitled to claim interest from the date of sale till the date of deposit.<sup>7</sup>

**24. Sub-rule (2).** — The object of this sub-rule is to prevent a person who intends to impeach a sale under Rule 90 from, at the same time, obtaining the benefit of the concession granted by this rule.<sup>1</sup> It has been held by the Allahabad High Court<sup>2</sup> that where applications under Rules 89 and 90 made by the same person are pending, the Court ought to call upon the applicant to make his election as to which application he will prosecute. But this view has been dissented from by the Nagpur High Court<sup>3</sup> which has held that it is for the applicant to withdraw the application under Rule 90 and not for the Court to ask him to do so. The fact that an applicant makes an application under Rule 90 is not a permanent disqualification and therefore he may carry on the application under this rule, if the other application has been withdrawn.<sup>4</sup> A person whose application under Rule 90 is *dismissed* is also not disqualified from subsequently applying under this rule.<sup>5</sup> An application made by a person under this rule is not barred by the pendency of an application under Rule 90 by *another person*.<sup>6</sup> But where the same person first applies under Rule 90 and then applies under Rule 89, the latter application is not competent and cannot be *entertained* so long as the previous application is pending.<sup>7</sup>

(‘88) AIR 1988 Cal 521 (522).

[See also (‘88) AIR 1988 Nag 849 (852).]

4. (‘08) 12 Cal W N 800 (802).

5. (‘03) 13 Mad L Jour 221 (221).

6. (‘98) 8 Mad L Jour 185 (187).

7. (‘14) AIR 1914 Low Bur 190 (190).

**Note 24**

1. (‘98) 8 Mad L Jour 56 (58).

2. (‘25) AIR 1925 All 778 (779) : 47 All 850.

3. (‘87) AIR 1987 Nag 161 (162).

4. (‘09) 1 Ind Cas 304 (306) (Cal). (Decision under S. 174, Bengal Tenancy Act.)

(‘96) 28 Cal 958 (960, 961).

(‘98) 8 Mad L Jour 56 (58).

(‘07) 10 Oudh Cas 141 (144).

[See also (‘88) AIR 1988 Sind 177 (182). (Application both under Rr. 89 and 90— Application saying that the application under R. 89 should be taken into consideration only if the sale was not set aside under R. 90 — Judgment-debtor afterwards withdrawing application under R. 90

—Application under R. 89 should be deemed as made only on such date.)]

5. (‘28) AIR 1928 All 196 (197).

(‘18) AIR 1918 Oudh 8 (9) : 20 Oudh Cas 329.

[See also (‘26) AIR 1926 All 754 (755). (An application under R. 90 before conclusion of sale is not an application under R. 90 and will not bar one under R. 89.)]

6. (‘08) 90 All 192 (196).

(‘96) 28 Cal 682 (686). (Other judgment-debtor appealing against an order under R. 90.)

[See (‘87) AIR 1987 Nag 161 (162). (But the above proposition will not apply to a case where the applicant under R. 89 is a person on whom the interest of the applicant under R. 90 has devolved.)]

7. (‘87) AIR 1987 Nag 161 (162).

[See also (‘11) 11 Ind Cas 757 (758) (Cal). (On date of withdrawal of application under R. 90, 80 days elapsed— Held that application under S. 174, Bengal Tenancy Act corresponding to R. 89 not competent.)]

Sub-rule (2) will not apply if the application to set aside the sale does not come within the scope of Rule 90 but comes within the scope of Section 47, *ante*.<sup>8</sup> Irregularity in the conduct of or in publishing the sale cannot be taken as a plea in an application under this rule.<sup>9</sup>

There is no provision converse to this sub-rule and therefore there is nothing to prevent an application being made under Rule 90 where an application under this rule has been made and withdrawn or dismissed.<sup>10</sup>

**25. Setting aside sale in respect of portion of property sold.** — See Note 22 above.

**26. Necessary parties to application.** — See Notes to O. 21 R. 92, *infra*.

**27. Notice.** — See Notes to O. 21 R. 92, *infra*.

**28. Limitation.** — An application under this rule to set aside a sale is governed by Article 166 of the Limitation Act and must be made on or before the thirtieth day from the date of the sale.<sup>1</sup> The starting point of limitation for such an application is the date on which the sale is *completed*, that is, the day on which the highest bid is accepted and the twenty-five per cent. of the purchase money is deposited<sup>2</sup> and not the date on which the sale is confirmed.<sup>3</sup> The provisions of Section 14 of the Limitation Act are not applicable to an application under this rule.<sup>4</sup>

As to the effect of the failure to implead the auction-purchaser and to issue notice to him within thirty days, see Notes to Order 21 Rule 92.

Sub-rule (2) of Rule 92, *infra* and the words "may apply . . . . on his depositing" in this rule show that not only the application, but the deposit also must be made within thirty days from the date of the sale.<sup>5</sup> If the deposit is not made in time, the Court has no power to extend the time either under Section 148 of the Code or under Section 5 of the Limitation Act.<sup>6</sup> It has, however, been held by the Oudh Chief Court in the undermentioned case<sup>7</sup> that where a decree-holder who is himself the auction-purchaser consents to accept a deposit made by the judgment-debtor in full

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8. ('09) 4 Ind Cas 253 (254) : 33 Bom 698. (To set aside sale on account of fraud under S. 244 of the old Code.)

9. ('01) 28 Cal 78 (76).

[See ('99) 23 Bom 531 (535).]

10. ('25) AIR 1925 All 778 (779) : 47 All 850.

(('11) 11 Ind Cas 196 (196) (Cal).

**Note 28**

1. ('11) 9 Ind Cas 33 (33) (All).

(('26) AIR 1926 Bom 335 (335).

(('19) AIR 1919 Bom 130 (131) : 43 Bom 735. (It is not enough to make deposit within 30 days.)

(('26) AIR 1926 Lah 689 (640).

(('28) AIR 1928 Nag 136 (143).

(('25) AIR 1925 Oudh 411 (412). (Section 5, Limitation Act, does not apply to an application under O. 21 R. 89.)

[See ('15) AIR 1915 Low Bur 97 (97). (On 30th day sale confirmed—Thereafter petition on the same day—Petition is in time.)]

2. ('12) 17 Ind Cas 788 (784) : 35 All 65.

(('26) AIR 1926 Bom 335 (335).

(('35) AIR 1935 Oudh 131 (132) : 10 Luck 557.

(('34) AIR 1934 Oudh 25 (27) : 9 Luck 398.

(('30) AIR 1930 Lah 41 (42).

(('19) AIR 1919 Lah 809 (810).

(('28) AIR 1928 Nag 111 (112).

(('31) AIR 1931 Oudh 291 (292).

(('35) AIR 1935 Oudh 131 (132) : 10 Luck 557.

(Collector selling property under directions of executing Court and Court approving sale subsequently—Sale is complete only when Court accepts it — See however Note 2 to S. 84 in this connection.)

3. ('02) 29 Cal 626 (628, 631, 636).

(('12) 17 Ind Cas 884 (884) (Nag).

(('36) AIR 1936 Pat 558 (559).

4. ('02) 29 Cal 626 (632).

5. ('11) 10 Ind Cas 51 (53) (Cal).

(('17) AIR 1917 Mad 176 (176, (177).

(('29) AIR 1929 Nag 10 (11).

(('36) AIR 1936 Pat 119 (120).

6. ('11) 10 Ind Cas 148 (152) (Cal).

(('34) AIR 1934 Lah 875 (876).

(('33) AIR 1933 Rang 8 (9).

(('17) AIR 1917 Cal 554 (555).

(('12) 13 Ind Cas 365 (368) (Cal).

(('17) AIR 1917 Mad 176 (177). (Inherent power under S. 151 cannot be invoked.)

(('17) AIR 1917 Pat 344 (344) : 2 Pat L Jour 164.

(('28) AIR 1928 Rang 286 (286) : 6 Rang 490.

7. ('36) AIR 1936 Oudh 55 (56) : 11 Luck 418.



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satisfaction of his decree and consents to have the sale set aside on receipt of such deposit, it is open to the Court to set aside the sale although the deposit was made beyond thirty days from the date of the sale.

Where the applicant, without any fault of his own, is not able to deposit the money into Court, on account of the fact that the *challan* was not signed by the Judge and returned to him in time or on account of some other act of the Court, the deposit made on the next day will be a valid deposit on the principle expressed by the maxim *actus curiæ neminem gravabit*—an act of Court shall prejudice no man.<sup>8</sup> Where the Court is closed on the last day for making the deposit it may be made on the next re-opening day by virtue of the provisions of Section 10 of the General Clauses Act.<sup>9</sup>

The provisions of Section 7 of the Limitation Act do not apply to the period of thirty days for making a deposit under this rule, as that period is not fixed by any provision of the Limitation Act, but by a provision in this Code, namely, Rule 92, *infra*. Consequently a minor is not entitled, by reason of his disability, to an extension of the period under Section 7 of the Limitation Act.<sup>10</sup>

Where *A* had applied under the rule, but the sale was set aside on the application of *B* under Rule 90 *infra*, whereupon *A* withdrew his application which was dismissed as withdrawn and got back the amount deposited, but subsequently *B*'s application was dismissed by the appellate Court and the sale confirmed, it was held that *A* could not claim to revive the original application made by him by re-depositing the amount after limitation.<sup>11</sup>

See also the undermentioned case.<sup>12</sup>

**29. Appeal.**— There was no provision in the old Code for an appeal against an order under Section 310A. Being, however, a decision on a question relating to the execution, discharge or satisfaction of the decree, it was held that such an order would be appealable if the *decree-holder* was the purchaser, inasmuch as the question was one between the parties to the suit.<sup>1</sup> But where the auction-purchaser was a stranger, there was a conflict of opinion as to the appealability of the order.<sup>2</sup> See Note 19 to Section 47 for a fuller discussion.

8. ('22) AIR 1922 All 195 (196) : 44 All 9.

('34) AIR 1934 Lah 875 (876).

('19) AIR 1919 All 339 (340).

('15) AIR 1915 All 414 (415) : 37 All 591. (Treasury officer regarded as an officer of the Court for purpose of this rule.)

('11) 10 Ind Cas 51 (54) (Cal).

('11) 10 Ind Cas 880 (881) (Cal).

('24) AIR 1924 Mad 324 (326) : 47 Mad 543. (*Obiter*).

('26) AIR 1926 Nag 331 (331). (The Court's direction to pay on the next day—Extension allowed.)

('08) 6 Oudh Cas 68 (71).

9. ('01) 18 Cal 231 (234).

('97) 19 All 140 (140).

('05) 9 Oudh Cas 214 (215).

('08) 6 Oudh Cas 68 (70).

10. ('09) 1 Ind Cas 178 (179) : 5 Nag L R 1.

11. ('34) AIR 1934 Mad 598 (595).

12. ('37) AIR 1937 Pat 118 (116) : 16 Pat 202 (FB). (Agreement between decree-holder purchaser and judgment-debtor that if the decretal amount was paid within a certain date the sale would be set aside and that on default it would be confirmed—Held on construction of agreement that

time was of the essence of the contract and that on default of the judgment-debtor in paying the money within the appointed time the sale automatically became confirmed and no order of Court was necessary for the purpose.)

**Note 29**

1. ('09) 1 Ind Cas 304 (305) (Cal).

('11) 10 Ind Cas 51 (52) (Cal).

('02) 6 Cal W N 57 (60).

('01) 28 Cal 73 (76).

('97) 1 Cal W N 703 (705).

('08) 7 Cal L Jour 282 (283).

('09) 4 Ind Cas 253 (253, 254) : 33 Bom 698.

('06) 31 Bom 207 (214).

('99) 1 Bom L R 74 (75).

('98) 21 Mad 416 (416, 417).

('10) 8 Ind Cas 855 (856) (Mad).

[But see ('05) 27 All 263 (265).]

2. No appeal lies :

('08) 30 All 379 (383).

('97) 19 All 140 (141).

('01) 25 Bom 631 (635).

('07) 5 Cal L Jour 204 (205).

('96) 1 Cal W N 114 (117).

(1900) 10 Mad L Jour 228 (229).



Under this Code an order setting aside a sale or refusing to set aside a sale under Rule 92 is appealable *as an order* under Order 43 Rule 1 clause (j).<sup>3</sup> An appeal will lie even in a case where the sale is in execution of a small cause decree, transferred to the original side for execution against immovable property.<sup>4</sup> The *forum* of appeal depends upon the value for jurisdiction stated in the suit in which the decree has been passed.<sup>5</sup> No second appeal will lie from an order under this rule read with Rule 92, by virtue of the provisions of Section 104.<sup>6</sup>

Even though the matter may fall under Section 47 (in cases where the decree-holder is the purchaser) the order will not be appealable as a decree under this Code, as the definition of decree in Section 2 excludes even an order under Section 47 if it is appealable *as an order*. See Note 2 to Section 2, sub-section (2).

In cases under Section 174 of the Bengal Tenancy Act an appeal lies as from a decree where the decree-holder is the purchaser,<sup>7</sup> but not where such purchaser is a stranger.<sup>8</sup> But the Bengal Legislature has in 1928 amended Section 174 of that Act by adding a clause providing for an appeal under that Section in such cases.

When an application under this rule has been dismissed for default and an application for restoration thereof has been unsuccessful, no appeal lies against the order refusing to restore the application.<sup>9</sup>

An order confirming the sale is tantamount to a refusal to set aside the sale on the application of the judgment-debtor, and is therefore appealable.<sup>10</sup>

No second appeal lies against an order setting aside or refusing to set aside a sale under this rule.<sup>11</sup>

On a dispute between a person (not the judgment-debtor) who had applied under this rule to set aside a sale and the decree-holder, the latter's application to withdraw the money deposited by the former was refused. It was held that the matter did not fall under Section 47 and so was not appealable.<sup>12</sup>

**30. Revision.**— Where a Court refuses to entertain an application, under this rule, of a person who is entitled to apply, on the ground that the applicant has no *locus standi* to apply or allows the application of a person who has not the legal character specified in this rule, is the order revisable by the High Court? It has been held by

('11) 9 Ind Cas 472 (474) (Low Bur).

*Appeal lies :*

('07) 29 All 275 (276).

('01) 25 Bom 418 (421).

('11) 12 Ind Cas 169 (169) (Mad).

('07) 80 Mad 507 (508, 509).

3. ('18) AIR 1918 All 192 (194) : 40 All 425.

(Purchaser can appeal.)

('17) AIR 1917 Cal 554 (555).

('11) 10 Ind Cas 148 (149, 152) (Cal). (Sale set aside without notice to purchaser—Ho can appeal.)

('10) 6 Ind Cas 573 (573) (Cal).

('11) 12 Ind Cas 733 (733) (Lah).

('12) 14 Ind Cas 326 (326) (Mad).

('37) AIR 1937 Pat 113 (116) : 16 Pat 202 (FB).

(Appeal held competent even if procedure followed had been one substituted by agreement for that laid down by the Code where the procedure was in essence though not in form one under O. 21.)

4. ('20) AIR 1920 Mad 290 (291).

5. ('11) 12 Ind Cas 733 (733) (Lah).

6. ('24) AIR 1924 Bom 495 (497, 498) : 48 Bom 638.

('20) AIR 1920 Bom 60 (60) : 44 Bom 472.

('30) AIR 1930 Cal 249 (250).

('26) AIR 1926 Cal 400 (400).

('11) 10 Ind Cas 345 (345) : 38 Cal 339.

('10) 6 Ind Cas 573 (573) (Cal).

('21) AIR 1921 Lah 156 (157).

('19) AIR 1919 Lah 309 (309).

('10) 7 Ind Cas 718 (719) : 1910 Pun Re No. 72.

('12) 17 Ind Cas 884 (885) : 8 Nag L R 177.

('30) AIR 1930 Oudh 9 (9).

('25) AIR 1925 Oudh 622 (623) : 29 Oudh Cas 86.

('16) AIR 1916 Pat 307 (308).

('22) AIR 1922 Oudh 146 (147) : 25 Oudh Cas 78.

('29) AIR 1929 Rang 148 (148) : 7 Rang 37.

[See ('11) 9 Ind Cas 937 (938) (Mad). (Party having right of second appeal under law before 1908—Cannot be defeated by O. 43 R. 1 of the present Code.)]

7. ('12) 13 Ind Cas 365 (368) (Cal).'

8. ('25) AIR 1925 Pat 525 (526) : 4 Pat 718.

9. ('07) 29 All 596 (597, 598).

10. ('33) AIR 1933 Lah 210 (210).

11. ('37) AIR 1937 Rang 537 (538).

12. ('35) AIR 1935 Mad 842 (847) : 58 Mad 972 (F B).

**O. 21 R. 89**  
**Notes 30-31**

the High Courts of Calcutta,<sup>1</sup> Madras<sup>2</sup> and Patna<sup>3</sup> and by the Judicial Commissioner's Court of Nagpur<sup>4</sup> that the High Court can interfere on the ground that in such cases, the Court either refuses to exercise a jurisdiction vested in it by law or exercises a jurisdiction not vested in it by law. The High Court of Allahabad<sup>5</sup> has, however, taken a contrary view that the Court has jurisdiction to decide whether the applicant is entitled to apply and that a decision arrived at in the *exercise of such jurisdiction*, even though erroneous, cannot be interfered with by the High Court in revision.

Where an applicant has complied with the terms of this rule but his application is nevertheless rejected,<sup>6</sup> or where a sale is set aside even though the applicant does not conform to the provisions of this rule,<sup>7</sup> the order is open to revision by the High Court.

See also the undermentioned cases.<sup>8</sup>

**31. Deposit — Suit for refund and contribution.** — Where property belonging to *A* is sold in execution of a decree against *B* and *A* has the sale set aside on depositing the amount under this rule, can he sue the decree-holder for the recovery of such amount? It has been held by the High Courts of Bombay, Calcutta and Patna that he is not so entitled to recover.<sup>1</sup> They proceed upon the view that the payment under this rule must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally. The decisions of the Madras High Court are conflicting

**Note 30**

1. ('03) 90 Cal 425 (428).
2. ('24) AIR 1924 Mad 723 (724).
- ('28) AIR 1928 Mad 659 (660).
- ('21) AIR 1921 Mad 157 (161, 168) : 44 Mad 554 (F B).
- ('20) AIR 1920 Mad 290 (291).
- ('13) 18 Ind Cas 579 (582) (Mad).
- ('14) AIR 1914 Mad 46 (47) : 38 Mad 775.
- [But see ('19) AIR 1919 Mad 183 (184).]
3. ('23) AIR 1923 Pat 490 (491) : 2 Pat 715.
- ('19) AIR 1919 Pat 501 (502) : 4 Pat L Jour 340.
- [See however ('36) AIR 1936 Pat 119 (121).  
 (Held Court had jurisdiction to decide if applicant had *locus standi*. The fact that it decided it erroneously is no ground for revision.)]
4. ('26) AIR 1926 Nag 10 (14, 15) : 21 Nag L R 102.
5. ('23) AIR 1923 All 892 (892, 893) : 45 All 425 (F B).
- ('06) 28 All 84 (87, 88).
6. ('31) AIR 1931 All 756 (757) : 53 All 959.
- ('28) AIR 1928 All 815 (818).
- ('30) AIR 1930 All 843 (845) : 53 All 152.
- ('29) AIR 1929 All 598 (595, 596) : 51 All 910.
- ('97) 1 Cal W N 135 (136).
- ('23) AIR 1923 Pat 159 (162).
- ('30) AIR 1930 Oudh 9 (9, 10).
- (1900) 8 Oudh Cas 286 (288).
7. ('29) AIR 1929 Nag 10 (11).
8. *No revision lies* :  
 ('24) AIR 1924 Pat 37 (88, 89) : 2 Pat 800.  
 ('27) AIR 1927 All 754 (754). (Decision that "Court" means Civil Court.)  
 ('18) AIR 1918 All 192 (198) : 40 All 425. ("Court" means Civil Court.)  
 ('31) AIR 1931 All 449 (450). (Rejection of application on the ground that the deposit not made by the proper person.)  
 ('19) AIR 1919 Bom 180 (181) : 43 Bom 785. (Application under the rule not made within thirty days.)

('17) AIR 1917 Mad 662 (662). (Erroneous decision on limitation.)

('02) 5 Oudh Cas 377 (379). (Where no appeal lies, no revision.)

('37) AIR 1937 Rang 587 (588). (Application to set aside sale dismissed as time-barred — Appellate Court holding that land was not saleable under S. 60, C. P. O., and sale must be set aside irrespective of time of deposit — Held Court had jurisdiction to decide question and no revision lay.)

('37) AIR 1937 Oudh 108 (111). (Error of judgment on point of law — Tender under O. 21 R. 89 by would-be purchaser acquiring interest in property after auction-sale — Order of Court setting aside sale holding tender valid, though wrong, cannot be interfered with in revision.)

*Revision lies :*

('30) AIR 1930 Cal 249 (250). (Rejection on the ground that deposit is insufficient — Court officer misleading judgment-debtor — Revision lies.)

('25) AIR 1925 Nag 17 (18, 19). (Dismissal for defect without asking applicant to give particulars.)

('16) AIR 1916 Pat 290 (292) : 1 Pat L Jour 459. (Order without jurisdiction.)

('19) AIR 1919 Pat 465 (466). (Court declining to accept deposit from the judgment-debtor.)

('01) 25 Bom 681 (685). (Do.)

('02) 6 Cal W N 57 (60).

('96) 1 Cal W N 114 (117).

('35) AIR 1935 Mad 842 (847) : 58 Mad 972 (F B). (Lower Court refusing decree-holder's application to withdraw the money deposited under this rule on the ground that it had been deposited under protest — Held that the order was without jurisdiction and could be set aside in revision.)

**Note 31**

1. ('21) AIR 1921 Bom 169 (171, 172) : 45 Bom 1094.

('33) AIR 1933 Bom 289 (242) : 57 Bom 601.

on this point.<sup>2</sup> In a recent decision of that Court<sup>3</sup> it has been held that where a decree-holder, though his decree has been fully satisfied, fails to enter satisfaction and fraudulently brings the property to sale and the mortgagee of the property makes a payment under this rule to avoid the sale, the payment so made can be recovered back by the mortgagee under Section 72 of the Contract Act. It is pointed out in the decision that in such cases there is no outstanding decree as contemplated by this rule.

Where the deposit is made by one of several judgment-debtors or by a person entitled to apply under this rule and the sale is set aside in consequence, the person making the deposit is entitled to sue the other persons liable to pay the decree-amount for contribution or for re-imbursement as the case may be.<sup>4</sup> The High Court of Madras has held in the undermentioned case<sup>5</sup> that where the sale is set aside at the instance of a purchaser subsequent to the court-sale, the payment made by him is not lawful within the meaning of Section 70 of the Contract Act, even though he was allowed by the Court to apply and, therefore, he cannot sue for compensation.

**O. 21 R. 89**  
**Note 31**

**R. 90.** [S. 311.] (1) Where any immoveable property<sup>3</sup> has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale,<sup>8</sup> may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

**O. 21 R. 90**

**Application to set aside sale on ground of irregularity or fraud.**

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court<sup>2</sup> is

- (‘07) 12 Cal W N 151 (152, 158).
- (‘28) AIR 1928 Pat 193 (194, 195) : 7 Pat 30.
- [See also (‘02) 6 Cal W N 336 (337). (Suit by undertenant to recover money paid for his lessor.)
- (‘39) 20 Pat L Tim 640 (640). (Decree-holder cannot be restrained from withdrawing the money deposited.)]
- 2. (‘31) AIR 1931 Mad 753 (757, 759). (Refund can be claimed under S. 72, Contract Act, as money paid under coercion.)
- (‘35) AIR 1935 Mad 842 (846) : 58 Mad 972 (FB). (Refund cannot be claimed.)
- (‘80) AIR 1980 Mad 921 (924). (Do.)
- 3. (‘88) AIR 1988 Mad 498 (494, 495). (Reversing on Letters Patent Appeal, A I R 1985 Mad 961.)
- 4. (‘28) AIR 1928 All 127 (128). (Deposit by mortgagee.)
- (‘11) 10 Ind Cas 458 (459) (All). (Claim regarding the five per cent. is not tenable.)
- (‘14) AIR 1914 All 880 (881, 882) : 86 All 272. (Deposit by one of several judgment-debtors.)
- (‘18) 21 Ind Cas 207 (209) (Cal). (Deposit by reverser — Suit against widow for recovery of the amount deposited by him — Widow held liable except for the money which represented the damage payable to the execution purchaser.)
- (‘31) AIR 1931 Pat 394 (400, 402) : 10 Pat 528. (Mortgagor entitled to contribution from his co-mortgagors of the amount paid by him, but not the statutory compensation.)
- (‘13) 17 Ind Cas 90 (92) (Cal). (Suit by one of the co-owners for compensation — Plaintiff held entitled to it though the other owner, in whose name the property was recorded, had assigned his share to a stranger.)
- (‘12) 18 Ind Cas 144 (147) (Cal). (Plaintiff obtained a money decree against the defendant — Deposit by the plaintiff to set aside the sale of the defendant’s property in execution of rent decree — Plaintiff held entitled to the amount from the defendant.)
- (‘10) 6 Ind Cas 810 (810, 812, 813) : 38 Cal 1. (Cannot recover the five per cent.)
- (‘17) AIR 1917 Bom 141 (145, 147) : 42 Bom 556. (Do.)
- [See (‘04) 31 Cal 975 (978). (Mortgagee paying the deposit has an additional lien.)]
- [But see (‘28) AIR 1928 Rang 278 (280) : 6 Rang 500.]
- 5. (‘80) AIR 1980 Mad 644 (646).

**O. 21 R. 90** satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

[1877, S. 311; 1859, S. 256.]

### Local Amendments

#### ALLAHABAD

For the words "Provided that no" read the words "Provided that—

(a) no . . . . . or fraud;"

and add the following proviso:

"(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up."

#### CALCUTTA

Add the following to sub-rule (1):

"or on the ground of failure to issue notice to him as required by Rule 22 of this Order."

Cancel the proviso and, substitute therefor the following:

"Provided—

(i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon."<sup>1</sup>

#### LAHORE

Add the following proviso:

"Provided that no such sale be set aside on the ground which the applicant could have put forward before the sale was conducted."<sup>1</sup>

#### MADRAS

After the first paragraph and before the present proviso to the rule, insert the following:

"Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit such amount in Court:

Provided also that the security furnished or the deposit made as aforesaid, shall

#### O. 21 R. 90 (Local Amendments)

1. (Calcutta). ('38) 42 Cal W N 661 (665). (O. 21 R. 90, Proviso (ii), is inapplicable if the particular defect in the sale proclamation that is complained of is no part of the order of the Court in drawing up the sale proclamation and it finds a place in the sale proclamation that is actually issued despite the direction of the Court to the contrary.)

1. (Lahore). ('37) AIR 1937 Lah 309 (310). (Where objection to a sale of immovable property is taken under S. 60 (1) (c) after sale, but before sale is confirmed, objection falls under O. 21 R. 90, as amended by the Lahore High Court and is not entertainable.)

('38) AIR 1938 Lah 508 (508). (The objections as to the contents of the proclamation ought to be raised before the sale and cannot be considered at the stage of appeal under the proviso to R. 90, O. 21 added by the Lahore High Court.)

('39) AIR 1939 Lah 118 (117): I L R (1939) Lah 108. (Proviso 2 to O. 21 R. 90 only relates to what lies within O. 21 R. 90, that is to matters in connexion with publishing or conducting the sale. It has and can have no application to a question raised under Section 47.)

('39) AIR 1939 Lah 222 (222). (If the judgment-debtors were never served with a notice as regards sale it is obvious that the objection could not have been preferred earlier and hence the proviso does not apply.)

be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale :” **O. 21 R. 90**

In the present proviso *after* the word “Provided” *insert* the word “further”.

**NAGPUR**

*After* the proviso to sub-rule (1), *insert* the following further proviso :

“Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale.”

**N.-W. F. P.**

*Add* the following further proviso to sub-rule (1) :

“Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted.”<sup>1</sup>

**UDH**

*Add* the following second proviso :

“Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale.”<sup>1</sup>

**PATNA**

*Substitute* the following for the proviso to sub-rule (1) :

“(i) Provided that no application to set aside a sale shall be admitted unless,

(a) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and

(b) the applicant deposits with his application such amount not exceeding 12½ per cent. of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.<sup>1</sup>

(ii) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.”

*Add* the following as sub-rule (2) :

“(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i) (b), if any.”

**RANGOON**

*For* the present provisos to rule 90, *substitute* the following :

“Provided that —

(a) no application to set aside a sale shall be admitted unless it discloses a ground which could not have been put forward by the applicant before the sale was conducted; and

(b) no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.”<sup>1</sup>

1. (N.-W. F. P.). ('38) AIR 1938 Pesh 52 (53). (Objection that could have been raised before sale—Sale cannot be set aside.)

1. (Oudh). ('35) AIR 1935 Oudh 386 (336). (Sale proclamation—Omission to specify value of property — Judgment-debtor failing to object before sale — He cannot raise objection in application under this rule.)

1. (Patna). ('37) AIR 1937 Pat 260 (261). (Provision as to deposit is not retrospective.)

('38) AIR 1938 Pat 240 (241) : 17 Pat 107. (The rule specifically allows the Court to accept security other than cash as the circumstances justify.

While asking the judgment-debtor to deposit necessary security, it should be made clear as to what amount should be deposited.)

('39) AIR 1939 Pat 248 (252) : 18 Pat 227 (F B). (Deposit made after presentation of application but before admission is deposit made with the application—Application if not accompanied by deposit cannot be rejected — Opportunity must be given to applicant.)

1. (Rangoon). ('37) AIR 1937 Rang 419 (420) : 1937 Rang LR 268 (FB). (Proviso (b) as it stood before 27th January 1937 does not regulate procedure and is *ultra vires* the rule-making Com-

*Synopsis*

1. Legislative changes.
2. Scope and applicability of the Rule.
3. Immovable property.
4. Sale will not be set aside unless application is made under this Rule. See Note 2.
5. Who may apply under the Rule.
6. Auction-purchaser.
7. Persons entitled to rateable distribution.
8. "Any person whose interests are affected by the sale."
9. Strangers.
10. Grounds on which a sale can be set aside.
  11. Material irregularity in publishing or conducting the sale.
  12. Omission to attach property and irregularity in attaching property before sale.
  13. Omission to make an order for sale.
  14. Omission to issue notice.
  15. Irregularities in publishing the sale — Omission to publish or irregularity in publishing sale proclamation.
  16. Misdescription of property.
  17. Omission or mis-statement of the value of the property.
  18. Omission to state the revenue or rent payable on the land.
  19. Omission or mis-statement of the encumbrances over the property.
  20. Other mistakes in the sale proclamation.
  21. Omission to beat drum.
22. Postponement of sale and issue of fresh proclamation.
23. Irregularities in conducting the sale—Sale within thirty days of the proclamation.
- 23a. Omission to fix time for sale.
24. Sale on a holiday.
25. Omission to hold sale at stated time and place.
26. Sale of property in one lot though advertised for sale in separate lots.
27. Irregularities regarding the order of sale of lots.
28. Other cases where the sale is not in terms of the proclamation.
29. Purchase by decree-holder without permission to bid. See Note 7, Rule 72.
30. Irregularities in the grant of permission to bid.
31. Sale after satisfaction of the decree.
32. Sale after an order of postponement.
33. Sale after attachment under Rule 53.
34. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings.
35. Non-representation of minor.
36. Other instances of material irregularity.
37. Fraud in publishing and conducting the sale.
38. Combination among bidders.
39. Substantial injury — Proviso.
40. Applicant must have sustained substantial injury by reason of such irregularity or fraud.
41. Waiver of irregularity and estoppel.
42. Bona fide purchaser for value without notice.
43. Setting aside sale on grounds not taken in the application.
- 43a. Setting aside sale in part only, if and when permissible.
44. Joinder of claims under Section 47.
45. Suit to set aside sale for material irregularity. See Notes to O. 21 R. 92.
46. Sale, if can be challenged by way of defence in suit for possession. See Notes to O. 21 R. 92.
47. Necessary parties. See Notes to O. 21 R. 92.
48. Applicability of Order 9 to applications under this Rule.
49. Limitation.
- 49a. Step-in-aid of execution.
50. Appeal.
51. Revision.

*Other Topics (miscellaneous)*

- Appeal to Privy Council. See Note 50.
- Compromise of proceedings under this rule — Whether can be recorded under O. 23 R. 3. See Note 2.
- More inadequacy of price — Whether sufficient ground. See Note 40.
- Objections that cannot be taken. See Note 2.
- Proceedings under this rule—Judicial. See Note 2.
- Rule, whether applies to sales in execution of a decree on mortgage. See Note 2.
- Sale — Whether can be set aside by consent. See Note 2.
- Sale without notice to receiver not in possession of property—Whether irregular. See Note 36.
- Sale under the Bengal Tenancy Act — Rule, whether applies. See Note 2.
- "The Court" — Application to Collector. See Note 2.

**1. Legislative changes. —**

1. The words "or any person entitled to share in a rateable distribution of assets" after the word "decree-holder" have been newly added. See Note 7.

2. The words "or whose interests are affected by the sale" have been substituted for the words "or any person whose immovable property has been sold." See Notes 6 and 8.

3. The words "or fraud" have been newly added after the word "irregularity." See Notes 37 and 50.

4. The words "unless upon the facts proved the Court is satisfied" have been substituted for the words "unless the applicant proves to the satisfaction of the Court." See Note 40.

**2. Scope and applicability of the Rule. —** The rule provides for the setting aside of sales in execution on the ground of material irregularity or fraud in publishing or conducting them. The auction-purchaser at an execution sale has no absolute right to its being confirmed when there is an irregularity or fraud in publishing or conducting it; if the irregularity or fraud is a *material* one and has caused *substantial* injury to any party, the sale will be set aside at the instance of *that party*<sup>1</sup> even though the purchaser be a stranger.<sup>2</sup>

Before a sale can be so set aside, the following conditions must be satisfied, *viz.* —

- (1) *There must be an application for the purpose.*<sup>3</sup> The Court cannot set aside the sale under its inherent powers<sup>4</sup> especially when it is barred by limitation.<sup>5</sup> But the application need not be accompanied by a deposit as is necessary for an application under Rule 89.<sup>6</sup>
- (2) *The application must be one under this rule.* A sale cannot be set aside under this rule on an application made under Rule 89.<sup>7</sup>
- (3) *The application must be by one or other of the persons specified in the rule.*<sup>8</sup>
- (4) *The application must be made to the Court executing the decree.* As to the power of the Collector to set aside a sale in cases where the execution of a decree has been transferred to him, see Note 6 to Section 70, *ante*.
- (5) *The application must be based on an irregularity or fraud in publishing or conducting the sale.*<sup>9</sup>

**Order 21 Rule 90 — Note 2**

1. ('15) AIR 1915 Mad 989 (993) : 21 Ind Cas 389 (392) : 38 Mad 387.

2. ('10) 5 Ind Cas 390 (395) (Cal).

3. ('82) 1882 All W N 1 (1).

('80) AIR 1930 All 556 (557). (Two decrees consolidated and property sold in execution by one bid—To challenge sale on ground of irregularity sales in execution of both decrees must be challenged.)

[See also ('26) AIR 1926 Lah 514 (514). (An application signed by a duly authorized pleader is enough.)]

4. ('80) AIR 1980 Lah 789 (790).

('85) AIR 1985 Mad 459 (464) (Obiter.)

('88) AIR 1988 Rang 433 (435).

[See ('85) AIR 1985 Pat 242 (242). (In order to set aside an auction sale, it is necessary to bring the matter within Order 21.)]

[See also ('86) AIR 1986 Pat 442 (443).]

5. ('15) AIR 1915 Mad 392 (395).

6. ('29) AIR 1929 All 671 (672).

7. ('01) 28 Cal 73 (76).

[See ('11) 11 Ind Cas 196 (196) (Cal). (But where an application under Rule 89 has been withdrawn or dismissed, one under this rule may be made.)]

8. See Notes 5 to 9.

9. ('26) AIR 1926 Cal 829 (829, 830).

('34) AIR 1934 Nag 250 (251). (Inadequacy of price by itself is no ground unless it is due to material irregularity.)

('25) AIR 1925 Mad 325 (326).

('96) 19 Mad 219 (222, 227). (Objection on the ground that sale was held subsequent to insanity of judgment-debtor—If such objection is raised before confirmation of sale, it falls within this rule.)

[See ('08) 30 All 146 (150).]

**O. 21 R. 90**  
**Note 2**

Thus, the following objections are outside the scope of the rule, viz. —

- (i) An objection that the sale is illegal and therefore null and void.<sup>10</sup>
- (ii) An objection that the Court had no jurisdiction to execute the decree or sell the property.<sup>11</sup>
- (iii) An objection that the property is not legally saleable.<sup>12</sup>
- (iv) An objection that the decree is invalid,<sup>13</sup> for example, on the ground of fraud in obtaining the decree.<sup>14</sup>
- (v) An objection that the execution is barred by limitation<sup>15</sup> or that no execution ought to have issued under the decree.<sup>16</sup>
- (6) *The applicant must prove not only irregularity or fraud in the publishing or conducting of the sale but must also show that he has sustained substantial injury thereby.*<sup>17</sup>

An application under the rule cannot be disposed of summarily, without any investigation.<sup>18</sup> Opportunity must be given to either party to adduce evidence in respect of the several allegations made.<sup>19</sup> The proceeding under this rule is a judicial one,<sup>20</sup> and the decision must be based on findings arrived at on legal evidence.<sup>21</sup>

It is open to the parties to compromise the proceedings.<sup>22</sup> In such a case all the parties affected must be parties to the compromise.<sup>23</sup> The judgment-debtor and the decree-holder cannot, by a compromise between themselves, have the sale set aside behind the back of the auction-purchaser.<sup>24</sup>

10. ('24) AIR 1924 All 698 (699).

('87) AIR 1937 All 407 (410).

11. ('96) 18 All 141 (144, 145).

('06) 28 All 273 (275).

('85) 7 All 365 (366). (On the ground that he was no party to decree.)

[See ('11) 9 Ind Cas 252 (253) (Mad). (An objection that the minor defendant was not properly represented in execution does not fall under Section 311.)]

12. ('85) 7 All 641 (642, 645).

('20) AIR 1920 Pat 715 (715).

('35) AIR 1935 All 1016 (1018) : 58 All 360.

('88) AIR 1938 Nag 558 (559).

13. ('26) AIR 1926 Cal 109 (110).

14. ('02) 29 Cal 395 (400) : 29 Ind App 99 (P C). [See also ('96) 23 Cal 686 (689, 690). (Non-service of summons.)]

15. ('82) 6 Mad 287 (289).

('27) AIR 1927 Oudh 488 (489).

('17) AIR 1917 Pat 467 (467) : 2 Pat L Jour 157.

16. ('66) 6 Suth W R Misc 46 (47).

('11) 10 Ind Cas 625 (625) (Cal). (On account of uncertified adjustment.)

17. ('24) AIR 1924 Lah 592 (592).

('34) AIR 1934 Pat 540 (541).

('17) AIR 1917 Lah 186 (187).

('11) 9 Ind Cas 252 (253) (Mad).

(1865) 2 Suth W R 74 (74).

('87) 1887 All W N 117 (117).

('66) 8 Bom H O R A C 110 (112).

[See also ('28) AIR 1928 Cal 328 (332).]

18. ('75) 24 Suth W R 216 (217).

('25) AIR 1925 Nag 289 (291).

('35) AIR 1935 Mad 842 (847) : 58 Mad 972 (FB).

[See ('12) 16 Ind Cas 974 (975) (Cal). (It cannot be dismissed on the ground that a similar application by another judgment-debtor has failed.)]

19. ('32) AIR 1932 Pat 326 (327) : 11 Pat 542.

('84) AIR 1934 Pat 540 (541).

('11) 9 Ind Cas 383 (384) (Cal).

(1865) 4 Suth W R Misc 9 (9).

('69) 12 Suth W R 511 (512).

('82) 1982 All W N 61 (61).

20. ('73) 20 Suth W R 424 (425).

21. ('70) 2 N W P H C R 142 (142).

(1865) 2 Suth W R Misc 1 (2).

('81) 7 Cal 34 (38, 41). (Regarding the service of process in execution proceedings the returns of the nazir are not evidence by themselves but must be proved on oath.)

('82) AIR 1932 Nag 14 (15) : 27 Nag L R 339.

('24) AIR 1924 Mad 217 (218, 221) : 46 Mad 786.

[See also ('35) AIR 1935 All 182 (183). (Objection that sale proclamation was not posted in locality and beat of drum was not properly made—Negative evidence let in by judgment-debtor—Evidence to contrary by decree-holder—Test as to genuineness of objections is to see whether judgment-debtor produces a witness who is willing to purchase property and to make deposit.)]

22. ('18) AIR 1918 All 367 (368).

('09) 2 Ind Cas 338 (341) : 36 Cal 422.

('29) AIR 1929 Pat 400 (400).

('21) AIR 1921 Pat 107 (108) : 6 Pat L Jour 258.

(Compromise should be recorded under O. 28, R. 8 and not under O. 21 R. 2 as proceedings are not in execution.)

('29) AIR 1929 Lah 886 (887). (It is not a proceeding in execution—It is in the nature of a suit—Compromise can be recorded under O. 23, R. 8—O. 21 R. 2 does not apply.)

[See ('28) AIR 1928 Pat 418 (419) : 2 Pat 534.]

23. ('25) AIR 1925 Cal 779 (780).

24. ('11) 10 Ind Cas 148 (151, 152) (Cal).



An execution sale vitiated by irregularity or fraud should ordinarily be set aside in its entirety<sup>25</sup> except when the sale is by separate lots<sup>26</sup> in which case only the sale of the lots so vitiated will be set aside.<sup>27</sup> (See also Note 43a.)

**O. 21 R. 90  
Note 2**

The effect of setting aside a sale under the rule is to restore the parties to the position which they occupied immediately before the sale.<sup>28</sup> If the purchaser has got into possession after the sale, the judgment-debtor can be put back in possession by way of restitution.<sup>29</sup> In proper cases he can be awarded compensation for the loss of profits during the period he was out of possession.<sup>30</sup> Conversely, the purchaser can recover from the judgment-debtor any money which he might have paid *bona fide* in order to save and preserve the property;<sup>31</sup> and if there was no irregularity or fraud for which he was responsible, he can also be awarded interest on the purchase-money deposited by him.<sup>32</sup>

The rule applies also to sales in execution of mortgage decrees.<sup>33</sup> The principle of the rule is also applicable to the following sales, *viz.* —

- (1) Sales by receivers appointed by Court.<sup>34</sup>
- (2) Sales under the Bengal Tenancy Act.<sup>35</sup>
- (3) Sales under the Madras Rent Recovery Act, VIII of 1865.<sup>36</sup>

The rule does not apply to sales held by the Official Receiver under the Provincial Insolvency Act.<sup>37</sup> It has also been held to be inapplicable to sales under the Madras Estates Land Act.<sup>38</sup> Again, it has been held that where, as the result of the compulsory winding up of a company, the official liquidator sells a decree standing in the name of the directors by auction and the liquidator assigns the decree to the purchaser with the sanction of the Court, this rule does not apply and the Court has no power to set aside the sale.<sup>39</sup>

As to whether an application under this rule can be filed after confirmation of the sale, see the undermentioned cases.<sup>40</sup>

As to whether an application by a party to the suit to set aside the sale falls

(‘31) AIR 1981 P C 33 (35, 36) : 58 Ind App 50 : 27 Nag L R 95 (PC). (Approving 10 Ind Cas 148.)

(‘25) AIR 1925 Oudh 693 (693).

25. (‘28) AIR 1928 Cal 349 (351).

26. (‘26) AIR 1926 Cal 829 (829, 830).

27. (‘14) AIR 1914 Cal 778 (774).

(‘10) 8 Ind Cas 1100 (1100) (Mad).

(‘36) AIR 1936 Mad 121 (122) : 59 Mad 438.

[See (‘37) 41 Cal W N 224 (225).]

28. (1864) 1864 Suth W R 26 (28). (Thus, where a sale was set aside under the rule the attachment was held to have revived.)

(‘27) AIR 1927 Cal 511 (512). (On setting aside sale, the execution petition should not be dismissed but opportunity should be given to the decree-holder to take further steps.)

(‘21) AIR 1921 Cal 594 (595). (A second application is one for revival of the earlier one.)

29. (‘06) 9 Oudh Cas 101 (103).

[See (‘31) AIR 1981 All 655 (656). (Appellate decree in suit varied, amount reduced and charged only one property — Other properties sold in execution of original decree — Held though under Rule 90 petition failed and sale was confirmed judgment-debtor could apply for restitution.)]

30. (‘14) AIR 1914 Cal 692 (693). (That is, in case the decree-holder purchaser was guilty of fraud.)

(‘30) AIR 1930 Pat 280 (281, 282) : 9 Pat 685.

31. (17) AIR 1917 Cal 216 (217). (A benamidar court-auction-purchaser who had paid money to save and preserve the estate can, when the sale is set aside for irregularity, recover it from the judgment-debtor.)

32. (‘21) AIR 1921 P C 27 (27) : 48 Ind App 24 : 6 Pat L Jour 129 (PC).

33. (1900) 25 Mad 244 (258, 266, 270) (FB).

(1900) 4 Cal W N 474 (479, 480).

34. (‘04) 6 Bom L R 1140 (1145).

35. (‘16) AIR 1916 Cal 719 (721).

(‘81) 7 Cal 168 (165).

36. (‘11) 12 Ind Cas 137 (137) Mad.

37. (‘29) AIR 1929 Lah 622 (623).

(‘32) AIR 1932 Lah 320 (320).

(‘18) AIR 1918 Mad 136 (136).

[See however (‘27) AIR 1927 Nag 262 (263).]

38. (‘20) AIR 1920 Mad 292 (293) : 43 Mad 351.

(‘21) AIR 1921 Mad 507 (508).

(‘39) AIR 1939 Mad 609 (609).

39. (‘38) AIR 1938 Mad 176 (177).

40. (‘10) 5 Ind Cas 390 (395) (Cal). (Sale can be set aside even after confirmation.)

(‘17) AIR 1917 Pat 467 (467) : 2 Pat L Jour 157. (After confirmation of a sale in execution the only remedy of the judgment-debtor is to apply to have the sale set aside under the rule.)

**O. 21 R. 90**  
**Notes 2-6**

under Section 47 or this rule, see Notes 51 and 55 to Section 47 *ante*, and the undermentioned cases.<sup>41</sup>

**3. Immovable property.**—A house attached to land is “immovable property.”<sup>1</sup> A debt secured by a mortgage of immovable property or a decree thereon is only moveable property and this rule does not apply to a sale thereof in execution.<sup>2</sup> It has, however, been held in the undermentioned case<sup>3</sup> that mortgagee rights as well as the mortgage debt are immovable property. See also Section 16, Note 4 and O. 21 R. 54.

**4. Sale will not be set aside unless application is made under this Rule.**  
— See Note 2 above.

**5. Who may apply under the Rule.**—Under the old Code the right to apply under the corresponding Section was limited to the *decree-holder* and to persons *whose property had been sold*.<sup>1</sup> Under the present rule, however, the right is conceded to —

- (1) the decree-holder;
- (2) any person entitled to share in a rateable distribution of the assets; and
- (3) any person whose interests are affected by the sale.

Where *A* who holds a decree against *B*, attaches a decree held by *B* against *C*, and as attaching creditor executes *B*'s decree, and *C*'s properties are sold in such execution, *B* will be considered to be a decree-holder entitled to apply under the rule.<sup>2</sup>

Where after making an application under the rule the applicant dies, his legal representative can continue the proceedings.<sup>3</sup>

See also Notes 6 to 9 below.

**6. Auction-purchaser.** — Under the old Code an auction-purchaser could not apply under this rule as he was neither a decree-holder nor “a person whose immovable property has been sold.”<sup>1</sup> In the present rule the expression “or any person whose interests are affected by the sale” has been newly introduced. Does this expression include an auction-purchaser? Yes, according to the High Courts of Madras, Allahabad, Patna and Nagpur, the reason being that the word “interests” is not confined to interest *prior to the sale* but includes “interest” *created by the sale itself*.<sup>2</sup> The High Courts of Calcutta<sup>3</sup> and Lahore<sup>4</sup>, and the Judicial Commissioner's Court of Sind<sup>5</sup> have, on the

[See ('99) 26 Cal 727 (730, 731).

('09) 32 Mad 242 (252).

('08) 35 Cal 61 (77).]

[But see ('11) 9 Ind Cas 472 (474) (Low Bur).

(Section 311 cannot be applied after the sale has been confirmed under S. 312.)]

41. ('86) AIR 1936 Lah 969 (971). (Sale attacked on ground of material irregularity in conduct or publication of sale—R. 90 and not S. 47 applies.)

('87) AIR 1987 All 407 (410). (If decree-holder is auction-purchaser, judgment-debtor can make application under S. 47 to set aside sale only when it is not provided by Rr. 89 and 90.)

('89) AIR 1989 Nag 241 (242). (A judgment-debtor when he applies to set aside a sale cannot be said to apply under S. 47 when there is the specific provision in this rule — The fact that the auction-purchaser is not made a party will not affect the question.)

**Note 3**

1. ('80) AIR 1980 All 513 (513).

2. ('02) 26 Bom 305 (310, 312).

('02) 6 Cal W N 5 (8).

[See also ('21) 64 Ind Cas 388 (390) (Cal). (Decree

for possession of immovable property is not immovable property.)]

3. ('88) AIR 1983 Lah 210 (211).

**Note 5**

1. ('88) 5 All 42 (44). (Co-sharer whose share has not been sold is not entitled to apply.)

2. ('98) 21 Mad 417 (418, 419).

3. ('82) AIR 1982 Pat 234 (236) : 11 Pat 424.

**Note 6**

1. ('93) 20 Cal 8 (11) : 19 Ind App 154 (PC).

2. ('20) AIR 1920 Mad 145 (146).

('88) AIR 1933 Pat 435 (439) : 12 Pat 665 (SB). (AIR 1924 Pat 319, Overruled.)

('25) AIR 1925 All 459 (461, 463) : 47 All 479.

('22) AIR 1922 Nag 113 (114).

('89) AIR 1939 Nag 179 (182) : I L R (1989) Nag 857. (Dissenting from A I R 1923 Nag 161.)

('87) AIR 1987 Nag 140 (142).

3. ('28) AIR 1928 Cal 828 (830).

4. ('82) AIR 1982 Lah 468 (469, 470) : 14 Lah 1. (Reversing A I R 1981 Lah 630 on Letters Patent Appeal.)

5. ('31) AIR 1981 Sind 107 (110) : 25 Sind L R 405.

other hand, held that the "interests" referred to in the rule are interests independent of the sale and not such as come into existence *as a result of the sale*. The Bombay High Court has also held a similar view.<sup>6</sup>

**O. 21 R. 90**  
**Notes 6-8**

The decisions of the High Court of Rangoon<sup>7</sup> are conflicting on the point.

**7. Persons entitled to rateable distribution.** — Although a person entitled to rateable distribution had not been specified in Section 311 of the old Code as a person entitled to apply thereunder, such right had been conceded to him on the ground that he was a "decree-holder."<sup>1</sup> The present rule specifically includes such persons.<sup>2</sup>

Persons entitled to dividends under the Provincial Insolvency Act are not "persons entitled to rateable distribution" within the meaning of the rule, and cannot therefore apply to set aside execution sales.<sup>3</sup>

**8. "Any person whose interests are affected by the sale."** — The expression "any person whose immovable property has been sold" in the old Section 311 was interpreted by a Full Bench of the Calcutta High Court to mean "any person whose interests are affected by the sale."<sup>1</sup> The present rule gives effect to this view.

The judgment-debtor is a person whose "interests are affected by the sale."<sup>2</sup>

The 'interest' need not necessarily be a *proprietary* or a *possessory* interest; it may be a pecuniary or other interest.<sup>3</sup> Thus, an attaching creditor *in whose favour a decree has been passed* is a person 'whose interests are affected by the sale' within the meaning of this rule.<sup>4</sup> Similarly, where a mortgage decree was passed against *A* and *B*, and the sale of the properties of *A* was postponed until the sale of the properties of *B*, and the properties of *B* were sold for an inadequate price, it was held that *A* was a person whose interests were affected by the sale.<sup>5</sup> There is a conflict

6. ('36) AIR 1936 Bom 311 (312) : 60 Bom 750.  
7. (29) AIR 1929 Rang 33 (33) : 6 Rang 621 (No.)  
(27) AIR 1927 Rang 301 (302) : 5 Rang 516 (Yes.)

**Note 7**

1. ('93) 15 All 318 (320).  
(02) 29 Cal 548 (554).  
(87) 10 Mad 57 (59, 62).  
(01) 24 Mad 311 (315).  
(98) 21 Mad 51 (53).  
[See ('93) 20 Cal 673 (675). (But a person who is not entitled to come in under S. 73 and share in the distribution of the sale-proceeds is not included within the term decree-holder under old S. 311.)]  
2. ('15) AIR 1915 Cal 16 (16).  
(27) AIR 1927 Mad 67 (68).  
(15) AIR 1915 Mad 541 (542). (A person not entitled to come in under S. 73 is not entitled to apply under this rule.)  
(36) AIR 1936 All 626 (627). (He must have applied for rateable distribution before receipt of assets by the Court.)  
[See however ('25) AIR 1925 Sind 101 (101).]  
3. ('17) AIR 1917 Sind 33 (34) : 10 Sind L R 189.  
(16) AIR 1916 Sind 20 (21) : 10 Sind L R 53.

**Note 8**

1. ('88) 15 Cal 488 (492) (FB).  
2. ('39) AIR 1939 Mad 193 (194).  
3. ('24) AIR 1924 Cal 786 (787) : 51 Cal 495.  
(27) AIR 1927 Mad 783 (784).

- (30) AIR 1930 Pat 451 (452). (A mortgagee who would be entitled to claim in satisfaction of his debt any surplus proceeds of the rent sale as against the mortgagor is a person interested.)  
(86) 13 Cal 346 (348). (Do.)  
(05) 1 Cal L Jour 454 (455). (Do.)  
(19) AIR 1919 Cal 181 (181).  
(18) AIR 1918 Cal 846 (847).  
(36) AIR 1936 Cal 26 (27). (Case under S. 174, Bengal Tenancy Act—Words of S. 174 (1) being *in pari materia* with O. 21 R. 90).  
(39) AIR 1939 Cal 146 (147) : I L R (1939) 1 Cal 273.  
(39) AIR 1939 Nag 179 (181) : I L R (1939) Nag 357.  
4. ('32) AIR 1932 All 2 (3) : 53 All 759.  
(34) AIR 1934 Cal 477 (478).  
(33) AIR 1933 Mad 455 (456). (Person attaching before judgment and getting a decree.)  
(33) AIR 1933 Pat 445 (445).  
(24) AIR 1924 Cal 786 (787, 789) : 51 Cal 495.  
(74) 11 Bom H C R 15 (18).  
(86) AIR 1936 Cal 547 (549) : I L R (1937) 1 Cal 280. (Case under S. 174, Bengal Tenancy Act.)  
(39) AIR 1939 Mad 193 (194).  
(37) AIR 1937 Cal 7 (8). (Person obtaining order for attachment before judgment and subsequently getting decree before the sale.)  
[But see (1900) 4 Cal W N 542 (544).]  
5. ('31) AIR 1931 Pat 217 (217, 218).

**O. 21 R. 90**  
**Note 8**

of decisions as to whether a person who has merely obtained an attachment *before judgment* and in whose favour a decree has not yet been passed can be said to be a person having any such interest. It has been held by the Madras High Court<sup>6</sup> that such a person is one whose interests are affected by the sale within the meaning of the rule. But the Calcutta High Court has held a contrary view.<sup>7</sup> It is not necessary that the applicant should have a *present* interest in the property;<sup>8</sup> a reversioner to a Hindu widow's estate<sup>9</sup> or a person who is entitled to specific performance of a contract to sell the property<sup>10</sup> can apply under this rule. Similarly, a defaulting auction-purchaser who would be liable to make good the deficiency on a re-sale, and whose liability is only a contingent one, can apply under this rule.<sup>11</sup> But whatever the nature of the interest might be, it must be in existence at the time when the sale takes place. If it is created *after* the sale, it cannot be affected by the sale. Thus, a person purchasing the property after the execution sale cannot apply under this rule.<sup>12</sup> Similarly, a decree-holder who attaches the property *after* the court-sale and before confirmation of the sale has no *locus standi* to apply under this rule to set aside the sale.<sup>13</sup>

The following persons have been held entitled to apply as being persons "*whose interests are affected by the sale*" —

- (1) A real owner of property sold in execution of a decree against his benamidar.<sup>14</sup>
- (2) A judgment-debtor who has sold away his property.<sup>15</sup>
- (3) The legal representative of a deceased judgment-debtor.<sup>16</sup>
- (4) Where the judgment-debtor is a minor, his guardian.<sup>17</sup>
- (5) Where the judgment-debtor is a ward of Court, the Court of Wards.<sup>18</sup>
- (6) Where he is an adjudicated insolvent, the Official Receiver.<sup>19</sup>

('83) AIR 1933 All 54 (55) : 55 All 121. (Decree directing sale of item 1 in the first instance and only in the event of deficiency sale of item 2—Sale of item 1—Fraud in—Mortgagee of item 2 can apply to set aside sale of item 1).

[See however ('85) 7 All 588 (585). (Where the facts were different.)]

6. ('89) AIR 1939 Mad 250 (253); ILR (1939) Mad 374 (FB). (AIR 1915 Mad 541, Overruled.)

7. ('25) AIR 1925 Cal 1108 (1104).

('12) 15 Ind Cas 668 (669) (Cal).

('86) AIR 1936 Cal 26 (27). (Case under Bengal Tenancy Act, S. 174.)

[See however ('34) AIR 1934 Cal 477 (478). (Decree obtained after sale but before application—Attaching creditor can apply.)]

8. ('83) AIR 1933 Mad 694 (694, 695). (Judgment-debtor who has been adjudged insolvent and whose property has vested in Official Receiver can apply.)

9. ('28) AIR 1928 Mad 1188 (1189).

('26) AIR 1926 Mad 959 (960).

('19) AIR 1919 Pat 127 (127) : 4 Pat L Jour 360.

[See ('25) AIR 1925 Pat 556 (557). (But a presumptive heir of the transferee of an occupancy holding cannot apply under this rule as no man is heir to a living person).]

10. [See ('19) AIR 1919 Pat 127 (127) : 4 Pat L Jour 360.]

11. ('83) AIR 1933 Cal 815 (815).

12. ('39) AIR 1939 Cal 146 (148) : I L R (1939) 1 Cal 273.

[See ('37) AIR 1937 Nag 161 (162). (Judgment-debtor applying under R. 90 and then selling property to another — Latter can continue application.)]

13. ('39) AIR 1939 Mad 501 (502).

14. ('93) 20 Cal 418 (424, 425).

('96) 19 Mad 167 (168).

15. ('26) AIR 1926 Mad 217 (218). (Before court-sale).

('26) AIR 1926 Cal 56 (56). (After court-sale).

16. ('26) AIR 1926 Cal 56 (56).

('90) 12 All 440 (446) (FB).

('01) 25 Bom 387 (348) : 27 Ind App 216 (PO).

(Where a sale in pursuance of a decree obtained during the debtor's lifetime is executed against the wrong person as representative, such a person can apply under this rule.)

17. ('30) AIR 1930 Nag 185 (186, 187) : 26 Nag L R 173.

18. ('17) AIR 1917 Cal 745 (746).

19. ('28) AIR 1928 Mad 454 (455). (An interim receiver).

('16) AIR 1916 Sind 20 (21) : 10 Sind L R 53. (The insolvent cannot apply.)

('35) AIR 1935 Mad 459 (461). (Receiver in father's insolvency—Son's share in joint family property sold by creditor in execution of decree against father — Receiver can apply under this rule.)

- (7) A purchaser from the judgment-debtor *pendente lite*.<sup>20</sup>
  - (8) A transferee of a tenure or occupancy holding sold in execution of a decree for arrears of its own rent.<sup>21</sup>
  - (9) One only of several co-sharer judgment-debtors.<sup>22</sup>
- See the undermentioned cases<sup>23</sup> for further illustrations.

**9. Strangers.**— The words “whose interests are affected by the sale” are wide enough to cover persons who are not parties to the suit.<sup>1</sup> But a person who claims the property sold by a title paramount, that is adversely to the judgment-debtor, is not one whose interests are affected by the sale, and cannot therefore apply under this rule.<sup>2</sup>

**10. Grounds on which a sale can be set aside.**— Before a sale can be set aside under this rule, it must be shown —

- (i) that there has been a *material* irregularity or fraud in publishing and conducting the sale,<sup>1</sup> and

- [See also ('33) AIR 1933 Cal 486 (486).]
20. ('27) AIR 1927 Mad 783 (784).
- ('33) AIR 1933 Cal 788 (789). (Purchaser after attachment and before sale is “person whose interest has been affected”.)
- [See however ('82) 8 Cal 367 (369). (Does not include a purchaser of the same property at a prior execution sale which has not been confirmed.)]
21. ('25) AIR 1925 Cal 925 (925). (Purchaser of a non-transferable occupancy holding.)
- ('95) 22 Cal 802 (804).
- ('84) 10 Cal 496 (500).
- ('05) 9 Cal W N 194 (140). (Purchaser of a portion.)
- ('14) AIR 1914 Cal 524 (524, 526). (Do.)
- ('25) AIR 1925 Pat 461 (461, 462). (Do.)
22. ('08) 90 All 192 (196).
23. ('35) AIR 1935 Pat 210 (211). (Expression “any person interested in the sale” in S. 173, Bengal Tenancy Act, is more comprehensive than the corresponding expression in O. 21 R. 90, C. P. Code—Sale attacked on ground that judgment-debtor himself has purchased—Application under S. 173 is maintainable.)
- ('89) AIR 1939 Mad 193 (194). (Sale of property in execution of mortgage decree — Judgment debtor and attaching decree-holder are persons whose interests *prima facie* are affected by the sale — But if by reason of the claims of mortgagees of the property there would be no balance left which would be available to the judgment-debtor and the attaching decree-holder even if a proper price had been fetched at the sale they will not be persons whose interests are affected by the sale.)
- ('37) 41 Cal W N 1246 (1248). (A mortgagor judgment-debtor is entitled to maintain an application under O. 21 R. 90, C. P. Code, for setting aside the sale in execution of the mortgage decree, although a receiver has been appointed by Court in respect of the mortgaged properties.)
- ('35) AIR 1935 Pat 205 (206) : 14 Pat 436. (Sale of joint family property in execution of decree against father—Sons can apply to set aside sale.)
2. ('88) 15 Cal 488 (492) (FB). (Overruling 14 Cal 240 — Purchaser prior to attachment.)
- ('16) AIR 1916 All 147 (148) : 38 All 358. (Person not a party to a mortgage decree.)
- ('13) 20 Ind Cas 16 (17) (All). (Do.)
- ('27) AIR 1927 Cal 82 (83, 84).
- (1865) 2 Suth W R Misc 13 (14, 15). (Purchaser prior to attachment.)
- ('76) 25 Suth W R 79 (79).
- ('93) 16 Mad 476 (478). (Decree against one brother — Not binding on the other—He is not entitled to apply.)
- ('26) AIR 1926 Nag 68 (71). (Where during the pendency of a partition suit, the suit property was sold by auction in execution of a decree against one member alone as belonging to him only the other members cannot apply under R. 90 to have the sale set aside as the decree-holder could validly take only the share of that member.)
- ('23) AIR 1923 Pat 451 (452) : 2 Pat 386.
- ('22) AIR 1922 Upp Bur 22 (22) : 4 Upp Bur Rul 97.
- [See also ('25) AIR 1925 Pat 556 (557). (But a person who holds a protected interest under the Bengal Tenancy Act in a holding which has been sold under that Act for arrears of rent is not entitled to apply.)]
- [But see ('90) 12 All 440 (457) (FB).]

#### **Note 10**

- 1. (1900) 4 Cal W N 474 (477).
- ('14) AIR 1914 All 325 (325). (There was irregularity, but not a material one.)
- ('19) AIR 1919 Cal 169 (170).
- ('08) 12 Cal W N 757 (758, 759). (The statement of the value of property which proves to be inadequate is an irregularity, but not a material irregularity.)
- ('32) AIR 1932 All 369 (369).
- ('28) AIR 1928 Lah 918 (918).
- ('11) 12 Ind Cas 572 (573) (Lah).
- ('25) AIR 1925 Mad 729 (730).
- ('19) 52 Ind Cas 167 (167) (U P B R). (The mere absence of a notice to a judgment-debtor of the intended sale of his property is not a material irregularity.)
- ('16) AIR 1916 All 186 (187).

#### **Note 9**

- 1. ('36) AIR 1936 Lah 969 (971).

**O. 21 R. 90**  
**Notes 10-12**

(ii) that substantial injury has resulted to the applicant thereby.<sup>3</sup>

A sale which is *illegal and void* is not within the contemplation of this rule. Such a sale need not in fact be set aside at all and can be ignored.<sup>3</sup> Nor need any injury be shown to have been sustained by reason of such sale.<sup>4</sup> Where the decree-holder is the purchaser, it is open to the judgment-debtor under Section 47 to attack a sale on grounds other than those specified in this rule.<sup>5</sup>

In determining what is illegal and what is irregular, it may be remarked that the distinction is one of *degree*.<sup>6</sup> As a general rule, in order to establish an illegality there must be shown some disregard of a positive prohibition of the law.<sup>7</sup>

See Note 12 to Section 115, *ante* for a fuller discussion on this point.

**11. Material irregularity in publishing or conducting the sale.**—The term “irregularity” means “not being in conformity to some recognized rule” and in the present context it means “not being in conformity to the rules proscribed for regulating execution sales.”<sup>1</sup> The material irregularity referred to in this rule is an irregularity in the procedure to be followed before property is put up for sale. It does not include the irregularity of selling property not belonging to the judgment-debtor.<sup>2</sup> The expression “publishing or conducting the sale” refers respectively to the proclamation of sale under Rule 66 and to the action of the sale officer.<sup>3</sup> The words “conducting the sale” do not refer to anything done *before* the sale or any proceedings unconnected with the actual carrying out of the sale.<sup>4</sup> The material irregularity complained of must be one on the part of the Court or its officer.<sup>5</sup>

**12. Omission to attach property and irregularity in attaching property before sale.**—It was originally held by the High Court of Allahabad<sup>1</sup> that a regularly perfected attachment was an essential preliminary to sales in execution of simple money-decrees and that where there was no such attachment the sale was *void* and not merely voidable. In view of the decision of the Privy Council in *Tassaduk v. Ahmad*, I. L. R. 21 Calcutta 66, it has now been held by the said High Court that the absence of attachment is only a material irregularity which would not render the sale *ipso facto* void.<sup>2</sup> The same view has been held by other High Courts also.<sup>3</sup>

[See also ('14) AIR 1914 Cal 125 (126) : 41 Cal 276. (Omission to issue a notification of a revenue sale in vernacular while it was notified in English is not an irregularity)].

2. ('32) AIR 1932 All 969 (369).

('89) 11 All 333 (342, 343).

3. ('93) 15 All 324 (326, 327).

('82) 4 All 982 (384).

('25) AIR 1925 All 551 (552).

('11) 9 Ind Cas 584 (585) (Cal).

('87) 1887 All W N 32 (32).

4. ('89) 11 All 333 (338).

[But see ('95) 5 Mad L Jour 70 (73). (There is no distinction between material irregularity and illegality—In both cases substantial injury must be proved—*Obiter*)].

5. ('38) AIR 1938 All 192 (196).

6. ('21) AIR 1921 Mad 583 (585) : 44 Mad 35.

7. ('29) AIR 1929 Mad 275 (279).

**Note 11**

1. ('95) 5 Mad L Jour 70 (73).

2. ('38) AIR 1938 Pat 435 (440) : 12 Pat 665 (S B).

3. ('08) 32 Bom 572 (574).

[See ('37) AIR 1937 Nag 140 (141). (Irregularity or fraud in sale proclamation is covered by rule)].

4. ('85) 7 All 641 (645).

('20) AIR 1920 Mad 481 (484). (Notice under Rule 66 not issued—It is not a material irregularity in publishing.)

5. (1865) 4 Suth W R Misc S. 11 (12).

**Note 12**

1. ('83) 5 All 86 (91) (FB).

('85) 7 All 38 (40).

('88) 10 All 506 (514, 517).

2. ('99) 21 All 311 (313).

('84) AIR 1984 All 430 (432).

('13) 21 Ind Cas 46 (47) (All).

3. ('27) AIR 1927 Cal 847 (847).

('81) AIR 1981 Cal 35 (36) : 57 Cal 1206.

('16) AIR 1916 Cal 465 (467, 468).

('07) 84 Cal 787 (802).

('94) 21 Cal 639 (641).

('91) 18 Cal 188 (193).

('67) 8 Suth W R 415 (418, 419).

('80) AIR 1980 Lah 685 (686).

('29) AIR 1929 Lah 441 (442).

('26) AIR 1926 Mad 211 (218 to 216).

('18) AIR 1918 Mad 1262 (1263).

The question next arises whether, in cases in which it has been held that the absence of attachment is only a material irregularity, it is an irregularity in *publishing and conducting the sale* within the meaning of this rule. According to the High Courts of Calcutta and Rangoon, it is not.<sup>4</sup> The reason, it is conceived, is that such an irregularity is one which is *antecedent* to the publishing and conducting of the sale and, therefore, will be a ground for a proceeding only under Section 47. The High Courts of Allahabad, Lahore and Madras have, on the other hand, held that it is an irregularity in publishing and conducting the sale.<sup>5</sup> The publication of the attachment is a step leading up to the publication of the sale, the actual proclamation of sale being a notice to the public that the sale is to take place upon a particular date. The absence of attachment may, therefore, be deemed to be a material irregularity in the publishing of the sale.<sup>6</sup>

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Where there has been an attachment, an error in the warrant of such attachment<sup>7</sup> or the absence of notice of the attachment to the judgment-debtor<sup>8</sup> would only be mere irregularities which will not vitiate the sale.

**13. Omission to make an order for sale.** — The omission to pass an order absolute for sale under Section 89 of the Transfer of Property Act in a mortgage decree was held in the undermentioned case<sup>1</sup> to be not an irregularity in publishing or conducting a sale but one *antecedent* to it and, therefore, did not fall within this rule.

**14. Omission to issue notice.** — An omission to issue notice under Rule 22 is an irregularity in proceedings which are *anterior* to the publishing or the conduct of the sale.<sup>1</sup> It also goes to the root of the jurisdiction of the Court executing the decree and renders the sale *illegal and void*.<sup>2</sup> It is therefore not a matter coming under this rule. In the undermentioned cases,<sup>3</sup> however, it has been held that want of a notice under O. 21 R. 22 is a ground for setting aside a sale under this rule. (For a full discussion of the subject, see Order 21 Rule 22 Note 5.)

There is a conflict of opinion as to whether the non-service of notice under Rule 66 will be a ground for setting aside a sale under this rule. According to the High

(18) 18 Ind Cas 498 (499) (Mad).

(95) 18 Mad 437 (439).

(28) AIR 1923 Nag 18 (20).

(28) AIR 1923 Pat 45 (47) : 2 Pat 207.

(24) AIR 1924 Rang 124 (124) : 1 Rang 533.

(10) 5 Ind Cas 798 (799, 800) : 13 Oudh Cas 43.

(Attachment by Court without jurisdiction—Does not affect sale).

(11) 9 Ind Cas 918 (922) (Cal). (But where an objection that the property proclaimed for sale has not been attached is taken before the sale, it is the duty of the Court not to proceed with the sale, and to direct an attachment).

(23) AIR 1923 Nag 78 (79). (Minor irregularity in attachment—Sale not void).

(89) AIR 1939 Lah 36 (37) : 1 L R (1938) Lah 582. (Dissenting from AIR 1934 Lah 395).

(87) AIR 1937 Lah 297 (298).

(89) AIR 1939 Bom 277 (278) : 1 L R (1939) Bom 420. (86 Bom 156, Dissented.)

(86) AIR 1936 Bom 815 (321).

(87) AIR 1937 Nag 149 (149) : 1 L R (1939) Nag 450.

(86) AIR 1936 Mad 99 (100). (Even if there were no attachment at all, a sale would not be set

aside merely for want of it. Still less where an attachment has been made before the guardian to a minor was appointed).

[See also (1900) 27 Cal 789 (792).

(84) AIR 1934 Bom 348 (351) : 58 Bom 564. (Decision of single Judge holding that it is only an irregularity.)

[But see (12) 12 Ind Cas 911 (912) : 36 Bom 156.

(18) AIR 1918 Cal 1036 (1036).]

4. (27) AIR 1927 Cal 847 (847).

(24) AIR 1924 Rang 124 (124) : 1 Rang 533.

5. (99) 21 All 311 (313).

(90) AIR 1930 Lah 685 (686).

(26) AIR 1926 Mad 71 (211, 215).

6. (99) 21 All 311 (313).

7. (10) 6 Ind Cas 713 (715) : 1909 Pun Re No. 40.

(80) AIR 1930 Lah 789 (791).

8. (1865) 2 Suth W R 74 (75).

#### **Note 13**

1. (88) 1 Oudh Cas 155 (156).

#### **Note 14**

1. (08) 32 Bom 572 (574).

2. (97) 21 Bom 424 (439, 458) (F B).

3. (88) AIR 1933 Pesh 71 (72).



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Court of Madras,<sup>4</sup> the irregularity is not one relating to the publication or the conduct of the sale and the question can be considered only under Section 47. The Chief Court of Lower Burma<sup>5</sup> has held that the absence of such a notice is more than an irregularity and renders the sale void. The High Courts of Calcutta and Lahore and the Judicial Commissioner's Courts of Nagpur and Peshawar have held that it is an irregularity in publishing the sale.<sup>6</sup> The onus of proving that notice under Rule 66 was not properly served is on the judgment-debtor.<sup>7</sup>

Where no notice under Rule 66 is required to be given, as where a fresh proclamation is ordered to issue under Rule 69, the non-issue of notice is no ground for setting aside a sale under this rule.<sup>8</sup>

The absence of notice prescribed by O. 21 R. 16 is not a mere irregularity but affects the jurisdiction of the Court.<sup>9</sup>

A sale in execution of a decree pending an insolvency petition against the judgment-debtor is not bad for want of notice to the interim receiver.<sup>10</sup>

Non-publication of the notices prescribed by Regulation VIII of 1819 in cases of *putni* sales has been held to be a material irregularity.<sup>11</sup>

See also Section 47 Note 61, Order 21 Rule 16 Note 14 and Order 21 Rule 66, Notes 5 and 16.

**15. Irregularities in publishing the sale — Omission to publish or irregularity in publishing sale proclamation.** — The failure to publish the sale proclamation is an irregularity within this rule;<sup>1</sup> so is an irregularity in the preparation and service thereof.<sup>2</sup> As has been seen in the Notes to Rule 67 *ante*, the proclamation should be published on the spot<sup>3</sup> and a copy of the proclamation should be affixed to a conspicuous portion of the property,<sup>4</sup> and a failure to do the one or the other will be an irregularity within this rule. If the properties are situated in several villages or are distinct, the failure to proclaim the sale at each village or property will be an irregularity.<sup>5</sup> If, however, the properties are sold in lots and they are sufficiently separated from each other, the affixture of the proclamation on one of such lots may

('20) AIR 1920 Mad 1084 (1035) : 43 Mad 57.  
(Property already under attachment—Sale without notice to judgment-debtor only irregularity.)

4. ('25) AIR 1925 Mad 1142 (1142).

('20) AIR 1920 Mad 481 (484).

[See however ('85) AIR 1935 Mad 459 (462).]

5. ('18) AIR 1918 Low Bur 114 (114).

6. ('18) 18 Ind Cas 715 (717) (Cal).

('28) AIR 1928 Lah 592 (593) : 4 Lah 248.

('27) AIR 1927 Lah 84 (84).

('14) AIR 1914 Lah 105 (106).

('29) AIR 1929 Nag 180 (181) : 28 Nag L R 58.

('85) AIR 1935 Lah 962 (962).

('39) AIR 1939 Pesh 9 (11).

7. ('83) AIR 1933 Pat 640 (640).

8. ('26) AIR 1926 Oudh 76 (76, 77).

9. ('88) AIR 1938 Cal 784 (785, 786).

10. ('86) AIR 1936 Mad 121 (122) : 59 Mad 488.

11. ('16) AIR 1916 Cal 257 (259).

**Note 15**

1. ('26) AIR 1926 Cal 577 (578). (It is not an illegality.)

('29) AIR 1929 All 948 (949, 950) : 52 All 115.  
(Where the Court alters the date fixed for a sale without giving notice to the parties as required by R. 66 (2) there is a material irregularity.)

[See ('88) AIR 1938 Mad 174 (175). (The fact that there was no proclamation might legitimately give rise to an inference that if the sale had been proclaimed, the intending purchasers might have been present to bid for the property which might have fetched a higher price in consequence.)]

2. ('80) AIR 1930 Pat 153 (154).

('18) 18 Ind Cas 715 (716) (Cal).

('39) AIR 1939 Pesh 9 (12). (Failure to affix a copy of the sale proclamation at the court-house of the execution Judge amounts to irregularity of a material character as described in O. 21 R. 90.)

3. ('82) 1882 All W N 53 (53).

('81) 7 Cal 34 (39, 41).

4. ('29) AIR 1929 All 948 (948, 950) : 54 All 115.  
(Affixed not on the property but on a tree some distance off is a material irregularity.)

('02) 6 Cal W N 44 (46). (Affixed not on the property but on a school some distance off is a material irregularity.)

('81) 7 Cal 466 (469, 470).

('28) AIR 1928 Lah 671 (671).

5. ('18) 19 Ind Cas 296 (298) : 40 Cal 635 : 40 Ind App 140 (P O).

('85) 11 Cal 74 (76).



be enough.<sup>6</sup> The failure to affix a copy of the sale proclamation in the Collector's office as required by Rule 54 has also been held to be an irregularity under this rule<sup>7</sup>; but not the failure to direct an advertisement of sale in the Gazette.<sup>8</sup> Where two lots, each lot comprising several villages, were brought to sale but the sale proclamation affixed in each village showed that the subject of sale was the *particular village* at which the copy was posted and not the lot of which such village was part, it was held that it was a material irregularity.<sup>9</sup>

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**16. Misdescription of property.** — A mere misdescription of property in the sale proclamation where the parties concerned knew what had been attached and sold, is a mere irregularity which would not necessarily invalidate a sale.<sup>1</sup> But a fundamental misdescription of the property which has misled the purchaser will be a ground for setting aside the sale.<sup>2</sup> The principle of *caveat emptor* cannot apply to such cases.<sup>3</sup>

The non-specification of the share of the judgment-debtor in the property sold is also a material irregularity.<sup>4</sup>

See also the undermentioned decision.<sup>5</sup>

**17. Omission or mis-statement of the value of the property.** — A mere omission to state in the proclamation of sale the estimated value of the property to be sold will not be a material irregularity under the rule.<sup>1</sup> But in particular cases it may

[See however ('11) 9 Ind Cas 698 (701) (Cal). (There need not be separate proclamation in each village unless proper notice of the sale could not otherwise be given.)]

6. ('88) 12 Bom 368 (870). (Otherwise it would be an irregularity.)

('30) AIR 1930 Lah 685 (687).

7. ('91) 18 Cal 422 (426) (F B). (It is not an illegality.)

('82) 8 Cal 932 (932, 933).

('24) AIR 1924 Mad 217 (219, 223): 46 Mad 736.

8. ('19) AIR 1919 Lah 260 (261).

9. ('33) AIR 1933 Mad 225 (226, 227): 56 Mad 356.

**Note 16**

1. ('26) AIR 1926 Nag 246 (248).

('33) AIR 1933 Lah 1031 (1032). (Boundaries not correctly given in sale proclamation—But everybody recognizing property to be sold from municipal number—*Held* sale could not be set aside.)

('33) AIR 1933 Cal 662 (663). (Advertisement in newspaper—One property fully described and for description of others reference to sale proclamation given — Bidders not misled — Irregularity does not vitiate sale.)

('76) 25 Suth W R 326 (327). (Mention of wrong pargana.)

('17) AIR 1917 Mad 967 (967).

('34) AIR 1934 Pat 186 (187). (Registry office wrongly described in respect of property—Irrregularity is not sufficient to set aside sale.)

2. ('25) AIR 1925 All 459 (462, 464): 47 All 479.

('26) AIR 1926 Lah 587 (588). (A mistake in the dimensions of the property is a material irregularity.)

('05) 1905 Pun Re No. 47, page 168.

('08) 6 Oudh Cas 61 (62). (Inadequate description — Only numbers given and not boundaries.)

('32) AIR 1932 Pat 284 (286, 287): 11 Pat 424 (430). (Where in the proclamation of sale the area of the land was stated to be 144 acres,

whereas in fact it was 440 acres and its value as Rs. 20,000 when in fact it was worth about two lakhs of rupees—A material irregularity.)

('89) 12 Mad 19 (25): 15 Ind App 171 (PC). (Assumed.)

('34) AIR 1934 Lah 413 (413). (Plan of property defective and bidders prevented from offering bid on account of this is a material irregularity.)

[See also (1900) 22 All 168 (170). (Description of property vague and misleading—*Held* to be material irregularity.)]

('35) AIR 1935 Lah 390 (391). (Proclamation not giving proper boundaries and silent on estimated value of property—No bidders except decree-holder—Sale set aside.)]

3. ('25) AIR 1925 All 459 (462, 464): 47 All 479.

4. ('87) 1887 All W N 50 (51).

('02) 6 Cal W N 526 (527, 528).

('78) 3 Cal 544 (546).

[See ('38) AIR 1938 Rang 433 (434). (Proclamation not bad for not specifying shares of judgment-debtors *inter se*.)]

[See however ('31) AIR 1931 Bom 367 (368). (*Held* to be no misdescription but only a lacuna in it.)]

('21) AIR 1921 All 223 (224). (Mistake in sale proclamation regarding share of judgment-debtor—Suit by auction-purchaser to set aside sale—*Held*, intentional misrepresentation was essential.)]

5. ('36) AIR 1936 Cal 703 (705). (A condition of sale requiring the purchaser to assume certain facts, specifically added owing to the inability of the vendor to obtain particular title-deeds or documents, is not misleading if the vendor believes the facts to be true, even though the condition is intended to cover a flaw which goes to the root of the title.)

**Note 17**

1. ('22) AIR 1922 Lah 35 (36).

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be necessary to give the value in order to enable the bidders to judge the value of the property; the omission in such cases may amount to a material irregularity.<sup>3</sup>

A deliberate *mis-statement* of the value of the property calculated to mislead possible bidders and to prevent them from offering adequate prices or from bidding at all, is a material irregularity.<sup>3</sup> If it results in substantial injury, the sale will be set aside but not otherwise.<sup>4</sup>

**18. Omission to state the revenue or rent payable on the land.** — The omission in the sale proclamation of the Government revenue payable on the land is a material irregularity under the rule,<sup>1</sup> as also a materially incorrect statement of such revenue.<sup>2</sup> But the omission to state the *income* of the property has been held not to be a material irregularity.<sup>3</sup>

**19. Omission or mis-statement of the encumbrances over the property.** — An omission to state or a mis-statement of the encumbrances on the property will be a material irregularity under this rule.<sup>1</sup> It has been held in the undermentioned

- (‘16) AIR 1916 All 186 (187).  
(‘88) AIR 1933 Cal 662 (668). (Omission by Judge to determine value is gross irregularity but sale will not be set aside unless substantial injury is caused as a result of such irregularity.)  
(‘81) AIR 1931 Cal 490 (491) : 58 Cal 813.  
(‘27) AIR 1927 Mad 1009 (1009). (Especially where the decree-holder and judgment-debtor disagree hopelessly.)  
(‘28) AIR 1928 Nag 281 (282).  
(‘38) AIR 1938 Lah 508 (508).  
[See (‘24) AIR 1924 Cal 589 (592). (Valuation of both parties given in proclamation without value fixed by Court—It is no material irregularity.)]  
2. (‘29) AIR 1929 All 948 (948, 949) : 52 All 115.  
(‘30) AIR 1930 Nag 191 (192).  
(‘85) AIR 1935 Lah 390 (391). (Proclamation silent as to estimated value of property—No bidders except decree-holder—Fresh sale after fresh proclamation ordered.)  
3. (‘98) 20 All 412 (417, 418) : 25 Ind App 146 (PC).  
(‘33) AIR 1933 Cal 339 (340). (When discrepancy in value was so great as to shock the conscience, that circumstance must be regarded as something more than the kind of irregularity commonly alleged and it really was good evidence of fraud on the part of the decree-holder.)  
(‘13) 19 Ind Cas 296 (298) : 40 Cal 635 : 40 Ind App 140 (PC).  
(‘30) AIR 1930 Cal 511 (512).  
(‘29) AIR 1929 Cal 818 (819) : 57 Cal 67.  
(‘19) AIR 1919 Cal 350 (351).  
(‘17) AIR 1917 Cal 461 (462).  
(‘12) 16 Ind Cas 974 (975) (Cal).  
(‘11) 13 Ind Cas 337 (341) (Cal).  
(‘11) 11 Ind Cas 498 (441) (Cal).  
(‘11) 10 Ind Cas 475 (476) (Cal).  
(‘11) 9 Ind Cas 698 (701) (Cal).  
(‘10) 6 Ind Cas 185 (187) (Cal).  
(‘01) 6 Cal W N 48 (56).  
(‘01) 6 Cal W N 886 (888).  
(‘18) 21 Ind Cas 592 (593) (Mad).  
(‘16) AIR 1916 Mad 989 (991) : 38 Mad 387.  
(1900) 28 Mad 568 (570).

- (‘30) AIR 1930 Oudh 81 (81, 82) : 5 Luck 481.  
(‘28) AIR 1928 Pat 108 (109).  
(‘21) 57 Ind Cas 640 (641) (Pat).  
(‘18) AIR 1918 Pat 266 (267).  
(‘17) AIR 1917 Pat 72 (74).  
(‘35) AIR 1935 Bom 331 (332).  
[See (‘89) AIR 1939 Cal 668 (666) : I.L.R. (1939) 2 Cal 163. (Application within limitation to set aside sale on ground of gross under-valuation—Even in such case Court would require high standard of evidence to prove that there had been fraud or irregularity on account of under-valuation (*Obiter*).)]  
[See however (‘34) AIR 1934 Pat 186 (187). (Under-valuation in sale proclamation is not always by itself sufficient to set aside sale.)]  
[But see (‘08) 12 Cal W N 757 (759, 760). (*Held* to be not good law in 13 Ind Cas 337.)]  
4. (‘20) AIR 1920 Cal 518 (518, 519).  
(‘34) AIR 1934 Mad 260 (262).  
(‘17) AIR 1917 Pat 72 (74).  
(‘37) AIR 1937 Rang 157 (158).

**Note 18**

1. (‘23) AIR 1923 P C 93 (93, 94) (P C).  
(‘89) 9 Cal 656 (661) : 10 Ind App 25 (P C).  
(‘81) 9 Cal L Rep 134 (136).  
(‘81) 7 Cal 723 (725).  
(‘98) 21 Mad 51 (52, 53).  
(1900) 28 Mad 628 (629).  
[See also (‘69) 12 Suth W R 488 (488, 489).]  
2. (‘15) AIR 1915 Mad 989 (991) : 38 Mad 387.  
(‘77) 26 Suth W R 44 (47).  
3. (‘28) AIR 1928 Lah 918 (918).  
(‘17) AIR 1917 Lah 136 (137).

**Note 19**

1. (‘32) AIR 1932 All 369 (369, 370).  
(‘86) 8 All 116 (117).  
(‘02) 6 Cal W N 836 (837).  
(‘81) 7 Cal 34 (40, 42). (Encumbrance stated but amount omitted—Material irregularity.)  
(‘87) 10 Mad 57 (62). (A material error in describing the encumbrances on the property sold may be a material irregularity.)  
(‘29) AIR 1929 Pat 588 (589).  
(‘21) AIR 1921 Pat 479 (480).

case<sup>2</sup> that an omission to mention encumbrances would not, of itself, be injurious to the judgment-debtor as it would only be likely to persuade auction-purchasers to offer higher prices.

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An attachment is not an encumbrance on the property and hence an omission to mention an attachment in a sale proclamation is not a material irregularity.<sup>3</sup>

**20. Other mistakes in the sale proclamation.** — Where the sale proclamation advertised the sale of property in satisfaction of the whole decree amount but as a matter of fact part of the decree had been satisfied, it was held in the undermentioned case<sup>1</sup> that it was only an irregularity and did not render the sale a nullity.

**21. Omission to beat drum.** — Omission to have the drum beaten at the time of the proclamation of sale as required by O. 21 Rr. 54 and 67 is a material irregularity within the meaning of this rule.<sup>1</sup> But an omission to have the drum beaten at the time of the sale is not such an irregularity.<sup>2</sup>

**22. Postponement of sale and issue of fresh proclamation.** — Where a sale is adjourned under Rule 69 by more than seven days, a fresh proclamation is necessary, unless the same has been waived. (See Notes 8 and 9 to O. 21 R. 69, *ante*.)

**23. Irregularities in conducting the sale — Sale within thirty days of the proclamation.** — A sale held within thirty days of the date of the publication of the proclamation at the place where the property is situate, or within thirty days of the affixture of the proclamation in the court-house is vitiated by a material irregularity within the meaning of this rule; but it does not become *ipso facto* null and void.<sup>1</sup>

**23a. Omission to fix time for sale.** — An omission to fix the time for sale is an irregularity.<sup>1</sup>

**24. Sale on a holiday.** — To hold a sale on a holiday is neither an illegality nor an irregularity within the meaning of this rule.<sup>1</sup>

(‘85) AIR 1935 Lah 962 (962).

(‘35) AIR 1935 Mad 607 (609). (Parties agreeing that sale shall be free from encumbrances — Statement to contrary in sale proclamation not corrected — Omission to inform intending purchasers that sale is free from encumbrances — There is material irregularity and sale should be set aside.)

[See (‘99) 1899 Pun Re No. 30, page 153.]

2. (‘88) AIR 1938 All 546 (548, 550) : 55 All 519. (Under-valuation making property fetch low price is not irregularity.)

3. (‘37) AIR 1937 Pat 50 (52).

**Note 20**

1. (‘17) AIR 1917 Mad 739 (741).

**Note 21**

1. (‘86) 10 Bom 504 (505).

(‘38) AIR 1938 All 747 (747) : 55 All 182.

(‘97) 20 Mad 159 (161).

2. (‘20) AIR 1920 All 206 (207).

**Note 23**

1. (‘94) 21 Cal 66 (69) : 20 Ind App 176 (P C). (‘88) AIR 1938 Lah 186 (186). (The sale can be set aside and property re-sold if the judgment-debtor gave security for making up the deficiency, if any, on the re-sale.)

(‘89) 11 All 333 (339, 345). (Per Brodhurst, J.)

(‘87) 9 All 511 (512, 513). (Per Mahmood, J.)

(‘85) 1885 All W N 304 (304).

(‘04) 31 Cal 385 (392).

(‘81) 7 Cal 34 (40, 41).

(‘82) 11 Cal L Rep 303 (304). (Sale within thirty days of publication on the spot — Material irregularity.)

(‘95) 5 Mad L Jour 70 (72, 73).

(‘91) 14 Mad 227 (228).

(‘24) AIR 1924 Nag 293 (294).

(‘18) AIR 1918 Nag 213 (213, 214).

(‘28) AIR 1928 Pat 45 (48) : 2 Pat 207.

(‘85) AIR 1935 Lah 962 (962).

*In view of the Privy Council decision in 21 Cal 66 the following cases to the contrary are no longer good law :*

(‘87) 14 Cal 1 (8).

(‘85) 7 All 289 (289).

(‘82) 4 All 300 (301, 302).

**Note 23a**

1. (‘35) AIR 1935 Lah 992 (992).

(‘37) AIR 1937 All 407 (409).

**Note 24**

1. (‘81) 3 All 333 (334).

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**Note 25**

**25. Omission to hold sale at stated time and place.** — As to the effect of a sale held on a day different from that on which it was notified to be held, and of which judgment-debtor could have had no notice, see Note 12 to Rule 69. See also the undermentioned cases.<sup>1</sup> Where the Court ordered the sale to be held at a particular place but it was notified to be held and was actually held at a different place, it was held that the sale was illegal.<sup>3</sup>

An officer conducting a sale is entitled to postpone a sale for a period of not more than seven days for sufficient reasons.<sup>3</sup> Such reasons must, however, be recorded in writing; otherwise the postponement will constitute a material irregularity.<sup>4</sup> Where a sale is adjourned for a period of *more* than seven days it will be a material irregularity to hold the sale without a fresh proclamation.<sup>5</sup> It has also been held that where a re-sale is ordered or a sale is adjourned, the omission to fix the date and hour of the sale is a material irregularity.<sup>6</sup> As to whether the holding of sale at an earlier or later *hour* than that specified is an irregularity, see Note 6 to Rule 66 and the undermentioned cases.<sup>7</sup> See the same Note and the cases noted

('82) 1882 All W N 169 (169).

[But see (1865) 3 Suth W R Misc 24 (24).]

**Note 25**

1. ('38) AIR 1933 Cal 486 (487). (Date fixed for sale a holiday — Sale held the next day not a nullity.)

('39) AIR 1939 Cal 869 (374) : I L R (1939) 1 Cal 590. (Failure to mention in advertisement of sale, date from which monthly sales commence is not irregularity — Also failure to mention therein that Collector has taken possession of properties under S. 99, Cess Act, does not prejudice judgment-debtor.)

('37) AIR 1937 Pat 20 (21). (The holding of a sale, fixed for the first day of the monthly sales, on the following day in its due order, because it could not be held earlier, is not illegal—It does not amount even to a material irregularity.)

('37) AIR 1937 Pat 104 (105). (Advertising sale to take place on certain day but actually holding it one day afterwards does not amount to material irregularity in conducting sale owing to provisions of Rr. 14 and 15 of the Patna High Court General Rules.)

('84) AIR 1934 Pat 659 (660). (Where there is no sale on the date advertised it cannot be said to have been postponed and hence sale on some future date must be set aside.)

('88) 177 Ind Cas 188 (140) (Pat). (Where a sale was under hammer on the 18th but in fact was held on the 20th, a day which was not fixed for the sale, it is not illegality but only an irregularity.)

2. ('21) AIR 1921 Mad 583 (585, 586) : 44 Mad 35.

3. ('11) 12 Ind Cas 174 (175) : 39 Cal 26 : 38 Ind App 200 (P C).

('90) 17 Cal 152 (154).

('81) 7 Cal 34 (40). (Illness of the selling officer is a good reason.)

('72) 17 Suth W R 278 (278). (That the date originally fixed was a holiday is a good reason.)

('72) 17 Suth W R 210 (210). (That there was no bidder is a good reason.)

4. ('32) AIR 1932 All 869 (369).

[See ('90) 14 Mad 227 (228). (Adjournment without ground is a mere irregularity.)]

5. [See ('21) AIR 1921 Cal 597 (598).]

[See however ('10) 8 Ind Cas 564 (565) (Mad). (A sale in execution conducted from day to day for longer than seven days, is neither illegal nor irregular.)]

6. ('30) AIR 1930 All 542 (543).

('33) AIR 1933 All 546 (549) : 55 All 519. (This will however be otherwise where the judgment-debtor agreed that there should be no fresh proclamation.)

('33) AIR 1933 Cal 662 (663). (Non-specification of hour of sale is irregularity.)

('27) AIR 1927 All 241 (241) : 49 All 402.

('12) 13 Ind Cas 837 (843) (Cal).

('12) 16 Ind Cas 894 (895) (Cal).

('02) 6 Cal W N 48 (51).

('97) 20 Mad 159 (161).

('25) AIR 1925 Mad 631 (633). (Omission to mention date of sale in proper place in sale proclamation—Irregularity.)

('88) AIR 1938 Nag 107 (109) : I L R 1938 Nag 436. [See also ('33) AIR 1933 All 192 (195).]

[See however ('35) AIR 1935 All 182 (182, 183). (Sale officer adjourned the sale for want of time — No hour mentioned as regards the adjourned date—No irregularity.)]

7. ('70) 14 Suth W R 320 (321).

('34) AIR 1934 Bom 348 (351) : 58 Bom 564.

(Sale notified to take place from 11 A. M. to 5 P. M. begun at 12 noon and closed at 3 P. M. — Court finding that there were sufficient bidders and sale could be finished earlier—Closing of sale at 3 P. M. is not an irregularity.)

('33) AIR 1933 Pesh 57 (58, 59). (Sale held earlier than hour mentioned in proclamation—Sale not void—It is material irregularity.)

('85) 1885 Pun Re No. 96 page 218. (Material irregularity.)

('07) 4 Low Bur Bul 128 (124). (Do.)

('87) 1887 All W N 129 (129).

('86) 88 Pun L R 515 (517). (Sale conducted two hours after appointed time — Intending bidders departing after waiting—Sale irregular.)

below<sup>8</sup> as to the effect of the omission to state the place of sale, or of holding the sale at a place different from that notified.

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**Notes 26-27**

**26. Sale of property in one lot though advertised for sale in separate lots.** — Where property has been ordered and advertised to be sold in separate lots, it will be a material irregularity to sell it in one lot. But if there was no order for sale in separate lots though the sale proclamation described the property in several lots, it is not a material irregularity to sell all the property in one lot.<sup>1</sup> Again, where property has been advertised for sale in one lot it is not an irregularity to sell it in separate lots.<sup>2</sup>

**27. Irregularities regarding the order of sale of lots.** — Where the decree itself directs the sale of properties in a particular order, a sale held in any other order will be vitiated by a material irregularity.<sup>1</sup> Where a mortgage decree does not give any direction as to the order in which the mortgaged properties are to be sold but there are a number of judgment-debtors with rights of contribution, they can apply to the executing Court to look into the equities *inter se* and direct a sale in consonance therewith. Where the Court disregards such equities, there is a material irregularity.<sup>2</sup> In the absence of any direction in the decree, a particular course followed by the Court in selling the properties cannot be said to constitute a gross irregularity merely because a better way of carrying out the sale was possible.<sup>3</sup>

Where, in the absence of a direction in the decree the executing Court fixes the order in which the properties are to be sold, any change in the order so specified will be a material irregularity unless the change is notified in time to the bidders.<sup>4</sup>

The practice in the Madras Presidency as regards execution sales is to sell the lots in the order in which they appear in the sale proclamation and a departure from that order may amount to material irregularity.<sup>5</sup>

In the absence of a direction by the executing Court for the sale of the properties in a particular order, the sale of the items in an order different from that specified in the sale list will not be irregular.<sup>6</sup>

(‘39) AIR 1939 Nag 258 (259, 260). (Holding of sale two or three hours before the time fixed is not merely an irregularity but an illegality which in itself renders the sale void.)

(‘86) AIR 1936 Bom 315 (319). (In a sale proclamation it was declared that the sale would take place between the hours of 11 A. M. to 5 P. M. and the same commenced from 12 noon and was closed at 3 P. M. as higher bids were not forthcoming — Held that there was no irregularity vitiating the sale.)

(‘94) 16 Cal 794 (798). (Sale before hour fixed — Held, there was no sale).

[See (‘75) 24 Suth W R 240 (240).]

8. (‘09) 2 Ind Cas 459 (460) (Bom). (Sale held at a different place not illegal and void).

(‘28) AIR 1923 Lah 213 (216). (Assumed that time, date and place were not specified.)

(‘21) AIR 1921 Mad 484 (486). (Omission to state in the proclamation the place of sale did not mislead the bidders — Held sale not liable to be set aside.)

#### Notes 26

1. (‘17) AIR 1917 Lah 186 (187).

[But see (‘69) 12 Suth W R 492 (493, 494).]

2. (‘98) 21 Mad 417 (419).

[See (‘75) 23 Suth W R 1 (4, 5).]

#### Note 27

1. (‘12) 16 Ind Cas 235 (236) (Cal).

(‘17) AIR 1917 Mad 877 (879).

2. (‘25) AIR 1925 Pat 148 (150, 151).

3. (‘28) AIR 1928 Mad 684 (685).

4. (‘69) 12 Suth W R 281 (282).

[See also (‘96) 23 Cal 351 (353, 356).

(‘14) AIR 1914 All 925 (926). (Where property to be sold was divided in nine lots and the Court ordered the sale only of so many lots as would satisfy the decree, but the nazir sold all the items because there were a number of applications for rateable distribution — Held it was a material irregularity.)

(‘39) AIR 1939 Cal 369 (372) : ILR (1939) 1 Cal 530. (The disturbance by the officer conducting sale, of the list of properties to be sold in course of monthly sales prepared under Rule 233 of Calcutta High Court Civil Rules and the sale of property out of its turn is only a breach of R. 234 and amounts to irregularity and not an illegality and the sale is not void but voidable if that irregularity has resulted in loss to the judgment-debtor or decree-holder.)]

5. (‘39) AIR 1939 Mad 303 (303) : ILR (1939) Mad 216.

6. (‘81) AIR 1981 All 159 (160).

**O. 21 R. 90**  
**Notes 28-32**

**28. Other cases where the sale is not in terms of the proclamation. —**

It is a material irregularity for a decree-holder to cause the sale officer to announce at the time of the sale an encumbrance not stated in the proclamation and an application to notify which had been rejected by the Court.<sup>1</sup> It will be equally an irregularity if without notice the property is sold free of encumbrance, when the sale proclamation advertised the sale subject to encumbrances.<sup>2</sup>

Where an entire interest in a property has been proclaimed and brought to sale but on the date of sale a portion only of such property is sold without fresh proclamation, does it amount to an irregularity? According to the High Courts of Allahabad, Madras and Patna it does not.<sup>3</sup> But according to the High Courts of Calcutta, Lahore and Nagpur it amounts to a material irregularity rendering the sale liable to be set aside.<sup>4</sup>

**29. Purchase by decree-holder without permission to bid. —** See Note 7 to Rule 72, *ante*.

**30. Irregularities in the grant of permission to bid. —** Where after the decree-holder had been given leave to bid and without notice to him the Court imposed a limit below which the decree-holder should not bid and the property was sold at an undervalue, it was held that the sale could be set aside for irregularity.<sup>1</sup> Where there were three applications by the decree-holder on different dates for leave to bid, but the affidavit required by Rule 153 of the Madras Civil Rules of Practice was not attached to the first two applications but only to the last one, it was held by the Madras High Court that this did not amount to any irregularity.<sup>2</sup>

**31. Sale after satisfaction of the decree. —** Where after a decree has been satisfied and the satisfaction has been recorded, a sale is held in execution of the decree, the sale is a nullity<sup>1</sup> and therefore the matter does not fall within this rule. See Note 71 to Section 47, *ante*.

If the satisfaction has not been recorded and the period for certification has expired, the Court cannot go into the question at all and an application to set aside the sale on the ground that the decree was satisfied cannot be maintained under this rule.<sup>2</sup> Even if the ninety days have not elapsed, there is no irregularity or fraud in publishing or conducting the sale and the matter will not fall under this rule but only under Section 47.<sup>3</sup>

**32. Sale after an order of postponement. —** A sale held after an order of postponement passed by the executing Court is a *nullity* whether the order was or was not communicated to the selling officer before the sale.<sup>1</sup>

As to the effect of sales held in contravention of a stay order, see Note 66 to Section 47 and Order 41 Rule 5.

(‘39) AIR 1939 All 546 (547) : 55 All 19.

**Note 28**

1. (‘25) AIR 1925 Oudh 424 (424).
2. (‘11) 9 Ind Cas 883 (884) (Cal).
3. (‘32) AIR 1932 All 664 (664). (Under circumstances it may amount to irregularity.)
- (‘20) 11 Mad L W 477 (478, 479).
- (‘24) AIR 1924 Pat 803 (803).
4. (‘78) 3 Cal 544 (546).
- (‘80) 6 Cal L Rep 287 (288).
- (‘30) AIR 1930 Lah 15 (16). (Whole house advertised—Sale of half of the house irregular.)
- (‘39) AIR 1939 Nag 241 (242).

[See also (‘82) AIR 1982 All 664 (664). (Do.)]

**Note 30**

1. (‘25) AIR 1925 Oudh 881 (882).
2. (‘25) AIR 1925 Mad 729 (780).

**Note 31**

1. (‘11) 9 Ind Cas 452 (452) (Low Bur).
- (‘13) 20 Ind Cas 887 (840) (Cal). (Even as against a *bona fide* purchaser for value without notice.)
- (‘94) 16 All 5 (7, 9).
2. (‘27) AIR 1927 Lah 84 (84).
3. (‘11) 10 Ind Cas 625 (625) (Cal).

**Note 32**

1. (‘21) AIR 1921 All 102 (108).

Where an order of *injunction* restraining the sale has been obtained but the sale is held *before* the order is communicated, it is a material irregularity according to the Judicial Commissioner's Court of Nagpur<sup>2</sup> but not according to the High Court of Allahabad.<sup>3</sup> Where the sale is held *after* the order of injunction was communicated, it is a nullity.<sup>4</sup>

O. 21 R. 90  
Notes 32-35

**33. Sale after attachment under Rule 53.** — A sale held in contravention of an attachment of the decree effected under Rule 53 is invalid as being without jurisdiction and is not a mere irregularity.<sup>1</sup>

**34. Omission to make the legal representatives of the deceased judgment-debtor or decree-holder parties to sale proceedings.** — Where an execution is taken against a wrong representative, the sale is not a *nullity* though it may amount to a material irregularity.<sup>1</sup>

A sale held during the lifetime of the judgment-debtor but confirmed after his death without impleading his legal representatives on the record is not void.<sup>2</sup>

Where properties had been attached during the lifetime of the decree-holder but the sale was held after his death without impleading his legal representatives, it was held that there was no irregularity.<sup>3</sup>

As to the effect of a sale where the judgment-debtor dies after attachment but before sale and the sale is held without impleading his legal representatives, see Note 12 to Section 50 *ante*, and the undermentioned cases.<sup>4</sup>

**35. Non-representation of minor.** — A sale held in execution of a decree against a minor is not void for the reason that no guardian had been appointed for him in the execution proceedings.<sup>1</sup> It will, however, be a material irregularity under this rule.<sup>2</sup> But where the minor is not represented in the suit itself, a sale in execution of such decree is void even though he is represented by a guardian in the execution proceedings.<sup>3</sup>

Where subsequent to the decree but prior to the sale in execution, the judgment-debtor had been adjudged insane and no guardian was appointed for him in the execution proceedings, it was held that there was a material irregularity under this rule.<sup>4</sup>

('90) 12 All 96 (98).

('80) 2 All 686 (687).

('74) 6 N W P H C R 354 (356).

('72) 4 N W P H C R 135 (137).

2. ('20) AIR 1920 Nag 12 (13).

3. ('22) AIR 1922 All 282 (282).

4. ('25) AIR 1925 Oudh 424 (424, 425).

**Note 33**

1. ('05) 32 Cal 1104 (1106).

**Note 34**

1. ('01) 25 Bom 387 (347, 348) : 27 Ind App 216 (PC).

('38) AIR 1938 Mad 945 (946).

2. ('29) AIR 1929 Oudh 235 (237) : 4 Luck 635.

3. ('80) 8 All 759 (765).

('82) 1882 All W N 169 (169).

[See ('29) AIR 1929 Pat 200 (200). (Whether it is irregularity — *Quære*.)]

4. ('13) 19 Ind Cas 120 (121) (All). (Sale is not nullity.)

('19) AIR 1919 Cal 411 (413). (Do.)

('96) 23 Cal 686 (689). (Do.)

**Note 35**

1. ('96) 23 Cal 686 (689). (Nor even incorrect description of a person as a minor.)

('83) AIR 1933 Mad 833 (836). (Decree obtained against minor's father — Death of father — Minor not impleaded but his mother brought on record as legal representative — *Held*, execution proceedings were substantially right.)

('83) AIR 1933 Mad 179 (180). (Minor judgment-debtor represented by Court officer—Representation sufficient.)

('35) 61 Cal L Jour 322 (327).

2. ('13) 19 Ind Cas 296 (297, 298) : 40 Cal 635 : 40 Ind App 140 (P C).

('27) AIR 1927 Cal 873 (874).

('26) AIR 1926 Cal 109 (112).

('21) AIR 1921 Cal 476 (478).

('16) AIR 1916 Cal 603 (604).

[But see ('11) 9 Ind Cas 252 (253) (Mad).]

3. ('38) AIR 1938 Cal 627 (629) : 60 Cal 753.

4. ('96) 19 Mad 219 (227, 228).



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**Note 36**

**36. Other instances of material irregularity.** — The following have been held to constitute material irregularity within the meaning of this rule, *viz.* —

- (1) Collusion between the decree-holder and the judgment-debtor.<sup>1</sup>
- (2) Disparaging remarks by the decree-holder about the property to be sold, which are calculated to deter bidders from bidding at the sale.<sup>3</sup>
- (3) Omission in the execution of a mortgage decree of the name of the subsequent mortgagee.<sup>3</sup>
- (4) Holding sale in court-room without notice to the public.<sup>4</sup>
- (5) Confirmation of sale before an application under this rule is decided.<sup>5</sup>

For other cases of irregularity, see the undermentioned decisions.<sup>6</sup>

**Note 36**

1. ('25) AIR 1925 Pat 461 (462).
2. ('80) 5 Cal 308 (310).  
[See ('90) 17 Cal 152 (154). (But where disparaging remarks are made by by-standers or purchasers other than the decree-holder it is not a material irregularity.)]
3. ('16) AIR 1916 Pat 64 (65) : 1 Pat L Jour 261.
4. ('33) AIR 1933 All 161 (162).
5. ('33) AIR 1933 All 137 (138).
6. ('29) AIR 1929 All 671 (672). (Time given to produce a person offering a higher bid and sale in his favour.)
- ('33) AIR 1933 Oudh 345 (346) : 8 Luck 731. (Failure to deposit 25 per cent. of purchase-money immediately is only irregularity which does not affect validity of sale unless substantial injury is caused to judgment-debtor.)
- ('16) AIR 1916 All 186 (189). (Allowing a bidder for several lots to deposit 25 per cent. at the conclusion of the sale of all the lots, is an irregularity.)
- ('85) 1885 All W N 919 (919). (Landed ancestral estate which ought to be sold, under rules made by Government, by the Collector, was sold by the Civil Court — *Held* it is a material irregularity.)
- ('82) 1882 All W N 89 (89). (Judgment-debtor preventing decree-holder from bidding — Sale must be set aside.)
- ('24) AIR 1924 Cal 1055 (1055). (The objection that properties were sold in execution without the consent of the Court by which the receiver was appointed is not such as would render the sale void : at most, it is merely an irregularity.)
- ('88) 9 Cal 98 (99). (Default in making deposit under R. 84 is a material irregularity — See also O. 21 R. 84, Note 4.)
- ('88) 1888 Pun Re No. 5. (The omission to get the sanction of the Financial Commissioner (*vide* Notification No. 1297, 10th September, 1885, is a material irregularity.)
- ('98) 21 Mad 51 (53). (High Court had ordered in execution of another decree to have the villages of the zamindari sold one by one — In the present case decree-holder applied to sell the entire village subject to the decree in the other mortgage suit — In the remarks column the decree-holder was bound to state the effect of the High Court order — Non-mention is a material irregularity.)
- ('29) AIR 1929 Oudh 26 (29) : 4 Luck 93. (Amount of decree, Rs. 2200 — Two items sold — Decree-holder offered Rs. 1800 for one item and offered to bid for the rest with regard to other item — Sale officer refused to accept his bid and accepted the next lower bid of Rs. 700 — *Held*, material irregularity in conducting the sale.)
- ('25) AIR 1925 Sind 101 (102). (Two secured decree-holders — A single sale by arrangement with Nazir — Proclamation mentioning only one charge — *Held*, a material irregularity.)
- ('21) AIR 1921 Cal 382 (383). (Sale of mortgaged property in execution of a decree for costs against the mortgagee decree-holder.)
- ('28) AIR 1928 Pat 103 (109). (Putting in a subsequent sale proclamation a different value of property which is once valued in a previous sale is a material irregularity.)
- ('86) AIR 1986 Lah 555 (557). (Auctioneer arbitrarily closing auction at four o'clock, although another bidder is willing to purchase property for larger sum amounts to material irregularity.)
- ('35) AIR 1935 Oudh 154 (155). (An omission by the officer conducting an execution sale to record the bid of a bidder is an irregularity.)
- ('86) AIR 1986 Pat 572 (576). (Property in possession of receiver — Sale in execution of decree without leave of Court is irregular and not void.)
- ('87) AIR 1937 Rang 157 (158). (Setting out valuation of property as given by decree-holder without previous inquiry — It is good ground for setting aside sale by application under O. 21, R. 90, only after sale takes place, but is no ground for appeal before sale.)
- ('39) AIR 1939 Nag 241 (242). (If the sale proclamation states that the entire houses would be sold but actually only a portion of them is sold, this constitutes an irregularity and even perhaps a material irregularity, but whether such irregularity results in substantial injury depends upon the facts of each case.)
- ('85) AIR 1985 Mad 438 (439). (No service of notice of sale proclamation — Absence of declaration under O. 5 R. 19 — Property grossly undervalued and low upset price fixed — Sale must be set aside.)
- ('85) AIR 1985 Lah 992 (992). (Rule 11 in Ch. 12-M, Vol. 1 (Lahore) has not the force of law and a sale conducted in contravention of it cannot be held to be illegal.)



In the following cases the sale was held to be *void* on the ground of *illegality* :

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Note 36**

- (1) Omission to serve notice under Rule 22.<sup>7</sup> *Vide also* Notes under Rule 22.
- (2) Omission on the part of the Judge to sign the order of attachment and sale notification.<sup>8</sup>
- (3) Selling the property as being subject to a mortgage when the decree directs its sale free from the mortgage.<sup>9</sup>
- (4) Selling property not covered by the decree.<sup>10</sup> (See also Note 68 to Section 47, *ante*.)
- (5) Decree-holder deterring persons by threats and intimidation from attending and bidding at the sale.<sup>11</sup>

The following circumstances have been held to constitute no irregularity :

- (1) Omission to make an application for sale as required by Rule 66.<sup>12</sup>
- (2) Holding a sale for a sum larger than what is really due.<sup>13</sup>
- (3) Knocking down the sale to the highest bidder for a price which is subsequently found to be too low.<sup>14</sup>
- (4) Knocking down the sale to a lower bidder when the higher bidders are not *bona fide* and have no money to deposit as required.<sup>15</sup>
- (5) Sale held without notice to a receiver who is not in possession of the property sold.<sup>16</sup>
- (6) Conducting a sale from day to day and fixing a date for bringing the sale to an end.<sup>17</sup>
- (7) Decree-holder purchaser dissuading others from bidding at a court sale and thus causing the property to be sold at a low price.<sup>18</sup>
- (8) Reduction of upset price during the conduct of the sale without notice to the judgment-debtor.<sup>19</sup>

See also the undermentioned cases.<sup>20</sup>

Where the same property has been notified for sale in execution of two decrees, it is quite proper and regular to hold one sale in respect of both of them.<sup>21</sup> In the

(‘37) AIR 1937 Lah 118 (114). (Deposit of 25 per cent. made three days after sale and accepted by Court—There is mere irregularity.)

7. (‘14) AIR 1914 P C 129 (131) : 42 Cal 72 : 41 Ind App 251 (P C).

(‘26) AIR 1926 Cal 589 (540).

(‘21) AIR 1921 Cal 609 (611).

(‘24) AIR 1924 Mad 481 (486, 488) : 47 Mad 288 (FB).

8. (‘85) 7 All 506 (510) (PC).

(‘81) 3 All 701 (704, 705).

9. (‘98) 20 Cal 599 (602).

10. (‘25) AIR 1925 All 551 (552).

[See also (‘23) AIR 1923 Bom 62 (62) : 46 Bom 914. (Property not subject to mortgage was so shown by plaintiff through mistake—Property was included in the decree and was sold under it—Sale is not nullity.)]

[But see (‘25) AIR 1925 All 286 (287) : 47 All 304. (Sale can be set aside under R. 90.)]

11. (‘81) 1881 All W N 106 (106).

12. (‘30) AIR 1930 Lah 685 (686).

(‘17) AIR 1917 Lah 186 (188).

13. (‘69) 1 N W P H O R 61 (63).

14. (‘84) 8 Bom 424 (425).

(‘78) 5 N W P H O R 19 (20).

15. (1861) 9 Moo Ind App 824 (841, 842) (PC.)

(So held under the unusual circumstances of the case.)

16. (‘29) AIR 1929 Rang 311 (312) : 7 Rang 425.

17. (‘38) AIR 1938 Mad 225 (227) : 56 Mad 356.

(But the system of conducting sales in such a manner must be condemned and deprecated.)

18. (‘11) 9 Ind Cas 816 (817) (Lah).

[See (1900) 23 Mad 227 (233, 234) : 27 Ind App 17 (PC).]

[But see (‘81) 7 Cal 346 (347). (Their Lordships of the Privy Council in 23 Mad 227 remarked that the observations in this case to the effect that the decree-holder must exercise most scrupulous fairness were too sweeping; but the decision of the case was held to be correct.)]

19. (‘39) AIR 1939 Mad 193 (194).

20. (‘38) AIR 1938 Nag 107 (108) : I L R (1938) Nag 436.

(‘35) AIR 1935 Mad 697 (699). (Order for sale — Receiver appointed by same Court in respect of same property in another suit — Receiver aware of above order, applying for adjournment so that he may pay decree debt — Subsequent sale — Omission to get leave of Court is not fatal — Sale should not be set aside.)

21. (‘81) 1881 All W N 89 (89).

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**Notes 36-37**

undermentioned case<sup>32</sup> the High Court had directed stay of sale on the judgment-debtor furnishing security. He did not furnish security, but on the day of sale offered a security which was rejected by the officer conducting the sale. Thereupon the sale was held. It was held that the sale could not be set aside on the ground that there was an impression that the sale had been postponed and consequently few bidders attended the sale.

**37. Fraud in publishing and conducting the sale.** — Section 311 of the old Code provided only for cases of material irregularity as a ground for setting aside a sale and did not include *fraud* in publishing and conducting a sale as a ground of attack. It was held under that Code that such an application came within the scope of Section 244 (now Section 47).<sup>1</sup> The fact that Section 312 of the old Code provided that the sale shall be confirmed in the absence of an application under Section 311 on the ground of material irregularity, was held not to deprive the Court of the power to refuse to confirm the sale where it had been brought about by fraud.<sup>2</sup> The present rule has been framed so as to include fraud as well, so that an application can now be made under this rule to set aside a sale on the ground of fraud in publishing and conducting the sale.<sup>3</sup> The effect of including fraud in this rule is to take the applications setting up fraud in publishing and conducting the sale out of the scope of Section 47 and to bring them under this rule.<sup>4</sup> See also Note 55 to Section 47, *ante*.

The word "fraud" in this rule means "that which is dishonest and morally wrong" and does not include an irregularity.<sup>5</sup> The burden of proving fraud rests upon the applicant and must be proved by clear and definite evidence.<sup>6</sup> General and vague allegations of fraud<sup>7</sup> and mere proof of suspicious circumstances are not enough.<sup>8</sup> But it is open to a Court to make an inference of fraud from established facts taken together as a whole.<sup>9</sup> In order to enable an applicant to succeed, it is not necessary that the *auction-purchaser* should also have been a party to the fraud; the fraud of the decree-holder would be sufficient.<sup>10</sup> The reason is that the applicant claims relief not against the purchaser alone but also against the decree-holder. The view expressed in the undermentioned case<sup>11</sup> that it must be proved that the auction-purchaser was a party to the fraud is, it is submitted, not correct.

[See also ('79) 2 All 107 (112). (But same property sold separately on same date in pursuance of two orders for sale in two different decrees — No irregularity in the conduct of sale.)]

22. ('81) 1881 All W N 104 (104).

**Note 37**

1. ('06) 28 All 681 (682, 683).
- ('05) 27 All 702 (708). (Application could be made even after confirmation of sale.)
- ('09) 4 Ind Cas 253 (254) : 83 Bom 698.
- ('07) 5 Cal L Jour 328 (332).
- ('02) 6 Cal W N 288 (285, 288).
- ('99) 26 Cal 324 (331).
- ('99) 4 Cal W N 538 (540).
- ('98) 2 Cal W N 691 (693).
- ('02) 24 All 239 (241). (Suit to set aside sale on the ground of fraud was held to be barred under Section 244.)
- ('01) 28 All 478 (480). (Do.)
2. ('81) 2 Mad 264 (269, 270).
3. ('16) AIR 1916 All 184 (185).
- ('15) AIR 1915 Mad 150 (155).
4. ('28) AIR 1928 Lah 592 (593) : 4 Lah 243.

('85) AIR 1985 Cal 356 (357). (Hence no separate suit lies to set it aside on this ground.)

5. ('11) 10 Ind Cas 361 (362) : 88 Cal 622.

6. ('09) 4 Ind Cas 1006 (1008) (Lah). (Fraud is not lightly to be assumed.)

7. ('12) 14 Ind Cas 53 (54) (Cal).

('21) AIR 1921 Pat 145 (147) : 6 Pat L Jour 819. (Facts constituting fraud must be stated serially and in detail.)

8. [See ('09) 4 Ind Cas 1006 (1009) (Lah).]

[See also ('26) AIR 1926 Oudh 45 (46). (The mere fact that at an auction-sale a property fetches a smaller price than it is worth raises no presumption of fraud.)]

9. ('28) AIR 1928 P O 78 (76) (PC). (See observations of the Privy Council in proof of fraud.)

('24) AIR 1924 Pat 67 (69).

10. ('28) AIR 1928 All 854 (854).

('02) 6 Cal W N 288 (285, 288).

('28) AIR 1928 Pat 485 (485).

[See also ('07) 6 Cal L Jour 111 (118). (Allegation of fraud against purchaser alone — Held can succeed.)]

('01) 6 Cal W N 279 (281, 288). (Do.)]

11. ('97) 20 Mad 10 (12).

A mere undervaluation of property will not amount to fraud within the meaning of this rule.<sup>12</sup> But a wilful mis-statement of value in the sale proclamation evidencing a deliberate design to get the property sold for a low price will amount to fraud.<sup>13</sup> Similarly, any other wilful mis-statement in the sale proclamation calculated to affect the price of the property may amount to fraud.<sup>14</sup> So also, a great discrepancy between the value of the property stated in the proclamation and the real value is valuable evidence of fraud.<sup>15</sup>

See also the undermentioned cases<sup>16</sup> as to particular instances of fraud.

See the undermentioned cases<sup>17</sup> for circumstances which were held not to amount to fraud.

**38. Combination among bidders.** — There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale.<sup>1</sup> Therefore, a charge against a bidder or decree-holder that he and other bidders who

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12. ('26) AIR 1926 Cal 577 (578).
- ('22) AIR 1922 Pat 507 (511) : 2 Pat 65.
- ('02) 26 Bom 543 (549).
- ('25) AIR 1925 Pat 521 (521). (Gross undervaluation of property and non-service of processes do not by themselves constitute fraud.)
13. ('22) AIR 1922 Pat 507 (510, 511) : 2 Pat 65.
- ('11) 11 Ind Cas 295 (297) (Cal).
14. ('28) AIR 1928 Mad 1138 (1139). (To bring property to sale subject to a bogus mortgage is fraud.)
- ('72) 18 Suth W R 342 (343). (Where six tenures with separate recorded jamas were lumped together and sold in one lot, and no description of the property to be sold was given, in consequence of which the purchaser was the only bidder, the sale was set aside, as being fraudulent.)
15. ('93) AIR 1933 Cal 839 (840). (Real value seventy times more than given in the proclamation.)
16. ('01) 5 Cal W N 265 (268). (The purchase of property by a decree-holder in the name of another at a price less than that at which the decree-holder obtained permission to bid for the property constitutes fraud.)
- ('10) 6 Ind Cas 135 (136) (Cal). (Do.)
- ('92) 15 Mad 389 (392, 393, 394). (The decree-holder's vakil having obtained leave to bid for his client, acting in an underhand manner, purchased the property himself: *held*, this was fraud.)
- ('25) AIR 1925 Oudh 381 (382, 383). (Where the purchaser at an auction-sale was the clerk of the pleader who represented the decree-holder in the suit, *held*, that he was in a position of active confidence towards the decree-holder, that his purchase without informing the decree-holder of his intention was a gross abuse of confidence and amounted to a fraud.)
- ('12) 15 Ind Cas 888 (889) (Oudh). (Permission to bid was granted to decree-holder on condition that his minimum bid was the decree amount—He bids for less—Amounts to fraud.)
- ('18) AIR 1918 Pat 297 (298) : 8 Pat L Jour 645. (Where the decree-holder agreed not to hold the sale if payment was made within a certain time

and he then fraudulently proceeded to sale of the property in contravention of this arrangement, *held* this amounted to fraud.)

- ('86) AIR 1936 Rang 327 (327). (Where a person is not aware of the sale proclamation and false representations are made to him by the bailiff as to the nature and interest put to sale and he purchases the property relying on those representations, the sale must be set aside.)
  - ('35) AIR 1935 All 868 (871) : 58 All 249. (Decree-holder by exercise of fraud keeping judgment-debtor ignorant of the execution proceedings culminating in the sale and as a consequence of such fraud, decree-holder succeeding in purchasing property of judgment-debtor for much less than its real value.)
  - ('87) AIR 1937 Cal 273 (276). (False representation having effect of dissuading bidders from bidding—Sale should be set aside.)
- See also cases in foot-notes (1) and (2).  
(See also ('03) 30 Cal 142 (153).  
(('99) 26 Cal 727 (732).  
(('04) 26 All 101 (104).

17. ('21) AIR 1921 Pat 145 (147) : 6 Pat L Jour 319. (Mero want of diligence is not fraud.)
- ('28) AIR 1928 All 704 (705). (The fact that certain property alleged to be wrongly sold was not included in the mortgaged property decreed to be sold is not fraud.)
- ('11) 11 Ind Cas 399 (401) (PC). (Where the plaintiff was dissuaded from bidding at the sale by the pleader for the judgment-debtor falsely assuring him that he had instructions to apply for a postponement, the auction-purchaser could not be held responsible for the misrepresentation.)
- ('35) AIR 1935 Mad 257 (257). (Uncertified agreement between judgment-debtor and decree-holder not to sell property of judgment-debtor — Agreement cannot be relied on to prove fraud in conducting sale.)
- ('35) AIR 1935 Cal 92 (93). (Any fraud antecedent to the decree cannot be a ground for setting aside a sale under S. 174, Bengal Tenancy Act.)

**Note 38**

1. ('94) 18 Bom 342 (346).

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have acted in concert with him have acted in such a manner as to prevent the best price from being obtained, does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale.<sup>3</sup> There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition. If the object be to obtain the property at a sacrifice by artifice, the combination is fraudulent; if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent.<sup>3</sup>

**39. Substantial injury—Proviso.**—Before a sale is set aside under this rule, it is essential under the proviso to the rule that there should have been *substantial injury* and that such injury should have been sustained by the applicant *by reason of the irregularity or fraud*. A Court has no jurisdiction to set aside a sale under this rule without going into the question of substantial injury.<sup>1</sup> That is to say, the applicant must prove substantial injury in addition to the material irregularity, or fraud in publishing and conducting the sale, and a mere proof of irregularity or fraud alone is of no avail.<sup>2</sup> A decree-holder who has suffered substantial injury is entitled to have a sale set aside under this rule; it does not matter whether that substantial injury is suffered by him in his capacity as a decree-holder or as an individual.<sup>3</sup> The onus of proving substantial injury lies on the applicant.<sup>4</sup>

"Injury" means loss which is wrongful.<sup>5</sup> Such loss must also be *substantial*.<sup>6</sup> The fact that the price realized at the sale is less than the value stated in the proclamation of sale is no proof of wrongful loss.<sup>7</sup> Nor is the *market value* of the property a safe criterion in finding substantial injury.<sup>8</sup> But a denial of opportunity to purchase the property is a substantial injury.<sup>9</sup>

2. (1900) 23 Mad 227 (233, 234) : 27 Ind App 17 (PC). (Affirming 19 Mad 315 on this point.)
- ('09) 1 Ind Cas 158 (161) : 36 Cal 226.
- ('09) 4 Ind Cas 1006 (1012) (Lah).
- ('16) AIR 1916 Sind 20 (21) : 10 Sind L R 53.
3. ('07) 6 Cal L Jour 111 (115, 116).

**Note 39**

1. ('18) AIR 1918 Pat 352 (352). (No publication of sale on spot—Substantial injury not proved—Sale cannot be set aside.)
- [See ('01) 25 Bom 387 (348) : 27 Ind App 216 (PC). ('90) 12 All 96 (98). (Where sale is illegal, no injury need be proved.) ('88) 10 All 506 (517). (Do.)]
- [See also ('95) 5 Mad L Jour 70 (73, 74). (In both cases injury must be proved—This is not good law.)]
2. ('11) 12 Ind Cas 174 (175) : 38 Ind App 200 : 39 Cal 26 (P C).
- ('33) AIR 1933 Cal 486 (487). (Date fixed for sale holiday—Sale on following day—No allegation or proof as to paucity of bidders—Sale held could not be set aside although there was material irregularity.)
- ('11) 10 Ind Cas 475 (476) (Cal). (Deliberate undervaluation of property in sale proclamation held material irregularity—Property sold below proper value—Sale set aside.)
- ('09) 1 Ind Cas 246 (247) (Cal).
- ('82) 8 Cal 932 (938).
- ('14) AIR 1914 Mad 312 (315, 317).
- ('14) AIR 1914 Oudh 164 (165).

- ('31) AIR 1931 Pat 43 (44).
- ('30) AIR 1930 Pat 58 (60). (And one of the most usual forms of showing that the applicant has sustained injury is to show that the property has been sold for a gross undervalue.)
- '24) AIR 1924 Pat 785 (786).
- '21) AIR 1921 Pat 479 (480).
- '22) AIR 1922 Upp Bur 22 (22) : 4 Upp Bur Rul 97.
- ('25) AIR 1925 Sind 253 (254) : 18 Sind L R 130. (Except in very exceptional circumstances no sale should be set aside by Court *suo motu* without proof of substantial injury.)
- ('28) AIR 1928 Cal 928 (331). (The fact that decree-holder offered to return the property to the judgment-debtor for the price bought may be considered to see whether judgment-debtor suffered injury.)
- ('37) AIR 1937 All 407 (410).
3. ('38) AIR 1938 All 161 (162).
4. ('25) AIR 1925 Pat 148 (149).
5. ('08) 7 Cal W N 439 (440). (When a person loses what he has been in the habit of wrongfully gaining, it is no substantial injury or injury of any sort or kind.)
- ('25) AIR 1925 All 459 (462) : 47 All 479. (Loss need not be pecuniary.)
6. ('27) AIR 1927 Cal 878 (874).
- ('26) AIR 1926 Pat 202 (203) : 4 Pat 696.
7. ('22) AIR 1922 Pat 550 (551) : 1 Pat 214.
8. ('72) 18 Suth W R 197 (197, 198).
9. ('38) AIR 1938 All 161 (168).

Where in a case it was found that there had been material irregularity in the conduct of the sale and the property fetched an inadequate price in consequence, the mere fact that the real value of the property did not exceed the amount of the decree and that the unsatisfied balance of the decree could not be realized from the judgment-debtor on account of limitation, would not bring the case within the proviso to this rule.<sup>10</sup>

See the undermentioned case<sup>11</sup> which is illustrative of what is and what is not "substantial injury."

**40. Applicant must have sustained substantial injury by reason of such irregularity or fraud.** — As has been already mentioned in Note 39 above, in order that an applicant under this rule may have a sale set aside, a mere proof of irregularity is not enough; he must show that he sustained substantial injury *as a result of* such material irregularity or fraud.<sup>1</sup> In the absence of evidence to show that the injury is the result of irregularity, the Court cannot presume from the proved existence of irregularity and injury that the latter occurred by reason of the former.<sup>2</sup>

The proviso to Section 311 of the old Code provided that "no sale shall be set aside . . . unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." In a case<sup>3</sup> arising under that Section their Lordships of the Privy Council observed as follows :

"Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions

10. ('12) 15 Ind Cas 728 (729) (Cal).

11. ('86) AIR 1986 Pat 26 (27). (No interest of judgment-debtor in property sold or having doubtful claim therein at date of sale — Price fetched not inadequate— Judgment-debtor held not materially prejudiced.)

#### Note 40

1. ('88) 9 Cal 656 (660, 662); 10 Ind App 25 (PC). (Injury cannot be inferred from proof of irregularity.)

('84) AIR 1934 Pat 186 (187). (Undervaluation in sale proclamation is not always by itself sufficient to set aside sale.)

('84) AIR 1934 Pat 274 (279) : 13 Pat 467.

('20) AIR 1920 All 206 (207).

('16) AIR 1916 All 186 (187).

('18) 20 Ind Cas 16 (17) (All).

('24) AIR 1924 All 698 (699).

('28) AIR 1928 Cal 328 (331).

('24) AIR 1924 Cal 1055 (1055).

('21) AIR 1921 Cal 597 (598).

('20) AIR 1920 Cal 518 (518).

('19) AIR 1919 Cal 1005 (1006).

('12) 16 Ind Cas 394 (395, 396) (Cal).

('07) 5 Cal L Jour 240 (242) (FB).

('05) 82 Cal 502 (507, 508) (F B).

('74) 22 Suth W R 550 (550).

('78) 19 Suth W R 78 (78).

('71) 15 Suth W R 95 (95).

('69) 12 Suth W R 492 (498).

('69) 12 Suth W R 488 (489).

(1865) 6 Suth W R Misc 45 (46).

('66) 6 Suth W R Misc 31 (31). (Smallness of price is not sufficient ground for setting aside sale unless it be the effect of irregularity.)

(1865) 2 Suth W R Misc 1 (2).

('80) AIR 1980 Lah 692 (695).

('27) AIR 1927 Lah 84 (84).

('26) AIR 1926 Lah 587 (588).

('24) AIR 1924 Lah 592 (592).

('23) AIR 1923 Lah 213 (216).

('22) AIR 1922 Lah 35 (36).

('19) AIR 1919 Lah 260 (262).

('18) AIR 1918 Mad 1262 (1264).

('11) 9 Ind Cas 252 (252, 253) (Mad).

('89) 12 Mad 19 (26) : 15 Ind App 171 (P C).

('98) 1 Oudh Cas 155 (156).

('98) 1 Oudh Cas 14 (17).

('17) AIR 1917 Pat 694 (695).

('18) AIR 1918 Pat 686 (687).

('18) 20 Ind Cas 192 (193) (Low Bur).

('96) 18 All 141 (143).

('88) 15 Cal 488 (491) (FB).

('17) AIR 1917 Mad 877 (878). (Some connection must be shown.)

('88) 42 Cal W N 661 (662).

('87) AIR 1937 All 407 (410).

('35) AIR 1935 Lah 390 (391).

('86) AIR 1986 Lah 555 (557).

('84) 36 Pun L R No. 183 (184).

[See also ('85) AIR 1935 Cal 743 (744). (For annulment of sale under the Bengal Land Revenue Sales Act, by Civil Court, sale must be contrary to provisions of Act and substantial injury to owner must be caused by irregularity.)]

2. ('89) 9 Cal 656 (660, 662) : 10 Ind App 25 (PC).

('89) 12 Mad 19 (25, 26) : 15 Ind App 171 (P C).

('85) 11 Cal 658 (660, 661).

('85) 11 Cal 200 (210, 213) (F B).

[But see ('81) 7 Cal 730 (732). (Where both material irregularity and injury have been proved, Court may reasonably presume that the injury is due to such irregularity.)]

3. ('94) 21 Cal 66 (70) : 20 Ind App 176 (P C).

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of Section 290 (now Rule 68 of Order 21). The Section clearly contemplates *direct evidence* on the subject."

Relying upon this passage, the High Court of Allahabad<sup>4</sup> held that it was not sufficient for an applicant under Section 311 to prove material irregularity and injury, but that he must *connect* the irregularity with the inadequacy of price as cause and effect, by means of direct evidence. But the High Courts of Calcutta<sup>5</sup> and Madras<sup>6</sup> and the Judicial Commissioner's Court of Oudh<sup>7</sup> held that the relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be *inferred*, where such inference is reasonable from the nature of the irregularity and the extent of the inadequacy of the price. As regards the phrase "direct evidence" used by their Lordships of the Privy Council, it was held that their Lordships intended only to say that there must be evidence showing that substantial injury was the *necessary* result of the irregularity complained of.<sup>8</sup> The substitution of the words "unless upon the facts proved the Court is satisfied" in this rule gives legislative recognition to the latter view.<sup>9</sup> In order to connect the two things the applicant should point out some facts from which the Court can reasonably infer substantial injury from the irregularity or fraud complained of.<sup>10</sup> Thus, where in a sale proclamation the property is undervalued and it has been sold at an inadequate price, the sale may be set aside.<sup>11</sup> The reason is that where the irregularity is an understatement of the probable price of the property, the connection is so near that it is open to the Court to infer, without any other evidence, that injury has resulted from the irregularity.<sup>12</sup>

A mere inadequacy of price is, however, no ground for setting aside a sale.<sup>13</sup>

4. ('96) 18 All 37 (41).

('96) 18 All 141 (143).

5. ('04) 31 Cal 815 (819, 820).

('03) 30 Cal 1 (9).

('05) 32 Cal 542 (549).

('02) 6 Cal W N 886 (888).

('01) 6 Cal W N 48 (55).

('02) 6 Cal W N 526 (528).

('01) 6 Cal W N 44 (48).

('97) 24 Cal 291 (294, 295).

('93) 20 Cal 599 (604).

('85) 11 Cal 74 (76).

('81) 7 Cal 466 (467).

('78) 3 Cal 542 (544).

[See also ('81) 7 Cal 730 (732). (When both material irregularity and substantial injury are proved, the Court may presume that the substantial injury was due to their irregularity.)]

6. ('97) 20 Mad 169 (161).

('99) 22 Mad 440 (447, 448).

7. ('08) 6 Oudh Cas 61 (66, 67).

8. ('97) 24 Cal 291 (294, 295).

9. ('27) AIR 1927 All 241 (242) : 49 All 402.

(Serious irregularities in conducting sale — Inadequacy of price fetched will be attributed to such irregularities.)

('29) AIR 1929 All 948 (949, 950) : 52 All 115. (Do.)

('29) AIR 1929 Pat 588 (590). (Do.)

('80) AIR 1930 Lah 15 (16). (Loss may be inferred from the nature of the irregularity and inadequacy of the price.)

('88) AIR 1938 Cal 662 (664). (31 Cal 815, Followed.)

('88) AIR 1938 Mad 225 (227) : 56 Mad 356.

('88) AIR 1938 Mad 174 (175). (It is no longer necessary to prove the casual connection between the inadequacy of price fetched at the sale of a property and the material irregularity in the conduct of the sale of the same by means of direct evidence.)

[But see ('17) AIR 1917 Mad 967 (967). (Direct evidence must be given—21 Cal 66 (P C), Followed.)]

10. ('14) AIR 1914 All 925 (925).

('85) AIR 1935 Mad 459 (468).

('88) AIR 1938 Lah 152 (154). (Material irregularity in publishing and conducting sale — Auction price grossly inadequate — Substantial loss may be presumed.)

('88) AIR 1938 Mad 174 (175).

11. ('11) 10 Ind Cas 475 (476) (Cal).

('21) 57 Ind Cas 640 (641) (Pat).

('09) 1 Ind Cas 246 (247) (Cal). (But if property is sold at fair value sale will not be set aside.)

('88) AIR 1938 Mad 720 (720). (Upset price shown in sale proclamation grossly low — Price realized far below market value—Such sale can be set aside.)

('85) AIR 1935 Mad 459 (468).

12. ('26) AIR 1926 Mad 959 (960).

('85) AIR 1935 Mad 488 (489).

[See also ('19) AIR 1919 Cal 850 (851).]

13. ('78) 19 Suth W R 227 (229).

'76) 25 Suth W R 326 (327).

'25) AIR 1925 Mad 302 (303).

'26) AIR 1926 Lah 588 (588).

'88) AIR 1938 Lah 508 (508).

('88) AIR 1938 Mad 174 (175).

('85) AIR 1935 Pat 242 (242).

The inadequacy must have been occasioned by some irregularity.<sup>14</sup> In the absence of proof to the contrary the presumption is that the price fetched at a court-sale is adequate.<sup>15</sup>

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For other instances where substantial injury has been held to be the result of irregularity or fraud, see the cases cited below.<sup>16</sup> See also the undermentioned case.<sup>17</sup>

**41. Waiver of irregularity and estoppel.**—If a judgment-debtor has received notice under Rule 66 *ante*, or has knowledge of the contents of the proclamation of sale before it is issued, and neglects to take any objection to the proceedings, he will not afterwards be allowed to object to the sale under this rule on any of the grounds which he might have then urged.<sup>1</sup> The reason of this rule of estoppel is stated by their Lordships of the Privy Council as follows: "It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property, if the judgment-debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which they knew well, but of which the execution creditor or decree-holder might be perfectly ignorant, that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole

14. ('25) AIR 1925 Mad 729 (730).

('34) AIR 1934 Nag 250 (251).

15. ('83) AIR 1933 All 218 (223) : 55 All 221.

16. ('13) 21 Ind Cas 592 (593) (Mad). (Irregularity in fixing value.)

('25) AIR 1925 Oudh 424 (424). (Irregularity in proclaiming incumbence.)

('15) AIR 1915 Oudh 124 (126) : 18 Oudh Cas 1. (Time of sale on adjourned date not specified.)

('12) 15 Ind Cas 888 (890) : 16 Oudh Cas 86. (Fact that the decree-holder agrees to bid for the property for the amount of the decree and purchases it for a sum less than that amount is sufficient to show that his fraud has led to substantial loss.)

17. ('36) AIR 1936 Pat 26 (27). (Decree for Rs. 75,000 to one lac—Price fetched by sale of judgment-debtor's property amounting to a little over Rs. 44,000—Decree-holder not proposing further execution for balance—Position of parties not altering materially even if properties had fetched full decretal amount—Case for setting aside sale *held* not made out by judgment-debtor.)

#### Note 41

1. ('84) AIR 1934 Cal 205 (208, 210).

('34) AIR 1934 Bom 348 (349) : 58 Bom 564.

('27) AIR 1927 All 513 (514) : 49 All 788.

('31) AIR 1931 All 534 (535).

('06) 28 All 273 (276).

('07) 29 All 612 (614).

('09) 2 Ind Cas 459 (460) (Bom).

('80) AIR 1930 Bom 290 (291) : 54 Bom 348.

('28) AIR 1928 Cal 828 (831).

('25) AIR 1925 Cal 552 (555).

('22) AIR 1922 Cal 98 (94). (Value of the land not stated in sale proclamation is only a material irregularity—Failure to serve sale proclamation but judgment-debtor aware of it—Sale is not vitiated.)

('12) 16 Ind Cas 235 (236) (Cal).

('30) AIR 1930 Lah 685 (686).

('24) AIR 1924 Mad 217 (218, 220) : 46 Mad 786.

('17) AIR 1917 Mad 967 (967).

('14) AIR 1914 Mad 312 (317).

('22) AIR 1922 Mad 301 (302). (Defendant becoming major after decree, not recorded as major—Sale held—Ex-minor knew of proceedings—Is estopped.)

('31) AIR 1931 Pat 63 (64).

('24) AIR 1924 Pat 111 (112) : 2 Pat 916.

('31) AIR 1931 Rang 179 (180). (The Rangoon High Court has added a proviso to this rule giving effect to this principle.)

('35) AIR 1935 Cal 614 (618).

('36) AIR 1936 Bom 315 (319).

[See ('34) AIR 1934 Nag 250 (252). (Case under the second proviso to the rule.)

('31) AIR 1931 Oudh 393 (399). (Where an execution sale is wholly without jurisdiction the fact that the judgment-debtor failed to raise an objection when notice was issued to him is immaterial.)]

[See also ('30) AIR 1930 All 542 (543).

('82) 8 Cal 932 (933).

('22) AIR 1922 Oudh 11 (13). (Property sold as belonging to one sharer—Other co-sharers who are parties keeping quiet even though aware of the sale—Estopped from suing for their shares.)

('39) AIR 1939 Mad 5 (6).

('34) AIR 1934 Pat 695 (696).]

[See however ('37) AIR 1937 Pat 493 (493). (Notice under R. 66 served—Judgment-debtor failing to appear—Objection to undervaluation is not maintainable—Yet he can plead inadequacy of price and consequential loss.

Note. The decision seems to offend the principle that mere inadequacy of price is no ground for setting aside a sale under this rule—See Note 40.)]

[But see ('30) AIR 1930 Nag 191 (193). (Judgment-debtor not appearing though served to settle terms of proclamation—Still he is not estopped from applying to set aside sale.)

('01) 4 Oudh Cas 379 (384).

('71) 15 Suth W R 95 (95). (Silence of judgment-debtor on previous occasion is no bar to his



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proceedings were vitiated."<sup>2</sup> The same principle will apply if the judgment-debtor had consented to the irregularity before sale.<sup>3</sup>

Where a judgment-debtor applies for postponement of the sale and gets it adjourned, he must be deemed to have admitted that the proclamation was correct, or at any rate, there was no such mistake or irregularity as would be likely to mislead.<sup>4</sup> The judgment-debtor cannot also urge any objections to the sale if at the time of postponement of the sale he consented to waive any irregularity.<sup>5</sup> Where, however, he was not aware of the facts to which he was bound to object at the time when he had an opportunity of so doing, there can be no waiver or estoppel.<sup>6</sup> The reason is that a person can be taken to have waived only such rights as were within his knowledge.

In the following instances it has been held that there is no waiver :

- (1) Where a judgment-debtor agrees to waive an irregularity provided the sale is postponed, but the Court does not allow such postponement, there can be no relinquishment of his right to object to the sale.<sup>7</sup>
- (2) Where the judgment-debtor waives the issue of a fresh proclamation only, he can urge any objection on the ground of an irregularity in the publication of the *original* proclamation.<sup>8</sup>
- (3) Even though a sale is postponed at the instance of the debtor on the condition that fresh proclamation is waived, if an attaching decree-holder subsequently applies that a fresh proclamation should issue and that prayer is refused, the latter can question the sale on the ground of want of fresh proclamation.<sup>9</sup>
- (4) A judgment-debtor who waives a fresh proclamation will not be deemed to have waived the non-specification of the hour of sale on the day to which the sale is postponed.<sup>10</sup>
- (5) The fact that the applicant himself bid at the sale will not amount to a waiver of the irregularity.<sup>11</sup>

Where a judgment-debtor's objection to an irregularity made before sale is overruled by the Court, he is not precluded from urging the same ground in an application to set aside the sale.<sup>12</sup>

Where, during the pendency of an application under this rule to set aside

- 
- being heard when he objects alleging material irregularity.)
2. ('89) 12 Mad 19 (25) : 15 Ind App 171 (PC).
  3. ('29) AIR 1929 Mad 275 (277).
  - ('84) AIR 1934 Cal 251 (253).
  - [See ('18) AIR 1918 Cal 194 (196).]
  4. ('77) 26 Suth W R 44 (48) : 3 Ind App 230 (PC).
  - ('94) AIR 1934 Cal 251 (253).
  - ('87) AIR 1937 Lah 118 (114).
  - [See also ('85) AIR 1935 Mad 150 (151). (Judgment-debtor getting adjournment of sale by giving up objections to sale proclamation will be estopped from raising same objection in an application under this rule.)
  - ('88) AIR 1938 P C 230 (231, 232) : 82 Sind L R 879 (PC). (Waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation. But the waiver of any necessity for a fresh sale proclamation will not imply a waiver of the right to object to irregularities in attachment.)]
  5. ('26) AIR 1926 Cal 577 (578).
  - ('18) AIR 1918 Cal 293 (294).
  - ('05) 2 Cal L Jour 584 (587, 589).
  - ('74) 22 Suth W R 481 (481).
  - ('35) AIR 1935 Pat 483 (485).
  - [See also ('88) AIR 1938 Pat 199 (201).]
  6. ('11) 9 Ind Cas 698 (703, 704) (Cal).
  - ('07) 6 Cal L Jour 62 (67 to 70).
  - ('01) 6 Cal W N 42 (48, 44).
  - ('07) 6 Cal L Jour 111 (113). (Judgment-debtor forgoing his right to object to irregularity, or inadequacy of price, does not thereby waive his right to question the sale on ground of fraud.)
  - ('15) AIR 1915 Mad 989 (993) : 21 Ind Cas 889 (892) : 88 Mad 887.
  - [See also ('94) 17 Mad 804 (805).]
  7. ('10) 5 Ind Cas 489 (490) (Cal).
  - [See also ('81) 7 Cal 618 (615).]
  8. ('11) 11 Ind Cas 488 (440) (Cal).
  9. ('01) 24 Mad 811 (815, 816).
  10. ('01) 8 Cal W N 48 (54).
  11. ('29) AIR 1929 Lah 678 (675).
  12. ('80) AIR 1980 Oudh 81 (82) : 5 Luck 481.
  - ('28) AIR 1928 Pat 25 (27) : 6 Pat 588.



a sale, the debtor got time for paying the decree amount on condition that the petition should be dismissed on his failure to do so, he would be estopped, on his failure to abide by the agreement, from continuing the proceedings.<sup>13</sup> **O. 21 R. 90 Notes 41-43a**

A question of waiver is a mixed question of law and fact.<sup>14</sup>

As to whether an objection can be taken in the event of appeal, see Note 43.

**42. Bona fide purchaser for value without notice.** — Where the conditions laid down in this rule are satisfied, the fact that the auction-purchaser is a stranger and a *bona fide* purchaser for value without notice of irregularity or fraud will not prevent the sale from being set aside.<sup>1</sup> See also Note 37, *ante*. The plea of *bona fide* purchaser for value may, however, be given effect to in proceedings or suits to set aside sales on the ground that the decree and the execution proceedings are tainted by fraud and collusion.<sup>2</sup>

**43. Setting aside sale on grounds not taken in the application.** — It has been held by the High Courts of Allahabad and Lahore that where an application under this rule is made on certain grounds, it is not open to the applicant to ask the Court to adjudicate upon objections which were not expressly taken in the application.<sup>1</sup> But he can apply, even after the expiry of thirty days, to be allowed to furnish *further particulars* and this application may be treated as one to amend the original application.<sup>2</sup> The High Court of Madras<sup>3</sup> has, however, held that there is nothing to prevent a Court even in appeal from considering the validity of the sale from every point of view and exercise its inherent powers in setting aside a sale on a ground not pleaded. It has been held by the Nagpur High Court<sup>4</sup> that where an irregularity is demonstrable from the record itself, it is within the power of the Court to consider the objection based on such irregularity even if not specifically taken in the application. But a new ground requiring evidence cannot be taken for the first time in appeal.<sup>5</sup>

**43a. Setting aside sale in part only, if and when permissible.** — It has been held by the Patna High Court that where properties are sold in several lots, the Court can set aside the sale in respect of some only of the lots but that the circumstances under which this can be done are limited to cases in which *both* the irregularity and the injury can be satisfactorily allotted to one part only of the sale: where the irregularity extends to the whole property and to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale

13. ('02) 29 Cal 577 (580).

14. ('11) 9 Ind Cas 698 (704) (Cal). (And should not be allowed to be raised at a late stage of the proceedings.)

#### Note 42

1. ('28) AIR 1928 Cal 538 (541).

('17) AIR 1917 Mad 42 (42).

('28) AIR 1928 Pat 485 (485).

[See also ('68) 9 Suth W R 196 (199) (FB). (It must be decided in each case in accordance with the principles of justice, equity and good conscience, as to whether the sale ought to be set aside or not.)]

2. ('66) 10 Moo Ind App 454 (478, 474) (P C).

('02) 26 Bom 543 (550).

('28) AIR 1928 Cal 588 (550, 551).

(1900) 1900 Low Bur Rul 22 (23).

[See also ('96) 19 Mad 219 (228, 229).

('87) AIR 1987 Pat 644 (645).]

#### Note 43

1. ('32) AIR 1932 Lah 576 (576). (Objections taken after period of limitation.)

('99) 21 All 140 (142).

('19) AIR 1919 Lah 260 (261). (Objections not stated in application cannot be entertained by Appellate Court.)

('11) 9 Ind Cas 816 (817) (Lah).

[See also ('14) AIR 1914 All 325 (328, 329).]

2. ('26) AIR 1926 All 305 (305) : 48 All 286.

3. ('24) AIR 1924 Mad 778 (778).

[See ('27) AIR 1927 Nag 319 (319). (If in the course of hearing other irregularities *ejusdem generis* come to light, Court can consider them provided parties have notice of them.)

('82) 9 Cal L Rep 134 (135).]

4. ('89) AIR 1989 Nag 258 (260).

5. (1900) 28 Mad 227 (234) : 27 Ind App 17 (P C).

('88) 9 Cal 656 (668) : 10 Ind App 25 (P C).

**O. 21 R. 90** price obtained cannot be shown to be inadequate in view of the advertised value.<sup>1</sup> But  
**Notes 43a-44** this view has been dissented from by the Madras High Court which has held that in such cases the sale should be set aside only in respect of the items which have been sold for an inadequate price in consequence of the irregularity but not in respect of the items which notwithstanding the irregularity have been sold for an adequate price.<sup>2</sup>

It has been held by the Calcutta High Court that where, after dismissing the applications under this rule made by some of the judgment-debtors, the Court passes an order setting aside the sale on an application by another judgment-debtor under this rule, the order will take effect only so far as the share and interest of that judgment-debtor are concerned and the sale will stand confirmed as regards the share and interest of the other judgment-debtors.<sup>3</sup> But, this decision has been distinguished by the Nagpur High Court in the undermentioned case<sup>4</sup> in which it was held that where there are several judgment-debtors to whom the property belongs but the application is made by only one of them and the property sold consists of only one item and the irregularity cannot be apportioned, the entire sale must be set aside and not only with regard to the share of the judgment-debtor who applies.

See also Note 2, *ante*.

**44. Joinder of claims under Section 47.**—A prayer for a relief coming within the scope of Section 47 can be joined with a prayer for a relief under this rule in one and the same application.<sup>1</sup> Every application to set aside a sale involves a question relating to the execution, discharge or satisfaction of the decree, and therefore comes within the scope of Section 47.<sup>2</sup> But where the application falls within the scope of this rule, and Section 47, a second appeal against an order on such an application is barred by Section 104.<sup>3</sup> See Note 15 to Section 2, sub-section (2), *ante*. But where the matter falls within Section 47 *alone*, even though the application purports to be under this rule also, and the question is between parties to the suit, the order will be appealable as a decree.<sup>4</sup> Where an application contains grounds coming both under Section 47 and this rule, that portion of the order relating to the question under Section 47 is

[See ('28) AIR 1928 PC 98 (94, 95) (P.C.). (Applicant did not ask for opportunity to let in evidence—Cannot ask for it before the Privy Council.)]

**Note 43a**

1. ('38) AIR 1938 Pat 223 (224) : 12 Pat 181.
2. ('86) AIR 1986 Mad 121 (122) : 59 Mad 488.
3. ('37) 41 Cal W N 224 (225).
4. ('39) AIR 1939 Nag 258 (260). (Where there is only one house which is sold and the irregularity in the conduct of the sale could not be apportioned and it is such an irregularity as to amount to an illegality, the sale cannot be set aside in part and it is immaterial in such a case whether both judgment-debtors objected or not.)

**Note 44**

1. ('28) AIR 1928 Pat 272 (272) : 7 Pat 381.  
[But see ('96) 18 All 141 (148, 144).]
2. ('17) AIR 1917 Mad 924 (925).
- ('17) AIR 1917 Mad 877 (879).

[See ('34) AIR 1934 Nag 21 (27) : 81 Nag L R 67. (Application to set aside sale on ground of fraud or irregularity—Only decree-holder made party—Stranger purchaser not formally joined—Application is not under Rule 90 but under Section 47.)]

3. ('17) AIR 1917 Mad 924 (925).

('24) AIR 1924 Mad 778 (779).

4. ('32) AIR 1932 Cal 672 (673) : 59 Cal 956. (Application purporting to be under R. 90 also.)

('26) AIR 1926 Cal 1219 (1220). (Application under R. 90 to set aside sale on ground of suppression of processes—Held this ground can be raised only under S. 47, C. P. C.)

('24) AIR 1924 Mad 431 (432) : 47 Mad 288 (FB).

('25) AIR 1925 Mad 1142 (1142).

('17) AIR 1917 Mad 924 (925).

('24) AIR 1924 Rang 124 (124) : 1 Rang 533. (Defective attachment—Question comes under Section 47.)

('24) AIR 1924 All 698 (699).

[See ('35) AIR 1935 Mad 438 (438). (It is not clear from the report of this case whether the ground on which the application was made came within S. 47 alone—It seems however from the trend of the observations in the judgment that it is held that because the application is by the judgment-debtor therefore S. 47 would apply and a second appeal would lie and no reference is made to the question as to the ground on which the application is made being exclusively covered by S. 47—If this interpretation of the judgment is correct, then, it is submitted, the judgment is not correct.)]

open to second appeal.<sup>5</sup>

Where an application really comes under this rule, the mere mention of Section 47 in the application will not make it one under that Section for the purpose of appeal.<sup>6</sup>

**O. 21 R. 90**  
**Notes 44-46**

**45. Suit to set aside sale for material irregularity.** — See Notes to Order 21 Rule 92, *infra*.

**46. Sale, if can be challenged by way of defence in suit for possession.** — See Notes to Order 21 Rule 92, *infra*.

**47. Necessary parties.** — See Notes to Order 21 Rule 92, *infra*.

**48. Applicability of Order 9 to applications under this Rule.** — The general trend of opinion is that the provisions of Order 9 do not apply to proceedings under this rule.<sup>1</sup> See Note 2 to Section 141. But the Court has inherent power to dismiss an application under this rule for default where the applicant fails to appear in support of his application.<sup>2</sup> So also, the Court has got inherent power to set aside an order under this rule passed *ex parte* or to restore an application dismissed for default.<sup>3</sup> See also Note 1 to Order 9, 'General'.

As regards appeal against orders of dismissal for default of an application under this rule and orders refusing to restore such an application, see Note 50 below.

**49. Limitation.** — It has been already mentioned in Note 37 *ante*, that under the old Code it was held that an application to set aside a sale on account of fraud in publishing and conducting the sale fell within the scope of Section 244 (now Section 47). Article 166 of the Limitation Act of 1877 did not apply to cases where the application to set aside a sale was based on the ground of fraud in publishing or conducting the sale. It was therefore held that under Article 178 (now Article 181) of the Limitation Act of 1877, the period of limitation for such an application was three years from the date of the sale.<sup>1</sup> Under the Limitation Act of 1908, an application to set aside a sale in execution of a decree on whatever ground the application is based is governed by Article 166 which provides for a period of thirty days from the date of sale. Therefore an application under this rule whether made on the ground of material irregularity or fraud must be made within thirty days of the date of sale.<sup>2</sup>

5. ('24) AIR 1924 Mad 481(482):47 Mad 288 (FB).  
(20) AIR 1920 Mad 481 (481).

[See however ('21) AIR 1921 Pat 145 (149) : 6 Pat L Jour 319. (Application on grounds under S. 47 and R. 90 — Second appeal — Held the whole case should be considered by the Court.) ('24) AIR 1924 Pat 67 (68). (Execution attacked as also sale thereunder—Second appeal lies.)]

6. ('84) AIR 1934 Pat 627 (628).  
[See (26) AIR 1926 Cal 109 (110).]  
[See also ('17) AIR 1917 Mad 924 (925). (Converse case.)]

#### Note 48

1. ('81) AIR 1931 All 594 (594, 595).  
(27) AIR 1927 Cal 988 (939).  
(26) AIR 1926 Cal 773 (775, 777) : 53 Cal 679.  
(26) AIR 1925 Cal 510 (511).  
(19) AIR 1919 Pat 192 (193):4 Pat L Jour 185 (FB).  
[But see ('09) 2 Ind Cas 156 (156) (Cal).]  
2. ('88) AIR 1938 Mad 495 (495) : ILR (1938) Mad 686.  
3. ('81) AIR 1931 All 594 (594, 595).

(21) AIR 1921 Pat 293 (295).

(21) AIR 1921 Sind 55 (56) : 17 Sind L R 105.

[See ('28) AIR 1928 All 301 (301). (Mistaken order of dismissal set aside under S. 151).]

#### Note 49

1. ('09) 2 Ind Cas 844 (845) : 30 Cal 654.

(01) 5 Cal W N 265 (266).

(99) 26 Cal 324 (332, 333, 334).

(98) 2 Cal W N 691 (693).

(99) 3 Cal W N 333 (336).

(70) 7 Bom H O R A C 74 (77).

[See ('99) 26 Cal 539 (542, 544).]

2. ('26) AIR 1926 Cal 109 (110).

(34) AIR 1934 All 314 (314).

(32) 36 Cal W N 242 (245).

(24) AIR 1924 Mad 137 (139, 143) : 47 Mad 525.

(15) AIR 1915 Mad 392 (393, 395, 396, 397.)

(31) AIR 1931 Pat 43 (44).

(26) AIR 1926 Pat 266 (267).

(04) 31 Cal 885 (892). (Case of material irregularity under the old Code.)

(04) 6 Bom L R 1140 (1145). (Do.)

**O. 21 R. 90**  
**Note 49**

The starting point of limitation is the date on which the officer conducting the sale has accepted the final bid; therefore, the period of limitation does not begin to run until then.<sup>3</sup>

The period of limitation prescribed by Article 166 cannot be enlarged by Section 5 of the Limitation Act.<sup>4</sup> Where an execution sale is held by the Collector to whom the decree has been transferred for execution, and the applicant applies to the Collector under this rule and after the expiry of thirty days prefers a second application to the Court, the time spent in prosecuting the first application cannot be excluded under Section 14 of the Limitation Act.<sup>5</sup> Where the applicant was a minor on the date of sale, it was held in cases arising under the old Limitation Act of 1877 that he was entitled to the benefit of Section 7 of the Limitation Act in computing the period of limitation for an application under this rule.<sup>6</sup> The present Sections 6 and 7 of the Limitation Act, 1908, limit the application of those Sections to applications *in execution of a decree* and do not apply to an application to set aside a sale.<sup>7</sup>

Where, in an application under this rule made more than thirty days of the sale, the applicant relies upon fraud as an exemption from limitation, he must bring his case within Section 18 of the Limitation Act.<sup>8</sup> Where a sale is brought about by fraud, for instance, by suppression of processes and submission of false returns, and an application to set aside the sale is made more than thirty days after the date of the sale, it is not enough for the applicant to show that the execution proceedings were irregular and fraudulent, but he must carry the fraud further and show that the existence of his right to set aside the sale had been kept concealed from his knowledge by fraud.<sup>9</sup> Such fraud need not necessarily be that of the decree-holder or auction-purchaser but may be of a third person.<sup>10</sup> When once such fraud has been established by the applicant, it is for the opposite party to show at what precise point of time the applicant had clear and definite knowledge of the facts which would entitle him to apply for setting aside the sale. The reason is that the fraud is a continuing influence and until that influence ends, it retains its power of mischief.<sup>11</sup>

('10) 6 Ind Cas 713 (714, 715): 1910 Pun Re No. 40. (Do.)

('17) AIR 1917 Low Bur 80 (81). (Do.)

('36) AIR 1936 Pat 558 (560). (Sale set aside after one month — Order setting aside reversed on appeal — Fresh application to set aside by another person — Limitation runs only from date of sale and not from the date on which order setting aside sale was reversed.)

('35) AIR 1935 Lah 972 (972). (When an application to set aside a sale in execution is time-barred, the Court has no jurisdiction to set aside the sale.)

[See ('14) AIR 1914 Mad 297 (298). (Where sale is nullity, Art. 166 does not apply.)

3. ('30) AIR 1930 Lah 41 (42)

('35) AIR 1935 Pesh 160 (161). (The sale is complete as soon as the offer of the auction-purchaser is accepted by the auctioneer and it is immaterial for the purpose of Art. 166, whether the 25 per cent. deposit is made or not.)

4. ('26) 92 Ind Cas 839 (839) (Lah).

('34) AIR 1934 All 814 (814).

('39) AIR 1939 Cal 810 (812): ILR (1939) 1 Cal 452.

5. ('99) 23 Bom 531 (535).

6. ('87) 9 All 411 (418).

('10) 6 Ind Cas 488 (489) (Lah).

7. ('35) AIR 1935 Pat 450 (450).

8. ('18) AIR 1918 Cal 77 (78).

[See ('99) 3 Cal W N 333 (336).

('36) AIR 1936 Cal 706 (707). (Execution sale fraudulently conducted by decree-holder — Application to set aside sale beyond time — S. 18 cannot apply when property is purchased *bona fide* by third party.)

('85) AIR 1935 Cal 89 (90). (Auction-purchaser guilty of fraud — Application to set aside sale under S. 173, Bengal Tenancy Act — S. 18, Limitation Act can be availed of.)

9. ('11) 11 Ind Cas 438 (442) (Cal).

('97) 1 Cal W N 67 (68, 70).

('26) AIR 1926 Cal 229 (230, 231).

('25) AIR 1925 Pat 521 (522, 523).

('23) AIR 1923 Pat 435 (436).

('22) AIR 1922 Pat 507 (509, 510): 2 Pat 65.

('19) AIR 1919 Lah 152 (154).

('09) 2 Ind Cas 844 (845): 36 Cal 654.

('39) AIR 1939 Cal 663 (665): 43 Cal W N 862 (865): 1 L R (1939) 2 Cal 163.

10. ('38) AIR 1938 Mad 626 (627): 56 Mad 784.

11. ('28) AIR 1928 Cal 849 (850).

('38) AIR 1938 Cal 339 (340).

In cases where fraud is relied on in support of an application made after time, it is immaterial that the application is made after confirmation of the sale.<sup>12</sup>

**O. 21 R. 90**  
**Notes 49-50**

Where notice under Rule 22 of this Order is not given, the sale is *void*. But if an application is made under this rule to *set it aside*, it must be filed within thirty days of the sale.<sup>13</sup>

See also Notes to Article 166 in the Authors' Commentary on the Limitation Act.

**49a. Step-in-aid of execution.** — It has been held that an application by a decree-holder praying for the dismissal of an application made by the judgment-debtor under this rule is a step-in-aid of execution within the meaning of Article 182 of the Limitation Act.<sup>1</sup>

**50. Appeal.** — Order 43 Rule 1, clause (j) provides for an appeal against an order under Rule 92 *infra*, setting aside or refusing to set aside a sale.<sup>1</sup> Section 174 of the Bengal Tenancy Act as amended by the Bengal Legislative Council in 1928 allows an appeal against an order under that rule.<sup>2</sup>

It has been already mentioned in Note 37 *ante*, that Section 311 of the old Code allowed an application to be made only on the ground of material irregularity and that an application to set aside a sale on the ground of fraud in publishing and conducting the sale fell within the scope of Section 244. It was therefore held that no second appeal lay against an order on an application seeking to set aside a sale on the ground of material irregularity,<sup>3</sup> but that if fraud was the ground of the application, a second appeal would lie if the matter was between parties to the suit.<sup>4</sup> But under this Code

(26) AIR 1926 Cal 229 (230, 231).

(21) AIR 1921 Cal 251 (252): 48 Cal 119.

(12) 16 Ind 464 (465) (Cal).

(03) 80 Cal 142 (153).

(29) AIR 1929 Pat 228 (229, 230).

(30) AIR 1930 Pat 58 (60).

(24) AIR 1924 Pat 496 (497).

(22) AIR 1922 Pat 422 (423).

(39) AIR 1939 Cal 663 (665) : 43 Cal W N 862 (867) : ILR (1939) 2 Cal 163.

12. ('03) 80 Cal 142 (147, 153).

(90) 17 Cal 769 (776).

(22) AIR 1922 Pat 422 (423).

[But see ('87) 14 Cal 679 (680, 681.)]

13. ('32) AIR 1932 Cal 881 (881).

#### Note 49a

1. ('94) 21 Cal 28 (25, 26).

(89) 16 Cal 747 (748). (Mere appearance by decree-holder to oppose the application of judgment-debtor is not an application.)

[See also ('28) AIR 1928 Pat 612 (614) : 7 Pat 708. (Where on the judgment-debtor applying under this rule, the decree-holder files a list of witnesses and a petition of objections, it amounts to taking a step-in-aid of execution.)]

#### Note 50

1. ('11) 10 Ind Cas 148 (150, 151) (Cal). (Auction-purchaser is entitled to appeal.)

(27) AIR 1927 Lah 681 (682). (Do.)

(28) AIR 1928 Lah 414 (416).

(24) AIR 1924 Pat 846 (847). (S. 96 (3) does not apply to execution proceedings.)

(82) AIR 1932 Nag 14 (15) : 27 Nag L R 389.

(18) AIR 1918 Upp Bur 28 (28) : 2 Upp Bur L R 189.

(87) 9 All 411 (412, 418).

(85) 7 All 253 (255, 256).

(79) 2 All 352 (353, 354).

(79) 2 All 896 (896). (Where auction-purchaser is a party to the proceeding under O. 21 R. 90 and an order is made against him, he can appeal under O. 43 R. 1.)

(80) 5 Cal 259 (262).

(39) AIR 1939 Mad 482 (483) : I L R (1939) Mad 349. (Order of Court declining to entertain application under O. 21 R. 90 falls under O. 43, R. 1 (j).)

(39) AIR 1939 Sind 62 (64) : ILR (1939) Kar 417. (Order under O. 21 R. 92 setting aside sale—Auction-purchaser can appeal.)

[But see ('73) 5 N W P H C R 19 (20). (Under the Code of 1861.)]

2. The following cases are no longer law in view of the amendment :

(26) AIR 1926 Cal 790 (791).

(27) AIR 1927 Cal 833 (834).

(22) AIR 1922 Cal 180 (180).

(05) 82 Cal 957 (961) (FB). (It was held by the majority of the Full Bench that an appeal will lie as the case fell within the proviso to S. 153—The decision did not advert to S. 174—Rampini, J. dissenting.)

3. ('99) 28 Bom 531 (535).

(01) 28 Cal 4 (6).

(95) 22 Cal 802 (804).

(91) 18 Cal 422 (426).

(66) 6 Suth W R Misc 119 (119, 120).

(98) 21 Mad 417 (419).

(96) 19 Mad 29 (30).

(96) 19 Mad 167 (168).

(69) 5 Mad H C R 213 (214).

4. ('12) 16 Ind Cas 690 (691) (Cal). (Right of second appeal under the old Code cannot be affected by new Code.)

**O. 21 R. 90**  
**Note 50**

an order on an application under this rule, whether made on the ground of material irregularity or on the ground of fraud, is not open to second appeal by virtue of the provisions of Section 104.<sup>5</sup> The result will be the same even if the question fell within Section 47; for, the order being appealable as an *order* will not fall within the definition of the term "decree" in Section 2 *ante*. As to the right of second appeal in cases where objections are taken both under this rule and under Section 47, see Note 44, *ante*.

Where the objection to the sale does not fall under this rule but falls under Section 47, a decision deciding such objection will be open to second appeal.<sup>6</sup>

No appeal lies under the Letters Patent against the order of a single Judge of the High Court made on appeal or in revision against the order of an executing Court in an application under this rule.<sup>7</sup>

The provisions of Section 104 and O. 43 R. 1 cannot restrict the provisions relating to appeals to the King in Council. Therefore, an appeal to the Privy Council will lie against an order of the High Court under Rule 92.<sup>8</sup>

An order dismissing an application under this rule for default is appealable under O. 43 R. 1, the effect of such order being the confirmation of the sale.<sup>9</sup> The fact that a distinct order confirming the sale has not been recorded does not alter the

- (04) 81 Cal 885 (390, 391).  
 ('99) 26 Cal 539 (542, 545).  
 ('99) 26 Cal 824 (826).  
 ('09) 2 Ind Cas 988 (984) (Cal).  
 5. ('29) AIR 1929 All 553 (553).  
 ('33) AIR 1933 Mad 838 (838).  
 ('33) AIR 1933 All 137 (137).  
 ('38) AIR 1938 All 654 (655). (Objection dealing with an alleged defect in notice and publication in regard to an auction sale proclamation amounts to an allegation of an irregularity in an auction sale and comes under Order 21 Rule 90.)  
 ('32) AIR 1932 Lah 530 (531).  
 ('28) All 1928 All 854 (354).  
 ('18) AIR 1918 All 309 (210) : 40 All 122.  
 ('32) AIR 1932 Cal 203 (204).  
 ('12) 18 Ind Cas 147 (147) (All).  
 ('27) AIR 1927 Cal 657 (658). (Even though between decree-holder-purchaser and judgment-debtor.)  
 ('26) AIR 1926 Cal 229 (231).  
 ('17) AIR 1917 Cal 9 (9).  
 ('17) AIR 1917 Cal 443 (444).  
 ('18) 18 Ind Cas 715 (717) (Cal).  
 ('12) 16 Ind Cas 486 (486) (Cal). (Application under old Code on the ground of fraud — Order after new Code—No second appeal.)  
 ('12) 15 Ind Cas 679 (680) (Cal). (Do.)  
 ('12) 14 Ind Cas 53 (54) (Cal). (Do.)  
 ('10) 8 Ind Cas 3 (4) (Cal). (Do.)  
 ('11) 9 Ind Cas 135 (135) (Cal).  
 ('30) AIR 1930 Lah 208 (209).  
 ('28) AIR 1928 Lah 444 (444).  
 ('28) AIR 1928 Lah 414 (416).  
 ('26) AIR 1926 Lah 204 (204).  
 ('25) AIR 1925 Lah 624 (625) : 6 Lah 250.  
 ('28) AIR 1928 Lah 592 (593) : 4 Lah 243.  
 ('23) AIR 1923 Lah 287 (288).  
 ('21) AIR 1921 Lah 156 (157).  
 ('20) AIR 1920 Lah 377 (377) : 1919 Pun Re No. 168.  
 ('19) AIR 1919 Lah 152 (154).  
 ('15) AIR 1915 Lah 298 (296).

- (29) AIR 1929 Mad 624 (624).  
 ('10) 8 Ind Cas 883 (883) (Mad).  
 ('30) AIR 1930 Nag 58 (58).  
 ('17) AIR 1917 Oudh 45 (45).  
 ('24) AIR 1924 Pat 803 (803).  
 ('24) AIR 1924 Pat 182 (183).  
 ('24) AIR 1924 Pat 111 (112) : 2 Pat 916.  
 ('20) AIR 1920 Pat 710 (710).  
 ('18) AIR 1918 Pat 297 (298) : 3 Pat L Jour 645.  
 ('18) AIR 1918 Upp Bur 30 (31) : 2 Upp Bur Rul 139.  
 ('88) AIR 1938 Nag 107 (107) : I L R (1938) Nag 436.  
 ('37) AIR 1937 Pat 20 (21).  
 ('35) AIR 1935 Rang 521 (521).  
 ('39) AIR 1939 Sind 62 (63) : I L R (1939) Kar 417.  
 ('35) AIR 1935 Lah 962 (962).  
 ('36) AIR 1936 Lah 969 (971).  
 ('36) AIR 1936 All 626 (627). (Second appeal treated as revision.)  
 ('36) AIR 1936 All 763 (764). (No second appeal lies even where the purchaser is the decree-holder himself.)  
 [But see ('80) AIR 1930 Nag 191 (192). (Submitted to be erroneous.)]  
 6. ('36) AIR 1936 Lah 573 (574). (Objection on ground that executing Court had no jurisdiction to sale.)  
 7. ('17) AIR 1917 All 325 (326) : 39 All 191.  
 ('92) 14 All 226 (232) (F B).  
 ('25) AIR 1925 Lah 624 (625) : 6 Lah 250.  
 8. ('18) 19 Ind Cas 296 (300) : 40 Cal 635 : 40 Ind App 140 (P O).  
 9. ('29) AIR 1929 Cal 407 (409) : 56 Cal 969.  
 ('25) AIR 1925 Cal 360 (360).  
 ('25) AIR 1925 Cal 510 (511). (Same is the case with order dismissing an application for restoration of original application to the file.)  
 ('17) AIR 1917 Cal 815 (816).  
 ('18) AIR 1918 Cal 474 (474).  
 ('10) 5 Ind Cas 498 (494) (Cal).

character of the order and is no ground for refusing to entertain an appeal.<sup>10</sup> But an order refusing to restore an application under this rule which has been dismissed for default is not appealable.<sup>11</sup> The reason is, as already mentioned in Note 48 *ante*, that Order 9 does not apply to proceedings under this rule.

An application by the Official Receiver to set aside a sale in execution is one under this rule and not under Section 47, inasmuch as he is not the representative of the judgment-debtor for this purpose. No second appeal therefore lies in such a case.<sup>12</sup>

In an appeal from an order confirming the sale, the purchaser in auction is the principal person interested and is a necessary party.<sup>13</sup>

Where an application by a judgment-debtor for setting aside a sale is dismissed and thereafter he is adjudicated insolvent on an application by a creditor filed subsequent to the sale, the judgment-debtor can appeal from the order; the property in such cases does not vest in the Official Receiver, having been sold away before adjudication.<sup>14</sup>

**51. Revision.** — Where a sale is set aside under this rule without proof of substantial injury,<sup>1</sup> or on the application of a person who is not entitled to apply,<sup>2</sup> or where a sale is confirmed before an application under this rule is decided,<sup>3</sup> or where the lower Court sets aside a sale having misunderstood the legal position with regard to sales,<sup>4</sup> the order is open to revision. Similarly, an order refusing to set aside a sale, on the ground that the applicant had no *locus standi* to apply, is open to revision.<sup>5</sup> But an order passed by a Court under this rule in the exercise of its jurisdiction is not revisable even though it may be erroneous.<sup>6</sup> An order dismissing an application

[See ('28) AIR 1928 Cal 25 (26) : 55 Cal 616.

(Opposite party ready — Order of dismissal is appealable — AIR 1926 Cal 773, Distinguished.)]

[But see ('26) AIR 1926 Cal 773 (778) : 53 Cal 679. (Dissenting from in AIR 1929 Cal 407.)

('07) 10 Oudh Cas 171 (172).]

10. ('29) AIR 1929 Cal 407 (409) : 56 Cal 969.

11. ('86) 10 Bom 488 (484).

('27) AIR 1927 Cal 938 (938).

('26) 97 Ind Cas 704 (704) (Cal).

('20) AIR 1920 Cal 447 (448).

('15) AIR 1915 Cal 539 (540).

('10) 6 Ind Cas 148 (148, 149) (Cal).

('04) 81 Cal 207 (209).

(1900) 27 Cal 414 (415).

('26) AIR 1926 Lah 109 (109).

('07) 1907 Pun Re No. 26, page 99.

('88) 11 Mad 319 (321).

('07) 10 Oudh Cas 358 (354).

[See ('11) 10 Ind Cas 361 (363) : 38 Cal 622. (Held to be doubtful.)]

[But see ('16) AIR 1916 Cal 221 (222).

('16) AIR 1916 Cal 619 (614).

('20) AIR 1920 Oudh 177 (178) : 28 Oudh Cas 349.]

12. ('32) AIR 1932 Cal 203 (204).

13. ('38) AIR 1938 Lah 324 (325).

('86) AIR 1986 Lah 478 (479). (Auction-purchaser not made party within time—Appeal should be dismissed — Affirming on Letters Patent Appeal, AIR 1985 Lah 802.)

[See ('88) AIR 1988 Nag 525 (527). (Appeal from order setting aside sale—Auction-purchaser on notice given to him not expressing one way or the other, his interest — His non-joinder is not fatal to the appeal.)]

14. ('33) AIR 1933 Mad 851(851):57 Mad 89(FB).

[See ('86) AIR 1986 Lah 368 (368). (In this case it was held that the insolvent judgment-debtor had no *locus standi* to appeal from an order confirming the sale — But it seems that his adjudication was before the sale and not afterwards as in the case adumbrated in the above proposition.)]

#### Note 51

1. ('24) AIR 1924 All 698 (699).

('90) AIR 1930 Pat 58 (60).

('24) AIR 1924 Pat 785 (786).

('01) 24 Mad 311 (315).

('76) 9 Mad 145 (146).

('37) AIR 1937 Pat 357 (358).

2. ('93) 20 Cal 8 (11) : 19 Ind App 154 (PC).

3. ('33) AIR 1933 All 137 (138).

4. ('37) AIR 1937 Pat 104 (105). (Advertising sale on certain day but actually holding it one day afterwards does not amount to material irregularity owing to Rr. 14 and 15, Patna High Court General Rules.)

5. ('39) AIR 1939 Mad 250 (251) : ILR (1939) Mad 374 (FB). (The question whether the applicant had a *locus standi* to apply under O. 21, R. 90 is a question of jurisdiction within the meaning of S. 115, O. P. C.)

('37) AIR 1937 Cal 7 (8). (There is failure to exercise jurisdiction by lower Court in such a case.)

6. ('32) AIR 1932 All 140 (140).

('29) AIR 1929 Bom 198 (199).

('28) AIR 1928 Cal 189 (190). (Erroneous view of limitation.)

('26) AIR 1926 Cal 773 (774, 775, 778) : 53 Cal 679. (Refusal to restore an application dismissed for default.)

**O. 21 R. 90**  
**Notes 50-51**



**O. 21 R. 90.** under this rule for default is not open to revision, since the order is appealable.<sup>7</sup> See **Note 61** also the undermentioned cases.<sup>8</sup>

It is not open to the petitioner to urge a new point in revision which was not taken in the Court below.<sup>9</sup>

**O. 21 R. 91**

**Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.**

**R. 91.** [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

[1877, S. 313.]

### Synopsis

1. Scope of the Rule.
2. Saleable interest.
3. Who may apply under this Rule.
  4. Necessary parties to application.
  5. Limitation.
6. To what Court application should be made where execution is transferred to Collector.
7. Notice. See Rule 92, proviso.
8. Compensation for loss of property bought at court-sale.
9. Suit for refund of purchase money where there is no saleable interest. See Notes to Order 21 Rule 93.
10. Appeal.

### Other Topics (miscellaneous).

No warranty of title in court-sales. See Notes 1 and 8.

Remedies open to purchaser. See Notes 1 and 8.

Rule inapplicable to purchaser knowing want of saleable interest at sale itself. See Note 1.

**1. Scope of the Rule.** — The general principle is that a court-sale carries with it no guarantee that the property is the property of the judgment-debtor; the auction-purchaser takes the risk and bears the loss if it is subsequently discovered not to be

- (15) AIR 1915 Lah 298 (295).  
 (18) 18 Ind Cas 715 (717, 718) (Cal).  
 (12) 15 Ind Cas 679 (681, 682) (Cal).  
 (95) 22 Cal 802 (805).  
 (94) 21 Cal 799 (806).  
 (81) AIR 1981 Cal 425 (426).  
 (70) 18 Suth W R 250 (251). (Absence of specific grounds in application—Court treating it as an application under this rule and deciding—High Court will not interfere in revision.)  
 (29) AIR 1929 Mad 624 (624).  
 (26) AIR 1926 Mad 959 (960).  
 (29) AIR 1929 Oudh 26 (29) : 4 Luck 98.  
 (17) AIR 1917 Cal 815 (816).  
 (16) AIR 1916 Mad 632 (632).  
 (85) AIR 1985 Oudh 154 (156).  
 7. (25) AIR 1925 Cal 510 (512).  
 8. (81) AIR 1981 All 594 (595).  
 (29) AIR 1929 All 798 (798) : 51 All 1028.  
 (28) AIR 1928 All 854 (854).  
 (26) AIR 1926 All 805 (806) : 48 All 286.  
 (98) 15 All 407 (409).  
 (29) AIR 1929 Cal 786 (787).  
 (26) AIR 1926 Cal 790 (791).  
 (21) AIR 1921 Cal 251 (252) : 48 Cal 119.  
 (28) AIR 1928 Lah 414 (417).

- (78) 2 Mad 264 (269).  
 (29) AIR 1929 Pat 588 (590).  
 (85) AIR 1985 Rang 521 (521). (Court confirming sale in favour of person not properly represented—No material irregularity in exercise of jurisdiction—Hence revision not competent.)  
 (88) AIR 1988 Pat 240 (242) : 17 Pat 107. (O. 21, R. 90 (Patna Amendment), Proviso (i)—Application for permission to give landed property as security instead of deposit—Court not applying mind to it and refusing—Dismissal of application to set aside sale for failure to make deposit—Appeal—Order refusing to accept security—Revision is maintainable.)  
 (89) AIR 1989 Lah 222 (222). (Objection to sale refused to be entertained by Court owing to erroneous belief that it was not entertainable in view of proviso 2 to Rule (Lahore Amendment)—Petition for revision is competent.)  
 [See also (12) 18 Ind Cas 147 (148) (All).]  
 (81) AIR 1981 Pat 68 (64).  
 (24) AIR 1924 Nag 298 (294).]  
 9. (22) AIR 1922 Lah 85 (86).  
 (25) AIR 1925 Pat 461 (461).



the property of the judgment-debtor. A sale in execution of a decree is therefore not void, so far as the purchaser is concerned, by reason of the fact that the property sold does not belong to the judgment-debtor.<sup>1</sup> This rule may be considered an exception to the general principle in that it allows an auction-purchaser to set aside a sale by an application under this rule, on the ground that the judgment-debtor had no saleable interest in the property sold. The distinction between this rule and Rule 90 is that while the latter provides for the setting aside of a sale for irregularities in the proceedings *which have led up to the sale*, this rule applies to an entirely different state of affairs and comes into operation in those cases where, in spite of the prescribed procedure having been *regularly followed*, property has been sold in which the judgment-debtor had no saleable interest.<sup>2</sup> The object of the rule is to provide a quick and inexpensive remedy in such cases by which the auction-purchaser could get out of his difficulty.<sup>3</sup> But the rule is intended for the protection of an *innocent* auction-purchaser; where, therefore, the purchaser *knew* at the time of the sale that the judgment-debtor had no saleable interest in the property sold,<sup>4</sup> or where the purchaser has abused the process of the Court for a fraudulent purpose and has not acted in good faith,<sup>5</sup> he is not entitled to the benefit of the provisions of this rule.

**O. 21 R. 91**  
**Note 1**

It follows from what has been stated above that an auction sale cannot be set aside on the ground of want of a saleable interest in the judgment-debtor, except by an application under this rule within the period of limitation prescribed therefor.<sup>6</sup> Where, therefore, no application under this rule is filed within time and the sale is confirmed under Rule 92, the auction-purchaser cannot treat the sale as void or (where he is the decree-holder) apply for execution again on the ground that he has subsequently discovered that the judgment-debtor had no saleable interest in the property sold. This is the view of the High Court of Madras.<sup>7</sup> The High Court of Patna has, however, held in the undermentioned cases<sup>8</sup> that the proposition that no judicial sale can be set aside for want of saleable interest in the judgment-debtor, except by a resort to the procedure of Order 21, is not well founded; it has accordingly held that where, in a suit to which both the auction-purchaser and the judgment-debtor were parties, the auction sale has been declared to be invalid as against a stranger, the sale must, in effect, be taken to have been set aside, and the auction-purchaser, if he is the decree-holder, can again apply for execution. But the same High Court has held in the undermentioned Full Bench decision<sup>9</sup> distinguishing the above cases, that

**Order 21 Rule 91 — Note 1**

1. ('27) AIR 1927 Mad 894 (895) : 50 Mad 689.  
(And in this view it makes no difference that the auction-purchaser is the decree-holder.)

('84) AIR 1934 Oudh 233 (236). (Only remedy is under O. 21 R. 91.)

('86) AIR 1936 Pat 97 (100) : 15 Pat 308 (FB).

('85) AIR 1935 Mad 340 (341).

('85) AIR 1935 All 910 (911).

('86) AIR 1936 Pat 97 (100) : 15 Pat 308 (FB). (Sale not nullity in the sense of being beyond jurisdiction of executing Court or void as between judgment-debtor and decree-holder or auction-purchaser.)

[See ('85) AIR 1935 P O 189 (148) : 62 Ind App 224 : 14 Pat 611 (PC). (The sale is a nullity so far as the real owner is concerned and Art. 12, Limitation Act, does not apply to a suit by the real owner.)]

2. ('89) AIR 1939 Pat 435 (440) : 12 Pat 665.

('39) AIR 1939 Nag 179 (182) : I L R (1939) Nag 357.

3. ('87) 9 All 43 (45).

4. ('81) 3 All 527 (527).

5. ('88) AIR 1933 Pat 684 (685).

6. ('35) AIR 1935 All 889 (890). (Once the sale is confirmed and has become absolute, the auction-purchaser can neither bring a separate suit to challenge the order nor have it set aside on the discovery of a defect in the title of the judgment-debtor.)

('85) AIR 1935 Mad 340 (341).

7. ('27) AIR 1927 Mad 835 (838, 839).

('27) AIR 1927 Mad 894 (895) : 50 Mad 689.

('85) AIR 1935 Mad 340 (341).

[See also ('28) AIR 1928 Mad 152 (153).]

8. ('24) AIR 1924 Pat 278 (274) : 2 Pat 829.

('31) AIR 1931 Pat 405 (407) : 11 Pat 250.

9. ('86) AIR 1936 Pat 97 (100, 101) : 15 Pat 308 (FB).

**O. 21 R. 91  
Notes 1-2**

once a sale has been *confirmed*, it will not be open to the decree-holder auction-purchaser to apply for execution again on the ground that the judgment-debtor had no saleable interest in the property. The Allahabad High Court has also held the same view.<sup>10</sup>

So also, except by following the procedure laid down in this rule and in Rule 93, *infra*, an auction-purchaser cannot recover the purchase-money paid by him on the ground that the judgment-debtor had no saleable interest in the property.<sup>11</sup> See for fuller discussion, Notes to Rule 93, *infra*.

Where a sale in execution of a decree is set aside on the ground that the judgment-debtor had no saleable interest in the property sold, the execution proceedings are revived and the decree-holder can file an application for execution again within three years of the judgment of the Court setting aside the sale.<sup>12</sup>

This rule does not apply to sales held under the Bengal Tenancy Act 1885<sup>13</sup> or to sales under the Orissa Tenancy Act, II of 1913 [Section 228, sub-section (3)], or to proceedings under the Madras Estates Land Act, I of 1908 [Section 192, sub-section (a)]. It does not also apply to sales held by the Registrar under Chapter 27 of the Calcutta High Court Rules.<sup>14</sup>

This rule is applicable to proceedings under the Chota Nagpur Tenancy Act: see Rule 95 Note 1, *infra*.

Where after a sale in execution of a decree, a third party files a suit for a declaration that the properties belong to him, and the purchaser thereupon files an application that he should be allowed to pay the purchase-money after the decision of the declaratory suit, it has been held that such an application is not one under this rule and is not justified by any provision in the Code.<sup>15</sup>

**2. Saleable interest.** — The words “no saleable interest” in this rule mean “nothing to sell” and are not intended to be confined to cases where a judgment-debtor’s interest is unsaleable either by prohibition of law or for some other reason.<sup>1</sup> Where there is a total failure of consideration for the price paid by the purchaser at a court-sale by reason of the fact that the judgment-debtor has no saleable interest whatever in the property sold, the sale can be set aside on an application under this rule.<sup>2</sup> But where the judgment-debtor has some saleable interest, however small it may be, the purchaser buys at his own risk and, there being no warranty that the property sold shall answer to the description given of it, the sale cannot be set

10. ('88) AIR 1938 All 593 (601): ILR (1938) All 922 (FB). (Order confirming sale is *res judicata* between decree-holder auction-purchaser and judgment-debtor and former cannot re-open matter by application for further execution or by any other means.)

[See also ('85) AIR 1985 All 910 (911).]

11. ('88) AIR 1988 Pat 447 (449). (No inherent power under S. 151, C. P. O., to grant refund without setting aside sale.)

('85) AIR 1985 All 910 (911). (After application under R. 91 becomes barred by time, the decree-holder auction-purchaser cannot apply to realize the auction purchase money in execution of the original decree and invoke S. 47 for the purpose.)

('89) AIR 1989 Cal 810 (812): ILR (1989) 1 Cal 452. (Suit or application under S. 151, C. P. O. not maintainable.)

('87) AIR 1987 All 18 (19).

('88) AIR 1988 All 593 (601): ILR (1988) All 922 (FB). (Suit for refund of purchase money not maintainable.)

('88) AIR 1988 Cal 263 (268): ILR (1988) 1 Cal 512. (Do.)

('37) AIR 1937 Pat 532 (533): 16 Pat 196. (Do.)

('38) AIR 1938 Pat 150 (152). (Do.)

12. ('28) AIR 1928 All 46 (49): 50 All 211.

13. ('26) AIR 1926 Cal 788 (789, 740). (S. 174 excludes such applicability.)

14. ('29) AIR 1929 Cal 207 (208).

15. ('81) AIR 1981 Lah 244 (245).

**Note 2**

1. ('88) 5 All 577 (585, 588) (FB).

2. ('18) 21 Ind Cas 774 (776) (Cal).

('83) 9 Cal 217 (220).

('80) 6 Cal L Rep 85 (90).

('25) AIR 1925 Sind 193 (195): 17 Sind L R 291.

aside under this rule.<sup>3</sup> Thus, where in a court sale several parcels of immovable properties are sold in one lot and it is found that the judgment-debtor has a saleable interest in one of such parcels and none in others, this rule does not apply.<sup>4</sup> The fact that it is found that the property sold is subject to a mortgage does not mean that the debtor has no saleable interest,<sup>5</sup> and this is so even if the amount due under the encumbrance exceeds the value of the property.<sup>6</sup>

The saleable interest contemplated by this rule is the interest *on the date of sale.*<sup>7</sup> Thus, where a decree for foreclosure of certain mortgaged properties allowed time till 20th July 1883 to the mortgagor to redeem and the property was sold in execution of a money decree on 30th June 1883, it was held that the fact that before the *confirmation* of the sale the judgment-debtor had lost his interest was immaterial and that this rule did not apply, inasmuch as on the date of sale he had a saleable interest.<sup>8</sup>

See also Note 5 to Section 60, *ante*.

**3. Who may apply under this Rule.** — It is only the *auction-purchaser* who is entitled to apply under this rule.<sup>1</sup> The judgment-debtor cannot apply under this rule.<sup>2</sup> But a decree-holder auction-purchaser can apply under this rule.<sup>3</sup> Where the purchase is made by an executor of the deceased judgment-debtor in his personal capacity, he is not debarred from applying under this rule, even though he had applied under Rule 90 in the capacity of executor.<sup>4</sup>

**4. Necessary parties to application.** — A person alleged by the auction-purchaser to be the real owner of the property is not a necessary party to an application under this rule, as he is not a person who will be affected by the order.<sup>1</sup> See also Notes to Rule 92, *infra*.

**5. Limitation.** — An application under this rule is governed by Article 166 of the Limitation Act and must be made within thirty days of the date of the sale.<sup>1</sup>

**6. To what Court application should be made where execution is transferred to Collector.** — Where a decree is transferred for execution to the Collector, an application under this rule should be made to the Civil Court and not to the Collector.<sup>1</sup> See also Rule 91A added by the Bombay High Court.

3. ('18) 21 Ind Cas 774 (776) (Cal).

('09) 3 Ind Cas 488 (489) (Cal).

('01) 28 Cal 235 (237).

('83) 9 Cal 626 (627).

('26) AIR 1926 Nag 17 (19) : 24 Nag L R 48.  
(House and site sold—After sale destroyed by fire.)

[See also ('95) 22 Cal 565 (573).]

('24) AIR 1924 Pat 355 (359).]

4. ('12) 15 Ind Cas 109 (110) (Mad).

('14) AIR 1914 Low Bur 142 (142).

5. ('83) 9 Cal 506 (507).

('18) AIR 1918 Pat 636 (637) : 3 Pat L Jour 516.

[But see ('81) 8 Cal L Rep 468 (470).]

6. ('87) 9 All 167 (168).

7. ('25) AIR 1925 Sind 193 (195) : 17 Sind L R 281.

('05) 2 Cal L Jour 506 (507). (Purchaser after default in payment of revenue cannot apply in the event of a subsequent revenue sale.)

8. ('84) 1884 All W N 818 (818).

#### Note 3

1. ('05) 1 Nag L R 167 (168).

2. ('07) 29 All 612 (613).

3. ('85) AIR 1985 Mad 840 (841). (His only remedy is to apply under this rule.)

('35) AIR 1935 All 910 (911).

4. ('15) AIR 1915 Cal 536 (539).

#### Note 4

1. ('14) AIR 1914 Mad 318 (319).

#### Note 5

1. ('27) AIR 1927 Mad 394 (395) : 50 Mad 639.

('27) AIR 1927 Mad 835 (836, 838).

('21) AIR 1921 Nag 60 (62).

('38) AIR 1938 Rang 433 (435). (Specific provisions for setting aside sale not availed of — Inherent power cannot be invoked where application under specific provision is time-barred.)

('39) AIR 1939 Cal 310 (311) : I L R (1939) 1 Cal 452. (S. 5, Limitation Act, does not apply.)

('35) AIR 1935 All 889 (891).

('38) AIR 1938 Nag 558 (559).

('35) AIR 1935 Mad 340 (341).

('35) AIR 1935 All 910 (911).

[See ('05) 2 Cal L Jour 506 (507). (Under Art. 172, Limitation Act of 1877, a period of 60 days was allowed — This is no longer law.)]

#### Note 6

1. ('87) 9 All 43 (45).

('89) 11 All 94 (96).

O. 21 R. 91  
Notes 7-8

7. Notice. — See Rule 92, proviso.

8. Compensation for loss of property bought at court-sale. — As has been seen in Note 1 above, there is no warranty of title in court sales.<sup>1</sup> The reason is, as observed by Peacock, C. J. : "A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment-debtor. He knows that no one guarantees to him that the judgment-debtor has a good title and he purchases the property with his eyes open, and he regulates the price which he bids for the land with reference to the circumstances under which he is purchasing, and the risk he runs."<sup>2</sup>

Now, suppose that, subsequent to the sale, the auction-purchaser finds that the judgment-debtor has title only to a portion of the property, that is to say, that he has only a fractional interest. It has been already mentioned in Note 2 *ante*, that to such a case this rule does not apply. Has the purchaser got any other remedy? On the principle mentioned above, he cannot claim to recover a proportionate part of the purchase money by way of compensation either by an application in the execution proceedings<sup>3</sup> or by a separate suit.<sup>4</sup> Where the purchaser is induced by *misrepresentation* or *fraudulent concealment* to buy the property for a price much more than it is really worth, the purchaser has no remedy under this rule.<sup>5</sup> He can, however, recover compensation in a *separate suit*.<sup>6</sup>

It has been held by the High Court of Calcutta<sup>7</sup> that in the case of execution sales held by the Registrar on the original side of that Court, the purchaser is entitled to recover compensation for deficiency of the interest of the judgment-debtor. See also Note 1 above.

An execution sale is also liable to be set aside on account of the misrepresentations of the officer conducting the sale, which has led to a useless property being sold for a high price.<sup>8</sup> The reason is that it is incumbent on the Court to be scrupulous in

#### Note 8

1. ('78) 8 Cal 806 (815, 816): 5 Ind App 116 (PC).

('33) AIR 1933 All 218 (222): 55 All 221.

('33) AIR 1933 All 63 (64): 54 All 948.

('35) AIR 1935 All 910 (911).

('38) AIR 1938 Oudh 84 (86): 13 Luck 746.

(Auction-purchaser therefore cannot assume the position of *bona fide* transferee without notice.)

('34) AIR 1934 Pat 688 (685).

('38) AIR 1938 Pat 447 (449).

2. ('69) 12 Suth W R 8 (10) (FB).

[See also ('37) AIR 1937 All 18 (19).]

3. ('31) AIR 1931 All 377 (378): 53 All 496.

(1900) 27 Cal 264 (268).

('21) AIR 1921 Cal 115 (117).

('80) 1880 Pun Re No. 16, p. 37.

[But see ('33) AIR 1933 All 218 (220, 221): 55 All 221. (Rule of *caveat emptor* is not to be extended to case where purchaser is decree-holder and sale is found to be nullity in another suit.)]

4. ('21) AIR 1921 All 228 (224).

('05) 27 All 537 (539).

('01) 23 All 355 (357, 358).

('80) 2 All 828 (829, 830).

('16) AIR 1916 Mad 622 (623).

('94) 17 Mad 228 (231).

('19) AIR 1919 Lah 253 (254): 1919 Pun Re No. 52.

('79) 1879 Pun Re No. 131, page 385.

[See also ('20) AIR 1920 Mad 316 (317): 43 Mad 309.]

[But see ('71) 3 N W P H O R 67 (69).]

5. ('98) 20 Cal 8 (10, 11): 19 Ind App 154 (PC).

('15) AIR 1915 Cal 548 (550).

('84) 10 Cal 868 (872).

6. ('09) 8 Ind Cas 488 (489, 440) (Cal).

('10) 7 Ind Cas 60 (63, 64, 65): 34 Mad 143.

('31) AIR 1931 Nag 116 (118): 27 Nag L R 318.

('16) AIR 1916 Low Bur 3 (5): 8 Low Bur 427.

[See ('14) AIR 1914 Low Bur 142 (142). (He cannot recover when he is not misled by such fraud.)]

('37) AIR 1937 Pat 532 (533): 16 Pat 196.

(Where an auction-purchaser at a court sale has suffered loss through the fraud of the execution creditor or the breach of any duty which the execution creditor owes to the auction-purchaser, he is entitled to receive compensation for the loss which he has thereby sustained.)]

7. ('02) 29 Cal 420 (426).

[See ('02) 29 Cal 370 (374).]

8. ('09) 1 Ind Cas 122 (123, 124): 36 Ind App 32:

36 Cal 823 (PC).

[See also ('18) AIR 1918 Bom 59 (68).]

the extreme and to be very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its officers.

**O. 21 R. 91**  
**Notes 8-10**

**9. Suit for refund of purchase money where there is no saleable interest.** — See Notes to Order 21 Rule 93, *infra*.

**10. Appeal.** — Under Order 43 Rule 1, clause (j), an appeal lies against an order setting aside or refusing to set aside a sale under Rule 92 read with this rule.

### Local Amendment

#### BOMBAY

The following shall be *added* as Rule 91A:

"91A. Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under Rules 89, 90 or 91, and in the case of an application under Rule 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under Section 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of Rules 89, 90 and 91."<sup>1</sup>

**O. 21 R. 91A**  
**(Bombay)**

**R. 92.** [Ss. 312, 314.] (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale,<sup>12</sup> and thereupon the sale shall become absolute.

**O. 21 R. 92**

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days<sup>3</sup> from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.<sup>4</sup>

(3) No suit<sup>5</sup> to set aside an order made under this rule shall be brought by any person against whom such order is made.

[1877, Ss. 312, 314; 1859, Ss. 256, 257.]

### Local Amendments

#### ALLAHABAD

In sub-rule (1), *after* the words "the Court shall," *insert* the words "subject to the provisions of Rule 58 (2)."

#### MADRAS

In sub-rule (2), *after* the words "within thirty days from the date of sale," *insert* the following words:

"and in case where the amount deposited has been diminished owing to any

### O. 21 R. 91A (Bombay)

1. ('88) AIR 1988 Bom 209 (209). (There is nothing to compel an applicant to make his application to the Collector rather than to the Civil Court.)

**O. 21 R. 92** cause not within the control of the depositor such deficiency has been made good  
**Notes 1-2** within such time as may be fixed by the Court."

#### NAGPUR

In sub-rule (1), *after* the word "make," *insert* the words "subject to the provisions of Rule 58 (2)."

#### ODDH

In sub-rule (1), *after* the words "the Court shall," *insert* the words "subject to the provisions of Rule 58 (2)."

#### PATNA

In sub-rule (1), *after* the words "the Court shall" *insert* the words "subject to the provisions of Rule 58 (2)."

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>2a. Court, meaning of.</li> <li>3. Deposit made within thirty days. See Notes to O. 21 R. 89.</li> <li>4. Necessary parties and notice to them.</li> <li>5. Suit to set aside or restore sale.</li> <li>6. Plea of irregularity or fraud in defence.</li> <li>7. Suits to set aside sales under other Acts.</li> <li>8. Limitation for suits to set aside sales.</li> </ol> | <ol style="list-style-type: none"> <li>9. Court-fee on a plaint in suit to set aside sale.</li> <li>10. Sale by receiver.</li> <li>11. Sale held by Collector — Confirmation.</li> <li>12. Confirmation before thirty days.</li> <li>12a. Compromise after sale but before confirmation.</li> <li>13. Appeal.</li> <li>14. Appeal to the Privy Council. See Section 109 Note 6 and O. 21 R. 90 Note 50.</li> <li>15. Step-in-aid of execution.</li> <li>16. Revision.</li> </ol> |
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### Other Topics (miscellaneous)

Absence of application—Effect. See Notes 2 and 4.

Application disallowed—Effect. See Note 2.

Confirmation—Effect. See Notes 2 and 6.

Effect of reversal of decree before confirmation. See Note 2.

Inherent powers to set aside sales. See Note 2.

Letters Patent appeal. See Note 18.

Plea of irregularity of sale cannot be raised after confirmation. See Note 6.

Sale not liable to be set aside merely because execution was barred. See Note 2.

Second appeal. See Note 18.

Suit on other grounds for setting aside sales. See Note 5.

When sale is to be set aside under this rule. See Note 2.

#### 1. Legislative changes. —

1. Under Section 312 of the old Code, the Court was bound to confirm the sale only if no application under Section 311 (now Rule 90) had been made or if such application is made and disallowed. Under the present rule the Court should confirm the sale only where no application is made under Rules 89, 90 or 91 or where such application is made and disallowed.

2. The words "as regards the parties to the suit" which occurred in the first paragraph of Section 312 of the old Code have been omitted. See the undermentioned case.<sup>1</sup>

3. The words "on the ground of such irregularity" after the words "no suit to set aside" in the last paragraph of Section 312 corresponding to sub-rule (3) have been omitted.

**2. Scope of the Rule. —** This rule provides for the confirmation of sale in certain cases and for the setting aside of sale in certain other cases. A sale should be *confirmed* where no application is made under Rules 89, 90 or 91 or where such

#### Order 21 Rule 92 — Note 1

1. (1900) 1 Low Bur Rul 58 (54).

application is made and disallowed. It is the duty of the Court in such cases to confirm the sale,<sup>1</sup> even without an application by, or the presence of, the party concerned.<sup>2</sup> Where the purchaser is a stranger, the Court cannot refuse to confirm the sale on the ground that the decree has been subsequently adjusted by the decree-holder and judgment-debtor.<sup>3</sup> Upon confirmation the sale will become absolute.<sup>4</sup> The rule requires an order confirming the sale. In the absence of such order, the sale will not automatically get confirmed merely because no application to set aside the sale has been made within the period of limitation or an application has been made and disallowed.<sup>5</sup> It has, however, been held that an *express* order of confirmation is not necessary.<sup>6</sup>

A sale should be *set aside* under this rule where an application under Rules 89, 90 or 91 is made and allowed. But this does not mean that the Court has no power to set aside an execution sale on any ground whatever in the absence of such an application. Thus, under Section 47 of the Code the Court can, at any time before the sale is confirmed, take notice of an objection by the judgment-debtor that the property is not liable to sale and refuse to confirm the sale.<sup>7</sup> Under its *inherent powers*, the Court can refuse to confirm the sale or can set it aside where it has been misled by

**O. 21 R. 92  
Note 2**

**Note 2**

1. ('26) AIR 1926 Mad 12 (14, 17).
- ('84) AIR 1984 Lah 146 (146). (No irregularity in publishing and conducting sale — Executing Court cannot refuse to confirm sale.)
- ('93) 20 Cal 8 (11) : 19 Ind App 154 (PC).
- ('76) 8 Ind App 230 (236) (PC).
- ('99) 21 All 140 (141).
- ('96) 18 All 141 (146).
- ('84) 8 Bom 424 (425).
- ('97) 24 Cal 682 (684, 685).
- ('78) 19 Suth W R 227 (229).
- ('07) 1907 Pun Re No. 92, page 499.
- ('26) AIR 1926 Nag 17 (19) : 24 Nag L R 48.
- ('26) AIR 1926 Nag 198 (194) : 21 Nag L R 157.
- ('20) AIR 1920 Nag 12 (14).
- ('25) AIR 1925 Rang 271 (278) : 3 Rang 182.
- ('27) AIR 1927 Lah 71 (72).
- ('88) AIR 1988 Nag 525 (526). (Proviso to R. 92 (2) dealing with notice does not relate to R. 92 (1).)
- ('86) AIR 1986 Lah 191 (192). (Sale cannot be set aside merely on ground that after date of sale but before confirmation judgment-debtor was declared to be member of agricultural tribe whose land cannot be sold.)
- ('88) AIR 1988 Cal 798 (801).
- ('88) AIR 1988 Pat 593 (594).
2. ('30) AIR 1930 Nag 184 (185).
- ('88) AIR 1988 Lah 99 (100) : 18 Lah 761.
- ('88) AIR 1988 Mad 807 (812). (There is no provision in the Code of Civil Procedure for an application by the auction-purchaser for confirmation of the sale; confirmation follows automatically under R. 92 (1) and the setting aside follows automatically under Rule 92 (2) of Order 21.)
3. ('84) AIR 1984 Lah 508 (509) : 15 Lah 801.
- ('81) AIR 1981 PC 83 (84) : 58 Ind App 50 : 27 Nag L R 95 (PC). (Adjustment between decree-holder and judgment-debtor after execution sale—Court cannot refuse to confirm the sale on the ground of adjustment—AIR 1922 Nag 248 and AIR 1928 Nag 42, Overruled.)

See also Notes to Rules 2 and 89 ante, and the

*following cases :*

- ('81) AIR 1981 Rang 148 (149) : 9 Rang 104. (Held that Court ought not to stay confirmation.)
- ('28) AIR 1928 Nag 265 (272) : 24 Nag L R 127 (FB). (Court cannot confirm sale where purchaser is decree-holder, but it can confirm where purchaser is a third party.)
- ('26) AIR 1926 Nag 298 (300). (Does not affect a stranger purchaser.)
4. ('21) AIR 1921 Mad 498 (507).
- ('12) 17 Ind Cas 242 (242, 243) (Mad).
- ('85) 1885 Pun Re No. 96, page 213.
5. ('84) AIR 1984 Cal 822 (823). (Until confirmation judgment-debtor can apply under O. 34 R. 5 — Merely order disallowing application under R. 90 not equivalent to confirmation.)
- ('98) AIR 1998 Oudh 221 (228) : 14 Luck 186.
- ('37) AIR 1937 Mad 560 (561, 562). (Deposit under O. 34 R. 5 may be made at any time before order of confirmation of sale although more than 30 days from sale may have passed.)
- ('37) 1937 Oudh W N 1158 (1156).
- ('84) AIR 1984 Cal 822 (823). (Until such order is made judgment-debtor under mortgage decree can make deposit under O. 34 R. 5.)
6. ('27) AIR 1927 Cal 881 (882).
- ('15) AIR 1915 Lah 9 (9) : 1915 Pun Re No. 81.
7. ('89) AIR 1989 Lah 113 (115) : I L R (1989) Lah 103.
- ('89) AIR 1989 All 368 (369) : I L R (1989) All 385. (Legal representative of judgment-debtor failing to object in execution proceedings that property sought to be sold or sold is his personal property and not that of the judgment-debtor cannot bring a separate suit for the purpose.)
- [See also ('86) AIR 1986 Pat 303 (305). (Puisne mortgagee impleaded as defendant in mortgage suit against whom a personal decree has been passed, behind his back, when there was no prayer for a personal decree in the plaint, can in execution take an objection to the executability of such a decree under S. 47 within 30 days of the sale of the property of the puisne mortgagee, and relief cannot be refused to him.)]



**O. 21 R. 92**  
**Note 2**

the decree-holder or where there has been abuse of the process of Court,<sup>8</sup> or where the decree has been reversed before the date of confirmation of the sale.<sup>9</sup> Similarly, a sale can be set aside on the ground that before the sale, the decree had been adjusted between the parties although the fact of such adjustment is brought to the notice of the Court only after the sale.<sup>10</sup> (See also Note 2 to Section 151.) But a sale is not liable to be set aside merely on the ground that the application for execution was time-barred,<sup>11</sup> or on the ground that the decree has been amended.<sup>12</sup> Similarly, the inherent power of the Court cannot be invoked where there is another remedy available for getting the sale set aside.<sup>13</sup> The Court has also no jurisdiction to set aside a sale under Section 151 of the Code on the application of a *third* party alleging that owing to the conduct of another third party, he was misled and therefore did not attend and could not bid at the auction of the property.<sup>14-15</sup> As to the effect of the reversal of a decree on the rights of the auction-purchaser, see Note 13 to Section 144.

This rule relates only to cases of valid sale where no application is made under Rules 89, 90 and 91 or where such application is made and disallowed. It has no application to cases where the sale is a nullity.<sup>16</sup> In such cases the Court can declare the sale to be void.<sup>17</sup>

Where an application is made to set aside a sale under the inherent powers of the Court,<sup>18</sup> or where an application is made under Rule 90 after the expiry of thirty days from the date of the sale, relying on Section 18 of the Limitation Act,<sup>19</sup> the fact that the sale has been confirmed is no bar to the maintainability of the application.

Where a sale is set aside, and, in the meanwhile, the purchaser has obtained possession of the properties, the Court has got inherent power to order restitution to be made.<sup>20</sup> See also Note 34 to Section 144.

A decree-holder is entitled to interest on the decretal amount up to the date of confirmation, inasmuch as he is not bound to withdraw the money deposited by the

8. ('23) AIR 1923 Mad 685 (686, 688) : 46 Mad 588.

('83) AIR 1933 Mad 899 (401). (Sale in contravention of direction of Court.)

('80) AIR 1930 Lah 208 (210).

('15) AIR 1915 Oudh 140 (142).

('81) 6 Cal 108 (106).

('72) 18 Suth W R 11 (12).

('72) 18 Suth W R 833 (834).

('80) AIR 1930 Lah 793 (794).

('80) 2 Mad 264 (269).

('26) AIR 1926 Nag 17 (18) : 24 Nag L R 48.

('25) AIR 1925 Sind 253 (254) : 18 Sind L R 180.

See also Note 2 to Section 151.

[See ('29) AIR 1929 All 485 (491, 492). (Where the remedy is time-barred it cannot be given by the use of inherent powers.)]

9. ('20) AIR 1920 Cal 99 (101).

('21) AIR 1921 Nag 121 (122).

[See also ('25) AIR 1925 Nag 60 (61) : 20 Nag L R 168.]

10. ('89) AIR 1939 Lah 326 (327) : 41 Pun L R 220 (221).

11. ('13) 19 Ind Cas 877 (878) (Cal).

('85) 11 Cal 376 (378).

('81) 7 Cal 91 (96).

('88) 6 Mad 287 (288).

('17) AIR 1917 Pat 467 (467) : 2 Pat L Jour 157.

[But see ('70) 18 Suth W R 273 (275).

('88) AIR 1938 All 89 (90).]

12. ('25) AIR 1925 All 264 (266).

[See ('26) AIR 1926 All 41 (42). (Setting aside sale — Sale held in accordance with decree — Decree subsequently amended—Sale cannot be set aside as against *bona fide* purchaser.)]

13. ('88) AIR 1938 Rang 438 (435). (Where a party has not applied under O. 21 Rr. 89, 90 or 91 it is not open to him to seek the inherent power of the Court to set aside the sale.)

('37) AIR 1937 Lah 416 (417). (Sale illegal under Punjab Alienation of Land Act — As Act itself provides for remedy inherent power of Court cannot be invoked.)

14-15. ('39) AIR 1939 Cal 161 (162).

16. ('88) AIR 1938 Mad 598 (605) : 56 Mad 808.

17. ('86) AIR 1936 Mad 205 (214) : 59 Mad 461 (F B). (Judgment-debtor dead — Property sold without impleading his legal representatives—Sale is void.)

18. ('24) AIR 1924 All 261 (262) : 46 All 158.

('98) 26 Cal 727 (731).

('02) 6 Cal W N 288 (285).

19. ('23) AIR 1923 All 282 (284) : 45 All 816.

20. ('80) AIR 1930 Pat 280 (281, 282) : 9 Pat 685.

('18) AIR 1918 Pat 52 (53) : 2 Pat L Jour 206.

[See ('05) 8 Oudh Cas 254 (256).]



auction-purchaser before the sale is confirmed.<sup>21</sup>

The effect of an order setting aside the sale is to remit the parties to the position in which they stood before the date of the sale.<sup>22</sup>

Section 21 of the Central Provinces Debt Conciliation Act, II of 1933, does not preclude the Court from confirming an execution sale held prior to an application made by the debtor under Section 4 of the Act.<sup>23</sup>

**2a. Court, meaning of.**—The word "Court" in this rule means the Court which held the sale.<sup>1</sup>

**3. Deposit made within thirty days.**— See Notes to Order 21 Rule 39.

**4. Necessary parties and notice to them.**— It has been seen in the Notes to Rules 89, 90 and 91 that an application under these rules to set aside the sale must be made within thirty days of the date of the sale under Article 166 of the Limitation Act. If no such application is made within time, the sale cannot be set aside under this rule.<sup>1</sup>

Before an order setting aside a sale under this rule is made, it is essential that notice of the application should be given to all persons affected by the order thereon.<sup>2</sup> Thus, notice must be given to the auction-purchaser.<sup>3</sup> An order setting aside the sale, made without giving such persons an opportunity of being heard, is, according to the High Courts of Madras and Patna, without jurisdiction.<sup>4</sup> According to the High Court of Calcutta such an order is not a nullity and if the person affected does not impugn the validity of the order in a proceeding directed against it, he cannot attack it collaterally in any other proceeding.<sup>5</sup> The Peshawar Judicial Commissioner's Court has held that the omission to issue notice under this rule makes the order setting aside the sale illegal.<sup>6</sup> Where on an agreement between the decree-holder and some of the judgment-debtors the Court settled a sale with X and confirmed it on the same date without notice to the other judgment-debtors, it was held by the High Court of

21. ('14) AIR 1914 Cal 210 (211, 212).

('15) AIR 1915 Cal 297 (298).

('88) AIR 1938 Nag 54 (54) : ILR (1938) Nag 456.

22. (1864) 1864 Suth W R Sup No. 26 (28).

('88) AIR 1938 Cal 862 (863). (The debt which was extinguished by the sale is revived as soon as the sale is set aside.)

23. ('88) AIR 1938 Nag 273 (275) : ILR (1938) Nag 104.

[See also ('87) AIR 1937 Nag 98 (99). (Executing Court cannot refuse to confirm sale on ground that after the sale the Debt Conciliation Board issues a certificate under S. 15 (1) of the Act.)]

**Note 2a**

1. ('84) AIR 1934 Cal 822 (823).

**Note 4**

1. [See ('25) AIR 1925 All 286 (287) : 47 All 304.]

2. ('94) 18 Bom 594 (596).

('83) 7 Bom 424 (424, 425).

('80) 1880 Bom. P J 254.

('12) 15 Ind Cas 176 (176) : 89 Cal 881.

('11) 10 Ind Cas 148 (150) (Cal).

('12) 15 Ind Cas 228 (228) (Cal).

('10) 5 Ind Cas 805 (805) (Cal).

(1900) 5 Cal W N 68 (64).

('96) 28 Cal 893 (896).

('96) 1 Cal W N 114 (118).

('96) 1 Cal W N 161n.

('21) AIR 1921 Lah 156 (157).

('23) AIR 1923 Pat 353 (353).

('24) AIR 1924 Pat 507 (509).

('25) AIR 1925 Cal 157 (158). (If a party has actual notice, the absence of formal notice does not vitiate the proceedings.)

('12) 14 Ind Cas 67 (69) : 39 Cal 687.

('21) AIR 1921 Pat 54 (55) : 6 Pat L Jour 16.

(The provisions of R. 92, requiring notice to be served does not apply to proceedings brought by a judgment-debtor to set aside a sale under S. 174 of the Bengal Tenancy Act.)

[See ('27) AIR 1927 Oudh 23 (24). (Judgment-debtor dying before confirmation—No notice is necessary to his legal representative.)]

3. ('86) AIR 1938 Pesh 14 (15).

('89) AIR 1939 Sind 62 (64) : ILR (1939) Kar 417.

(Though he is not a person "whose interests are affected by the sale" within R. 90 — As to this, however, there is a conflict of decisions for which see Note 6 to R. 90.)

4. ('16) 32 Ind Cas 891 (893) (Mad).

('21) AIR 1921 Pat 293 (294).

5. ('38) AIR 1938 Cal 464 (466).

('28) AIR 1928 Cal 267 (268). (It is only a wrong order.)

6. ('88) AIR 1938 Pesh 14 (15). (Notice not given to auction-purchaser—Order set aside on appeal by him.)

**Q. 21 R. 23**  
**Notes 4-5**

Allahabad that the proceedings were materially irregular and that the sale should be set aside.<sup>7</sup> But in any case it is not necessary that the notice should be given *within thirty days* of the date of the sale.<sup>8</sup>

It is not necessary that the persons who would be affected by an order under this rule need be described as parties in the application: it is sufficient if the notice required by this rule is given to them.<sup>9</sup> Certain decisions, however, hold that such persons are *necessary parties*.<sup>10</sup> Where an application to set aside a sale was made *bona fide* impleading the decree-holder as a party, but he was dead on the date of the application, and his legal representative was brought on the record after the expiry of the period of limitation, it was held in the undermentioned case<sup>11</sup> that the application would not be defeated by reason of the fact that the legal representative of the decree-holder was not impleaded within the period of limitation.

Where the auction-purchaser is alleged to be a *benamidar* for a third party, it is not necessary to give notice to the latter under this rule.<sup>12</sup> Persons who have applied for rateable distribution in the proceeds of an execution sale have no such direct or proximate interest as would entitle them to notice under this rule.<sup>13</sup>

**5. Suit to set aside or restore sale.**—Section 312 of the old Code provided in the last paragraph thereof that “no suit to set aside on the ground of such irregularity, an order passed under this Section shall be brought . . . .” etc. In the undermentioned cases<sup>1</sup> these words were interpreted as not including suits to *confirm* the sale which had been set aside under Section 312. These cases are now no longer law in view of the alteration effected in sub-rule (3) of the present rule which enacts that “no suit to set aside *an order made under this rule* shall be brought,” etc.

7. ('29) AIR 1929 All 671 (672).
8. ('13) 19 Ind Cas 475 (476) : 37 Bom 387.
- ('28) AIR 1928 Lah 413 (414).
- ('29) AIR 1929 Mad 763 (764) : 52 Mad 861.
- ('32) AIR 1932 Pat 255 (256) : 11 Pat 504.
- ('26) AIR 1926 Pat 266 (267).
- ('24) AIR 1924 Pat 37 (38) : 2 Pat 800.
- ('22) AIR 1922 Oudh 129 (180).
- ('80) AIR 1930 All 167 (168).
- ('35) AIR 1935 Cal 502 (503) : 62 Cal 286. (Application not bad in form because notice has not been given—Notice can be given at any time.)
9. ('29) AIR 1929 All 593 (596) : 51 All 910.
- ('13) 19 Ind Cas 475 (476) : 37 Bom 387.
- ('23) AIR 1923 Cal 394 (396, 397).
- ('28) AIR 1928 Lah 413 (414).
- ('28) AIR 1928 Lah 414 (417).
- ('28) AIR 1928 Lah 418 (419).
- ('27) AIR 1927 Lah 681 (682).
- ('97) 1897 Pun Re No. 3, p. 8.
- ('29) AIR 1929 Mad 763 (764) : 52 Mad 861.
- ('32) AIR 1932 Pat 255 (256) : 11 Pat 504.
- ('26) AIR 1926 Pat 266 (267).
- ('24) AIR 1924 Pat 37 (37, 38) : 2 Pat 800.
- ('14) AIR 1914 Oudh 307 (307) : 25 Ind Cas 907 (908) : 17 Oudh Cas 806.
- ('35) AIR 1935 Cal 502 (503) : 62 Cal 286.
- [See ('80) AIR 1930 Pat 318 (318, 319) : 9 Pat 810. (But in an appeal he must implead him in the beginning.)]
- [See also ('24) AIR 1924 Pat 507 (509).]
10. ('28) AIR 1928 Cal 189 (189).
- ('19) AIR 1919 Cal 510 (510).

- ('12) 15 Ind Cas 176 (176) : 39 Cal 881.
- ('29) AIR 1929 Lah 778 (779).
- ('80) AIR 1930 Nag 5 (5) : 26 Nag L R 127.
- ('21) AIR 1921 Pat 498 (498).
- ('91) 1891 All W N 121 (121).
- ('98) 15 All 407 (409).
- ('37) 167 Ind Cas 166 (166) (Lah). (Auction-purchaser is necessary party.)
11. ('32) AIR 1932 Cal 738 (738).
12. ('02) 29 Cal 682 (686).
- [See also ('28) AIR 1928 All 462 (468).]
13. ('81) AIR 1931 Mad 465 (466, 467) : 55 Mad 64.
- [But see ('19) AIR 1919 Mad 869 (870).
- ('37) AIR 1937 Mad 589 (591). (There is good deal of force in contention that person entitled to rateable distribution is entitled to notice under this rule.)]

#### Notes 5

1. ('98) 20 All 379 (381, 382) (F B). (Overruling 18 All 437.)
- ('08) 25 All 355 (357).
- ('81) 3 All 554 (558, 561) (F B).
- ('88) 1888 All W N 248 (248).
- ('87) 9 All 602 (604).
- ('91) 1891 All W N 41 (42).
- ('81) 3 All 701 (704).
- ('81) 3 All 206 (210).
- ('76) 1 All 374 (377).
- ('95) 19 Bom 216 (219, 220).
- [See also ('69) 1 N W P H C R 61 (68). (Held that the order was not under Sa. 266, 267 and could not be regarded as bar to the suit.)]

A suit to set aside an execution sale on grounds covered by Rules 89, 90 and 91 is barred by sub-rule (3),<sup>3</sup> inasmuch as the suit would in effect be one to set aside an order under this rule.

A suit to set aside a sale in execution on grounds other than those covered by Rules 89, 90 and 91 is not within the prohibition of sub-rule (3) and is, therefore, not barred by it.<sup>3</sup> Thus, where the decree and the sale are attacked on the ground of fraud (not covered by Rule 90)<sup>4</sup> or where the sale is attacked on the ground of want of jurisdiction,<sup>5</sup> a suit to set aside such a sale on those grounds is not barred by this rule. Where in execution of a mortgage decree a property not included in the mortgage was sold, a suit by the mortgagor to recover possession of the property from the mortgagee-purchaser was held not to be barred by this rule.<sup>6</sup>

The rules relating to the execution of decrees under this Code do not apply to

2. ('07) 29 All 196 (202) : 34 Ind App 37 (PC).
- ('30) AIR 1930 All 556 (557).
- ('30) AIR 1930 All 678 (579).
- ('28) AIR 1928 All 704 (705).
- ('16) AIR 1916 All 184 (185).
- ('85) 7 All 450 (454).
- ('88) 1888 All W N 264 (264).
- ('81) 1881 All W N 38 (89).
- ('02) 26 Bom 40 (42).
- ('19) AIR 1919 Cal 411 (413).
- ('15) AIR 1915 Mad 150 (155).
- ('89) 16 Cal 33 (40).
- ('73) 19 Suth W R 414 (416).
- ('29) AIR 1929 Lah 618 (619).
- ('26) AIR 1926 Lah 165 (165) : 7 Lah 1.
- ('28) AIR 1928 Mad 1138 (1139).
- ('21) AIR 1921 Mad 121 (121) : 44 Mad 351.
- ('29) AIR 1929 Nag 130 (131) : 25 Nag L R 58.
- ('26) AIR 1926 Oudh 45 (46).
- ('28) AIR 1928 Rang 18 (19) : 5 Rang 606.
- ('27) AIR 1927 Rang 301 (301) : 5 Rang 516.
- ('98) 8 Mad L Jour 115 (116).
- ('38) AIR 1938 Pat 150 (151). (No suit by auction-purchaser for refund of purchase-money on ground that judgment-debtor had no saleable interest in the property is maintainable.)
- ('38) 68 Cal L Jour 431 (433).
- ('37) AIR 1937 Nag 140 (142).
- ('85) AIR 1935 All 470 (478) : 57 All 690.
- ('35) AIR 1935 Cal 856 (357).
- [See ('92) 19 Cal 341 (345).
- ('91) 18 Cal 139 (143).
- ('84) 10 Cal 496 (500).
- ('90) 17 Cal 769 (772) (FB).
- ('18) AIR 1918 Nag 102 (103).
- (1864) 1 Suth W R 204 (204). (Section 257, Act VIII of 1859, applies only to sales held after that Act came into operation.)]
- [But see ('21) AIR 1921 All 327 (328).
- ('16) AIR 1916 Lah 301 (302).
- ('69) 11 Suth W R 244 (244).
- ('67) 8 Suth W R 506 (506).]

3. See cases in points 4 to 6 *infra*.

('32) AIR 1932 Cal 126 (128) : 59 Cal 117. (The sub-rule, however, has no application here; what is prayed for in the suit is not the setting aside of the order confirming the sale but certain declarations, the nature of which has already been set out and also an injunction as regards the taking of possession.)

- ('25) AIR 1925 Pat 376 (378). (The rule does not apply when the property, for possession of which the judgment-debtor sued was never sold at all but was wrongly taken possession of by the auction-purchaser.)
- ('85) 7 All 450 (452).
- ('69) 12 Suth W R 41 (42).
- ('11) 11 Ind Cas 399 (401) (PC). (So assumed.)
- [See also ('83) 11 Cal 136 (138) : 11 Ind App 234 (PC).
- ('35) AIR 1935 All 470 (475) : 57 All 690. (Where a decree in execution of which the sale took place is itself found to be invalid, or where it is found that the sale officer had no authority to sell the property, the remedy of a separate suit would not be barred.)]
- [See however ('38) AIR 1938 Lah 690 (691). (In this case, a suit by judgment-debtor to set aside sale on an allegation of fraud not covered by R. 90 was held to be barred by S. 47.)]
4. ('02) 29 Cal 395 (400) : 29 Ind App 99 (PC).
- ('33) AIR 1933 Cal 454 (456). (If suit succeeds the sale will also fall if the purchase is not made by a third party without notice.)
- ('34) AIR 1934 Lah 400 (400). (Declaratory suit by stranger purchaser on ground of fraud not barred by a prior dismissed application under O. 21 R. 90 for the same relief.)
- ('25) AIR 1925 All 146 (150, 154) : 47 All 217.
- ('97) 24 Cal 546 (548).
- ('69) 11 Suth W R 297 (298).
- ('35) AIR 1935 All 470 (475) : 57 All 690. (Decree itself attacked as invalid — Remedy of separate suit not barred.)
5. ('28) AIR 1928 All 527 (530, 532) : 51 All 346.
- ('81) 8 All 206 (210) (F B).
- ('75) 7 N W P H C R 183 (184).
- ('20) AIR 1920 Bom 30 (30) : 44 Bom 551.
- ('90) 17 Cal 699 (703) (F B).
- ('90) 1890 Pun Re No. 76, page 227.
- ('36) AIR 1936 Mad 205 (214) : 59 Mad 461 (FB).
- [See also ('78) 2 Cal L Rep 334 (338). (Suit by purchaser for rent — Defence that sale is void for want of jurisdiction — Allowed.)
- ('35) AIR 1935 All 470 (475) : 57 All 690. (Sale officer having no authority to sell — Separate suit not barred.)]
6. ('28) AIR 1928 All 363 (364, 365) : 50 All 686.
- ('29) AIR 1929 All 678 (673).

**O. 21 R. 92**  
**Notes 5-7**

insolvency proceedings: therefore, a suit, questioning an order dismissing an application to set aside a sale held by the Insolvency Court is not barred by this rule.<sup>7</sup>

It has been held that the auction-purchaser can sue for damages for loss suffered by him on account of the fraud practised by the decree-holder in regard to the sale.<sup>8</sup> See also Note 4 to O. 21 R. 93, *infra*.

An application to set aside a sale was withdrawn on a compromise between the parties and the sale was confirmed. Afterwards, the compromise was declared by a decree to be void. It was held that the effect of this was that the order confirming the sale also became void and the application to set aside the sale should be heard on the merits.<sup>9</sup>

**6. Plea of irregularity or fraud in defence.**— Where a party applies under Rule 90 to set aside the sale and the application is dismissed, he will, in answer to a suit by the purchaser for possession, be barred by *res judicata* from impeaching the sale on the same grounds.<sup>1</sup> Even if no such application is made, such a plea in defence cannot be raised after confirmation of the sale.<sup>2</sup> The reason is that the sale becomes absolute and the order confirming the sale amounts to a judicial determination that none of the objections exists upon which the validity of the sale could have been questioned. Nor can a third person impeach the title of the auction-purchaser on the ground of any alleged irregularities in the execution sale.<sup>3</sup>

It has been held in the undermentioned case<sup>4</sup> that the fact that an application under R. 89 or R. 90 has been dismissed will not preclude the mortgagor-judgment-debtor from pleading by way of defence in a suit by the auction-purchaser for possession, that the properties sold were not included either in the mortgage or in the decree thereon.

**7. Suits to set aside sales under other Acts. —**

(1) *Public Demands Recovery Act (Bengal Act III of 1913)*. — It was held under the repealed Act I of 1895 that this rule did not apply to sales held in enforcement of a certificate under that Act and that a suit to set aside such a sale was maintainable.<sup>1</sup> See Section 25 of Act III of 1913.

(2) *Bengal Tenancy Act (VIII of 1885)*. — It has been held that this rule does not apply to sales held under the Bengal Tenancy Act, inasmuch as S. 174 thereof contains a complete rule on the subject.<sup>2</sup> There is a conflict of opinion as to whether a suit is maintainable to set aside or to confirm such a sale. See the cases cited below.<sup>3</sup>

7. ('28) AIR 1928 Lah 224 (225).

8. ('87) AIR 1937 Pat 532 (538) : 16 Pat 196.

[See also ('84) AIR 1934 Lah 400 (400). (Suit for declaring sale to be void and for refund of purchase-money.)]

[See however ('85) AIR 1935 Nag 80 (81). (Suit by judgment-debtor against decree-holder for damages for having fraudulently brought to sale property on misrepresentation that the property was subject to a mortgage is barred by sub-rule (8).)]

9. ('34) AIR 1934 All 483 (484).

**Note 6**

1. ('17) AIR 1917 Cal 198 (198).

('09) 3 Ind Cas 24 (25) : 31 All 599.

('16) AIR 1916 Cal 465 (467).

2. ('26) AIR 1925 Cal 81 (81, 82).

('29) AIR 1929 Cal 374 (378, 379) : 57 Cal 403 (F B).

('14) AIR 1914 Cal 554 (556).

('12) 18 Ind Cas 542 (544) (Cal).

('12) 17 Ind Cas 126 (126) (Mad).

('18) 18 Ind Cas 498 (499) (Mad).

[See ('18) AIR 1918 All 805 (806) : 40 All 680.]

[But see ('26) AIR 1926 Bom 88 (84, 86). (Obiter.)]

3. ('27) AIR 1927 Cal 82 (83, 84).

4. ('21) AIR 1921 Mad 279 (280).

**Note 7**

1. ('06) 38 Cal 451 (458).

('05) 32 Cal 1130 (1140).

('02) 29 Cal 94 (98).

('02) 29 Cal 78 (91, 93) (F B).

('87) 14 Cal 1 (6).

('87) 14 Cal 9 (12).

[See also ('09) 1 Ind Cas 871 (878) : 37 Cal 107.]

[But see ('07) 34 Cal 787 (809, 810).]

2. ('21) AIR 1921 Pat 54 (56) : 6 Pat L Jour 16.

3. ('91) 18 Cal 481 (488) (No).

As to cases under Bengal Act XI of 1859 and Act X of 1859, see the under-mentioned cases.<sup>4</sup>

**O. 21 R. 92**  
**Notes 7-12**

(3) *Madras Estates Land Act (I of 1908)*. — A suit will lie to set aside a sale held under the Madras Estates Land Act.<sup>5</sup>

**8. Limitation for suits to set aside sales.** — In cases not covered by this rule and to which the bar under sub-rule (3) does not apply, a suit to set aside an execution sale should be brought within one year from the date of confirmation of sale under Article 12 of the Limitation Act of 1908.<sup>1</sup> That Article, however, does not apply where the sale is a nullity.<sup>2</sup> Such a sale does not require to be set aside, but may be declared to be void. A third person whose property has been sold is not bound by the sale and a suit by him for setting aside the sale is not governed by Article 12 of the Limitation Act.<sup>3</sup>

**9. Court-fee on a plaint in suit to set aside sale.** — A suit to set aside an auction sale for arrears of revenue is in no sense a suit for a mere declaration without consequential relief.<sup>1</sup> The plaint in such a suit should be stamped as if it were a suit for recovery of the property sold.<sup>2</sup>

**10. Sale by receiver.** — A sale by a receiver appointed by a Court is not one in execution of a decree and need not be confirmed under this rule.<sup>1</sup>

**11. Sale held by Collector — Confirmation.** — The Collector to whom a decree has been transferred for execution is not a Court executing the decree.<sup>1</sup> The Civil Court is the proper Court to confirm a sale held by the Collector.<sup>2</sup> See Notes 2, 4, 5 and 6 to Section 70.

**12. Confirmation before thirty days.** — No sale can be confirmed or can become absolute under this rule before the expiry of the period of thirty days from the date of the sale.<sup>1</sup> A sale becomes complete only where the bid is accepted and

(‘21) AIR 1921 Pat 54 (57): 6 Pat L Jour 16. (No. —Reversing A I R 1919 Pat 240.)

(‘18) AIR 1918 Pat 125 (125): 3 Pat L Jour 122 (Yes.)

4. *Under Act XI of 1859:*

(‘98) 25 Cal 876 (879). (Revenue sale where there is no arrear of revenue is void and can be set aside.)

(‘98) 25 Cal 883 (842): 25 Ind App 151 (PC). (Do.)

*Under Act X of 1859:*

(‘10) 7 Ind Cas 387 (388) (Cal). (Suit lies.)

(‘71) 15 Suth W R 58 (60) (Do.)

5. (‘27) AIR 1927 Mad 1095 (1096, 1097): 51 Mad 76.

(‘26) AIR 1926 Mad 190 (191): 49 Mad 490.

**Note 8**

1. (‘01) 25 Bom 837 (851, 852): 27 Ind App 216 (PC).

(‘18) 19 Ind Cas 120 (121) (All).

(‘95) 23 Cal 775 (785, 786): 23 Ind App 45 (PC).

(‘85) 11 Cal 287 (292).

(‘76) 2 Cal 98 (103).

(‘94) 17 Mad 816 (822).

(‘84) 7 Mad 258 (261, 262).

[See (‘10) 7 Ind Cas 503 (504): 33 All 93.]

[But see (‘88) AIR 1938 Pat 478 (480). (Suit to set aside sale in execution of decree on ground of fraud is governed by Art. 95 and not by Art. 12.)]

2. (‘29) AIR 1929 All 678 (678).

(‘28) AIR 1928 All 363 (365): 50 All 686.

(‘24) AIR 1924 Lah 396 (396, 397).

3. (‘86) 9 Mad 460 (463).

(‘84) 7 Mad 512 (514).

(1900) 1900 Low Bur Rul 53 (55).

(‘10) 4 Low Bur Rul 40 (42).

[See also (‘25) AIR 1925 Pat 376 (378).

(‘33) AIR 1933 Lah 10 (11). (Person not party to sale not suing to set aside sale but only contending that his rights are not affected by the sale—Art. 12 does not apply.)]

**Note 9**

1. (‘24) AIR 1924 Cal 731 (732): 51 Cal 216.

2. (‘81) 9 Cal L Rep 231 (232).

**Note 10**

1. (‘26) AIR 1926 All 124 (126): 48 All 209.

**Note 11**

1. (‘25) AIR 1925 All 146 (149): 47 All 217.

2. (‘96) 1896 Pun Re No. 83, page 261.

**Note 12**

1. (‘03) 13 Mad L Jour 231 (234).

(‘87) 9 All 411 (413).

(‘84) 1884 Pun Re No. 19, page 58.

(‘84) 7 Mad 512 (514). (Case under S. 312 of the old Code—The period allowed there was 60 days.)

(‘86) AIR 1936 Pat 164 (166). (But a petition of compromise between the parties under which the sale is to be confirmed without the auction-purchaser having to pay the full purchase-

**O. 21 R. 32**  
**Notes 12-13**

declaration is made of such bidder being the purchaser.<sup>3</sup>

**12a. Compromise after sale but before confirmation.** — After a sale and before its confirmation the decree-holder and judgment-debtor came to an arrangement that the judgment-debtor should pay the decree amount by 29th December 1930, that the confirmation of the sale should be held over till that date and that if the amount was not paid as agreed the sale should be confirmed without delay. Both parties applied to the Court to pass orders accordingly. The Court passed orders accordingly and stated "the darkhast is allowed to be withdrawn for the present." It was held that these words must be taken as amounting only to an order staying the execution till 29th December 1930, and that on the failure of the judgment-debtor to pay the amount as agreed the sale should be confirmed.<sup>1</sup>

**13. Appeal.** — An order under this rule setting aside or refusing to set aside an execution sale is appealable under Order 43 Rule 1 (j) of the Code.<sup>1</sup> An order merely confirming the sale in the absence of an application to set it aside,<sup>2</sup> or an order refusing to confirm a sale on the ground that the decree had been satisfied,<sup>3</sup> is not an order setting aside or refusing to set aside a sale and is, therefore, not appealable. Similarly, an order setting aside a sale *suo motu* under the Court's *inherent* powers is not one under this rule and is not appealable.<sup>4</sup> In the undermentioned case<sup>5</sup> it was held that an order directing the re-sale of the property on the failure of the auction-purchaser to deposit 25 per cent. of the purchase money as required by Rule 84 was covered by this rule and that it was appealable. As to whether an appeal lies from an order setting aside or refusing to set aside a sale under the Madras Estates Land Act or the Bengal Tenancy Act or the Agra Tenancy Act, see the undermentioned cases.<sup>6</sup>

money may be recorded before the expiry of (thirty days.)

2. ('84) AIR 1934 Oudh 25 (27); 9 Luck 393.

#### Note 12a

1. ('33) AIR 1933 Bom 358 (359); 57 Bom 616.

#### Note 13

1. ('22) AIR 1922 All 90 (90); 44 All 209.

('83) AIR 1933 All 137 (137).

('85) 7 All 253 (256).

('87) 9 All 411 (413).

('80) 2 All 396 (398).

('80) 2 All 352 (353, 354).

('17) AIR 1917 Cal 554 (555).

('02) 29 Cal 548 (552).

(1900) 4 Cal W N 474 (479).

('89) 16 Cal 429 (432).

('14) 14 Ind Cas 326 (326) (Mad).

('32) AIR 1932 Nag 14 (15); 27 Nag L R 339.

('81) AIR 1931 Pat 97 (98). (Decision under O. 21, R. 92 held as a decision under S. 47.)

[See ('37) AIR 1937 Pat 672 (672). (An order refusing the application of one of the parties for an order directing the other party to act up to the terms of a compromise whereby the parties had agreed to the postponement of the confirmation of the sale is not open to appeal.)]

As to the right of appeal in cases arising under the old Acts, see the following decisions:

('81) 8 All 816 (820). (No appeal—Decision under the Code of 1877 as amended by Act XII of 1879.)

('74) 6 N W P H C R 809 (810). (No appeal—Decision under Act XXIII of 1861.)

('78) 1 Cal L Rep 250 (251). (No appeal—Decision under Act of 1859.)

('79) 8 Cal L Rep 208 (210). (Do.)

[See ('28) AIR 1928 Lah 675 (676). (A judgment-debtor, who has been adjudicated an insolvent cannot appeal from an order confirming sale of his property.)]

('82) 1882 All W N 117 (117).]

2. ('29) AIR 1929 Lah 778 (779).

('29) AIR 1929 All 671 (672).

('27) AIR 1927 Oudh 28 (24).

[See however ('36) AIR 1936 Oudh 172 (172).

(Sale confirmed without an application to set aside having been made — Application to set aside made afterwards refused — Order comes under Rule 92 and is appealable.)]

[But see ('89) 11 All 338 (337).]

3. ('29) AIR 1929 Lah 438 (439).

[See also ('88) AIR 1938 Mad 307 (312). (An order rejecting an auction-purchaser's application for confirmation of the sale is not an appealable matter nor can it be revised.)]

4. ('25) AIR 1925 Sind 253 (254) : 18 Sind L R 180.

5. ('39) AIR 1939 Lah 46 (46). (The auction-purchaser in this case was the decree-holder himself and therefore it was held that an appeal lay under S. 47 also.)

6. ('28) AIR 1928 Mad 1107 (1107). (Madras Estates Land Act — No appeal lies.)

('19) AIR 1919 Cal 921 (921). (Bengal Tenancy Act — No appeal lies.)

('05) 2 All L Jour 180 (181). (Agra Tenancy Act — No appeal lies.)

No second appeal will lie from an order setting aside or refusing to set aside a sale under this rule.<sup>7</sup> See Section 104, sub-section (2). As to whether an appeal lies under the Letters Patent against an order under this rule, see Note 50 to Order 21, Rule 90 and the undermentioned cases.<sup>8</sup>

In an appeal from an order rejecting an application under this rule to set aside an execution sale, the auction-purchaser is a necessary party. If he is not made a party, the appeal must be dismissed.<sup>9</sup> As to whether the auction-purchaser is a necessary party to an appeal against an order *setting aside* a sale, see the undermentioned decision.<sup>10</sup>

Where there is an appeal filed against an order refusing to set aside the sale under this rule, the sale does not become absolute within the meaning of Article 180 of the Limitation Act until the disposal of the appeal, even though the Court has confirmed the sale.<sup>11</sup>

An auction-purchaser is a "party" to a proceeding for setting aside a sale and hence, he can appeal from an order passed in such proceeding.<sup>12</sup> See also the under-mentioned case.<sup>13</sup>

**14. Appeal to the Privy Council.**—See Note 6 to Section 109 and Note 50 to Order 21 Rule 90.

**15. Step-in-aid of execution.**—An application or an objection preferred by the decree-holder praying that an application to set aside a sale should not be granted is a step-in-aid of execution within the meaning of Article 182 of the Limitation Act.<sup>1</sup> But an application merely asking for a confirmation of sale where no application under Rules 89, 90 or 91 is preferred is not a step-in-aid of execution, inasmuch as it is the duty of the Court to confirm the sale even in the absence of any application for that purpose.<sup>2</sup> Nor will the mere act of confirmation by the *Court* amount to a step-in-aid

7. ('99) 23 Bom 531 (534).

('32) AIR 1932 Cal 203 (204).

('82) AIR 1932 Lah 530 (531).

('83) AIR 1933 Nag 72 (73) : 29 Nag L R 92.

('30) AIR 1930 Cal 249 (250) : 57 Cal 1336 (SB).

('26) AIR 1926 Cal 400 (400).

('19) AIR 1919 Cal 1006 (1007).

('12) 14 Ind Cas 67 (68) : 39 Cal 687.

('01) 28 Cal 4 (6).

('95) 22 Cal 802 (804).

('94) 21 Cal 799 (802).

('91) 18 Cal 422 (426) (FB).

('98) 8 Cal W N 333 (335).

('68) 9 Suth W R 218 (220, 223).

(1863) Beng L R Sup Vol App 1 (4).

(1865) 2 Suth W R Misc 29 (30).

(1865) 2 Suth W R Misc 19 (19).

('27) AIR 1927 Lah 808 (809).

('12) 17 Ind Cas 884 (884, 885) : 8 Nag L R 177.

('17) AIR 1917 Oudh 45 (45).

('18) AIR 1918 Upp Bur 30 (31) : 2 Upp Bur Rul 139.

('36) AIR 1936 Oudh 172 (172).

('39) AIR 1939 Sind 62 (68) : I L R (1939) Kar 417.

('86) AIR 1936 Pat 119 (120).

('38) AIR 1938 Nag 107 (107) : I L R (1938) Nag 486.

[See ('12) 16 Ind Cas 690 (691). (Where second appeal lay under S. 244, of the old Code, right cannot be defeated by new Code.)]

[See also ('37) AIR 1937 Cal 461 (463). (First Court setting aside sale — Appellate Court

remanding case for re-hearing—No appeal lies from Appellate Court's order.)]

8. ('98) 16 All 443 (449). (No appeal lies.)

('70) 4 Beng L R A G 181 (191). (Appeal lies.)

9. ('34) AIR 1934 Lah 592 (593).

('37) 167 Ind Cas 166 (167) (Lah).

('36) AIR 1936 Lah 478 (479). (Affirming on Letters Patent Appeal AIR 1935 Lah 802.)

[See also ('38) AIR 1938 Nag 525 (527).]

[See however ('37) AIR 1937 Lah 263 (265). (Objection to sale by legal representative of judgment-debtor—Objection dismissed and property sold — Appeal under S. 47 against order dismissing the objection — Auction-purchaser is not necessary party to appeal because at the date of the lower Court's order, his rights had not come into existence.)]

10. ('38) AIR 1938 Nag 520 (527). (Where an auction-purchaser, although served with notice, expresses no interest one way or other, it is unnecessary to join him as a party.)

11. ('34) AIR 1934 P C 134 (136) : 61 Cal 945 : 61 Ind App 248 (P C).

12. ('39) AIR 1939 Sind 62 (64) : I L R (1939) Kar 417.

13. ('86) AIR 1936 Lah 868 (868). (A judgment-debtor who was declared insolvent during the sale proceedings has no *locus standi* to appeal from an order confirming the sale.)

#### Note 15

1. ('94) 21 Cal 23 (26).

2. ('04) 31 Cal 1011 (1018).

**O. 21 R. 92  
Notes 13-16**



**O. 21 R. 92** by the party.<sup>3</sup>  
**Notes 15-16**

**16. Revision.** — See Note 24 to Section 115 and the undermentioned cases.<sup>1</sup>

**O. 21 R. 93**

**R. 93.** [S. 315.] Where a sale of immoveable property is set aside under rule 92,<sup>2</sup> the purchaser shall be entitled<sup>6</sup> to an order for repayment of his purchase-money, with or without interest<sup>7</sup> as the Court may direct, against any person to whom it has been paid.

[1877, S. 315; 1859, S. 258.]

### *Synopsis*

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|---|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. "Where a sale of immoveable property is set aside under Rule 92."</li> <li>2a. Right of decree-holder to withdraw purchase-money before confirmation of sale.</li> <li>3. Sale set aside for want of saleable interest.</li> <li>4. Suit for purchase-money in such cases.</li> <li>5. Sale set aside for irregularity.</li> </ol> | <ol style="list-style-type: none"> <li>6. What the purchaser is entitled to under this rule. See Notes 7 to 10.</li> <li>7. Interest.</li> <li>8. Value of improvements effected by him.</li> <li>9. Poundage fee.</li> <li>10. Liability for mesne profits.</li> <li>11. Limitation.</li> <li>12. Order under this Rule — Executability of.</li> <li>13. Appeal and revision.</li> </ol> |
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### *Other Topics (miscellaneous)*

"Caveat emptor" — Applicability to court-sales. Misrepresentation, fraud or negligence of the decree-holder—Effect. See Note 4.  
 See Notes 3 and 4.

**1. Legislative changes.** — Section 315 of the old Code ran as follows —

"Where a sale of immoveable property is set aside under Sections 310A, 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which was purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided for by this Code for the execution of a decree for money."

As to the effect of the changes introduced into this rule, see Notes 3 and 4 below.

**2. "Where a sale of immoveable property is set aside under Rule 92."** — This rule applies only where the sale is *set aside under Rule 92*. Where a sale is not so set aside, the mere fact that the auction-purchaser finds that the judgment-debtor had no saleable interest in the property sold will not entitle him to a refund under

3. ('82) 10 Cal L Rep 380 (380).
- ('70) 13 Suth W R 815 (815).
- ('69) 11 Suth W R 117 (117).
- ('68) 9 Suth W R 100 (101).
- ('67) 8 Suth W R 859 (860).
- ('70) 4 Beng L R A C 115 (116).
- [But see ('72) 18 Suth W R 156 (157).
- ('78) 20 Suth W R 81 (83).
- ('74) 12 Beng L R 506n.]

### **Note 16**

1. ('25) AIR 1925 Sind 253 (254): 18 Sind L R 180. (Where sale is set aside under inherent powers a revision lies.)
- ('88) AIR 1988 All 187 (187).
- ('88) AIR 1988 Lah 99 (100): 13 Lah 761. (Refusal to confirm sale—Revision lies.)
- ('86) AIR 1986 Oudh 172 (172).



this rule.<sup>1</sup> Where a sale of immovable property is set aside under Rule 92, *supra*, the auction-purchaser is entitled to an order under this rule for repayment of the purchase-money.<sup>2</sup> The decree-holder is also entitled to apply for a fresh sale but limitation therefor under Article 181 of the Limitation Act does not begin to run until he is compelled to refund the purchase-money.<sup>3</sup> Although this rule only applies to cases where the sale is set aside under Rule 92, yet, even where the sale is set aside under Section 47, the Court has inherent power to order a refund of the purchase-money by the decree-holder.<sup>4</sup> See also Note 4 below.

This rule is applicable to sales for arrears of rent under the Orissa Tenancy Act, II of 1913, Section 228 sub-section (2), as well as to sales of immovables under the Chota Nagpur Tenancy Act. See Rule 95 *infra*.

**2a. Right of decree-holder to withdraw purchase-money before confirmation of sale.**—This rule implies that the decree-holder may be allowed to withdraw the purchase-money even before the confirmation of the sale. But he cannot claim to do so *as of right*. The matter is in the discretion of the Court.<sup>1</sup> At the same time, he is not *bound* to withdraw the money before the confirmation of the sale and where he is entitled under the decree to interest up to the date of realization of the decretal amount, he is entitled to interest up to the date of confirmation.<sup>2</sup>

**3. Sale set aside for want of saleable interest.**—It has been already mentioned in Notes 1 and 8 to Rule 91 *supra*, that there is no warranty of title in court-sales. The purchaser must be taken to buy the property with all risks and all defects in the judgment-debtor's title, except as provided by Rule 91 and this rule.<sup>1</sup> But this rule as well as Rule 91 will apply only to cases of *entire absence of interest* in the judgment-debtor and not to cases where the judgment-debtor has *some* interest in the property, however small that may be.<sup>2</sup>

Under Section 315 of the old Code the purchaser could *apply* for refund of the purchase-money even where it was found in a *separate suit* that the judgment-debtor had no saleable interest in the property sold.<sup>3</sup> The omission of the words "where it is found that the judgment-debtor has no saleable interest . . . ." in the present rule,

#### Order 21 Rule 93 — Note 2

1. ('88) AIR 1938 All 63 (64); 54 All 948.

('88) AIR 1938 Pat 447 (449, 450). (Right of auction-purchaser on finding judgment-debtor had no saleable interest to apply for refund arises only after setting aside sale under O. 21, R. 91—Where such procedure is not followed Court cannot order refund under its inherent powers.)

('88) AIR 1938 Pesh 66 (67). (Execution sale confirmed and application by auction-purchaser to be put in possession—Possession not given on account of decree passed in favour of another in regular suit claiming property as his own—Auction-purchaser cannot apply under this rule for refund of purchase-money.)

('86) AIR 1936 Mad 50 (55); 59 Mad 202 (F B). (Finding in another suit in which decree and sale in execution are declared void—Auction-purchaser cannot apply under this rule.)

2. ('10) 6 Ind Cas 564 (565); 32 All 380.

('28) AIR 1928 Cal 267 (268).

('86) 1886 Pun Re No. 45 p. 85n.

('88) 1888 Pun Re No. 188.

('38) 1938 Nag L Jour 207 (209).

[See also ('85) 1885 Pun Re No. 68, p. 139.]

3. ('07) 30 Mad 209 (211).

4. ('86) AIR 1936 Lah 497 (499).

#### Note 2a

1. ('15) AIR 1915 Cal 297 (298). (12 Cal 252, Followed.)

('38) AIR 1938 Nag 54 (54); I L R (1938) Nag 456. (Rule 93 cannot be read as containing an implication that the decree-holder is entitled to withdraw the purchase-money before the confirmation of the sale.)

2. ('14) AIR 1914 Cal 210 (211).

('15) AIR 1915 Cal 297 (298).

('38) AIR 1938 Nag 54 (54); I L R (1938) Nag 456.

#### Note 3

1. ('05) 27 All 537 (539).

('01) 23 All 355 (357).

2. ('30) AIR 1930 Mad 856 (856).

('86) 9 Mad 437 (439). (Court has no jurisdiction to order refund in such a case.)

3. ('85) 8 Mad 101 (103).

('84) 1884 Pun Re No. 157, page 400.

[See also ('85) 8 Mad 99 (101).]

**O. 21 R. 93**  
**Notes 3-4**

now makes it clear that the purchaser is not entitled to apply for refund of purchase-money unless the sale is set aside *under Rule 92*.<sup>4</sup>

Where a court-sale is set aside on an application under Rule 91, *ante* and the auction-purchaser thereupon withdraws the money but the sale is subsequently confirmed by the Appellate Court, the Court can, under its inherent powers, compel the auction-purchaser to refund the money so withdrawn.<sup>5</sup>

**4. Suit for purchase-money in such cases.** — Where it is found that the judgment-debtor has no saleable interest in the properties sold, can the purchaser institute a suit for refund of purchase-money?

Under the Code of 1859 there was no provision for the return of the purchase-money in cases where the judgment-debtor was found to have no saleable interest. It was, therefore, held applying the general principle of *caveat emptor* that a purchaser could not claim to recover the purchase-money on the ground that the judgment-debtor had no saleable interest.<sup>1</sup> Section 315 of the Code of 1882 gave the purchaser the right to set aside the sale and recover the purchase-money where the judgment-debtor had no saleable interest in the property sold. That Section also provided that such right "may be enforced" under the rules provided by this Code for the execution of a decree for money. It was held, however, that the purchaser's remedy was not limited to the procedure prescribed in the execution department but that he could file a separate *suit* for the purchase-money.<sup>3</sup>

Material alterations have been made in this rule and there is a conflict of opinion under this Code as to whether a separate suit will lie. The words "may be enforced," etc. have now been omitted and the words "the purchaser shall be entitled to an *order* for repayment of his purchase-money" have been substituted. It has been held in several decisions that the auction-purchaser's right of *suit* has been taken away under this Code and that his only remedy is the one prescribed in Rule 91 *ante*, and in this rule.<sup>3</sup> The result, according to this view, is that where a purchaser finds, after the expiry of thirty days from the date of the sale, that the judgment-debtor has no saleable interest in the property sold, he has no remedy whatever. Where, however, the purchaser is

4. ('18) AIR 1918 Mad 1286 (1287).

5. ('17) AIR 1917 Pat 495 (497): 2 Pat L Jour 361. (Section 144 does not apply to such a case.)

**Note 4**

1. ('80) 2 All 780 (788, 784).

('80) 2 All 828 (830).

('74) 6 N W P H C R 168 (170).

('71) 9 Bom H C R 92 (97).

('69) 6 Bom H C R 258 (262).

('67) 4 Bom H C R A C 114 (118).

('69) 12 Suth W R 8 (10) (F B).

('71) 15 Suth W R 196n (196n).

('69) 2 Beng L R A C 82 (83)

[See ('69) 12 Suth W R 176 (177).]

[But see ('79) 2 All 299 (300). (Execution sale of property under the Code of 1859—Application by purchaser under Act of 1877—*Held* application maintainable. *Note*.—This case is dissented from in 2 All 780 above.)

('78) 2 All 107 (111).

('67) 2 Agra 50 (51).]

2. ('88) 5 All 577 (583, 586, 588, 589) (F B).

('18) AIR 1918 All 296 (297): 40 All 411.

('18) 19 Ind Cas 986 (988): 85 All 419.

('91) 13 All 883 (885). (Can recover money rate-

ably distributed.)

('06) 8 All L Jour 819 (825). (Suit *held* maintainable when there has been a total failure of consideration.)

('10) 7 Ind Cas 955 (956): 85 Bom 29. (Such suit cognizable by Small Cause Court.)

('98) 22 Bom 783 (785).

('06) 8 Bom L R 369 (370). (Suit is cognizable by Court of Small Causes.)

('09) 2 Ind Cas 559 (560): 87 Cal 67.

('06) 10 Cal W N 274 (275, 276).

('08) 7 Cal W N 105 (107).

('01) 5 Cal W N 240 (241).

('96) 1 Cal W N 140 (141). (Suit cognizable by Small Cause Court.)

('83) 12 Cal L Rep 381 (382).

('10) 6 Ind Cas 291 (291) (Mad). (Can recover money rateably distributed.)

('98) 16 Mad 361 (362, 368).

('94) 17 Mad 228 (230, 231).

('88) 11 Mad 269 (273). (Is not of a nature cognizable by Small Cause Court.)

[But see ('09) 8 Ind Cas 672 (675, 679): 5 Low Bur Rul 58.]]

3. ('21) AIR 1921 All 377 (381, 384): 43 All 60.

induced to buy the property on account of fraud or misrepresentation or gross neglect of duty on the part of the decree-holder, he can maintain a suit for the recovery of purchase-money.<sup>4</sup> The High Court of Lahore and the Chief Court of Oudh have taken the view that Rule 92, *ante*, and this rule have no application to a case where the auction-purchaser has been deprived of the property purchased by him after the confirmation of the sale owing to the action of a person having paramount title to it and on the ground that the judgment-debtor had no saleable interest in it, and that in such cases he obtains a right under the *substantive law* for refund of the purchase-money, and not under this rule.<sup>5</sup> A Full Bench of the Madras High Court has also held that where a sale turns out to be futile by a finding in another suit, the auction-purchaser can sue the decree-holder for refund of the purchase-money but that his remedy is not by *application*. The decision proceeds on the ground that there is an implied warranty in court-sales to the extent that there is *some* title in the judgment-debtor, though there is no warranty as to the *extent* of the title of the judgment-debtor.<sup>6</sup>

- (18) AIR 1918 All 325 (326).  
 (17) AIR 1917 All 363 (364): 89 All 114.  
 (22) AIR 1922 Bom 205 (206): 46 Bom 833.  
 (26) AIR 1926 Cal 971 (978, 974): 53 Cal 758.  
 (24) AIR 1924 Cal 172 (172).  
 (20) AIR 1920 Cal 791 (791).  
 (18) AIR 1918 Cal 148 (149).  
 (18) AIR 1918 Cal 505 (506).  
 (28) AIR 1923 Cal 85 (88, 89): 50 Cal 115. (Suit for refund of purchase-money, however, lies when right to sue has accrued before new Code.)  
 (21) AIR 1921 Nag 60 (62, 63).  
 (19) AIR 1919 Nag 96 (96): 15 Nag L R 140.  
 (18) AIR 1918 Nag 259 (262).  
 (17) AIR 1917 Nag 203 (203).  
 (25) AIR 1925 Pat 106 (110): 3 Pat 947.  
 (20) AIR 1920 Low Bur 158 (159).  
 (19) AIR 1919 Low Bur 99 (101): 10 Low Bur 76.  
 (37) AIR 1937 Nag 140 (142).  
 (38) AIR 1938 All 593 (601): I L R (1938) All 922 (F B).  
 (35) AIR 1935 All 470 (478): 57 All 690.  
 (37) AIR 1937 Pat 592 (593): 16 Pat 196.  
 (38) AIR 1938 Cal 268 (268): I L R (1938) 1 Cal 512.  
 (39) AIR 1939 Cal 310 (312): I L R (1939) 1 Cal 452.  
 (38) AIR 1938 Pat 150 (151, 152).  
 [See also ('88) AIR 1988 Pat 447 (449). (Where sale is not set aside, there is no inherent power to order refund of purchase-money.)  
 ('87) AIR 1987 All 18 (19). (No inherent power to grant refund.)]  
 [But see ('14) AIR 1914 All 252 (253): 36 All 529 (531).  
 ('26) AIR 1926 Cal 297 (298, 299). (So assumed.)]  
 4. ('22) AIR 1922 Bom 205 (207): 46 Bom 833.  
 (26) AIR 1926 Cal 971 (974): 53 Cal 758.  
 (21) AIR 1921 Nag 60 (63).  
 (17) AIR 1917 Nag 203 (203).  
 (37) AIR 1937 Pat 582 (588): 16 Pat 196. (Auction-purchaser entitled to receive compensation for loss caused through fraud or breach of duty of execution creditor.)  
 ('86) AIR 1986 Mad 421 (422). (Material misdescription of extent of property in sale proclamation—Suit by auction-purchaser against decree-hol-

- der for damages is maintainable.)  
 [See ('38) AIR 1938 Cal 268 (270): I L R (1938) 1 Cal 512. (Where invalidity of proceeding is due to fraud or negligence of decree-holder auction-purchaser is entitled to sue him for refund of purchase-money on ground of failure of consideration. Per Mukherjee, J.)]  
 [See also ('37) AIR 1937 Nag 140 (142). (Where there is fraud or misrepresentation other than fraud or irregularity in publishing or conducting the sale, there might be some remedy by way of damages against the person responsible.)]  
 5. ('32) AIR 1932 Lah 401 (411, 412): 13 Lah 618 (F B).  
 (24) AIR 1924 Lah 115 (115): 4 Lah 354.  
 (30) AIR 1930 Oudh 148 (153, 159): 5 Luck 552 (F B).  
 (37) AIR 1937 Oudh 145 (146): 12 Luck 626. (Decree-holder-purchaser losing property under decree obtained by third party—Decree-holder can sue for refund from another decree-holder to whom payment had been made by way of rateable distribution.)  
 (37) AIR 1937 Oudh 286 (287): 13 Luck 188. (The fact that the auction-purchaser loses the entire property or only a portion of it makes no difference in the application of this principle.)  
 [See also ('34) AIR 1934 Lah 911 (913). (Decree-holder withdrawing money deposited in Court by judgment-debtor on furnishing security—Decree reversed on appeal—Judgment-debtor by way of restitution recovering the money by sale of the property given as security and buying it himself—The property subsequently found not to belong to the surety—Decree finally passed in favour of the decree-holder and latter trying to execute the decree—Judgment-debtor is entitled to credit for the amount lost by him owing to the fact that the surety had no saleable interest in the property above-mentioned.)]  
 [But see ('25) AIR 1925 Lah 467 (469): 6 Lah 283.  
 ('25) AIR 1925 Lah 199 (201).  
 ('20) AIR 1920 Oudh 308 (311): 22 Oudh Cas 42.]  
 6. ('86) AIR 1986 Mad 50 (55): 59 Mad 202 (F B). (Overruling 17 Ind Cas 437 and A I R 1919 Mad 498.)

**O. 21 R. 93** See also the undermentioned case.<sup>7</sup>  
**Notes 4-10**

The right of the auction-purchaser to maintain a suit for refund of purchase-money in cases where the sale took place while the old Code was in force, must be determined with reference to the provisions of that Code.<sup>8</sup>

Where certain properties are sold in execution of a mortgage decree and, in a separate suit by a defendant, it is declared that the *decree* and the sale in execution are not binding on him and the auction-purchaser is deprived of the property, he is entitled to apply for refund of the purchase-money under Section 47.<sup>9</sup>

**5. Sale set aside for irregularity.** — Where a sale is set aside on account of material irregularity, the auction-purchaser is entitled to sue and recover from the decree-holder the amount of poundage which was deducted from the purchase-money deposited by him, as well as interest on such deposit.<sup>1</sup> The reason is that the right of suit in such a case exists *independently of the Code* and the words "shall be entitled to an order for repayment" do not take away the right of suit to enforce the same.

**6. What the purchaser is entitled to under this Rule.** — See Notes 7 to 10 below.

**7. Interest.** — When a sale is set aside and a refund of purchase-money is ordered under this rule, the Court has got power to award interest on the amount of the purchase-money.<sup>1</sup>

**8. Value of improvements effected by him.** — Where the auction-purchaser gets into possession of the properties sold to him and effects improvements thereon, he is entitled to compensation for such improvements, upon the sale being set aside.<sup>1</sup>

**9. Poundage fee.** — Where a sale is set aside under Rule 92, the purchaser is entitled to a refund of the poundage fee paid by him, but is not entitled to recover it from the judgment-debtor.<sup>1</sup> The High Court of Madras<sup>2</sup> has held that there is no means of obtaining a refund of the poundage fee and that the most that could be done would be to give a certificate to the party that the case is a fit one for refund and leave it to the revenue authorities to comply with it.

As to a suit for recovery of poundage fee, see Note 5 above.

**10. Liability for mesne profits.** — When an order for refund of purchase-money is made under this rule, the purchaser must account to the judgment-debtor for the rents and profits realized by him, if he has been in possession of the properties purchased.<sup>1</sup>

7. ('83) AIR 1933 All 218 (222) : 55 All 221.  
 (Entitled to refund.)

8. ('28) AIR 1928 Cal 85 (90) : 50 Cal 115.

9. ('28) AIR 1928 All 894 (896) : 45 All 869 (FB).  
 [See also ('76) 1 All 568 (579).]

**Note 5**

1. ('16) AIR 1916 Mad 290 (292) : 39 Mad 803.

**Note 7**

1. ('21) AIR 1921 P O 27 (27) : 48 Ind App 24 :  
 6 Pat L Jour 129 (P O). (Even though the security bond taken did not provide for interest, Court can award interest.)

('18) AIR 1918 Cal 511 (512).

('86) 12 Cal 252 (256).

('29) AIR 1929 Lah 617 (618).

('85) 8 Mad 101 (103). (If the purchaser himself has contributed to the loss he has incurred, interest may be refused.)

('91) 13 All 388 (386). (Where a person claims more than what he is entitled to, the Court may refuse interest.)

[See ('83) 5 All 364 (365, 366) (FB).]

**Note 8**

1. ('75) 23 Suth W R 398 (394).

('26) AIR 1926 Nag 160 (161).

**Note 9**

1. ('12) 18 Ind Cas 865 (870) (Cal).

2. ('84) AIR 1984 Mad 409 (410).

**Note 10**

1. ('75) 23 Suth W R 398 (394).

('12) 14 Ind Cas 456 (457) (Cal).

**11. Limitation.**— The period of limitation for an application under this rule is three years under Article 181 of the Limitation Act, 1908, from the date of the order setting aside the sale.<sup>1</sup> Article 120 of the Limitation Act will apply to cases where it has been held that a *suit* lies for the refund of purchase-money.<sup>2</sup>

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**Notes 11-13**

**12. Order under this Rule — Executability of.** — A purchaser who has obtained an order for refund of purchase-money under this rule can execute the order as if it were a decree.<sup>1</sup>

**13. Appeal and revision.** — No appeal lies against an order under this rule, granting, or refusing refund of the purchase-money to the purchaser.<sup>1</sup> But where the executing Court ordered refund in a case where the judgment-debtor had *some* saleable interest, it was held that the order was without jurisdiction and should be set aside in revision.<sup>2</sup>

**R. 94.** [S. 316.] Where a sale of immoveable property has become absolute, the Court shall grant a certificate<sup>2</sup> specifying<sup>5</sup> the property sold and the name of the person<sup>4</sup> who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

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[1877, S. 316; 1859, S. 259.]

**NAGPUR**

**Local Amendment**

*Add a comma after the word "sold" and insert the words "the amount of the purchase-money" between the word "sold" and the word "and."*

**Synopsis**

1. Legislative changes.
2. "The Court shall grant a certificate."
3. Certificate, if transfers title.
4. To whom certificate should be granted.
5. Contents of certificate of sale.
6. Construction of sale certificate.
7. Amendment of certificate.
8. What passes at a court-sale.
9. Variance between proclamation of sale and sale certificate.

10. Effect of new interpretation of law on sale.
11. Effect of certificate of sale.
12. Certificate, if operates as *res judicata*.
13. Limitation.
14. Registration of sale certificate.
15. Court-fee on application for sale certificate.
16. Appeal.

**Note 11**

1. ('89) 11 All 872 (874).
- ('28) AIR 1923 Cal 85 (88, 89) : 50 Cal 115.
- ('37) AIR 1937 Mad 779 (783, 784). (Time begins to run from the date of the passing of the original order setting aside the sale, and not from the order of the final Court of Appeal, confirming the order setting aside the sale.)
2. ('18) 19 Ind Cas 986 (988) : 35 All 419.  
[But see ('85) AIR 1985 Mad 354 (355). (Art. 62 applies.)
- ('87) AIR 1987 Oudh 286 (287) : 13 Luck 138.  
(Auction-purchaser's suit for refund of purchase-money—Suit is governed by three years' rule of

limitation either under Art. 97 or 62 and not by Art. 120, Limitation Act.)]

**Note 12**

1. ('19) AIR 1919 Mad 894 (895).

**Note 13**

1. ('90) 12 All 397 (399).  
('84) 1884 All W N 178 (178).  
('17) AIR 1917 Mad 217 (217, 218).  
('86) 9 Mad 437 (439).  
('39) AIR 1939 Mad 740 (742). (Reversing on Letters Patent Appeal, A I R 1937 Mad 779 — S. 47 does not apply to such order.)
2. ('86) 9 Mad 437 (439).

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**Notes 1-3**

*Other Topics (miscellaneous)*

Absence of certificate—Title. See Note 3.

Legal representative entitled to certificate. See Note 4.

**1. Legislative changes.** — This rule corresponds with the first part of Section 316 of the old Code. The latter part of that Section has been re-enacted under the present Code in Section 65.

The only important alteration under the present rule is the addition of the words "such certificate shall bear date the day on which the sale became absolute."

**2. "The Court shall grant a certificate."** — The provisions of this rule are mandatory and impose a positive and imperative duty on the Court to grant a sale certificate.<sup>1</sup> In granting such certificate it is the duty of the Court, not to determine what property is to pass by the sale but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. Its action in granting the certificate is *ministerial* and not judicial.<sup>2</sup>

The provisions of this Order do not apply to sales by receivers and the Court neither confirms nor grants certificates in the case of such sales.<sup>3</sup>

This provision applies to sales under the Chota Nagpur Tenancy Act, VI of 1920. See Section 50 of the Act.

**3. Certificate if transfers title.** — The title of the court auction-purchaser becomes complete on the confirmation of the sale under Rule 92,<sup>1</sup> and under Section 65 the property vests in the purchaser *from the date of sale.*<sup>2</sup> The certificate of sale does not, by itself, create title but is merely evidence of title.<sup>3</sup> As already observed in the previous Note, the certificate simply records an accomplished fact and states what has been sold.<sup>4</sup> Hence a mere omission to obtain the certificate does not destroy or take away the title of the purchaser.<sup>5</sup> He can prove his title and purchase by evidence

**Order 21 Rule 94 — Note 2**

1. ('17) AIR 1917 Pat 697 (697) : 1 Pat L Jour 446.

('71) 9 Bom H C R A C 64 (65).

('86) AIR 1986 Bom 187 (188).

2. ('25) AIR 1925 Pat 615 (616) : 4 Pat 760.

3. ('26) AIR 1926 All 124 (126) : 48 All 209.

**Note 3**

1. ('10) 5 Ind Cas 263 (264) (All).

('11) 9 Ind Cas 25 (25) (All).

('09) 2 Ind Cas 81 (82) (All).

('87) 1887 All W N 217 (218).

('88) 9 Cal 842 (843).

('07) 80 Mad 214 (215).

('15) AIR 1915 Lah 9 (9) : 1915 Pun Re No. 81.

2. ('18) AIR 1918 Oudh 9 (10).

('32) AIR 1982 Pat 80 (83) : 10 Pat 670.

('75) 7 N W P H C R 310 (312).

('85) 11 Cal 341 (342).

(1864) 1864 Suth W R Gap 279 (279). (Limitation starts from date of sale and not from date of confirmation.)

[See ('23) AIR 1923 Pat 355 (356). (Purchaser entitled to growing crops.)]

*Under the old Code, in the absence of S. 65, it was held that the purchaser had an equitable interest after sale till confirmation and grant of certificate. See the following cases:*

(1900) 22 All 168 (174).

('97) 19 All 188 (190).

('93) 17 Bom 375 (382).

('87) 11 Bom 588 (590).

('86) 10 Bom 453 (455, 456).

('85) 9 Bom 10 (14).

('86) 12 Cal 597 (601).

('98) 2 Cal W N 589 (591).

('08) 7 Cal L Jour 1 (28).

('15) AIR 1915 Mad 805 (806). (Case decided under the old Code.)

('05) 8 Oudh Cas 202 (205).

3. ('20) AIR 1920 Cal 435 (436) : 47 Cal 1108.

('32) AIR 1932 Pat 80 (83) : 10 Pat 670.

('72) 18 Suth W R 157 (158).

('38) AIR 1938 Mad 232 (233).

('38) AIR 1938 All 471 (473).

[See ('17) AIR 1917 Pat 555 (569) : 2 Pat L Jour 402 (FB). (Sale certificate under Bengal Land Revenue Sales Act, XI of 1859 is not certificate of title.)]

[But see ('11) 12 Ind Cas 360 (361) : 7 Nag L R 134.]

4. ('16) AIR 1916 Cal 319 (321) : 48 Cal 124.

5. ('88) 7 Bom 254 (255, 256).

('86) 10 Bom 444 (448).

('81) 6 Bom 139 (142).

('76) 25 Suth W R 493 (494).

('98) 1898 Pun Re No. 92, page 364.

('14) AIR 1914 Oudh 306 (306).

('82) 5 Mad 54 (60).

('94) 1894 All W N 54 (54).

*aliunde*.<sup>6</sup> The production of the order of confirmation of sale is sufficient to prove his title.<sup>7</sup>

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**Notes 3-6**

**4. To whom certificate should be granted.** — The person who is declared to be the purchaser after the bids are concluded, is the person in whose name the certificate should be granted.<sup>1</sup> If there are joint purchasers the certificate should be issued in the names of all of them.<sup>2</sup> If the purchaser is dead, his legal representative is entitled to the certificate.<sup>3</sup> But the Court cannot issue the certificate in favour of an undisclosed principal.<sup>4</sup>

It has been held by the Bombay High Court<sup>5</sup> that a sale certificate can be granted to an assignee from the auction-purchaser. But the contrary view has been held by the Allahabad High Court.<sup>6</sup>

**5. Contents of certificate of sale.** — What is sold at a judicial sale is nothing but the property attached, and that property is conclusively described in, and by, the schedule to the order of attachment. The certificate should be granted only in respect of the property attached and proclaimed for sale, and not in respect of some other property treating the case as one of misdescription. It was so laid down in *Raja Thakur Barmha v. Jiban Ram Marwari*.<sup>1</sup> In that case, A mortgaged a ten annas share of a mouza belonging to him. B, in execution of a simple money decree against A, attached a six annas share which was described in the sale proclamation as being subject to a mortgage and got the same sold in court-auction. The auction-purchaser, in applying for the sale certificate contended that the property sold to him was the unencumbered six annas share and the word 'not' was omitted in the sale proclamation. It was held by the Judicial Committee that the Court had no jurisdiction to issue the certificate describing the property as unencumbered. If in the above illustration no mention is made of the existence of any encumbrance in the sale proclamation, the *prima facie* presumption would be that it is the *unencumbered* six annas share that is sought to be attached and sold, and the purchaser would be entitled to the share purchased free from encumbrance.<sup>2</sup>

The encumbrances existing on the property subject to which the property is sold should be entered in the sale certificate.<sup>3</sup> It is incumbent on the Court to see that the certificate is clear and does not furnish materials for fresh litigation.<sup>4</sup>

The sale certificate should bear the date of the confirmation of the sale.<sup>5</sup>

**6. Construction of sale certificate.** — Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. Where there is *no ambiguity* in the words of the certificate, the object of the certificate would be defeated if it were possible to change its plain meaning by reference to other documents.<sup>1</sup> The

6. ('88) 11 Mad 296 (900).  
(‘82) AIR 1932 Pat 80 (84) : 10 Pat 670.  
(‘09) 1 Ind Cas 62 (66) (Cal).  
(‘08) 7 Cal L Jour 384 (385).  
(‘88) 5 All 805 (809).  
7. ('08) 1908 Pun Re No. 9, page 30.  
(‘85) 5 All 805 (809).  
(‘81) 7 Cal 199 (207).  
(‘80) 7 Cal L Rep 115 (116).

**Note 4**

1. ('20) AIR 1920 Cal 101 (102, 103).  
(‘88) AIR 1938 All 471 (473).  
2. ('26) AIR 1926 Cal 719 (719) : 51 Cal 992.  
3. (1900) 24 Bom 120 (122).  
(‘88) AIR 1938 All 471 (473).  
4. ('28) AIR 1928 Sind 54 (54).

5. ('86) AIR 1936 Bom 137 (138).

6. ('88) AIR 1938 All 471 (473).

**Note 5**

1. ('14) 41 Cal 590 (598, 599): 41 Ind App 38 (PC).  
2. ('07) 29 All 463 (465).  
[See (1849-54) 5 Moo Ind App 271 (296, 297) (PC).]  
3. ('94) 18 Bom 175 (177) (FB). (Claims admitted by parties or established by decree should be entered.)  
(‘86) 9 Bom 47 (49). (Do.)  
4. ('82) AIR 1932 Bom 210 (212).  
5. ('36) AIR 1936 Mad 733 (735).  
**Note 6**  
1. ('22) AIR 1922 P C 252 (253) : 44 Mad 483: 48 Ind App 155 (PC).  
(1900) 2 Bom L R 533 (535).



**O. 21 R. 94  
Notes 6-8**

Court ought not to embark upon an enquiry as to what was intended to be sold and must be deemed to have been sold, by reference to surrounding circumstances and other documents.<sup>2</sup> Thus, where, in execution of a mortgage decree, the sale certificate was issued in respect of "the whole of the *pannai* lands belonging to and enjoyed by the sons of the first defendant," the certificate cannot by reference back to the mortgage deed be construed as limiting, in any way, the extent of the *pannai* lands to which it referred or to exclude any portion of the *pannai*.<sup>3</sup> Where, however, the terms of the certificate are *ambiguous* and stand in need of explanation, evidence may be adduced to clear the ambiguity.<sup>4</sup> Evidence may also be let in to *identify* the property described in the sale certificate.<sup>5</sup> The Court can thus for this purpose look into the decree<sup>6</sup> and even into the suit document.<sup>7</sup>

The boundaries of the property sold as given in the certificate prevail over the areas mentioned therein.<sup>8</sup> But where the certificate contains only a general description of the boundaries of the whole area sold without specifying the boundaries of the plots sold, the *paimash* and survey numbers should be taken as far more correct description of what is sold than the boundaries.<sup>9</sup>

**7. Amendment of certificate.** — The Court has inherent jurisdiction to amend a sale certificate incorrectly describing the property actually sold.<sup>1</sup> Thus, the Court can rectify a mistake in the description of the boundaries<sup>2</sup> or correct an apparent error therein as, for instance, where the certificate includes properties which were not sold but advertised for sale.<sup>3</sup> But the Court has no jurisdiction to amend the certificate so as to show the purchase of a larger share of the property than what is stated in the proclamation of sale.<sup>4</sup>

A sale certificate should not be amended without notice to the judgment-debtor.<sup>5</sup>

Where the same error has crept into the decree as well as the sale certificate, both should be amended and it would not be proper to amend the sale certificate alone.<sup>6</sup>

**8. What passes at a court-sale.** — The general rule in the case of all private sales is that there is an implied warranty of title, in the absence of a contract to the

(‘35) AIR 1935 Oudh 304 (305). (Sale certificate not including grove—Mere mention of it in details of incumbrances—Grove is not included in sale.)

[See also (‘23) AIR 1923 Mad 48 (49).]

2. (‘27) AIR 1927 Mad 811 (812).

(‘70) 14 Suth W R 435 (436).

(‘19) AIR 1919 Cal 1051 (1052).

3. (‘22) AIR 1922 P C 252 (253): 48 Ind App 155: 44 Mad 483 (PC).

4. (‘14) AIR 1914 Cal 305 (306).

(‘24) AIR 1924 All 856 (857). (Sale certificate having two irreconcilable descriptions.)

(‘74) 22 Suth W R 181 (182).

(‘77) 26 Suth W R 104 (105). (Auction-purchaser cannot adduce evidence to show that he had purchased more than what certificate showed.)

[See also (‘17) AIR 1917 Pat 576 (576) : 2 Pat L Jour 628.]

5. (‘80) AIR 1980 Cal 235 (236).

(‘76) 25 Suth W R 401 (403).

(‘73) 19 Suth W R 276 (277). (Identity not in dispute—Only misdescription of right transferred—Sale not vitiated.)

(‘87) 7 Suth W R 245 (245). (Misdescription of property sold—Intention of parties must be

looked to.)

[See also (‘74) 21 Suth W R 93 (93, 94). (Mere verbal error in proceedings connected with attachment and sale—Auction-purchaser's rights not affected.)]

6. (‘24) AIR 1924 All 856 (857).

7. (‘30) AIR 1930 Cal 235 (236).

8. (‘14) 22 Ind Cas 26 (27) (Cal).

(‘26) AIR 1926 Pat 257 (257).

(‘02) 15 O P L R 168 (166).

9. (‘12) 18 Ind Cas 324 (325) (Mad).

[See also (‘20) AIR 1920 Cal 922 (924) (SB).

(Boundaries not mentioned in sale certificate—Estate described by name—Purchaser takes estate as it stood at date of sale.)]

#### NOTE 7

1. (‘14) AIR 1914 Cal 527 (528).

[See (‘69) 12 Suth W R 483 (484).]

2. (‘24) AIR 1924 Cal 881 (888).

3. (‘08) 12 Cal W N 1027 (1028).

4. (‘18) 18 Ind Cas 725 (726) (Cal).

5. (‘22) AIR 1922 Mad 68 (64, 66). (Amendment without notice irregular and revisable.)

(‘75) 28 Suth W R 301 (302).

(‘18) 20 Ind Cas 588 (590) (Cal).

6. (‘35) AIR 1935 Mad 420 (421).



contrary.<sup>1</sup> This rule, however, does not apply to sales *in invitum*. The principle applicable to such sales is *caveat emptor*.<sup>2</sup> What is sold in such sales is nothing but the *right, title and interest* of the judgment-debtor; all that is guaranteed is that the purchaser shall have the right and interest whatever they may be of the judgment-debtor, and that the judgment-debtor shall not recover back the properties sold.<sup>3</sup> The purchaser gets the property with all the risks and defects in the judgment-debtor's title.<sup>4</sup> In the absence of fraud, he has no remedy of suit against the judgment-debtor or the decree-holder for any defect in the property sold. It is only in cases where the judgment-debtor is proved to have *no saleable interest at all* that the purchaser has got the remedy provided for in Rule 91, *viz.*, to apply to set aside the sale.<sup>5</sup> If the sale is set aside he would be entitled to a refund of the purchase-money under Rule 93. The purchaser gets the property subject to the same restrictions and equities to which the judgment-debtor himself was subject.<sup>6</sup> Thus, if the property is subject to any valid

**O.21 R.94**  
**Note 8**

**Note 8**

1. See Section 55 of the Transfer of Property Act, 1882.
2. ('74) 6 N W P H O R 168 (169).
- ('66) 4 Bom H O R 114 (117, 118).
- ('69) 12 Suth W R 8 (10) (FB).
- ('69) 12 Suth W R 41 (44).
- ('68) 9 Suth W R 556 (557).
- ('70) 15 Suth W R 196n.
- ('10) 7 Ind Cas 409 (411) : 33 All 45.
3. ('78) 3 Cal 806 (815) : 5 Ind App 116 (FO).
- ('80) 2 All 828 (829).
- ('80) 2 All 780 (783).
- ('91) 13 All 28 (51).
- ('87) 9 All 136 (138, 139).
- ('75) 1 All 236 (237, 288, 289, 240) (FB).
- ('67) 2 Agra 125 (126).
- ('68) 3 Agra 171 (174).
- ('91) 16 Bom 197 (199).
- ('67) 18 Suth W R 55 (57).
- ('75) 12 Bom H O R 15 (16).
- ('09) 13 Cal W N 270 (272, 273).
- ('28) AIR 1923 Cal 166 (168).
- ('75) 24 Suth W R 109 (109).
- ('72) 17 Suth W R 511 (512).
- ('68) 9 Suth W R 118 (119).
- (1865) 3 Suth W R 65 (65).
- ('17) AIR 1917 Nag 195 (196) : 13 Nag L R 163.
- ('18) 21 Ind Cas 262 (264) (Oudh). (Sale in execution of joint and several decree.)
- ('11) 12 Ind Cas 831 (832) (Low Bur).
- ('79) 4 Cal 142 (156) (FB). (A, a Mahomedan, mortgaged his property — Death of A — Decree upon mortgage against some of A's heirs — The interest of other heirs does not pass in execution sale.)
- ('82) 11 Cal L Rep 268 (272). (4 Cal 142 (FB) followed.)
- ('76) 2 Cal 395 (398). (Sale in execution of decree against some heirs of deceased Mahomedan — Interest of other heirs does not pass.)
- ('96) 20 Bom 388 (345). (Where other heirs are also liable for the debt of the deceased Mahomedan, they will be bound even though were not parties to the suit.)
- ('88) 12 Bom 101 (108). (Remark given under 20 Bom 388 above is also applicable to this case.)
- ('80) AIR 1980 Lah 937 (941).

- ('86) 38 Pun L R 539 (541).
- ('37) AIR 1937 Lah 29 (32). (Where by a formal order of the Court certain portion of the property is released from execution, the judgment-debtor ceases to be the judgment-debtor in respect of such and therefore the auction-purchaser cannot resist the claim of the judgment-debtor in respect of such portion.)
- [See ('89) 12 Mad 90 (91).
- [See also ('36) AIR 1936 Pat 200 (207) : 14 Pat 518. (Certificate sale — Only right, title and interest of judgment-debtor is sold.)
4. ('01) 23 All 355 (357).
- ('33) AIR 1933 Mad 293 (294) : 56 Mad 546.
- ('69) 6 Bom H O R 258 (262).
- ('01) 28 Cal 235 (237).
- ('37) AIR 1937 Cal 129 (138) : ILR (1937) 1 Cal 203. (Notice to him of encumbrances and charges, legal and equitable, is not necessary to make them binding on him.)
- [See also ('36) AIR 1936 Cal 703 (705).]
5. ('05) 27 All 537 (539).
- ('78) 2 All 828 (829, 830).
- ('02) 29 Cal 370 (374). (Misdescription of area of property sold resulting in deficiency in quantity of land — No compensation to the purchaser allowed.)
- ('02) 29 Cal 420 (424). (In this case the sale was not annulled but compensation was allowed.)
- ('96) 1 Cal W N 106 (109). (Registrar's sale — Compensation awarded for deficiency.)
- ('24) AIR 1924 Cal 172 (172). (Suit by auction-purchaser for refund of purchase-money on ground that judgment-debtor had no saleable interest is not maintainable.)
- (1900) 27 Cal 264 (267).
- ('94) 17 Mad 228 (230, 231).
- ('20) AIR 1920 Mad 316 (317, 318) : 43 Mad 309.
6. ('81) 3 All 433 (435).
- ('83) AIR 1933 Cal 506 (507, 508). (Lease — Stipulation to pay chouth to lessor in case of transfer and that transfer would otherwise be invalid is valid — Such restrictive covenant runs with land — Right of treating transferee as trespasser onures not only to lessor but also to purchaser in rent execution sale.)
- ('81) 3 All 12 (14).
- ('68) 3 Agra 194 (195).

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**Notes**

encumbrance, the purchaser gets it subject to the same,<sup>7</sup> although, if the encumbrance turns out to be invalid, the benefit of it goes exclusively to the purchaser.<sup>8</sup> Similarly, if the property is subject to a lease or liable for arrears of revenue, the purchaser is also bound by the same.<sup>9</sup> So also where any plea of limitation could have been successfully urged against the judgment-debtor, it can also be availed of against the purchaser.<sup>10</sup> If the judgment-debtor had sold the property *benami* in the name of his wife and she as ostensible owner mortgaged it to a third person, the subsequent purchaser in court-sale cannot acquire any superior right to that of the mortgagee.<sup>11</sup> But a mere omission on the part of the judgment-debtor to take an objection as to want of jurisdiction to execute the decree in another execution proceeding against him will not operate as an estoppel so as to defeat the rights of the purchaser.<sup>12</sup> The court-sale would also be affected by *lis pendens* if the sale is held during the pendency of a suit relating to the same property.<sup>13</sup>

The words "right, title and interest of the judgment-debtor" are ambiguous words and, in order to determine what passes to the purchaser at a court-sale, regard must be had to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place.<sup>14</sup> In the absence of any limitation, they mean all the interest which the judgment-debtor could have honestly disposed of in the property.<sup>15</sup> The question to be decided in each case is, as pointed out

- (25) AIR 1925 Cal 485 (494).  
(21) AIR 1921 Cal 199 (201) : 48 Cal 93.  
(24) AIR 1924 Cal 881 (886).  
(88) 9 Cal 265 (270) : 9 Ind App 147 (PC).  
(78) 1 Cal L Rep 296 (313).  
(22) AIR 1922 Cal 87 (91) : 49 Cal 948.  
(84) 18 Cal 188 (198).  
(76) 1 Cal 387 (353).  
(68) 9 Suth W R 521 (521).  
(74) 11 Bom H C R 193 (194).  
(87) AIR 1937 Lah 98 (98).  
7. ('15) AIR 1915 All 201 (203).  
(16) AIR 1916 Bom 61 (63) : 41 Bom 357.  
(81) 6 Bom 495 (497).  
(75) 1 Bom 581 (585).  
(08) 35 Cal 877 (885, 886).  
(98) 3 Cal W N 328 (325).  
(84) 10 Cal 567 (571).  
(26) AIR 1926 Cal 859 (860).  
(74) 21 Suth W R 270 (271).  
(68) 10 Suth W R 384 (384).  
(68) 9 Suth W R 248 (245, 246).  
(93) 16 Mad 201 (211, 213). (Statement in sale certificate that purchase is subject to charge — Not conclusive evidence against purchaser.)  
(26) AIR 1926 Nag 446 (447).  
(24) AIR 1924 Nag 111 (111).  
(11) 8 All L Jour 407 (408). (Purchaser can plead that interest is unconscionable.)  
(12) 15 Oudh Cas 211 (218, 219).  
(27) AIR 1927 Rang 382 (383).  
[See ('32) AIR 1932 Lah 56 (57).  
(85) AIR 1935 Rang 19 (20). (Property not sold subject to mortgage — Auction-purchaser can dispute its validity. See Notes to O. 21 R. 62 for full discussion of this point.)]  
8. ('09) 31 All 583 (589) : 26 Ind App 208 (P O).  
(09) 1 Ind Cas 106 (108) : 33 Bom 311.  
(87) AIR 1937 Oudh 159 (164) : 12 Luck 540.  
(Where property has been sold subject to a mort-

gage which after completion of the sale is declared invalid, the purchaser is entitled to have the property exonerated from the mortgage liability.)  
[See ('23) AIR 1923 Nag 219 (221).]

9. ('81) 6 Cal 389 (391).  
(68) 10 Suth W R 325 (325).  
(64) 1864 Suth W R 207 (207).  
[See also ('04) 31 Cal 380 (383).]  
10. ('86) 6 Bom H C R 220 (223).  
11. ('95) 22 Cal 909 (919) : 22 Ind App 129 (PC).  
12. ('20) AIR 1920 Mad 505 (508) : 43 Mad 135.  
13. ('88) 15 Cal 756 (761) : 15 Ind App 97 (P O).  
(09) 10 Cal L Jour 590 (592).  
(05) 2 Cal L Jour 202 (214, 215).  
(1900) 28 Cal 28 (27).  
(99) 26 Cal 966 (970).  
(88) 15 Cal 94 (99).  
(86) 12 Cal 299 (301, 302).  
(79) 4 Cal 789 (792).  
(09) 9 Cal L Jour 96 (98, 103).  
(03) 26 Mad 230 (236).  
(16) AIR 1916 Oudh 232 (238) : 18 Oudh Cas 369.  
14. ('02) 29 Cal 813 (819).  
(89) 15 Bom 13 (18, 19).  
(27) AIR 1927 Lah 685 (687). (Purchaser not bound to look behind the decrees.)  
(74) 22 Suth W R 56 (59) : 1 Ind App 321 (PC). (Do).  
(87) 14 Cal 18 (25) : 13 Ind App 106 (P O). (Do).  
15. ('81) 6 Bom 198 (202) (F B).  
(81) 6 Bom 490 (498).  
(80) 5 Bom 14 (19, 20).  
(17) AIR 1917 Cal 19 (20).  
(18) AIR 1918 Cal 928 (925).  
(75) 24 Suth W R 263 (264).  
(18) 13 Ind Cas 444 (446) : 36 Mad 194.  
(1868) Marsh 647.  
(74) 22 Suth W R 208 (209).  
(90) 18 Mad 15 (16). (Right to growing crops also passes.)

by the Judicial Committee, "what did the Court intend to sell and what did the purchaser understand that he bought"<sup>16</sup> and this is a mixed question of law and fact in each case.<sup>17</sup>

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Where a right to receive royalty is attached and sold, only the right to the money which has already become due on the date of the sale, is sold, as money which has not become due is not an existing debt.<sup>18</sup>

*Sale in execution of mortgage decree.* — In the case of a sale in execution of a mortgage decree, the purchaser acquires the interest of the mortgagor and the mortgagee as on the date of the mortgage,<sup>19</sup> whereas in a sale in execution of a simple money decree, the purchaser gets the interest of the judgment-debtor as it stood on the date of the attachment freed from all subsequent private alienations.<sup>20</sup> See also Note 56 to Section 11.

*Sale in execution of decree against member of Hindu family.* — In a sale in execution of a decree against an undivided member of a joint Hindu family the purchaser buys only an uncertain and fluctuating interest with the right of converting

('74) 22 Suth W R 522 (522). (Right to easement also passes.)

('70) 2 N W P H C R 251 (252). (Trees on the land not severed also pass.)

('72) 18 Suth W R 32 (39). (Right of decree-holder to question validity of any transaction does not pass to the purchaser.)

('18) AIR 1918 Nag 72 (73) : 15 Nag L R 48. (Do.)

('96) 20 Bom 534 (536). (Sale in execution of decree against minor represented by guardian.)

('87) 14 Cal 754 (757).

*Sales in execution of rent decree :*

('78) 3 Cal L Rep 561 (566, 568) : 6 Ind App 47 (P C).

('28) AIR 1928 Cal 880 (880) : 56 Cal 173.

('25) AIR 1925 Cal 1247 (1247).

('22) AIR 1922 Cal 544 (548).

('10) 87 Cal 828 (829).

(1900) 27 Cal 545 (549).

('98) 2 Cal W N 251 (253, 254).

('99) 26 Cal 677 (690, 691, 699).

('79) 4 Cal 814 (815).

('87) 9 All 136 (139).

('28) AIR 1923 Pat 592 (595).

('18) AIR 1918 Pat 412 (412).

*Revenue sales :*

('12) 16 Ind Cas 210 (212) : 40 Cal 89 : 39 Ind App 228 (P C).

('96) 20 Bom 492 (494).

('36) AIR 1926 Cal 97 (98) : 52 Cal 862.

('09) 13 Cal W N 750 (752).

('12) 16 Cal W N 351 (352, 354).

('24) AIR 1924 Pat 213 (226) : 2 Pat 839.

('75) 23 Suth W R 305 (308, 309) : 2 Ind App 131 (P O).

*Sale of a samindari :*

('89) 12 Mad 142 (147) : 16 Ind App 1 (P O).

('85) 1885 All W N 801 (801).

('02) 24 All 218 (224).

('18) AIR 1918 All 49 (49) : 41 All 45 (47).

('82) 4 All 381 (382).

('15) AIR 1915 All 408 (409) : 38 All 59.

('12) 12 Mad L Tim 571 (579) : 86 Mad 325.

*Sale of an impartible samindari :*

('88) 6 Mad 1 (16, 18) : 9 Ind App 128 (P C).

('86) 9 Mad 188 (197, 200).

('99) 22 Mad 110 (112).

('90) 13 Mad 480 (483, 484).

('97) 21 Bom 539 (543).

16. ('87) 10 Mad 241 (248, 251) : 14 Ind App 84 (P C).

('28) AIR 1923 Nag 333 (334).

[See also (1900) 27 Cal 407 (413) : 27 Ind App 33 (P O).

('74) 22 Suth W R 408 (408).]

17. ('18) 36 Mad 325 (339).

('15) AIR 1915 Mad 208 (208) : 37 Mad 22.

('14) AIR 1914 Cal 305 (306).

18. ('36) AIR 1936 Pat 572 (577).

19. ('98) 22 Bom 945 (948).

('80) 5 Bom 8 (12, 13).

('86) 10 Bom 224 (226).

('80) 5 Bom 2 (5).

('80) 5 Bom 614 (618).

('77) 2 Bom 670 (672).

('77) 2 Bom 662 (665).

('95) 18 All 31 (33).

('80) 3 All 647 (650, 651, 652) (F B).

('11) 9 Ind Cas 840 (841) (Cal). (In this case the mortgagee himself was the purchaser.)

('27) AIR 1927 Cal 359 (364).

('67) 7 Suth W R 67 (67).

('82) 4 Mad 73 (86, 87) (F B).

('23) AIR 1923 Mad 160 (163).

('13) 16 Oudh Cas 148 (154).

('23) AIR 1923 Pat 371 (373) : 2 Pat 277. (Mortgagee-auction-purchaser stands in the same position as mortgagor as against strangers.)

('89) 16 Cal 682 (692) : 16 Ind App 107 (P C).

(Mortgagee purchasing with leave of Court is not a trustee for the mortgagor.)

[See ('92) 1892 Bom P J 346 (347).

('95) 18 Mad 153 (157). (Mortgagee purchasing with leave of Court is not a trustee for the mortgagor.)]

20. ('81) 7 Cal 107 (118) : 8 Ind App 65 (P C).

('70) 2 N W P H C R 38 (40, 41).

('82) 4 Mad 1 (65).

('95) 19 Bom 276 (282, 285).

('66) 6 Suth W R 223 (224, 225).

('68) 3 Agra 15 (15).

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it at any moment after the purchase, by partition into definite property.<sup>21</sup> If the purchaser buys certain specific properties as belonging to the share of the judgment-debtor, and in a subsequent partition between the members of the family some of the items purchased are allotted to the share of the other members, the purchaser cannot compel the judgment-debtor to give him other properties which the judgment-debtor got in substitution. The reason is that in sale *in invitum* there is no *privity of contract* between the judgment-debtor and the purchaser; there being no act or representation on the part of the former, he is not bound by any rule of estoppel.<sup>22</sup> If the judgment-debtor is the *manager* of the undivided family and if he is sued substantially in his capacity as manager, the sale of the right, title and interest of the judgment-debtor will pass the entire interest of all the members of the family, provided the debt in respect of which the decree is obtained was incurred for a *legal necessity or for the benefit of the family*.<sup>23</sup> In a joint Hindu family, the father has a disposing power over the ancestral family property to pay off his antecedent debts not tainted with illegality or immorality. If, therefore, a decree is obtained against a *Hindu father* in respect of a debt which is neither illegal nor immoral, and his right, title and interest is sold in execution without any limitation, the sale has the same effect as a private conveyance by the father and the purchaser gets the entire interest in the family property including that of the sons.<sup>24</sup> "All the sons can claim is that, not

[See ('17) AIR 1917 Cal 2 (4): 45 Cal 294. (Sale in execution of rent decree.)

21. ('78) 3 Cal 198 (209) : 4 Ind App 247 (PO).

('91) 14 Mad 408 (418) (FB).

('84) 10 Cal 626 (635, 686) : 11 Ind App 26 (PO).

('74) 11 Bom H O R 76 (80, 82, 88).

('74) 11 Bom H O R 72 (73, 74).

('84) 10 Cal 244 (246).

('15) AIR 1915 All 111 (112) : 37 All 120 (123).

[See ('16) AIR 1916 Mad 490 (481, 492).]

22. ('20) AIR 1920 Mad 316 (318) : 43 Mad 309.

('85) 9 Bom 285 (288).

[See however ('33) AIR 1933 Lah 258 (255): 14 Lah 22. (Partition subsequent to mortgage does not affect mortgagee's rights.)]

23. ('02) 29 Cal 583 (586, 587).

('88) AIR 1933 Lah 548 (543). (Personal property of minor coparcener not liable.)

('83) AIR 1933 Oudh 102 (104).

('84) 10 Cal 1 (7, 8).

('93) 20 Cal 453 (463).

('84) 10 Cal 996 (1001, 1002).

('83) 13 Cal L Rep 96 (101).

('90) 14 Bom 597 (602, 604).

('81) 8 All 443 (453, 455) (FB).

('06) 28 All 182 (183, 184).

('82) 4 All 486 (490, 491).

('11) 33 All 7 (13, 14).

('99) 23 Bom 372 (374, 375).

('94) 18 Bom 147 (151).

('88) 21 Bom 616 (619).

('87) 11 Bom 361 (365).

('91) 15 Bom 298 (296).

('85) 8 Mad 388 (393).

('88) 15 Cal 70 (81, 82) : 14 Ind App 187 : 1888 Pun Re No. 1 (PO).

See however the following cases :

('87) 11 Bom 700 (702).

('88) 7 Bom 91 (94, 95).

('89) 12 Mad 325 (329, 330).

('82) 5 Mad 125 (126, 129) (FB).

('84) 6 All 362 (365).

('84) 7 Mad 186 (188): (Seems to be of doubtful authority in view of 15 Cal 70 (PO).)

('82) 5 Mad 12 (14).

*Decree against karnavan in a Malabar tarwad :*

('87) 10 Mad 357 (361). (Decree passed against a person not in his capacity of karnavan — Property of tarwad does not pass.)

('82) 5 Mad 201 (207).

('95) 18 Mad 451 (453). (Tarwad property—Partition of tarwad—Decree against karnavan on tarwad debt incurred before partition — Execution of decree after partition.)

[See also ('33) AIR 1933 Lah 494 (496).]

[But see ('85) 11 Cal 293 (295). (It is submitted that this decision should be taken as overruled impliedly by 15 Cal 70 (PO).]

24. ('27) AIR 1927 Mad 311 (314).

('88) 11 Mad 64 (76) : 12 Ind Jour 15.

('86) 9 Mad 424 (428, 429).

('82) 5 Mad 251 (252).

('82) 5 Mad 61 (68).

('08) 29 Mad 200 (204) (FB). (Sale binding on sons only if debt is antecedent one.)

('90) 18 Mad 47 (51).

('99) 22 Mad 372 (375).

('78) 1 Mad 358 (369, 370) (FB). (The sale in execution was limited to the right, title and interest of the father — The whole of joint property did not pass.)

(1900) 25 All 214 (226, 228) (FB).

('11) 33 All 436 (439, 440).

('92) 14 All 190 (192).

('92) 14 All 179 (189) (FB).

('86) 8 All 205 (213).

('81) 8 All 72 (74).

('75) 7 N W P H O R 110 (112, 113).

('11) 8 All L Jour 922 (924).

being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own . . . . . If the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings."<sup>25</sup> There are only two cases in which the sons' interests do not pass in a sale in execution of a decree against the father —

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(1) when the father's interest in the property is alone sold excluding that of the sons, and

(2) when the debt is proved to be not binding on them.<sup>26</sup>

As to what are antecedent debts and as to how far a decree against a father can be executed against the sons, see the undermentioned cases.<sup>27</sup>

*Sale in execution of decree against Hindu limited owner.* — In order to determine the interest that passes to a purchaser in execution of a decree against a limited owner such as a *Hindu widow*, the test to be applied is whether the suit in respect of which the sale was directed was brought against the widow upon a cause of action *personal* to herself or one which affected the *whole inheritance* of the property in suit.<sup>28</sup> Where it appears that the decree against the widow is in respect of the

('99) 1899 All W N 27 (28) : 21 All 193. (Sons impeaching sale on mortgage must prove that mortgagee had notice of their interest in joint family property.)

('81) 3 All 294 (297). (Suit against father on hypothecation bond—In execution father's rights and interest only sold—*Held* that such interest only passed.)

('04) 28 Bom 383 (390).

('88) 12 Bom 431 (435).

('91) 15 Bom 87 (88, 89). (Money decree against father—In the absence of an intention to sell in execution entire family property, only interest of father passes.)

('87) 11 Bom 42 (44).

('84) 8 Bom 489 (491, 492). (Money decree against father—Only the right, title and interest passes to the purchaser.)

('84) 8 Bom 481 (486, 487).

('90) 17 Cal 584 (588, 589) : 17 Ind App 11 (PC). (Sale of joint family estate in execution of decree against the father upon debts contracted by him — Whether the whole of family estate passes at execution sale is a question of fact.)

('88) 9 Cal 495 (504).

('82) 8 Cal 898 (907).

('88) 9 Cal 889 (893, 894).

('82) 11 Cal L Rep 263 (264).

('98) 20 Cal 328 (337, 348).

('80) 5 Cal 855 (863) (FB).

('80) 5 Cal 845 (858).

('82) 9 Cal L Rep 850 (852).

('81) 7 Cal L Rep 218 (220). (Money decree against father—Only the right, title and interest of father passes.)

('80) 5 Cal 425 (435, 436).

('76) 25 Suth W R 421 (424) : 2 Cal 213.

('76) 25 Suth W R 148 (149).

('19) AIR 1919 Pat 422 (428) : 4 Pat L Jour 309.

(Decree against father based on his liability as surety for a stranger's crime—In execution sale father's interest only passes.)

[See ('88) 12 Bom 691 (694).]

25. ('85) 13 Cal 21 (36, 37) : 13 Ind App 1 (PC).

('80) 5 Cal 148 (173, 174) : 6 Ind App 88 (PC).

('20) AIR 1920 All 810 (811) : 42 All 58 (60).

('88) 12 Bom 625 (631, 632).

('83) 12 Cal L Rep 104 (113, 118).

('83) 9 Cal 508 (510).

('80) 5 Cal L Rep 36 (40).

('81) 6 Cal 135 (140, 141).

('86) 9 Mad 343 (351, 353) (FB).

('82) 4 Mad 96 (97, 98) (FB).

('90) 12 All 99 (104). (The *onus* is upon the sons to show that the debt is not binding.)

('88) 15 Cal 717 (724) : 15 Ind App 99 (PC). (Do.)

('90) 14 Bom 320 (326). (Do.)

26. ('16) AIR 1916 P C 220 (221) : 44 Ind App 1 : 44 Cal 524 (PC).

(1900) 24 Bom 343 (344).

('87) 9 All 672 (679, 681).

('97) 24 Cal 672 (675, 676).

('83) 6 Mad 155 (158).

('87) 14 Cal 572 (579, 580) : 14 Ind App 77 (PC).

(*Held*, father's interest alone sold.)

27. ('33) AIR 1933 All 235 (238) : 55 All 283. (Nature of debt.)

('32) AIR 1932 Bom 522 (523).

('32) AIR 1932 Bom 483 (483). (Decree against father can be executed against sons.)

('32) AIR 1932 Bom 438 (439). (Antecedent debts.)

('34) AIR 1934 Cal 118 (119). (The sons however should be given an opportunity to show that the debt was incurred for an immoral purpose so as not to bind the sons.)

('32) 138 Ind Cas 168 (169) ((Nag)).

('33) AIR 1933 Oudh 102 (104). (Antecedent debts.)

('32) AIR 1932 Pat 12 (14). (Pious duty to discharge all debts of father is limited to the extent of assets in his hands.)

28. ('84) AIR 1934 Cal 162 (164, 165, 169) : 60 Cal 1236.

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**Notes 8-9**

(1) What property could have been brought to sale in properly constituted suit.

(2) What property was actually intended to be sold and bought.

(3) Has there been such an error in the constitution of the suit or the conduct of the proceedings, that effect cannot be properly given to the intention, or to state it conversely, has there been a substantial representation of those interested in the property intended to be sold and bought.<sup>30</sup>

Where there is record available other than the judgment and the sale certificate to show whether the limited owner represented the inheritance or not, the nature of the debt will determine what passed at the sale.<sup>31</sup>

**9. Variance between proclamation of sale and sale certificate.** — When there is a variance between the description of the property as given in the proclamation of sale and as given in the sale certificate, the description in the former should be taken as conclusive and correct.<sup>1</sup> The description in the sale proclamation follows the description of the property attached and, as pointed out by the Judicial Committee, "what is sold in a judicial sale is the property described in the schedule to the order of attachment."<sup>2</sup>

A obtains a decree against five brothers and takes out execution against them all. The proclamation of sale describes that the interests of all the brothers are to be sold. B purchases in court auction. But the order of confirmation of sale as well as the sale certificate by mistake mentioned only the share of the eldest brother as being

[See also ('92) AIR 1932 Mad 185 (185).]

29. ('09) 1 Ind Cas 62 (65) (Cal).

('81) 7 Cal 357 (366).

('95) 22 Cal 974 (981).

('85) 11 Cal 45 (51).

('84) 10 Cal 985 (991) : 11 Ind App 66 (PC).

('71) 7 Beng L R 213 (216) : 16 Suth W R 49.

(If the debt by widow was incurred for legal necessity it would bind the reversioner.)

(1862) 1862 Suth W R 119 (121) (FB).

('78) 20 Suth W R 30 (31).

('75) 24 Suth W R 8 (4). (Decree declaring sale of widow's interest only — Reversioners not affected.)

('75) 24 Suth W R 306 (308) : 1 Cal 138 : 2 Ind App 275 (PC).

('79) 8 Cal L Rep 530 (532, 538). (Decree against widow personally.)

('72) 17 Suth W R 459 (461) (PC).

('26) AIR 1926 All 715 (718) : 48 All 637. (Decree against widow personally.)

('92) 16 Bom 233 (237). (Do.)

('94) 17 Mad 208 (209). (Do.)

('11) 34 Mad 188 (204, 205).

('08) 30 Cal 550 (555) : 30 Ind App 81 (PC). (Decree against daughter — Held only limited interest passed.)

[See ('76) 25 Suth W R 285 (289, 290) : 1 Cal 226 : 8 Ind App 7 (PC). (Decree against widows of undivided member of Hindu family for debts

incurred for personal benefit of such member— Surviving member can recover the interest sold in execution of such decree from auction-purchaser.)

('96) 23 Cal 374 (388, 389).

[See also ('98) 17 Bom 398 (399, 400). (Widow's right of residence vanishes.)

('89) 12 Mad 260 (265, 267, 272) (FB). (Decree obtained against the co-parceners on a debt binding upon the joint family — Such a debt is binding on the widowed mother of the coparceners, therefore where the house is sold in execution of such decree her right of residence vanishes.)

[But see ('34) AIR 1934 Cal 162 (169) : 60 Cal 1236. (Property of so and so as widow sold means, sale of only limited interest.)

('74) 8 Mad H C R 186 (188). (Widow held not to be her husband's representative.)]

30. (1900) 24 Bom 185 (146, 147).

31. ('82) AIR 1932 Mad 28 (31).

#### NOTE 9

1. ('78) 1 Cal L Rep 460 (463).

('25) AIR 1925 Pat 615 (616) : 4 Pat 760.

[See also ('28) AIR 1928 Pat 30 (31).]

2. ('13) 21 Ind Cas 986 (987, 988) : 41 Cal 590 (PC).

('88) AIR 1938 Mad 232 (238). (Property not included in proclamation of sale but included in sale certificate — Purchaser does not get title to such property.)

purchased. In such a case, it has been held that the entire interest of all the brothers as described in the sale proclamation nevertheless passes to B.<sup>3</sup>

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**10. Effect of new interpretation of law on sale.** — The rights of the parties in an execution sale are fixed with reference to the state of the law *at the time of sale* and any subsequent interpretation of the law will not operate so as to affect the result of that sale.<sup>1</sup> In *Abdul Aziz v. Appayasami*,<sup>2</sup> a purchase was made in court-auction, of the right, title and interest of a *zamindar* in an impartible *zamindari*. By the law as it stood at the time of the sale, the *zamindar* took only a life estate. But subsequent to the sale, the law was changed by the Judicial Committee holding that the *zamindar* took an absolute estate. Taking advantage of the subsequent change in the interpretation of the law the purchaser contended that the entire absolute estate passed to him under the court-sale. The Judicial Committee negatived this contention holding that : "The reversal of the previously accepted interpretation of the law does not displace its application to the construction of the contracts contained in the certificate of sale under consideration" and that the "parties must be taken to be bound by the law as it was at the time understood."

**11. Effect of certificate of sale.** — The irregularities if any in the execution proceedings are cured by the certificate of sale.<sup>1</sup> The purchaser's title becomes complete on the issue of the certificate and he is entitled to apply for possession of the property.<sup>2</sup>

**12. Certificate if operates as res judicata.** — A sale certificate does not operate as *res judicata* inasmuch as there cannot be said to have been any *litigation* as to the title of the property purchased. But persons who are parties to the suit under which the sale took place or their representatives-in-interest cannot, by virtue of Section 47, question the title of the purchaser.<sup>1</sup> The rights of third parties are, however, not affected by the court-sale.<sup>2</sup>

**13. Limitation.** — The provisions of the Limitation Act do not apply to an application for the issue of a sale certificate. The reason is that there is no duty imposed on the purchaser to apply for the certificate. The Court is bound as a matter of course to grant the certificate on the sale becoming absolute, and its function in granting the certificate is *ministerial* and not *judicial*.<sup>1</sup>

**14. Registration of sale certificate.** — Under Section 17, clause (12) of the Registration Act a certificate of sale is not compulsorily registrable.<sup>1</sup> Under Section 89,

3. ('08) 27 Bom 334 (339, 341).

**Note 10**

1. ('18) AIR 1918 Pat 73 (76); 2 Pat L Jour 725.
2. ('03) 27 Mad 181 (142, 143); 31 Ind App 1 (PC).

**Note 11**

1. ('82) 5 All 142 (157); 9 Ind App 132 (PC).  
[See also ('81) 7 Cal 91 (95, 96).  
( '85) 11 Cal 376 (378)].
2. ('98) 17 Bom 228 (229).  
( '79) 3 Bom 433 (436).  
( '02) 24 All 475 (476).  
[See ('98) 17 Bom 718 (721).  
( '82) AIR 1932 Rang 11 (12); 9 Rang 565.]

**Note 12**

1. ('29) AIR 1929 Cal 374 (379); 57 Cal 403 (FB).  
( '88) 12 Bom 589 (594).
- ( '19) AIR 1919 Oudh 132 (132); 21 Oudh Cas 400.
- ( '19) AIR 1919 Pat 809 (310). (Purchaser not bound by statement in sale certificate as to situation of property purchased.)

( '16) AIR 1916 Pat 362 (362). (Purchaser suing for possession—Defendant pleading that decree was tainted by fraud—Onus is on the defendant.)

2. ('10) 7 Ind Cas 409 (411); 33 All 45.

( '13) 20 Ind Cas 753 (754) (Cal).

( '09) 1 Ind Cas 193 (194) (Mad).

[See ('01) 28 Cal 139 (141, 142).]

[See also ('16) AIR 1916 Cal 376 (379).]

**Note 13**

1. ('82) 4 Mad 172 (173).
- ( '83) 1883 All W N 262 (262).
- ( '82) 6 Bom 586 (587).
- [But see ('80) 5 Bom 206 (207, 208).]

**Note 14**

1. ('83) 5 All 84 (85).
- ( '74) 11 Bom H C R 218 (223). (Revenue sale.)
- ( '83) 9 Cal 82 (87) (FB).
- ( '03) 1903 Pun Re No. 9, page 30.
- ( '84) 7 Mad 248 (252). (By registration of certificate purchaser does not acquire priority as



**O. 21 R. 94** clause (2) of the same Act the Court should send a copy of the sale certificate to the  
**Notes 14-16** registering officer.<sup>2</sup>

**15. Court-fee on application for sale certificate.** — It has been held in the undermentioned cases<sup>1</sup> that an application by the purchaser for the certificate need bear no court-fee stamp as the rule does not even require the application to be in writing.

**16. Appeal.** — No appeal lies against an order amending or refusing to amend a sale certificate.<sup>1</sup> In the undermentioned case<sup>2</sup> it was held that an order refusing to grant a certificate in favour of the decree-holder purchaser was not a matter coming under Section 47 and was not appealable.

### Local Amendment

#### RANGOON

The following shall be *inserted* as Rules 94A and 94B :

**O. 21 R. 94A**  
**(Rangoon)**

Copy of sale certificate to the Sub-Registrar.

"94A. A copy of every sale certificate issued under Rule 94 shall be sent forthwith to the Sub-Registrar within whose sub-district the land sold or any part thereof is situate.

**O. 21 R. 94B**  
**(Rangoon)**

Certification of name and address of purchaser to Superintendent of Land Records.

94B. If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under Rule 92 (1)."

**O. 21 R. 95**

**R. 95.** [S. 318.] Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may

**Delivery of property in occupancy of judgment-debtor.**

against a mortgagee whose mortgage is option-ally registrable.])

('84) 7 Mad 418 (419). (Do.)

*The following cases under the old and repealed Registration Act are no longer law :*

('70) 6 Mad H C R App 39 (40). (Proceedings, 18th November 1871).

('70) 7 Bom H C R A C 136 (137).

('81) 8 Mad 87 (41) (FB).

('73) 10 Bom H C R 435 (439).

('80) 2 All 392 (393).

[See also ('88) 5 All 568 (578).]

2. ('82) 1882 All W N 51 (51).

('08) 1908 Pun Re No. 142, page 652.

#### Notes 15

1. ('89) 18 Bom 670 (671).

*As for the stamp requisite for the certificate see the following cases :*

('80) AIR 1980 Bom 392 (393) (FB). (Purchaser

to bear stamp expenses.)

('84) 10 Cal 92 (96) : 13 Cal L Rep 164.

('98) 15 All 107 (108). (Property sold subject to mortgage—Sale certificate should be stamped according to the amount of purchase money.)

('91) 15 Bom 532 (535). (Court sale subject to mortgage—Stamp upon certificate should cover amount for which property was sold and amount of mortgage.)

('86) 10 Bom 58 (59). (Property in eighteen lots sold to different persons subject to mortgage—Whole amount of principal mortgage debt plus the price is to form consideration for calculating stamp duty.)

#### Notes 16

1. ('97) 20 Mad 487 (489).

('01) 23 All 476 (478).

('99) 26 Cal 529 (530, 531).

2. ('08) 7 Cal L Jour 436 (438).



appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same. **O. 21 R. 95**  
**Note 1**

[1877, S. 318; 1859, S. 263. See S. 74 and O. 21 R. 35.]

### Synopsis

- |  |   |
|--|---|
| 1. <b>Delivery of possession to purchaser.</b>                                     | 5. <b>Limitation for application.</b>   |
| 2. <b>Purchase of undivided share.</b> See Note 4, Rule 96.                        | 6. <b>Application, if a step-in-aid of execution.</b>                         |
| 3. <b>Effect of formal possession on limitation.</b> See Note 4, Rule 35.          | 7. <b>Separate suit for possession.</b> See Note 8 and Note 19 to Section 47. |
| 3a. <b>"Immoveable property."</b>  | 8. <b>Procedure under this Rule.</b>  |
| 4. <b>Successive applications for delivery of possession.</b> See Note 4, Rule 97. | 9. <b>Appeal.</b> See Note 19 to Section 47.                                  |

### Other Topics (miscellaneous)

"And a certificate of sale has been granted." See Note 1.  
"Nature of possession." See Note 1.

#### 1. Delivery of possession to purchaser. — See Note 8, *infra*.

The holder of a decree for possession of immovable property may obtain possession of the property under Rules 35 and 36. An auction-purchaser to whom a sale certificate has been granted under Rule 94 has to apply under this rule or under Rule 96 to obtain delivery of possession.<sup>1</sup>

If the property is in the possession of the judgment-debtor, or of some person on his behalf, the purchaser is entitled to *actual* possession under this rule.<sup>2</sup> If it is in the possession of tenants or other persons entitled to occupy the same, the purchaser is only entitled to *symbolical* possession under Rule 96. The Code thus prescribes two modes of delivery of possession based upon the nature of the property concerned. In respect of the *same* property there cannot be two modes of giving possession, one symbolical and the other actual.<sup>3</sup>

Unless the delivery of possession through Court to the auction-purchaser is effected in one of the modes prescribed under Rules 95 and 96, no possession can be deemed to be given.<sup>4</sup> Therefore if a person is dispossessed otherwise than in due course of law as provided by these rules, he may institute a summary suit under Section 9 of the Specific Relief Act to recover possession.<sup>5</sup>

But when once the amin puts the auction-purchaser in possession and the formalities of law are complied with, the delivery is complete,<sup>6</sup> and thereafter the possession of the judgment-debtor or any person becomes that of a trespasser.<sup>7</sup> Therefore if the auction-purchaser is subsequently dispossessed, it will be a cause of action for a regular suit, but no application under these rules is thereafter maintainable.<sup>8</sup> When a

#### Order 21 Rule 95 — Note 1

1. ('92) 15 Mad 203 (209). (Delivery of possession follows peremptorily from grant of sale certificate.)
- ('17) AIR 1917 All 812 (812) : 89 All 460 (462).
2. ('72) 17 Suth W R 80 (80).
- ('39) AIR 1939 Pat 151 (158). (In case of zamindari property or tank or mineral rights physical removal of judgment-debtor is not possible and mode of delivery in such cases is by proclaiming that decree-holder or auction-purchaser has been put in possession—Such delivery is actual and not symbolical.)
- [See ('08) 5 Bom L R 977 (978).]

3. ('32) AIR 1932 Pat 145 (147) : 11 Pat 65.  
[See also ('34) AIR 1934 Pat 119 (120). (Mode of delivery of possession does not depend on discretion of Court but depends on nature of property.)]
4. ('20) AIR 1920 Lah 30 (32).
5. ('08) 12 Cal W N 694 (696).
6. ('66) 6 Suth W R Misc 108 (108).
- ('23) AIR 1923 Mad 25 (26).
7. ('22) AIR 1922 Pat 197 (199).
- ('82) AIR 1932 Pat 145 (146) : 11 Pat 165.  
(Art 144, Limitation Act, applies to such cases.)
8. ('23) AIR 1923 Mad 25 (27).
- ('66) 6 Suth W R Misc 108 (108).

**O. 21 R. 95**  
**Notes 1-5**

purchaser is put in possession of a field with crops on it, he is entitled to such crops.<sup>9</sup>

As to whether the judgment-debtor can file a *suit* where a wrong property is delivered to the auction-purchaser or should only apply under Section 47, see Section 47 Note 19. Rules 95 to 103 are applicable to proceedings under the Chota Nagpur Tenancy Act, VI of 1920. See Section 50.

As to whether a question relating to the delivery of possession to the auction-purchaser or decree-holder falls under Section 47 of the Code, see Note 19 to Section 47, *ante*.

**2. Purchase of undivided share.** — See Note 4 to Rule 96, *infra*.

**3. Effect of formal possession on limitation.** — See Note 4 to Rule 35, *ante*.

**3a. "Immoveable property."** — It is only upon a sale of immovable property that delivery of possession of that property can be ordered under this rule. A usufructuary mortgage is not immovable property and a purchaser cannot proceed under this rule.<sup>1</sup>

**4. Successive applications for delivery of possession.** — See Note 4 to Rule 97, *infra*.

**5. Limitation for application.** — The period of limitation for an application for delivery of possession by a purchaser of immovable property at a sale in execution of a decree is three years from the date when the sale becomes *absolute*: see Article 180 of the Limitation Act.<sup>1</sup> As to when the sale becomes *absolute*, see O. 21 R. 92, *ante*. Where the purchaser is a *stranger*, he is not *bound* to apply under this rule, and may institute a separate suit for possession of the property within twelve years from the date when the sale becomes absolute: see Article 138 of the Limitation Act, and the undermentioned cases.<sup>2</sup> As to whether a *decree-holder* purchaser can also file a separate suit for possession, see Note 19 to Section 47, *ante*.

An order for delivery of possession is not a decree for possession and therefore cannot be kept alive by periodical applications.<sup>3</sup> Where an application for delivery was made within three years of the date when the sale became absolute, but delivery was not effected by reason of laches on the part of the purchaser, a second application under this rule more than three years after confirmation of sale will be barred; Article 181 does not apply to such a case.<sup>4</sup> But if the delivery could not be effected owing to causes beyond the control of the purchaser and the application had been "closed," it has been held that the second application should be considered to be a revival of the first and consequently is not barred under Article 180.<sup>5</sup>

('97) 1 Cal W N 192 (194).

('28) AIR 1928 Lah 910 (911).

9. ('86) AIR 1986 Cal 157 (158). (He is entitled to cut the crop.)

**Note 3a**

1. ('32) AIR 1932 Mad 283 (284).

**Note 5**

1. ('08) 80 All 890 (392).

('38) AIR 1938 Cal 811 (811).

('82) AIR 1982 Cal 75 (75).

('12) 1912 Mad W N 1186 (1187).

('30) AIR 1930 Cal 86 (89): 56 Cal 608.

('09) 5 Ind Cas 89 (90) (Cal).

('35) AIR 1935 Mad 803 (808): 58 Mad 898 (FB).

[But see ('27) AIR 1927 Nag 294 (295).]

The view that the period is to be reckoned from the date of issue of the sale certificate adopted

in the undermentioned cases under the Limitation Act of 1877 is now no longer law:

('79) 8 Bom 438 (436).

('84) 8 Bom 257 (258).

('98) 17 Bom 228 (229).

('09) 82 Mad 136 (138).

2. ('84) 6 All 75 (77).

('15) AIR 1915 Mad 1150 (1151).

('82) AIR 1982 Pat 145 (147): 11 Pat 165.

(Art. 188 applies only where no possession is delivered by Court as contemplated by O. 21, R. 95 or R. 96.)

3. ('26) AIR 1926 Mad 885 (885).

('09) 82 Mad 136 (138).

4. ('26) AIR 1926 Mad 885 (886).

5. ('27) AIR 1927 Mad 891 (898).

('88) AIR 1988 Mad 745 (748).

**6. Application, if a step-in-aid of execution.** — Where the decree-holder himself purchases the property in execution, and applies under this rule for delivery of possession of the property, the question arises whether such an application is a step-in-aid of execution within the meaning of Article 182, clause (5) of the Limitation Act. That question depends again upon another question, *viz.*, whether the purchase by the decree-holder is *pro tanto* satisfaction of the decree. For, unless the decree is satisfied, a fresh application for execution will lie. It has been held by the High Courts of Allahabad and Patna that there is no difference between an application by decree-holder purchaser and by a third party purchaser, to obtain delivery of *possession* of the property purchased by him, and therefore such an application is *not* a step-in-aid of execution,<sup>1</sup> the ground of the decisions being that execution comes to an end as soon as the property is sold, and the failure to obtain possession does not affect the satisfaction of the decree. But it has been held by the High Courts of Calcutta,<sup>2</sup> Bombay<sup>3</sup> and Madras<sup>4</sup> that an application by a decree-holder purchaser under this rule is still an application in execution and therefore a step-in-aid of execution of the decree within the meaning of Article 182, the ground of those decisions being that until possession is secured to the decree-holder purchaser, the decree cannot be said to be satisfied. The same view has been taken in the Judicial Commissioner's Court of Nagpur.<sup>5</sup>

**7. Separate suit for possession.** — See Note 8 below and Note 19 to Section 47, *ante*.

**8. Procedure under this Rule.** — It is not obligatory on the purchaser to apply for delivery of possession under this rule; it is open to him to obtain possession out of Court.<sup>1</sup> If he is a stranger purchaser, the remedies by way of an application under this rule, and by way of suit are concurrent.<sup>2</sup> He may bring a suit for possession in the first instance,<sup>3</sup> or may apply under this rule, and if unsuccessful<sup>4</sup> or if the summary remedy is barred<sup>5</sup> he may institute a regular suit for possession. If, however, the decree-holder himself is the purchaser, there is a conflict of decisions as to whether a *suit* for possession will lie: see Note 19 to Section 47 *ante*, and the undermentioned case.<sup>6</sup> See also Note 5 to Rule 97, *infra*.

The jurisdiction of the Court to order delivery under this rule exists only if the property is in the occupancy of judgment-debtor, or of some person on his behalf or of some person claiming under a title created subsequent to the attachment of such

(19) AIR 1919 Mad 1001 (1004). (Per Oldfield, J.)  
[See also ('35) AIR 1935 Mad 803 (808): 58 Mad 893 (FB).]

#### NOTE 6

1. ('28) AIR 1928 All 868 (870): 50 All 670. AIR 1919 All 890, Dissented from.)
- (28) AIR 1928 Pat 22 (22, 24): 2 Pat 249.
- ('08) 81 All 82 (97, 104, 107) (FB). (19 All 477, Dissented from.)  
[See also ('82) AIR 1982 Pat 286 (287): 11 Pat 518.]
- [But see ('19) AIR 1919 All 890 (890): 41 All 479. (Following 19 All 477 which is dissented from in 31 All 82 (FB).)
- ('88) AIR 1938 All 201 (203): 55 All 235. (Position of auction-purchaser is different from that of decree-holder.)]
2. (1900) 27 Cal 709 (712, 718).
- ('09) 18 Cal W N 694 (695).
3. ('11) 11 Ind Cas 987 (989): 35 Bom 452.

4. ('27) AIR 1927 Mad 288 (288): 50 Mad 403.

5. ('88) AIR 1938 Nag 369 (370).

#### NOTE 8

1. ('30) AIR 1930 Cal 586 (587).  
[See also ('86) AIR 1986 Mad 738 (739). (Attempted delivery of actual possession—No objection by judgment-debtor—Objection only by tenants—Delivery as far as the former is concerned must be held to be complete.)]
2. ('26) AIR 1926 All 120 (121). ('16) AIR 1916 Mad 480 (481, 432). ('87) 14 Cal 644 (648).
3. ('16) AIR 1916 Mad 480 (432).
4. ('86) 12 Cal 169 (173).
5. ('26) AIR 1926 All 120 (121). ('07) 29 All 468 (466).
6. ('82) AIR 1982 Nag 140 (141): 28 Nag L R 250. (Suit for possession by decree-holder purchaser is not barred.)

**O. 21 R. 95**  
**Notes 8-9**

property.<sup>7</sup> Therefore, if the Court is satisfied on *prima facie* evidence that the person in possession of the property is holding it on his own account, it has no option but to dismiss the application under this rule.<sup>8</sup> Thus, a prior mortgagee who purchased property in execution of his own mortgage decree and who is in possession, is not a judgment-debtor and cannot be dispossessed by the auction-purchaser under this rule.<sup>9</sup>

In the undermentioned case<sup>10</sup> it was held by the High Court of Calcutta that where possession was ordered to be delivered under this rule, the decree-holder was entitled to get possession without the property being burdened with huts, etc., erected on the property by the judgment-debtor and that it was not necessary that the order should specifically mention the removal of such burden. A contrary view has, however, been taken in a later case by the same High Court.<sup>11</sup>

Where possession is delivered under this rule, no proclamation by beat of drum is necessary.<sup>12</sup> Where a house sold in auction is ordered to be delivered to the purchaser under this rule but is found locked, the Court can direct the breaking open of the lock in order to put the purchaser in possession.<sup>13</sup>

It has been held in the undermentioned case<sup>14</sup> that when an application is made under this rule for *actual* delivery, the Court cannot order symbolical delivery.

As regards the extent of the inquiry to be made in proceedings for delivery of possession under this and the succeeding rules, the same considerations apply to such an inquiry as are applicable to proceedings under O. 21 R. 58 and a thorough inquiry into questions of title is not contemplated.<sup>15</sup>

**9. Appeal.** — See Note 19 to Section 47, *ante*.

**O. 21 R. 96****R. 96.** [S. 319.] Where the property sold is in the occu-

**Delivery of property in** pancy of a tenant or other person entitled to  
**occupancy of tenant.** occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

[1877, S. 319; 1859, S. 264.]

7. ('87) AIR 1937 Cal 301 (303). (Mortgage decree against executors in their representative capacity — Sale of property — Purchaser cannot by proceeding under Rr. 95 and 97 obtain possession against beneficiaries under will — Beneficiaries' possession is not "on behalf" of executors.)

('87) AIR 1937 Mad 582 (584). (Mortgage decree against Hindu father — Decision in partition suit that father fully represented the sons and that the decree was binding on them — They must be treated as parties to mortgage decree and delivery of possession can be ordered against them under this rule.)

8. ('24) AIR 1924 All 495 (498) : 46 All 693.

('87) AIR 1987 Mad 108 (108).

9. ('80) AIR 1980 Bom 221 (223).

[See also ('34) AIR 1934 Pat 215 (215). (First

mortgagee in possession in execution of his decree—Puisne mortgagee purchaser cannot dispossess first mortgagee under O. 21 R. 95 without redeeming him.)

10. ('88) AIR 1938 Cal 469 (471).

11. ('84) AIR 1984 Cal 751 (751) : 62 Cal 52. (The demolition of a pucca structure which is on the land covered by a decree or by a purchase made in execution of a decree is not necessary to make the possession delivered effective and complete as actual or khas possession.)

12. ('84) AIR 1984 Nag 172 (174).

13. ('84) AIR 1984 Pat 119 (119, 120).

14. ('85) AIR 1985 Rang 159 (159). (The decision, however, does not seem to be sound : see AIR 1985 Mad 547.)

15. ('85) AIR 1985 Rang 159 (159).

## Synopsis

**O. 21 R. 96**  
**Notes 1-5**

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Delivery of property in the occupancy of a tenant.</li> </ol> | <ol style="list-style-type: none"> <li>4. Purchase of undivided share.</li> <li>5. Symbolical delivery.</li> <li>6. Limitation.</li> <li>7. Appeal. See Note 19 to S. 47.</li> </ol> |
|---|--|

**1. Legislative changes.** — The words “on the application of the purchaser” are new. See Note 6 *infra*.

**2. Scope of the Rule.**—This rule provides for cases where the judgment-debtor himself is not entitled to actual possession of the property as where the property is in the occupancy of tenants or other persons entitled to occupy the same.<sup>1</sup> The delivery of possession in such cases has to be made in the manner provided by this rule. See Rule 35 *ante*, and Note 3 below. When once the Court passes an order for delivery of possession under this rule, it has thereafter no jurisdiction to stop the issue of the warrant for delivery and to order an enquiry into any objections subsequently raised in the matter.<sup>2</sup>

**3. Delivery of property in the occupancy of a tenant.**—If the property is in the occupancy of a tenant or other person entitled to occupy the same, the auction-purchaser is only entitled to *symbolical* delivery of possession under this rule.<sup>1</sup> Therefore, where the auction-purchaser *dispossessed* a tenant under a warrant for delivery of possession under Rule 95 *ante*, the tenant will be entitled to bring a suit for possession under Section 9 of the Specific Relief Act, as the dispossession could not be said to be in due course of law.<sup>2</sup>

**4. Purchase of undivided share.**—The holder of a decree for possession of an undivided share in a property may obtain joint possession in the manner provided in Rule 35, *ante*. There is no corresponding provision for delivery of joint possession to the *purchaser* of an undivided share in a property. But in such cases possession should be delivered under the provisions of O. 21 R. 95, read with Rule 35 sub-rule (2) : this rule does not apply to such a case.<sup>1</sup> Where the purchase is of an undivided share in a joint Hindu family, the remedy of the purchaser is only to institute a suit for partition and for possession of the share of the judgment-debtor.<sup>2</sup> Where the judgment-debtor is a cosharer and is himself in exclusive possession,<sup>3</sup> or where the entire rights of the joint family are sold in auction,<sup>4</sup> the purchaser is entitled to actual possession of the property under Rule 95, *ante*.

**5. Symbolical delivery.**—See Rule 35, *ante*. Symbolical possession is different from “paper possession” that is, the possession obtained by a party who being entitled to *actual* possession, only obtains delivery of possession on paper, without getting actual possession.<sup>1</sup> See also Note 3 above.

Delivery of symbolical possession is effective only as against the judgment-debtor

### Order 21 Rule 96 — Note 2

1. See ('89) 1889 Bom P J 92 (92). (Mortgagee in possession of property sold in auction.)
2. ('27) AIR 1927 Oudh 304 (304) : 1 Luck 226.

#### Note 3

1. ('27) AIR 1927 Rang 127 (128).
- ('18) AIR 1918 Mad 207 (208).
- ('85) AIR 1985 Mad 547 (548) : 58 Mad 986.
2. ('08) 12 Cal W N 694 (696).

#### Note 4

1. ('14) AIR 1914 All 511 (511) : 36 All 181 (182).

- ('16) AIR 1916 Mad 430 (430).
- ('27) AIR 1927 Sind 199 (201).
- [See ('35) AIR 1935 Rang 11 (12).]
2. ('06) 29 Mad 294 (295).
- ('78) 2 Bom 676 (678).
- ('27) AIR 1927 Sind 199 (201).
- ('81) 5 Bom 499 (502 to 505).
- [But see ('81) 5 Bom 505n (506n).
3. ('17) AIR 1917 Cal 232 (233).
4. ('93) 17 Bom 718 (721).

#### Note 5

1. ('18) AIR 1918 Mad 207 (208).

**O. 21 R. 96**  
**Notes 5-7**

and is of no effect against a third person who is in possession of the property. The possession of such third person continues to be undisturbed in spite of the delivery of symbolical possession.<sup>2</sup>

**6. Limitation.** — See Note 5 to Rule 95, *ante*.

Under Section 319 of the Code of 1882, it was held that it was the duty of the Court to order symbolical delivery of possession and that there was no period of limitation for delivery of possession under that Section.<sup>1</sup> The insertion of the words "*on the application of the purchaser*" in this rule as well as in Rule 95, and the insertion of a new Article, *viz.*, Article 180 in the Limitation Act, 1908, has made it clear that such applications should be made within three years from the date when the sale becomes absolute.

**7. Appeal.** — See Note 19 to Section 47, *ante*.

### RESISTANCE TO DELIVERY OF POSSESSION TO DECREE-HOLDER OR PURCHASER

**O. 21 R. 97**

**R. 97.** [Ss. 328, 334.] (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed

Resistance or obstruction to possession of immoveable property.

by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

[1877, S. 334; 1859, Ss. 226, 268. See O. 21 R. 35.]

#### Local Amendment

**PATNA**

Add the following as sub-rule (3):

"(3) The provisions of Section 5 of the Limitation Act, 1908, shall apply to applications under this rule."

#### Synopsis

1. Applicability of the Rule.
2. "Decree for possession" — Partition decree.  
2a. "Court."
3. Limitation.
4. Fresh application for delivery, if can be made.

5. Remedies of a person obstructed.
6. Order 9, if applies to proceedings under this Rule. See S. 141 Note 2 and O. 9 R. 9 Note 1.
7. Appeal.
8. Revision.

**1. Applicability of the Rule.**— According to the High Court of Allahabad,<sup>1</sup> an application under this rule is not maintainable, unless it is shown that the decree-

2. ('40) AIR 1940 Cal 16 (17) : 70 Cal L Jour 111 (114). (Order for delivery of possession of land in actual possession of tenants made in favour of the decree-holder purchaser under O. 21 R. 96 does not amount to dispossession.)  
(85) 89 Cal W N 1806 (1806). (When the purchaser who has got symbolical possession removes

crops grown on the land by the third person in actual possession, he is guilty of theft.)

#### Note 6

1. ('18) AIR 1918 Cal 545 (546).

#### Order 21 Rule 97 — Note 1

1. ('24) AIR 1924 All 495 (498, 500) : 46 All 698 (F B).

holder or the auction-purchaser has applied for delivery of possession or at least, he made an attempt to obtain possession *out of Court* and has been *obstructed or resisted* in obtaining it. The High Court of Calcutta has dissented from the view that this rule has any application to resistance to obtain possession *out of Court*, and has held that in the absence of an attempt *on the part of the Court* to give delivery in execution, this rule has no application.<sup>2</sup> There must be some *overt act* of opposition to delivery of possession,<sup>3</sup> though it is not necessary that the person resisting should be *actually present* at the obstruction.<sup>4</sup> Thus, the locking of the house by the judgment-debtor amounts to resistance within the meaning of this rule.<sup>5</sup>

It is necessary, before an investigation is made under this rule, that an *application* should be made to the Court by the *decree-holder or auction-purchaser*.<sup>6</sup> The Court cannot order investigation *suo motu*,<sup>7</sup> or on the Amin's or Nazir's report,<sup>8</sup> or on the application of the judgment-debtor,<sup>9</sup> or of third parties.<sup>10</sup> It has, however, been held that the Court may direct investigation under this rule on an *oral* application by the person obstructed.<sup>11</sup> It has also been held that where the decree-holder was present when the report of the bailiff was placed before the Court, it is reasonable to hold that the further proceeding was taken at the instance of the decree-holder.<sup>12</sup> The Court has to see *prima facie* whether there is any just cause for resistance and obstruction and need not investigate the question of title thoroughly,<sup>13</sup> though it may adjudicate upon questions of *title* between the contending parties in regard to their right to possession and pass orders under Rule 98, or Rule 99.<sup>14</sup> Where the auction-purchaser is present but does not adduce evidence with regard to one lot and one witness is examined by the opposite party and regarding another plot there is no opposition and the Court passes an order, it has been held that there is sufficient investigation so as to bring it within Article 11A of the Limitation Act.<sup>15</sup> The order passed on such investigation is final subject to the result of the suit under Rule 103, *infra*.

The procedure under this rule is *permissive* and not *mandatory*.<sup>16</sup> See Notes 3, 4 and 5 below.

This rule applies also to decrees for possession under Section 9 of the Specific Relief Act,<sup>17</sup> and to proceedings under Section 78 of the Madras Hindu Religious Endowments Act, II of 1927,<sup>18</sup> but does not apply to proceedings for delivery of possession under the Provincial Insolvency Act<sup>19</sup> or the Mamlatdars Act<sup>20</sup> (Bombay Act III of 1876).

2. ('38) AIR 1938 Cal 246 (250) : 60 Cal 8.

3. ('24) AIR 1924 All 495(500,501):46All693(FB).

[See also ('08) 7 Cal L Jour 98 (99). (Obstruction to commissioner appointed to make partition and give possession falls under this rule.)]

[But see ('25) AIR 1925 Rang 374 (375).]

4. ('26) AIR 1926 Mad 853 (354).

[But see ('24) AIR 1924 Rang 261 (262) (Obiter). ('01) 25 Bom 478 (485, 486) (Obiter).]

5. ('80) AIR 1930 Bom 375 (377) : 54 Bom 479.

6. ('28) AIR 1928 Lah 672 (673).

('92) 14 All 417 (419).

('85) AIR 1935 Nag 212 (212, 213) : 31 Nag L R 408.

7. ('81) AIR 1931 Lah 686 (687).

('85) AIR 1935 Nag 212 (213) : 31 Nag L R 408.

8. ('28) AIR 1928 Lah 215 (216).

('28) AIR 1928 Lah 672 (673).

9. ('06) 38 Cal 487 (489).

10. ('92) 14 All 417 (419).

('08) 12 Cal W N 115 (117).

('85) AIR 1935 Nag 212 (213, 214) : 31 Nag L R 408. (Prospective objector.)

11. ('81) AIR 1931 Lah 13 (14).

[See also ('07) 9 Bom L R 936 (939).]

12. ('84) AIR 1934 Lah 193 (194).

13. ('33) AIR 1933 All 57 (59) : 54 All 1031.

[See also ('84) AIR 1934 Pat 50 (51, 52).]

14. ('90) 14 Bom 627 (632).

[But see ('81) 3 Mad 104 (106, 107). (Decision prior to Amendment Act of 1879 — Enquiry limited to fact of possession.)]

15. ('85) AIR 1935 Cal 267 (267).

16. ('19) AIR 1919 Pat 425 (430) : 4 Pat L Jour 94 (F B).

'21) AIR 1921 Mad 559 (561).

'19) AIR 1919 Nag 31 (34).

'70) 2 N W P H C R 450 (451, 452).

17. ('26) AIR 1926 Mad 853 (853).

18. ('85) AIR 1935 Mad 612 (614) : 59 Mad 36.

19. ('19) AIR 1919 Mad 595 (596).

20. ('88) 13 Bom 552 (553, 554).



**O. 21 R. 97**  
**Notes 2-4**

**2. "Decree for possession" — Partition decree.** — A decree for partition of immovable property is a decree for possession within the meaning of this rule.<sup>1</sup> The rule applies also to an *order* for delivery of possession.<sup>2</sup>

**2a. "Court."** — It has been held that a Court to which a decree is sent for execution can entertain an application under this rule although the decree has not been passed by it or the property has not been sold by it.<sup>1</sup>

**3. Limitation.** — The period of limitation for an application under this rule is thirty days from the date of the resistance or obstruction (Limitation Act, Article 167). The resistance or obstruction is not necessarily the *first* resistance or obstruction, and every time the decree-holder or auction-purchaser is obstructed, he obtains a fresh cause of action and he may apply within thirty days of such obstruction.<sup>1</sup> See Notes 4 and 5 below.

An application under this rule may be treated as an application in an execution proceeding but cannot be treated as an *application for execution* within the meaning of Section 15 of the Limitation Act.<sup>2</sup>

For fuller discussion, see Notes to Article 167 in the Authors' Commentaries on the Limitation Act.

**4. Fresh application for delivery, if can be made.** — If the holder of a *decree for possession* applies for delivery of possession, but is resisted or obstructed in obtaining possession, it is not obligatory on him to proceed under this rule; he may either apply again for execution of the decree under Rules 35 and 36 *ante*,<sup>1</sup> or he may institute a regular suit for possession against the persons obstructing if they are third parties.<sup>2</sup>

But if an *auction-purchaser* is resisted or obstructed in the delivery of possession and he does not apply for an investigation under this rule within the period prescribed (thirty days), is it open to him to apply again under Rules 95 or 96, and if again resisted, to apply under this rule? If the first resistance was by the *judgment-debtor* or by any person on his behalf, there is nothing to prevent the purchaser from applying again for delivery of possession under Rule 95, within the period of limitation prescribed and the resistance offered afresh will furnish a fresh cause of action for proceeding under this rule.<sup>3</sup> But if the original obstruction was by *third parties* and not by the judgment-debtor or any person claiming through him, it has been held

**Note 2**

1. ('93) 16 Mad 127 (129, 130).
2. ('89) AIR 1989 Cal 494 (496). (Order for receiver to obtain possession — Application under O. 21, R. 97 made on his behalf is proper.)

**Note 2a**

1. ('36) AIR 1936 Sind 11 (13) : 30 Sind L R 290. (Decision proceeds on the ground that removal of obstruction is a matter pertaining to execution of a decree — As to this, however, there is a conflict of decisions for which see Note 19 to S. 47.)

**Note 3**

1. ('81) 5 Mad 118 (114).
- ('83) AIR 1933 Bom 457 (459) (F B).
- ('96) 18 All 233 (236).
- ('09) 18 Cal W N 724 (727, 728).
- ('28) 1928 Mad W N 236 (236).
- ('39) AIR 1939 Cal 494 (497).
2. ('36) AIR 1936 Cal 833 (834) : 62 Cal 66.

**Note 4**

1. ('92) 5 Mad 118 (114).
- ('33) AIR 1933 Bom 457 (458) (F B).

('09) 18 Cal W N 724 (727, 728).

('28) 1928 Mad W N 236 (236).

('21) AIR 1921 Mad 559 (561).

('96) 18 All 233 (237).

[But see ('10) 6 Ind Cas 649 (649) (Lah).]

2. ('84) 8 Bom 602 (608).

[See ('35) AIR 1935 Mad 803 (808) : 58 Mad 899 (F B). (Decree-holder purchaser seeking delivery of possession obstructed by judgment-debtor — His remedy is under Order 21 R. 97, O. P. O. — If obstructed by judgment-debtor and third party, remedy is under same rule — Judgment-debtor making no opposition or objection — Obstruction by third party — Court should note fact and deliver such possession as property capable of so far as judgment-debtor is concerned.)]

[See also ('68) 3 Agra 162 (163).]

3. ('90) 18 Mad 504 (506).

('19) AIR 1919 Pat 425 (430) : 4 Pat L Jour 94 (F B).

('18) 1918 Mad W N 179 (179).

('14) AIR 1914 Mad 117 (117).



that a second application for delivery of possession under Rule 95 is not maintainable.<sup>4</sup> Where once possession has been effectively delivered to the purchaser, a subsequent obstruction by the judgment-debtor will not entitle the purchaser to apply under this Rule.<sup>5</sup> See Note 5 below.

**O. 21 R. 97**  
**Notes 4-5**

After a final decree for foreclosure, the decree-holder obtained delivery of possession as against the judgment-debtor but was unable to get it against a transferee *pendente lite* from the judgment-debtor. The decree-holder then put in a second application for delivery of possession as against the transferee. It was held that the second application must be treated as one under O. 21 R. 11 and not under this rule.<sup>6</sup>

**5. Remedies of a person obstructed.** — See Notes 3 and 4 above.

It is not obligatory on the decree-holder or auction-purchaser to resort to the summary remedy provided under this rule.<sup>1</sup> But if he applies under this rule and an order is made on investigation against him, *i. e.*, under Rule 99, his remedy is only to file a suit under Rule 103 within one year from the date of the order to establish his right to the property. The following tabular statement will illustrate the various remedies open to the person obstructed —

*Remedies of a person obstructed*

Person obstructed.	Obstruction by whom.	Remedy.
I. Holder of a decree for possession.	a. On obstruction by <i>judgment-debtor</i> or by person claiming under him.	i. May proceed under Rule 97. ii. May apply again in execution of the decree under Rules 35 and 36, and if obstructed again, may apply under Rule 97. <sup>2</sup>
	b. On obstruction by <i>third parties</i> .	i. May proceed under Rule 97. ii. May apply again in execution of the decree under Rules 35 and 36. (Note 4). iii. May institute a regular suit for possession. (Note 4).
II. Purchaser in sale in execution.	a. On obstruction by <i>judgment-debtor</i> or any person claiming under him.	i. May proceed under Rule 97. ii. May apply again for delivery under Rules 95 and 96. (See Note 4). iii. May file a suit for possession. But if the <i>decree-holder</i> is the purchaser, see Note 19 to Section 47.
	b. On obstruction by <i>third parties</i> .	i. May proceed under Rule 97. ii. May file a suit for possession. (Note 3). <i>Note.</i> — There is a conflict of decisions as to whether a second application for delivery of possession will lie.

**Note 5**

4. ('04) 26 All 365 (367).

('87) 11 Bom 473 (474).

[But see ('88) AIR 1938 Cal 852 (853).]

5. ('87) AIR 1987 Rang 449 (449).

6. ('88) AIR 1988 All 201 (208); 55 All 285.

1. ('19) AIR 1919 Pat 425 (430); 4 Pat L Jour 94 (F B).

2. ('82) AIR 1982 Cal 241 (242); 59 Cal 739. (He is not necessarily bound to proceed under R. 97.)

**O. 21 R. 97**  
**Notes 6-8**

**6. Order 9, if applies to proceedings under this Rule.** — See Note 2 to Section 141 and Note 1 to Order 9 Rule 9, *ante*.

**7. Appeal.** — See Note 19 to Section 47 and Order 21 Rule 101.

Where a decree for restitution under Section 144 is made in favour of *A* but *A* is obstructed in the delivery of possession and applies under this rule for removal of obstruction and the petition is dismissed, the dismissal is, in effect, a *refusal of restitution* and the order is therefore appealable as a *decree*.<sup>1</sup>

**8. Revision.** — If the Court rejects the application under this rule without ordering investigation, the order of the Court is open to revision by the High Court.<sup>1</sup>

**O. 21 R. 98**

**R. 98.** [Ss. 329, 330.] Where the Court is satisfied that

Resistance or obstruction by judgment-debtor.

the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

[1877, Ss. 329, 330 ; 1859, Ss. 227, 228.]

#### Local Amendments

##### ALLAHABAD

After the words "at his instigation", wherever they occur, *add* the words "or on his behalf", and *after* the words at the end of the rule, "thirty days" *add* the words "(thirty days), and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order to pay costs and compensation made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree".

##### CALCUTTA

*Insert* the words "or on his behalf" after the words "at his instigation" occurring twice in the rule.

##### LAHORE

(1). After the words "at his instigation" where they occur first *add* the following words :

"or on his behalf."

(2). *Add* the following proviso :

"Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance."

#### Note 7

1. ('84) AIR 1984 Pat 109 (109): 13 Pat 109.

#### Note 8

1. ('07) 9 Bom L R 986 (940).

**NAGPUR**

(1). After the word "instigation", in both places where it occurs, *insert* the words "or on his behalf"; and

(2). After the words "thirty days" *insert* the words :

"and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally, in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

**N.-W. F. P.**

After the words "at his instigation" wherever they occur *add* the words "or on his behalf", and *after* the words "in the civil prison" *add* the words "at the expense of the Crown."

**UDH**

After the words "at his instigation", wherever they occur, *insert* the words "or on his behalf" and *after* the words "thirty days" at the end of the rule, *add* the words "and may order the person or persons whom it holds responsible for such resistance or objections to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree".

**RANGOON**

*Substitute* the following :

"98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession the Court may also, at the instance of the applicant or of its own motion, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison at the cost of Government for a term which may extend to thirty days."

*Synopsis*

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Scope and applicability of the Rule.</li> <li>2. Presidency Small Cause Court.</li> <li>3. Alienee from judgment-debtor pending attachment.</li> <li>4. "Just cause."</li> </ol> | <ol style="list-style-type: none"> <li>5. "Is still resisted or obstructed."</li> <li>6. "In obtaining possession," meaning of.</li> <li>7. Renewal of resistance — Fresh cause of action. See Note 4 to Rule 97.</li> <li>8. Appeal. See Note 19 to Section 47 and Rule 101.</li> </ol> |
|--|--|

**1. Scope and applicability of the Rule.** — In order that this rule might apply, the resistance or obstruction must be *without just cause* and must be by either the judgment-debtor or by some other person at his instigation. No order under this rule can therefore be passed against a person, not the judgment-debtor, unless his resistance was at the instigation of the judgment-debtor,<sup>1</sup> or against a person who was in possession on his own account though his resistance was at the instigation of the

**Order 21 Rule 98 — Note 1**

1. ('20) AIR 1920 Cal 706 (708); 47 Cal 907 (911). ('89) 1989 All W R (H O) 817 (818). (Note: The trend of this decision shows that in the view of the learned Judge, the mere fact that a decree would operate as res judicata against a person not actually a party to it, will not make him a judgment-debtor within the meaning of this rule—But this seems to conflict with AIR 1989

Mad 477 cited below—See also AIR 1937 Mad 582.)

('89) AIR 1989 Mad 477 (478, 479). (Suit on mortgage against legitimate son of deceased mortgagor—Plaintiff not aware of existence of illegitimate son and not impleading him as defendant — Effect — Illegitimate son is bound by decree and is not a person other than the judgment-debtor.)

**O. 21 R. 98**  
**Notes 1-8**

judgment-debtor<sup>3</sup> inasmuch as, in such case, his obstruction cannot be said to be *without just cause*.

By virtue of Section 146 *ante*, an application under this rule can be maintained against any person claiming under the judgment-debtor and bound by the decree, such as a tenant,<sup>3</sup> or a transferee *pendente lite*,<sup>4</sup> or a subsequent purchaser from the judgment-debtor in execution of a money decree against him.<sup>5</sup> The Court can pass an order under this rule only on an application made to it under Rule 97 and cannot therefore pass an order under this rule on an application for possession under Rule 95.<sup>6</sup>

**2. Presidency Small Cause Court.** — Under Section 48 of the Presidency Small Cause Courts Act, the provisions of the Code of Civil Procedure are made applicable to proceedings under Chapter VII of the Act, and, therefore, the Small Cause Court has power to direct removal of improper obstruction on the part of the judgment-debtor under this rule.<sup>1</sup>

**3. Alienee from judgment-debtor pending attachment.** — Under Rule 95, the Court may order delivery of possession against a person "claiming under a title created by the judgment-debtor subsequently to the attachment of such property." It has been held by the High Court of Madras<sup>1</sup> that this rule should be read along with Rule 95, and an order can be made under this rule against such a person, and further that such person is a representative of the judgment-debtor within the meaning of Section 146. See Note 1 and also Note 2 to Rule 102.

**4. "Just cause."** — This rule applies only to cases where the judgment-debtor or any person at his instigation resists delivery of possession without any *just cause*,<sup>1</sup> and therefore if the auction-purchaser sells the property to one of the judgment-debtors and he resists delivery of possession, the Court cannot order delivery of possession under this rule.<sup>2</sup> But the Court ought to decide the question of the existence or otherwise of just cause, on the evidence before it and not on a consideration that has no basis at all.<sup>3</sup>

**5. "Is still resisted or obstructed."** — If the judgment-debtor or any person acting at his instigation, again resists delivery of possession after an order for delivery is passed under this rule, the Court has the power to commit such person to prison, on an application by the person obstructed.

(<sup>86</sup>) AIR 1936 Mad 733 (739).

2. (<sup>92</sup>) 16 Bom 711n (711n).

(<sup>81</sup>) 3 Mad 81 (85).

3. (<sup>22</sup>) AIR 1922 Bom 273 (274); 46 Bom 526.

(<sup>31</sup>) AIR 1931 Mad 534 (535).

4. (<sup>25</sup>) AIR 1925 Cal 1243 (1244).

(<sup>10</sup>) 7 Ind Cas 418 (419); 34 Mad 450.

[See also (<sup>21</sup>) AIR 1921 Mad 559 (561, 562).]

5. (<sup>20</sup>) AIR 1920 Mad 943 (944).

6. (<sup>28</sup>) AIR 1928 Lah 215 (216).

[See also (<sup>37</sup>) AIR 1937 Mad 866 (866). (Order under this rule can be passed only after notice to the judgment-debtor and investigation of the case as contemplated by R. 97 (2).)]

#### Note 2

1. (<sup>24</sup>) AIR 1924 Mad 74 (74).

#### Note 3

1. (<sup>10</sup>) 7 Ind Cas 418 (419); 34 Mad 450.

#### Note 4

1. (<sup>10</sup>) 8 Ind Cas 133 (133) (Mad).

(<sup>90</sup>) 13 Mad 504 (507, 508).

(<sup>20</sup>) AIR 1920 Mad 106 (107); 43 Mad 685. (Unmarried sisters are not bound by sale of the judgment-debtor's interest and cannot be removed from possession.)

(<sup>89</sup>) AIR 1939 Nag 287 (293). (Between date of mortgage and suit thereon, land declared *sir* under S. 68, O. P. Tenancy Act, 1920, and mortgagor becoming entitled to benefit of S. 49 of Act—Mortgagor can claim such benefit in execution proceedings and although decree directs delivery of possession, decree-holder will get only possession of proprietary rights subject to the occupancy rights that have accrued to the judgment-debtor.)

2. (<sup>28</sup>) AIR 1928 Mad 806 (809).

(<sup>10</sup>) 1910 Mad W N 641 (642).

(<sup>90</sup>) 13 Mad 504 (507).

3. (<sup>20</sup>) AIR 1920 Pat 137 (138).

**6. "In obtaining possession," meaning of.** — The word "possession" in this rule is not restricted to actual or *physical* possession but includes also constructive possession or possession in law by receipt of rent or otherwise.<sup>1</sup>

**O. 21 R. 98**  
**Notes 6-8**

**7. Renewal of resistance — Fresh cause of action.** — See Order 21, Rule 97 Note 4.

**8. Appeal.** — See Section 47 Note 19 and Order 21 Rule 101.

**R. 99.** [Ss. 331, 335.] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

**O. 21 R. 99**

[1877, Ss. 331, 335; 1859, Ss. 229, 269.]

#### Local Amendments

##### ALLAHABAD

For the words in brackets, "(other than the judgment-debtor)" read the words in brackets "(other than persons mentioned in Rules 95 and 98 hereof)."

##### CALCUTTA

Insert the words "to have a right" after the words "in good faith."

##### MADRAS

For the words in brackets "(other than the judgment-debtor)" read the words in brackets "(other than those mentioned in Rule 98)."

##### NAGPUR

For the word "judgment-debtor" where it occurs in brackets, substitute the words "persons mentioned in Rule 95 or 98."

##### N.-W. F. P.

For the words "(other than the judgment-debtor)" substitute the words "(other than the persons mentioned in Rules 95 and 98)."

##### ODUH

For the words in brackets "(other than the judgment-debtor)" read the words in brackets, "(other than the persons mentioned in Rules 95 and 98 hereof)."

##### PATNA

For the brackets and words "(other than the judgment-debtor)," substitute the brackets and words "(other than the persons mentioned in Rules 95 and 98)."

##### RANGOON

Substitute the following :

"99. Where the Court is not so satisfied it shall make an order dismissing the application."

#### Synopsis

1. Procedure under the old Code.

2. Scope of the Rule.

3. "Person other than the judgment-debtor."  
See Note 2 to Rule 100.

4. "Claiming in good faith to be in possession."

5. "On his own account."

6. Transferee pendente lite. See Rule 102.

7. Inherent power to order delivery of possession.

8. Appeal. See Section 47 Note 19 and Order 21 Rule 101.

#### Note 6

1. ('01) 25 Bom 478 (492, 498).

('06) 38 Cal 487 (491, 498).

[See also ('04) 27 Mad 67 (71) (F B).]

**O. 21 R. 99**  
**Notes 1-8**

**1. Procedure under the old Code.** — This rule corresponds to Sections 331 and 335 of the Code of 1882. Section 331 related to the procedure to be adopted in the case of obstruction to delivery of possession to the *holder of a decree for possession*, and Section 335 related to the case of obstruction to *auction-purchaser*.

Under Section 331, however, the Court had to register the application as a *suit* between the decree-holder as plaintiff, and the claimant as defendant, and to investigate into the claim as if a suit for the property had been instituted by the decree-holder against the claimant. The undermentioned cases<sup>1</sup> which were decided under the old Code are no longer of any importance.

**2. Scope of the Rule.** — When delivery of property in execution of a decree is resisted, the Court can only deal with the matter on application to remove the obstruction, and only in the manner provided by law. It cannot direct that unless the obstructor filed a suit within a certain time to establish his right, his title to the property should cease.<sup>1</sup> The order passed under this rule is final subject to the result of the suit, if any, under Rule 103.<sup>2</sup>

**3. "Person other than the judgment-debtor."** — See Note 2 to Order 21, Rule 100.

**4. "Claiming in good faith to be in possession."** — The word 'possession' in this rule is not restricted to *actual* possession; it includes also *constructive* possession.<sup>1</sup> See Note 6 to Rule 98.

The party resisting delivery of possession should satisfy the Court that he is, in good faith, in possession of the property on his own account or on account of a person not the judgment-debtor.<sup>2</sup> If the obstructor has a good and legal right to obstruct, the fact that he acts at the instigation of the judgment-debtor will not prevent an order being made under this rule in his favour.<sup>3</sup> It has also been held in the undermentioned case<sup>4</sup> that the words "claiming in good faith to be in possession" do not mean "claiming in good faith to *have a right to be in possession*" but mean only that the claimant claims to be in possession as a matter of fact. See Rule 101, *infra*.

**5. "On his own account."** — The person in possession, resisting delivery of possession, may claim to be in possession on his own account, or as tenant of, or on

**Order 21 Rule 99 — Note 1**

1. ('87) 14 Cal 234 (235).
- ('85) 8 Mad 548 (551) (F B). (Section 331 confers special jurisdiction to try claim below pecuniary value of Court.)
- ('90) 13 Mad 520 (522). (Do.)
- ('10) 5 Ind Cas 573 (575) (Cal). (Do.)
- ('82) 4 Mad 220 (225, 226). (Suit under S. 331 is not continuation of original suit.)
- ('95) 22 Cal 880 (882). (Do.)
- ('79) 4 Bom 123 (125). (Suit is only a continuation of original suit.)
- ('82) 8 Cal 720 (721). (Court-fee payable.)
- ('95) 21 Bom 892 (898). (Appeal lies.)
- ('82) 1882 All W N 125 (125). (Do.)
- ('09) 1 Ind Cas 785 (787) (Cal). (Refusal to register as plaint appealable.)
- ('70) 14 Suth W R 858 (859). (Question of title should be tried.)
- ('71) 15 Suth W R 827 (828). (Do.)
- ('92) 18 Bom 37 (40).
- ('10) 6 Ind Cas 285 (285) (Mad).

**Note 2**

1. ('23) AIR 1923 Lah 145 (146).
2. ('20) AIR 1920 Lah 517 (520) : 1 Lah 57.

**Note 4**

1. ('01) 25 Bom 478 (480, 481).
2. ('28) AIR 1928 Mad 909 (909).
- ('26) AIR 1926 Mad 78 (80, 81) : 48 Mad 767.
- ('16) AIR 1916 Mad 820 (820).
- ('10) 5 Ind Cas 809 (810) : 1910 Pun Re No. 14 page 89.
- ('07) 1907 Pun Re No. 118, p. 541. (Claim being in good faith should be properly inquired into.)
- ('10) 8 Ind Cas 857 (858) (Mad).
- ('12) 15 Ind Cas 688 (684) (Cal). (Claimant whose claim under Rule 58 was dismissed cannot obstruct—His remedy is by suit under Rule 68.)
3. ('81) 8 Mad 81 (85).
- ('88) AIR 1938 Pat 604 (605). (Auction-purchaser obstructed in taking possession by brothers of judgment-debtor in their own right — Order of dismissal of application under O. 21 R. 99 is proper.)
4. ('20) AIR 1920 Cal 706 (707) : 47 Cal 907.

account of some person *other* than the judgment-debtor. Therefore, in execution of a decree against a tenant, a tenant of the tenant, *i. e.*, a sub-tenant cannot resist delivery of possession to the landlord.<sup>1</sup> The Calcutta High Court<sup>2</sup> has held that if the lessee granted the sub-lease against a covenant in the lease not to sub-let, the sub-lessee is a trespasser and therefore is a person claiming to be in possession on his own account and that the remedy of the landlord is to file a suit for possession against the sub-lessee. See Note 2 to Rule 101, *infra*.

**O. 21 R. 99**  
**Notes 5-8**

Under Hindu law, unmarried sisters are not bound by a decree against their brother, and as they have a right of residence in the family house they cannot be removed from possession in execution of a decree against their brother.<sup>3</sup>

It has been held that a decree against executors does not bind the beneficiaries under the will and that their possession of the testator's estate is not on behalf of the executors.<sup>4</sup>

**6. Transferee pendente lite.** — See Order 21 Rule 102, *infra*.

**7. Inherent power to order delivery of possession.** — It has been held in the undermentioned case<sup>1</sup> that the Court can, under its *inherent* powers, order delivery of possession to a decree-holder, where the property is in the possession of a *third* person who has no *bona fide* claim to the possession of the property on his own account.

**8. Appeal.** — See Note 19 to Section 47 and Order 21 Rule 101.

**R. 100.** [S. 332.] (1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

**O. 21 R. 100**

Dispossession by  
decree-holder or  
purchaser.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

[ 1877, S. 332; 1859, S. 230. ]

### Synopsis

1. Scope of the Rule.
2. "Any person other than the judgment-debtor."
3. "Is dispossessed."
4. Dispossession under order of Collector.

- 4a. "By the purchaser thereof."
5. Nature of investigation under this Rule. See Rule 101.
6. Limitation.
7. Applicability of Order 9 to applications under this Rule. See Rule 101.

#### Notes

1. ('22) AIR 1923 Bom 278 (274) : 46 Bom 526.
2. ('22) AIR 1922 Bom 449 (451) : 46 Bom 687.
2. ('20) AIR 1920 Cal 706 (708) : 47 Cal 907.

3. ('20) AIR 1920 Mad 106 (107) : 48 Mad 685.
4. ('37) AIR 1937 Cal 801 (801, 808).

#### Notes

1. ('10) 6 Ind Cas 120 (120, 121) (Cal).

**O. 21 R. 100**  
**Notes 1-2**

**1. Scope of the Rule.** — Where, in obtaining possession of property the holder of a decree for possession or the auction-purchaser, as the case may be, *dispossesses* any person other than the judgment-debtor, such person may apply to the Court for a summary investigation of the matter under this rule.<sup>1</sup> It is, however, not *obligatory* on such person to apply under this rule; he may bring a separate suit against the person who dispossessed him for possession of the property.<sup>2</sup> The Court cannot, however, act under this rule unless there is an *application* of the party dispossessed.<sup>3</sup>

Where an application is made under this rule, the Court should register the application,<sup>4</sup> make an investigation therein and should either dismiss the application or pass an order under Rule 101, *infra*.<sup>5</sup> It has no jurisdiction to pass a declaratory order under this rule.<sup>6</sup> The fact that the applicant's suit for declaration of *title* to the property has been dismissed is no bar to his application under this rule, the question involved in such application being only one of *possession*.<sup>7</sup> As to the *scope of the investigation under this rule*, see Rule 101, *infra*.

The remedy of the party against whom an order is made under Rule 101 is to file a suit under Rule 103 to establish his right to the possession of the property.

A third person dispossessed in execution of a decree under Section 9 of the Specific Relief Act can also apply under this rule.<sup>8</sup>

This rule applies to cases of exclusive as well as of joint possession.<sup>9</sup>

Where after an application was filed under this rule, the opposite party filed a suit for an injunction restraining the applicant from proceeding with his application, it was held that under Section 56 (a) of the Specific Relief Act the injunction could not be granted as the prosecution of the application could not be said to amount to a multiplicity of proceedings.<sup>10</sup>

See also the undermentioned cases.<sup>11</sup>

**2. "Any person other than the judgment-debtor."** — This rule has to be read along with Rule 101, *infra*. A judgment-debtor or his representative cannot apply under this rule.<sup>1</sup> As to who are "representatives," see the undermentioned cases<sup>2</sup> and

**Order 21 Rule 100 — Note 1**

1. ('26) AIR 1926 Cal 377 (377).
- ('89) 13 Bom 213 (214).
- ('93) 3 Mad L Jour 258 (259). (Third party purchaser should apply under this rule and not by way of restitution.)
- ('22) AIR 1922 Pat 210 (211). (Where possession has been effectively delivered by a Civil Court, the only course open to the aggrieved person (other than the judgment-debtor) is to apply under this rule; proceedings under S. 145, Cr. P. C., are not proper.)  
[See also ('94) 18 Bom 522 (524).]
2. ('31) AIR 1931 Lah 686 (687).
- ('67) 1867 Beng L R Sup Vol 688 (642) (F B).
- (1864) 1864 Suth W R 61 (61).
- [See also ('85) AIR 1935 Oudh 462 (464) : 11 Luck 288. (Tenant having alternative remedy of suit under S. 108 (10), Oudh Rent Act — Right of making application under O. 21 R. 100, O. P. C. is not barred on that account.)]
3. ('31) AIR 1931 Lah 686 (687).
4. ('24) AIR 1924 Pat 698 (700).
5. ('26) AIR 1926 Cal 377 (377).
6. ('27) AIR 1927 Nag 300 (301).
7. ('37) AIR 1937 Oudh 400 (400, 401).

8. ('70) 12 Suth W R 25 (25) (FB).

[But see ('67) 7 Suth W R 171 (172).]

9. ('83) AIR 1933 Pat 182 (133).
10. ('33) AIR 1933 Pat 250 (254, 255) : 12 Pat 727.
11. ('35) AIR 1935 Oudh 462 (464) : 11 Luck 288. (Transfers pending proceedings under this rule will be affected by doctrine of *lis pendens*.)
- ('36) AIR 1936 Pat 480 (481) : 15 Pat 614. (Section 170, Ben. Ten. Act, does not exclude claim under O. 21 R. 100 O. P. C.)

**Note 2**

1. ('28) AIR 1928 Pat 76 (82).
- ('17) AIR 1917 Pat 597 (597) : 2 Pat L Jour 478.
- ('95) 17 All 478 (481).
2. ('31) AIR 1931 Mad 534 (535). (Tenants and servants of judgment-debtor are bound by decree.)
- ('07) 17 Mad L Jour 321 (321). (Mortgagee after attachment is a representative of judgment-debtor.)
- ('29) AIR 1929 Pat 227 (228). (Purchaser of non-transferable holding is representative of judgment-debtor.)
- ('26) AIR 1926 Cal 956 (956). (Do.)
- ('18) AIR 1918 Mad 678 (674). (Do.)
- ('18) AIR 1918 Pat 488 (484) : 3 Pat L Jour 579. (Purchaser of the whole or part of an occupancy



Section 47 Notes 17 and 21, *ante*. The Calcutta High Court<sup>3</sup> has, however, held that the word "judgment-debtor" in this rule does not include any person other than the *actual* judgment-debtor; the question according to that Court is not whether the applicant is a *representative* of the judgment-debtor but if he is in possession on *his own account*, and this should be investigated under Rule 101. See Rule 101, *infra*.

A person who is a party to the suit, but against whom no decree has been passed, is not a judgment-debtor and, therefore, can apply under this rule.<sup>4</sup> If, however, the decree is binding on him, his remedy is to apply under Section 47.<sup>5</sup>

Rules 100 and 101 are not exhaustive and do not include a case where the judgment-debtor himself is in possession on account of some third person and not on his own account. It has been held, however, that in such a case the *third person* is entitled to apply under this rule if the judgment-debtor is dispossessed by the decree-holder or auction-purchaser.<sup>6</sup>

Where the judgment-debtor or his representative is dispossessed of property not included in the decree, his remedy is to apply under Section 47.<sup>7</sup>

**3. "Is dispossessed."** — Unless the applicant is *dispossessed* of the property, he has no cause of action to apply under this rule.<sup>1</sup> The dispossession should be in the course of the delivery of possession<sup>2</sup> and should be proved as a fact.<sup>3</sup> Thus, mere delivery of *symbolical* possession to the decree-holder or auction-purchaser will not amount to dispossession of the party in possession; it must be shown that the applicant was *actually* dispossessed of the property.<sup>4</sup>

Where dispossession does not take place in the course of the delivery of possession in execution but *subsequent* thereto, this rule has no application, and the remedy of the party aggrieved is to file a regular suit for possession.<sup>5</sup>

Where a person is in possession of the property by receipt of rent or otherwise, and the tenant in actual possession is dispossessed of the property by the decree-holder or auction-purchaser, the landlord is a person who is *dispossessed* of the property

holding not transferable by custom is a representative of the judgment-debtor.)

('89) AIR 1939 Pat 253 (253). (Purchaser of a transferable holding is not a representative of the judgment-debtor.)

('88) AIR 1938 Pat 90 (91). (Partition of tauzi—Mortgagor getting one takhta at partition and another person getting another takhta — Latter is not former's 'representative'.)

('95) AIR 1935 Pat 253 (253). (Sons of Hindu judgment-debtor are *prima facie* bound by decree against their father and are not persons other than judgment-debtors (*Obiter*).)

('27) AIR 1927 Cal 156 (157) : 53 Cal 913. (Purchaser of non-transferable holding not a representative of judgment-debtor.)

3. ('28) AIR 1928 Cal 792 (794).

('30) AIR 1930 Cal 848 (848).

4. ('95) 17 All 222 (225) (FB).

('96) 19 Mad 831 (834).

('07) 80 Mad 72 (74).

('18) AIR 1918 Mad 911 (912) : 40 Mad 964 (966, 967).

('27) AIR 1927 Pat 404 (405).

5. ('28) AIR 1928 Mad 1270 (1270).

6. ('01) 25 Bom 478 (493).

7. ('16) AIR 1916 All 104 (106) : 38 All 339.  
( '83) AIR 1933 Mad 569 (570).

### Note 3

1. ('69) 12 Suth W R 231 (232, 233).

('85) AIR 1935 Pat 253 (253, 254).

2. ('29) AIR 1929 Pat 553 (554, 555).

3. (1865) 3 Suth W R 205 (206).

4. ('04) 27 Mad 262 (268, 270).

('33) AIR 1933 Cal 144 (144).

('96) 20 Bom 351 (353) (FB).

('08) 80 Cal 710 (712).

('96) 1 Cal W N 343 (344).

('69) 11 Suth W R 191 (192). (Planting a bamboo and making proclamation to occupants is sufficient dispossession.)

[See ('38) AIR 1938 Nag 442 (443). (Objector in his application under O. 21 R. 100 contending firstly that he was in actual possession despite formal delivery to decree-holder—He alternately praying that if legal effect of formal delivery to decree-holder be dispossession, he (objector) should be given possession — Application is competent.)]

5. ('29) AIR 1923 Cal 601 (602) : 50 Cal 311.

[See also ('31) AIR 1931 Mad 534 (536).]

[But see ('88) AIR 1938 Cal 192 (192).]

**O. 21 R. 100**  
**Notes 3-7**

within the meaning of this rule,<sup>6</sup> even though the tenant is the judgment-debtor.<sup>7</sup> See Note 2 above.

**4. Dispossession under order of Collector.** — This rule has no application to a case where the decree has been transferred to the Collector for execution under powers conferred on him by the Local Government under Section 70 of the Code. The Court which passed the decree is for the time being *functus officio*, and has no jurisdiction to enquire into a complaint of dispossession under this rule;<sup>1</sup> but as soon as the Collector has *exhausted* all the powers conferred upon him, the Civil Court has jurisdiction to inquire into any matters requiring to be done in execution such as those provided in Rules 97 to 103 of the Code.<sup>2</sup>

**4a. "By the purchaser thereof."** — Although the wording of this rule refers only to the auction-purchaser, it must be taken to be intended to include his legal representatives.<sup>1</sup>

**5. Nature of investigation under this Rule.** — See Rule 101, *infra*.

**6. Limitation.** — The period of limitation for an application under this rule is thirty days from the date of dispossession.<sup>1</sup> See Article 165 of the Limitation Act, 1908.

**7. Applicability of Order 9 to applications under this Rule.** — See Order 21 Rule 101.

**O. 21 R. 101****R. 101.** [Ss. 332, 335.] Where the Court is satisfied that

Bona fide claimant to  
be restored to possession.

the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

*Synopsis***1. Procedure under the old Code.****1a. Applicability of Rule to proceedings under the Madras Estates Land Act, 1908.****2. "On his own account."****3. Transferee pendente lite.** See Rule 102.**4. Transfer of decree to Collector.** See Rule 100, Note 4.**5. Nature of investigation under this Rule.****6. Applicability of the provisions of Order 9 to proceedings under this Rule.****7. Appeal.****8. Revision.**

**1. Procedure under the old Code.** — Rules 100 and 101 correspond to Sections 332 and 335 of the Code of 1882. Section 332 related to the procedure to be

6. ('06) 88 Cal 487 (491, 498).

('01) 25 Bom 478 (488, 498).

('71) 15 Suth W R 70 (71).

[See also ('78) 20 Suth W R 378 (374). (Possession through a mortgagee is sufficient possession to bring a claim under this rule.)]

7. ('01) 25 Bom 478 (498).

Note 4

1. ('18) 87 Bom 488 (490).

('24) AIR 1924 Nag 809 (811).

2. ('14) AIR 1914 Bom 262 (258) : 38 Bom 678 (676, 678).

Note 4a

1. ('88) AIR 1938 Cal 298 (298).

Note 6

1. ('16) AIR 1916 All 104 (106) : 38 All 399.

('81) AIR 1931 Cal 385 (387) : 58 Cal 55.

adopted in the case of a person dispossessed by the *holder of a decree, for possession*, and Section 335 related to the case of dispossession by the *auction-purchaser*. But under Section 332, the Court had to *examine* the applicant, and on being satisfied that there was probable cause for making the application, had to ascertain on investigation if the following grounds existed, *viz.* —

- (i) Whether the property was *bona fide* in the possession of the applicant on his own account or on account of some person other than the judgment-debtor.
- (ii) Whether the property was not comprised in the decree, and
- (iii) If the property was comprised in the decree, whether the applicant was not a party to the suit in which the decree was passed.

If the Court was satisfied that these grounds existed, it had to order re-delivery of the property to the applicant—otherwise it had to dismiss the application.

As to the nature of the investigation under this rule, see Note 5 below.

**1a. Applicability of Rule to proceedings under the Madras Estates Land Act, 1908.** — By virtue of Section 192 of the Madras Estates Land Act, 1908, this rule is applicable to proceedings under that Act.<sup>1</sup>

**2. "On his own account."** — Rules 100 and 101 are not confined, in their application, to cases of *exclusive* possession, but are applicable also to cases where the person dispossessed was in *joint* possession.<sup>1</sup> Therefore, if a co-owner or a member of an undivided family is dispossessed in execution of a decree against another co-owner or coparcener, he may apply under Rule 100 to be put in joint possession with the decree-holder or the auction-purchaser;<sup>2</sup> but he cannot claim to be put in possession of *specific portions* of the property, as the Court cannot adjudicate on such questions of title under this rule.<sup>3</sup>

A mortgagee in possession of the property<sup>4</sup> or an occupancy tenant,<sup>5</sup> if dispossessed, can get back the possession under this rule as he is in possession on his own account, but not a mortgagee or transferee *pendente lite*. See Rule 102, *infra*. It has been held by the High Court of Patna that a usufructuary mortgagee is *not entitled to object* under O. 21 R. 58 to the attachment of the property of his mortgagor, and that if such an objection is made and disallowed, Rule 63 will not operate to debar him from making an application under this rule when he is dispossessed by the purchaser in execution of a decree.<sup>6</sup> It has been held by the High Court of Calcutta<sup>7</sup> that if the claimant was in possession on his own account or on account of some person other than the judgment-debtor, he is entitled to succeed under this rule, though he is a trespasser or has no title to the property.

#### Order 21 Rule 101 — Note 1a

1. ('85) AIR 1985 Mad 909 (810).

#### Note 2

1. ('81) AIR 1981 Cal 885 (387): 58 Cal 55.
2. ('18) 18 Cal L Jour 188 (140).
3. ('28) AIR 1928 Nag 52 (53): 18 Nag L R 206.
4. ('24) AIR 1924 Pat 506 (507).
5. ('94) 18 Bom 522 (524).
6. ('88) AIR 1988 Nag 442 (443, 444).
7. [But see ('98) 17 Bom 718 (721).]
8. ('10) 5 Ind Cas 298 (801) (Cal).
9. [See also ('88) AIR 1988 Nag 442 (444). (Decree for possession of fields against judgment-debtor entitled only to certain share in fields — Judg-

ment-debtor's co-owners on application under O. 21 R. 100, are not entitled to possession of entire set of fields but only to the extent of their share.)]

4. ('14) AIR 1914 Cal 580 (581).
5. ('78) 2 All 94 (95).
6. ('95) 17 All 222 (224, 225) (FB).
7. ('28) AIR 1928 Rang 127 (127): 6 Rang 122.
8. ('39) AIR 1939 Pat 263 (263).
9. ('81) AIR 1981 Mad 584 (535).
10. ('22) AIR 1922 Pat 408 (408): 1 Pat 159.
11. ('37) AIR 1937 Pat 63 (64).
12. ('27) AIR 1927 Cal 839 (340).
13. [See ('90) AIR 1920 Cal 706 (708): 47 Cal 907.]

**O. 21 R. 101**  
**Notes 2-6**

The Court is not entitled, on an application under this rule, to investigate into the question of *benami* in order to determine whether the applicant was in possession of the property on his own account.<sup>8</sup>

**3. Transferee pendente lite.** — See Order 21 Rule 102.

**4. Transfer of decrees to Collector.** — See Order 21 Rule 100 Note 4.

**5. Nature of the investigation under this Rule.** — Where a third party applies for re-delivery of property under this rule, the question which the Court has to decide is whether the applicant was in possession on his own account or on account of some person other than the judgment-debtor.<sup>1</sup> It cannot reject the application on the ground that originally the applicant had not obtained possession in a lawful manner.<sup>2</sup> The applicant has to prove that he was in possession and was dispossessed in the course of the delivery of possession to the decree-holder or purchaser<sup>3</sup> (see Notes 2 and 3 to Rule 100, *ante*). The onus lies upon him to prove his right to possession,<sup>4</sup> and it is a serious irregularity to ask the decree-holder or auction-purchaser to begin.<sup>5</sup> The Court should dispose of the application only after allowing the parties to produce whatever evidence they desire, oral or documentary.<sup>6</sup> The investigation under this rule being a summary one, the Court should confine itself to the question of possession and should not decide questions of title<sup>7</sup> or questions regarding the construction of the decree<sup>8</sup> or the equities of the parties.<sup>9</sup> An unsuccessful applicant under O. 21 R. 58 is not competent to apply under O. 21 R. 100 inasmuch as the order against him will be conclusive against him subject to the result of a suit instituted under O. 21 R. 63 to set aside the order.<sup>10</sup>

Where subsequent to the dispossession events have happened which disentitle the applicant to retain possession, the Court cannot refuse to take notice of such events in passing an order under this rule.<sup>11</sup>

**6. Applicability of the provisions of Order 9 to proceedings under this Rule.** — See Section 141, Note 2 *ante* and Note 1 to Order 9, General. If the application under Rule 100 is dismissed for *default* or ordered *ex parte*, it has been held by the High Court of Calcutta<sup>1</sup> that the Court may restore the application or set aside the *ex parte* order, as the case may be, under its *inherent powers*.

**8.** ('24) AIR 1924 Pat 506 (507).

**Note 5**

**1.** ('01) 25 Bom 478 (488).

[See ('17) AIR 1917 Nag 53 (54, 55) : 14 Nag L R 66.]

**2.** ('74) 22 Suth W R 406 (406).

**3.** (1865) 3 Suth W R 205 (206).

**4.** ('67) 8 Suth W R 8 (9).

**5.** ('69) 12 Suth W R 16 (17).

**5.** ('31) AIR 1931 Mad 534 (538).

**6.** ('35) AIR 1935 All 457 (457).

**7.** ('18) AIR 1918 Mad 911 (912) : 40 Mad 964 (966).

**7.** ('14) AIR 1914 Cal 580 (580).

**10** 8 Ind Cas 613 (614) (Low Bur).

**10** ('37) AIR 1937 Oudh 400 (401).

[See also ('38) AIR 1938 Pat 90 (91).

**10** ('38) AIR 1938 Pat 150 (153). (Decision of the Court in a summary proceeding under O. 21, R. 100 is strictly speaking not a decision as to title and is also not necessarily final.)

*But under the old Code, if the application itself was registered as a suit, it was held that*

*the question of title should be gone into : See the following cases:*

**10** ('70) 14 Suth W R 140 (141).

(1865) 3 Suth W R 213 (215).

**10** ('98) 1898 Bom P J 56.

**10** ('94) 1894 Bom P J 88.

**10** ('80) 5 Cal 278 (280).

**10** ('78) 2 All 94 (95, 96).

**10** ('70) 14 Suth W R 358 (359, 360).

**10** ('70) 13 Suth W R 80 (81, 82) (F B).

**10** ('73) 20 Suth W R 114 (115).

**10** ('08) 6 Oudh Cas 110 (112).

**10** ('69) 11 Suth W R 255 (256).

**10** ('30) AIR 1930 Pat 416 (417).

**10** ('26) AIR 1926 Mad 1127 (1128.)

**10** ('38) AIR 1938 Cal 288 (284) : 36 Cal W N 1034 (1035). (Claim case dismissed for default.)

**10** ('35) AIR 1935 Pat 122 (128). (Claim case dismissed summarily.)

**10** ('35) 158 Ind Cas 398 (398) (Pat).

**10** ('33) AIR 1933 Cal 534 (535) : 60 Cal 635.

**Note 6**

**1.** ('28) AIR 1928 Cal 179 (180).

**7. Appeal.** — If the proceedings relating to delivery of possession under Rules 97 to 102 are "between the parties or their representatives," an order passed in such proceedings will fall under Section 47 according to the view of the High Courts of Calcutta and Madras and of the Judicial Commissioner's Court of Sind. See Note 19 to Section 47, *ante*. An order under Rule 98 against a *stranger* will not fall under Section 47 even according to this view and no appeal will, therefore, lie in such a case.<sup>1</sup> But if the proceedings under this rule are between *parties* to the suit, and an order is passed under this rule, the High Court of Madras<sup>2</sup> has held that the aggrieved party will have only a right of *appeal* under Section 47, *ante*. In the undermentioned case<sup>3</sup> Mr. Justice Odgers observed as follows:

**O. 21 R. 101**  
**Notes 7-8**

"It was not open to the plaintiffs to proceed at their option, either by a suit or by way of appeal. It is also to be observed that Section 47 expressly bars a suit in contradistinction to Rule 103, which says that the order on obstruction proceedings shall be conclusive subject to the result of the suit if any. It has, as far as I know, never been suggested in any case that the procedure under Section 47 and under Rule 103 is cumulative."

See also Note 84 to Section 47.

**8. Revision.** — As the remedy of the party against whom an order under Rules 98, 99 or 101 has been passed is to file a suit under Rule 103 *infra*, ordinarily orders passed under these rules are not open to revision.<sup>1</sup> But if the lower Court refuses to order investigation,<sup>2</sup> or rejects the application on a misconstruction of the law,<sup>3</sup> or the lower Appellate Court erroneously entertains appeals from orders under those rules,<sup>4</sup> or if there are illegalities or material errors in the proceedings in the lower Court,<sup>5</sup> the High Court may interfere in revision.

## R. 102. [S. 333.] Nothing in rules 99 and 101 shall

**O. 21 R. 102**

Rules not applicable to transferee pendente lite.

apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

[1877, S. 333; 1859, S. 231.]

### Note 7

1. ('81) AIR 1981 Cal 574 (576) : 58 Cal 808.  
[See also ('87) AIR 1987 Pat 186 (187).]
2. ('21) AIR 1921 Mad 612 (614).
3. ('30) AIR 1920 Mad 979 (980, 981).
4. ('20) AIR 1920 Mad 126 (127) : 43 Mad 696.  
[See also ('19) AIR 1919 Mad 554 (554).]
5. ('25) AIR 1925 Mad 1198 (1199).

### Note 8

1. ('80) AIR 1980 Cal 348 (348).
2. ('88) AIR 1988 All 959 (960).
3. ('15) AIR 1915 Mad 744 (744).
4. ('11) 10 Ind Cas 188 (188) (Lah).
5. ('88) AIR 1988 Cal 192 (192).
6. ('88) AIR 1988 Cal 577 (578). (But High Court has power to interfere in revision — Simply because another remedy is open, application for revision cannot be said to be mala fide.)
7. ('86) AIR 1986 Mad 940 (940).

[But see ('84) 6 All 172 (173).]

2. ('07) 9 Bom L R 986 (940, 941).
3. ('24) AIR 1924 Pat 506 (507).
4. ('23) AIR 1923 Bom 214 (215).
5. ('80) AIR 1930 Bom 975 (978) : 54 Bom 479.
6. ('87) AIR 1987 Pat 186 (187).
7. ('31) AIR 1931 Cal 385 (386) : 58 Cal 55.
8. ('81) AIR 1981 Mad 534 (538). (Asking decree-holder to begin his case is a serious irregularity.)
9. ('10) 8 Ind Cas 618 (614) (Low Bur). (Since the Court went into the question of title in an investigation under this rule revision lay.)
10. ('87) AIR 1987 Rang 449 (449). (Where once possession has been delivered Court cannot again order delivery of possession simply because there has again been an obstruction — If the Court does so, it acts without jurisdiction and its order is revisable.)
11. [See also ('85) AIR 1985 Mad 309 (310).]

**O. 21 R. 102**  
**Notes 1-2**

*Synopsis*

**1. Scope of the Rule. | 2. Transferee pendente lite.**

**1. Scope of the Rule.** — This rule enacts that a transferee *pendente lite* cannot get the benefit of the procedure under Rules 99 and 101.<sup>1</sup> But such a person can raise all the objections that the judgment-debtor could have raised in execution.<sup>2</sup> A transferee *pendente lite* who pays off a prior *usufructuary mortgagee* and enters into possession of the property must, however, be considered as standing in the shoes of the usufructuary mortgagee himself and not as being a transferee *pendente lite* under this rule.<sup>3</sup>

It has been held by the Calcutta High Court that this rule applies also to *involuntary* sales of the judgment-debtor's property.<sup>4</sup> But the contrary view has been held by the Patna High Court.<sup>5</sup>

**2. Transferee pendente lite.** — This rule specifically deals with cases of a "decree for possession of immovable property." It does not deal with decrees for money in which property has been attached in execution and the judgment-debtor has, during such attachment, transferred his properties. It has been held in the cases cited below<sup>1</sup> that the principle of this rule will apply to such cases also.

See also Note 21 to Section 47 and Note 3 to Rule 98.

**O. 21 R. 103**

**R. 103.** [Ss. 332, 335.] Any party not being a judgment-

Orders conclusive sub-  
ject to regular suit.

debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

*Synopsis*

**1. Scope of the Rule.**

**1a. Applicability of Section 42 of the Specific Relief Act to suit under this Rule.**

**2. Suit by decree-holder or auction-purchaser under a different right.**

**3. "Any party against whom an order is made."**

**4. Order dismissing application under Rule 95.**

**4a. Parties to suit.**

**5. Limitation.**

**6. Court-fee.**

**1. Scope of the Rule.** — This rule declares that any party against whom an order is made under Rules 98, 99 or 101, may institute a suit to establish his right to the *present possession* of the property.<sup>1</sup> The word "party" refers to a party to the *petition*, and not to the decree under execution.<sup>2</sup>

**Order 21 Rule 102 — Note 1**

1. ('18) AIR 1918 Mad 673 (674). ('84) AIR 1984 Lah 457 (458).
- ('10) 8 Ind Cas 805 (805) (Mad).
- [See ('11) 11 Ind Cas 939 (939) : 39 Cal 920.]
2. ('26) AIR 1926 Mad 968 (969).
3. ('26) AIR 1926 Oudh 610 (611) : 2 Luck 269.
4. ('39) AIR 1939 Cal 709 (710) : 1 LR (1939) 2 Cal 63 : 48 Cal WN 692 (694).
5. ('35) AIR 1935 Pat 230 (230).

**Note 2**

1. ('10) 7 Ind Cas 418 (419) : 34 Mad 450.

[See also ('06) 28 Mad 119 (122).]

See also Note 21 to Section 47.

**Order 21 Rule 103 — Note 1**

1. ('23) AIR 1923 Lah 145 (146). (Order not passed under Rr. 98, 99 or 101—R. 103 does not apply.)
  - ('36) AIR 1936 Mad 940 (940). (The normal remedy is this and not an application for revision.)
  2. ('20) AIR 1920 Mad 126 (127) : 48 Mad 698.
- [See also ('21) AIR 1921 Bom 122 (124); 45 Bam 573.]

The right of suit under this rule is a statutory one, and the mere fact that a party has failed to prefer a claim under Rule 58 *ante*, will not debar him from maintaining a suit under this rule.<sup>3</sup> On the other hand, the failure to file a suit under this rule by a party against whom an order is made under the previous rules will render the order under those rules conclusive against him and his representatives.<sup>4</sup> However, where subsequent to the adverse order against a person his right to the possession of the property is established in another suit between the parties, it is not necessary to sue again under this rule to establish the right.<sup>5</sup> It will be useful here to compare Rule 63, *ante*, with this rule. A suit under the former is instituted for the purpose of establishing the right which the plaintiff claims to the *property* in dispute, while a suit under this rule is for the purpose of establishing the right which he claims to the *present possession* of the property.<sup>6</sup> Such right to possession may be based on title even without showing that the plaintiff was in actual possession at the date of the order against him.<sup>7</sup> Another point of distinction between Rule 63 and this rule is that while under the former even an order *without investigation* will be conclusive, such an order will not be conclusive under this rule.<sup>8</sup> The reason is that under Rule 63 the party against whom *any* order is made should institute a suit under that rule, whereas under this rule only a party against whom an order is made *under Rules 98, 99 or 101* need institute a suit under this rule, and an order under Rules 98, 99 or 101 can only be made "*where the Court is satisfied*," etc., which can only be on an *investigation* of the question.<sup>9</sup>

The scope of a suit filed under this rule is not the mere determination of the question of *possession* of the parties concerned, but the establishment of the right or title by which the plaintiff claims the present possession of the property.<sup>10</sup> It has been held that a suit under this rule is by way of *defence* of one's rights, and pleas available only by way of defence can be urged by the plaintiff in such suit. Thus, the plaintiff can rely on Section 53A of the Transfer of Property Act (doctrine of part

(84) 8 Mad 82 (88). (It is unnecessary to sue to have the order cancelled.)

(22) AIR 1922 Mad 63 (63). (Decree-holder's own property sold by mistake—Obstruction by him for delivery to auction-purchaser—Application by latter allowed for delivery—Decree-holder must sue under this rule.)]

3. ('31) AIR 1931 Lah 598 (598).

4. ('24) AIR 1924 Sind 97 (99): 17 Sind L R 63.

(92) AIR 1932 All 703 (704).

(17) AIR 1917 Cal 5 (5, 6).

(20) AIR 1920 Lah 517 (520): 1 Lah 57.

(87) 10 Mad 357 (361).

(15) AIR 1915 Mad 586 (587). (Claim for sole possession—Joint possession ordered—Suit must be filed by claimant.)

(24) AIR 1924 Mad 602 (602). (The pendency of another suit will not prevent the order from becoming conclusive.)

(88) 12 Bom 626 (633).

5. ('87) AIR 1937 Mad 582 (583, 584). (What makes order conclusive is not failure to institute suit but failure to have the right established.)

6. ('29) AIR 1929 Bom 379 (380): 53 Bom 668.

(20) AIR 1920 Lah 517 (520): 1 Lah 57. (It is not sufficient to show that the summary order is erroneous.)

7. ('21) AIR 1921 Mad 317 (318): 44 Mad 227.

(29) AIR 1929 Bom 379 (380): 53 Bom 668.

[See ('86) AIR 1936 Lah 530 (532).]

[See also ('82) AIR 1932 All 703 (704). (Suit contemplated by Rule 103 is not one under the Specific Relief Act, 1877, Section 9.)]

[See however ('39) AIR 1939 Bom 508 (510). (There are observations in this judgment to the effect that a person against whom an order for removal of obstruction has been passed and who sues under this rule must prove that he was in possession when he obstructed the delivery of possession.)]

8. ('22) AIR 1922 Cal 229 (232, 233).

(26) AIR 1926 Nag 423 (425): 22 Nag L R 94.

See also Note 3, *infra*.

9. ('26) AIR 1926 Nag 423 (424, 425): 22 Nag L R 94.

(22) AIR 1922 Cal 229 (233).

See also Note 3, *infra*.

10. ('35) AIR 1935 Bom 144 (148).

(39) AIR 1939 Bom 508 (510).

(37) AIR 1937 Pat 615 (616).

(88) AIR 1938 Pat 438 (434).

[See also ('87) AIR 1937 Mad 582 (583). (Policy underlying this rule is to have a speedy settlement of the questions of title raised in execution sales.)]



**O. 21 R. 103**  
**Note 1**

performance) in such suit although that Section is available only by way of defence.<sup>11</sup> A suit under this rule is not one under Section 9 of the Specific Relief Act, inasmuch as the dispossession on which it is based is not one "otherwise than in due course of law."<sup>12</sup> It is not open to a defendant in a suit by the decree-holder under this rule to question the validity of the decree.<sup>13</sup>

Where an order becomes conclusive under this rule, it will bar a suit as well as a defence by the party against whom the order is passed or his representative.<sup>14</sup> Where, however, the order also falls under Section 47 of the Code, this rule does not, according to the High Court of Allahabad, operate as a bar to an appeal under that Section.<sup>15</sup>

The provisions of Rules 97 to 103 are of a restrictive nature and strict compliance with them is necessary. If, in a particular case, it is shown that the provisions of any of these rules have not been strictly complied with, the penal consequence of barring the right of suit cannot legally flow therefrom.<sup>16</sup>

A suit instituted under this rule is not a continuation of the summary application, but an independent proceeding governed by the relevant provisions of the Code; it would lie in the Court within the local limits of whose jurisdiction the property in dispute is situate.<sup>17</sup> The onus of proving subsisting title is *prima facie* on the party who was out of possession,<sup>18</sup> and it has been held that the mere fact that the other party has been driven to institute a suit under this rule cannot shift that burden on to that party.<sup>19</sup>

Where the plaintiff in a suit under this rule succeeds, the order complained of must be set aside and the parties must be restored to the *status quo ante* and where the plaintiff has been removed from possession of the property, he must be put back in possession.<sup>20</sup>

Where an auction-purchaser of an undivided share of a co-owner gets delivery of possession in execution but, on objection by a *party* to the suit, re-delivery is ordered in his favour, and the auction-purchaser thereupon sues for partition of the share

11. ('40) AIR 1940 Oudh 1 (7) : 184 Ind Cas 401 (408).

12. ('32) AIR 1932 All 703 (704).

13. ('37) AIR 1937 Cal 88 (91). (Contention that decree was passed without jurisdiction not allowed.)

14. ('24) AIR 1924 Sind 97 (99) : 17 Sind L R 63. ('86) 10 Mad 357 (361).

15. ('17) AIR 1917 Cal 5 (5).

16. AIR 1918 Mad 165 (165). (But if order is left unenforced and person resisting remains in possession plea in defence not barred.)

17. ('37) AIR 1937 Mad 366 (366, 367). (But the order is not conclusive as to questions which could not have been raised in the prior proceeding.)

[See also ('37) AIR 1937 Oudh 401 (402) : 18 Luck 389. (Order dismissing manager's application is conclusive regarding rights of joint family under O. 21 R. 103 — Individual member's right to possession of his share in such property is equally barred.)]

[See however ('33) AIR 1933 Cal 246 (250) : 60 Cal 8. (Application not falling under Rule 97 — Dismissal — Suit for possession thereafter is not one under Rule 103.)]

('84) AIR 1984 Lah 457 (458). (Objections not falling under Rule 100 — Dismissal — Suit under

Rule 103 not maintainable.)]

15. ('83) AIR 1983 All 57 (59) : 54 All 1031.

16. ('28) AIR 1928 Lah 672 (674).

17. ('04) 6 Bom L R 301 (302).

18. ('84) 10 Cal 50 (55).

('98) 22 Bom 967 (968).

19. ('25) AIR 1925 Sind 201 (202).

[See however ('89) AIR 1989 Bom 508 (518). (In this case, plaintiff obstructed delivery of possession to the auction-purchaser — An order was passed removing obstruction and then plaintiff sued under this rule — The title under which plaintiff claimed was found to be void — It was held that he could not succeed in the suit notwithstanding that the auction-purchaser of the defendant was invalid.)]

20. ('89) AIR 1989 Bom 508 (510).

[See also ('40) AIR 1940 Oudh 1 (7) : 184 Ind Cas 401 (408). (Third person in possession — Objection by him to proceedings for delivery of possession dismissed but he continuing in possession — Suit by him under Rule 103 — During pendency of suit, he was dispossessed — He is entitled to be restored to possession on his ultimate success in the suit — Rule 101 may be applied in such cases.)]



purchased by him, such a suit is not governed by either this rule or by Article 11A of the Limitation Act, inasmuch as the re-delivery proceedings fall within Section 47.<sup>21</sup>

**O. 21 R. 103**  
**Notes 1-3**

**1a. Applicability of Section 42 of the Specific Relief Act to suit under this Rule.** — In a suit under this rule to establish the plaintiff's right to the present possession of the property, it is not necessary to ask for the further relief of possession : the proviso to Section 42 of the Specific Relief Act, 1877, does not take away the special right conferred by this rule of merely asking for a declaration of the plaintiff's right.<sup>1</sup> But the plaintiff is not precluded from claiming consequential relief in such a suit.<sup>2</sup>

**2. Suit by decree-holder or auction-purchaser under a different right.** — The cause of action for a suit under this rule is the *adverse order passed under Rules 98, 99 or 101, ante*. This rule does not therefore apply where the auction-purchaser or the claimant institutes a suit relating to the property in *any other capacity* or based on a cause of action *different* from the adverse order under Rules 98, 99 or 101, *ante*.<sup>1</sup>

#### Illustrations

1. A purchased certain property in execution of a decree and took delivery of possession of the property through Court. B filed an application under Rule 100, but the Court dismissed it on the ground that B was not dispossessed and had, therefore, no cause of action under Rule 100. B was *subsequently* dispossessed, and he brought a suit for possession, alleging as the cause of action the *subsequent dispossession*, more than one year after the date of the order under Rule 100. It was held that the suit was not barred.<sup>2</sup>

2. In execution of a decree for possession A was obstructed by B, and an order under Rule 98 was passed against B. B filed a suit to set aside *the decree* on the ground of *fraud* and for delivery of possession as a consequential relief. It was held that since the basis of the claim was distinct and different, and the possession claimed was not present possession but only by way of consequential relief, the suit was not barred.<sup>3</sup>

3. A dispossessed B in execution of a decree. B filed an application under Rule 100 and the same was granted. Subsequently A became aware of the fact that the judgment-debtor, a tenant, of a non-transferable holding had transferred the holding to the defendants. He thereupon filed a suit in ejectment against the defendant in the *capacity of a landlord*. It was held that the suit was not barred and that the cause of action was not the loss of possession but the fact that the tenant had unlawfully transferred a non-transferable holding to the defendants.<sup>4</sup>

Inasmuch as an order under Rules 98, 99 or 101 is conclusive under this rule only so far as the *present right to possession* is concerned, this rule will not operate so as to bar a party against whom an order has been passed under those rules, from maintaining a suit for *redemption* of property<sup>5</sup> or for enforcing a mortgage lien over the property.<sup>6</sup> See also the undermentioned case.<sup>7</sup>

**3. "Any party against whom an order is made."** — As has been observed in Note 1 *ante*, an order cannot be said to have been made against any party, within

21. ('27) AIR 1927 Mad 952 (953).

#### Note 1a

1. ('84) AIR 1984 Nag 169 (169).

('88) AIR 1938 Pat 558 (559).

2. ('85) AIR 1985 Sind 129 (180). (The suit is not for setting aside the adverse order but to establish the plaintiff's right.)

#### Note 2

1. ('26) AIR 1926 Mad 683 (684); 49 Mad 596. (Suit for partition by a purchaser from a Hindu coparcener is not barred by a prior decision against him in a suit by him for declaration of his right to possession under O. 21 R. 103.)

2. ('24) AIR 1924 Cal 97 (98).

3. ('27) AIR 1927 Bom 184 (187) : 51 Bom 158.

4. ('26) AIR 1926 Cal 377 (377).

5. ('21) AIR 1921 Nag 69 (70) : 17 Nag L R 33.

('28) AIR 1928 Nag 97 (98) : 28 Nag L R 164.

[But see ('89) AIR 1939 Pat 7 (13); 18 Pat 155.]

6. ('01) 29 Cal 25 (29).

7. ('88) AIR 1988 Cal 384 (384) : I J R (1988) 1 Cal 685. (Claim of applicant under O. 21 R. 97 for possession of whole of homestead — Opposite party claiming a share — Claim of applicant dismissed under O. 21 R. 99 — Suit by applicant for partition and possession of his share not barred.)

**O. 21 R. 103**  
**Notes 3-5**

the meaning of this rule, unless it was made after *investigation* into the matter.<sup>1</sup> It is also necessary that the Court should have come to a *definite conclusion* on the matter under enquiry; if it declines to give any decision at all on the matter, it will not be conclusive so as to bar a suit instituted more than one year from the date of the order.<sup>2</sup> The mere fact, however, that the investigation is not a *complete* one will not detract from the conclusiveness of the order.<sup>3</sup> Nor, where an application has been rejected *after investigation*, will the mere fact that the Court refers the parties to a regular suit, detract from the conclusive character of the order.<sup>4</sup> It has been held in the following cases that there is no order *against a party* within the meaning of this rule —

(1) Where the applicant *withdraws* his application and the Court makes an endorsement on the application that no investigation was made by reason of the withdrawal.<sup>5</sup>

(2) Where the application is dismissed for default of appearance<sup>6</sup> or for non-prosecution<sup>7</sup> without inquiry. But where the Court fixes a day for the enquiry and, on the plaintiff's failure to *produce evidence* in support of the case, dismisses the application in the presence of the parties, it cannot be said to be a dismissal for default without inquiry.<sup>8</sup>

(3) Where the application of the claimant is allowed for default of appearance of the decree-holder.<sup>9</sup>

(4) Where the application is simply dismissed without investigation.<sup>10</sup>

(5) Where the application is rejected on the ground that it has been filed beyond time.<sup>11</sup>

(6) Where the party was a minor and was not properly represented in the proceedings.<sup>12</sup>

Where A files an application and the same is decided against him, he cannot be said not to be a party "against whom an order has been passed" merely because he is a *benamidar* for another person.<sup>13</sup>

Although Rule 101 speaks of an order *directing* the applicant to be put in possession of property, it has been held that an order dismissing an application under Rule 100 to be put in possession is nevertheless an order against the applicant *under* Rule 101 for the purposes of this rule, and that the applicant would be bound to file a suit under this rule within one year from the date of the order.<sup>14</sup>

**4. Order dismissing application under Rule 95.** — An order on an application under Order 21 Rule 95 dismissing it on the ground that the person in possession was so on his own account and not on account of the judgment-debtor, is not an order under Rule 99 dismissing an application complaining of *resistance or dispossession*, and

**Notes 3**

1. ('10) 14 Cal W N 846 (851).

[See also ('18) AIR 1918 Mad 165 (165).

('19) AIR 1919 Lah 180 (181) : 1919 Pun Re No. 1. (The Court has no jurisdiction to direct the person in whose favour the order is made to bring a suit to establish his rights.)]

2. ('99) 9 Mad L Jour 175 (176, 177).

('08) 27 Mad 25 (26).

[See ('28) AIR 1928 Lah 672 (673, 674). (Consigning obstructor's application to record-room and directing decree-holder to file suit if necessary.)]

[See also ('14) AIR 1914 Mad 121 (125).]

3. ('99) 9 Mad L Jour 175 (176).

4. ('97) 7 Mad L Jour 810 (811).

5. ('81) 5 Bom 440 (441).

6. ('17) AIR 1917 Nag 53 (54, 55) : 14 Nag L R 66.

7. ('07) 84 Cal 491 (492, 493).

('17) AIR 1917 Nag 53 (54) : 14 Nag L R 66.

8. ('18) 20 Ind Cas 369 (369) (All).

('11) 8 All L Jour 626 (628, 629).

[See ('07) 6 Cal L Jour 362 (367).]

9. ('28) AIR 1928 Cal 179 (180).

10. ('18) AIR 1918 Mad 554 (554).

('16) AIR 1916 Cal 755 (756).

11. ('82) 4 All 181 (184).

12. ('08) 82 Bom 409 (409).

13. ('10) 8 Ind Cas 264 (266, 267) (Mad).

14. ('17) AIR 1917 Bom 188 (184) : 42 Bom 10.

this rule will not apply to such orders.<sup>1</sup> Nor will this rule apply where the decree-holder applying under Rule 95 gets possession without any resistance on the part of any one; and the party dispossessed is not bound to sue the auction-purchaser within one year under this rule.<sup>2</sup>

**O. 21 R. 103**  
**Notes 4-6**

**4a. Parties to suit.** — See the undermentioned cases.<sup>1</sup>

**5. Limitation.** — A suit under this rule is governed by Article 11A of the Limitation Act and should be brought within one year of the date of the order *against* the plaintiff.<sup>1</sup> It has been held in the undermentioned case<sup>2</sup> that where an order against a person in possession has remained unexecuted, he is, in a suit against him for possession, not estopped from pleading that plaintiff has no title to the properties. As has been seen in Note 3 above, where an order is passed without investigation, or where a suit is filed on a cause of action other than that of dispossession or of resistance or obstruction to delivery of possession, this rule does not apply and consequently Article 11A of the Limitation Act also does not apply.<sup>3</sup>

In computing the period of one year prescribed by Article 11A, the time taken in revision proceedings cannot be excluded under Section 14 of the Limitation Act.<sup>4</sup>

**6. Court-fee.** — A plaint in a suit under this rule is chargeable with a fixed fee under Article 17 of Schedule II of the Court-fees Act, 1870.<sup>1</sup>

### Local Amendments

#### ALLAHABAD

The following rules shall be *added* to Order XXI :

"104. When the certificate prescribed by Section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record-room.

**O. 21 R. 104**  
**(Allahabad)**

105. Every attachment of moveable property under Rule 43, of negotiable instruments under Rule 51, and of immovable property under Rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that

**O. 21 R. 105**  
**(Allahabad)**

#### Note 4

1. ('24) AIR 1924 All 495 (499, 500) : 46 All 693 (FB).

2. ('24) AIR 1924 Rang 261 (262).

#### Note 4a

1. ('38) AIR 1938 Nag 300 (302) : I L R (1939) Nag 422. (As it is essential for the plaintiffs in a suit under O. 21 R. 103, O. P. C., to establish their right not only against the decree-holder, but also against the judgment-debtor, in such cases the judgment-debtor would be a proper if not a necessary party.)

('85) AIR 1935 Sind 129 (131). (Suit against obstructor — Judgment-debtor is not necessary party.)

#### Note 5

1. ('22) AIR 1922 All 403 (404) : 44 All 607.

('17) AIR 1917 All 426 (427).

('86) 10 Bom 604 (609, 610).

('02) 26 Bom 146 (149).

('03) 26 Bom 780 (784).

('35) 90 Ind Cas 827 (828) (Cal).

('20) AIR 1920 Lah 517 (520) : 1 Lah 57.

('99) 9 Mad L Jour 131 (133).

('16) AIR 1916 Lah 298 (299).

('38) AIR 1938 Cal 577 (577, 578). (Revision against order dismissed — Time runs from lower Court's order and not from order in revision.)

[See also ('10) 6 Ind Cas 680 (680) (Mad).

('74) 11 Bom H C R 174 (181).]

[But see ('12) 16 Cal W N 971 (972). (Decided under old Limitation Act, 1877, Article 11, in which orders under S. 392 were not mentioned.)]

2. ('18) AIR 1918 Mad 165 (166).

3. ('83) 12 Cal L Rep 550 (554).

See Notes 2 and 3, *ante*.

[See also ('27) AIR 1927 Mad 898 (900). (Suit for mesne profits not barred.)]

4. ('30) AIR 1930 Bom 505 (506).

#### Note 6

1. (1900) 22 All 884 (886).

[See also ('85) 9 Bom 20 (22).

('88) AIR 1938 Nag 300 (302) : I L R (1939) Nag 422. (Suit under, is in substance suit for setting aside executing Court's order — Relief for possession is implicit and, if prayed for, does not necessitate levy of court-fee on *ad valorem* basis.)

('98) AIR 1938 Pat 321 (321). (No court-fee payable on prayer for possession.)]

**O. 21 R. 105 (Allahabad)** any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

*Note.* The provisions for recording reasons is only directory and not mandatory and an attachment made by a person (other than a Civil Court Amin or bailiff,) who has been appointed by the Court for the purpose but without recording reasons, is not illegal or without jurisdiction.<sup>1</sup>

**O. 21 R. 106 (Allahabad)**

106. When the property which it is sought to bring to sale is immovable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application for an order for sale a certificate from the Sub-Registrar within whose sub-district such property is situated, showing that the Sub-Registrar has searched his book Nos. I and II and their indices for the twelve years preceding the mortgage or attachment as the case may be and stating the encumbrances, if any, which he has found on the property.

*Note.* The omission to file a certificate as required by this rule will not entitle the decree-holder to have process issued, on his application,—but the application, if it satisfies the requirements of Rule 11, *ante*, will not on that account, cease to be one in accordance with law and cannot, therefore, be dismissed.<sup>1</sup>

**O. 21 R. 107 (Allahabad)**

107. Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887-I—238-10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary; and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

**O. 21 R. 108 (Allahabad)**

108. When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under Section 68, the Court, before ordering sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

**O. 21 R. 109 (Allahabad)**

109. The certificate of the Sub-Registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by the Collector.

**O. 21 R. 110 (Allahabad)**

110. The result of the enquiry under Rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purposes of the inquiry.

*Note.* It is necessary that the result of the enquiry under O. 21 R. 66, should be drawn up by the Judge in his own handwriting.<sup>1</sup>

**O. 21 R. 105 (Allahabad)**

1. ('85) AIR 1935 All 490 (491).

**O. 21 R. 106 (Allahabad)**

1. ('80) AIR 1980 All 188 (189).

**O. 21 R. 110 (Allahabad)**

1. ('32) AIR 1982 All 55 (56).

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

**O. 21 R. 111**  
(Allahabad)

112. The costs of the proceedings under Rules 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

**O. 21 R. 112**  
(Allahabad)

113. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

**O. 21 R. 113**  
(Allahabad)

114. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

**O. 21 R. 114**  
(Allahabad)

115. When an application is made for the attachment of live-stock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

**O. 21 R. 115**  
(Allahabad)

116. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

**O. 21 R. 116**  
(Allahabad)

117. If the custody of live-stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register

**O. 21 R. 117**  
(Allahabad)

- (a) the number and description of the animals;
- (b) the day and hour on and at which they were committed to his custody;
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

*Notes.* See the undermentioned case.<sup>1</sup>

118. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under Section 12 of Act No. I of 1871.

**O. 21 R. 118**  
(Allahabad)

And the sums so levied shall be sent to the Treasury for credit to the Municipal

**O. 21 R. 117 (Allahabad)**  
1. ('86) AIR 1986 All 555 (556). (Supurdar in good

faith handing over property to third person is liable to pay its price.)

**O. 21 R. 118 (Allahabad)** or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under Section 12 of the said Cattle Trespass Act.

**O. 21 R. 119 (Allahabad)** 119. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time prescribed under proper authority. Such rates shall, for animals specified in the Section mentioned in the last preceding rule, not exceed the rates for the time being fixed under Section 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

**O. 21 R. 120 (Allahabad)** 120. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

**O. 21 R. 121 (Allahabad)** 121. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in Rule 118.

**O. 21 R. 122 (Allahabad)** 122. For the safe custody of moveable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

*Notes.* See Note 2 to Section 122, *ante*.

The action of the attaching officer in handing over the property to a surety is within his lawful powers under Rule 122, and upon his action being approved either expressly or impliedly by the Court, the surety becomes the officer of the Court and therefore is liable as a surety for the purposes of Section 145, *ante*.<sup>1</sup> In the undermentioned case<sup>2</sup> it has been held that the sapurdar does not become a public officer within the meaning of O. 21 R. 52 of the Code, and therefore a fresh order of attachment need not be communicated to him instead of to the Amin. See also the undermentioned case.<sup>3</sup>

**O. 21 R. 123 (Allahabad)** 123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

**O. 21 R. 124 (Allahabad)** 124. The fee for the services of each such person shall be payable in the manner prescribed in Rule 116. It shall not be less than four annas and shall ordinarily not be more than six annas per diem. The Court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

*Note.* See the undermentioned case.<sup>1</sup>

**O. 21 R. 125 (Allahabad)** 125. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge:

Provided that where the amount does not exceed Rs. 5, it may be paid to the

**O. 21 R. 122 (Allahabad)**

1. ('81) AIR 1981 All 567 (571, 578): 54 All 268 (FB). (AIR 1926 All 406, Overruled.)

2. ('84) AIR 1984 All 867 (858).

3. ('85) AIR 1985 All 787 (788). (Commissioner appointed to attach moveables—He appointing sapurdar without permission of Court for con-

venience—Act approved by Court—Supurdar is liable.)

**O. 21 R. 124 (Allahabad)**

1. ('87) 169 Ind Cas 684 (685) (All). (It is the execution Court only which can settle the fee which is to be paid to the custodian under the rule; and it is only the decree-holder, as the

*sahna* by money order on requisition by the amin, and the presentation of the certificate may be dispensed with.

**O. 21 R. 125**  
(Allahabad)

*Note.* There is no provision in this rule or in any other part of Order 21 authorizing the executing Court to adjudicate on a dispute between the decree-holder and his *sahnas* (persons employed to watch crops and to see that they are not taken away).<sup>1</sup>

126. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

**O. 21 R. 126**  
(Allahabad)

127. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

**O. 21 R. 127**  
(Allahabad)

128. When any sum levied under Rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

**O. 21 R. 128**  
(Allahabad)

129. The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

**O. 21 R. 129**  
(Allahabad)

130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notices required by O. 21, Rr. 22, 66 and 107.

**O. 21 R. 130**  
(Allahabad)

#### GARNISHEE ORDERS

131. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

**O. 21 R. 131**  
(Allahabad)

*Notes.* — Where an objection is raised to a notice issued under this rule, and the objections are disallowed, the Court should pass an order under Order 21 Rule 133.<sup>1</sup>

Money left with the mortgagee for payment to the creditors is not a debt within the meaning of this rule and cannot be attached.<sup>2</sup>

132. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

**O. 21 R. 132**  
(Allahabad)

133. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be

**O. 21 R. 133**  
(Allahabad)

person who has got the property attached, that can be called upon to pay the fee.)

**O. 21 R. 131 (Allahabad)**

**O. 21 R. 125 (Allahabad)**  
1. ('85) AIR 1935 All 102 (102).

1. ('84) AIR 1934 All 770 (771).

('84) AIR 1934 All 1056 (1057).

2. ('84) AIR 1934 All 954 (956).



**O. 21 R. 133** tried as though it were an issue in a suit; and upon the determination of such issue  
(Allahabad) shall pass such order upon the notice as shall be just.

**O. 21 R. 134** 134. Whenever in any proceedings under these rules it is alleged, or appears to  
(Allahabad) the Court to be probable that the debt or property attached or sought to be attached belongs to some third person, or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

**O. 21 R. 135** 135. After hearing such third person, and any other person who may subse-  
(Allahabad) quently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

**O. 21 R. 136** 136. Payment or delivery made by the garnishee whether in execution of an  
(Allahabad) order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed.

**O. 21 R. 137** 137. Debts owing from a firm carrying on business within the jurisdiction of  
(Allahabad) the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction: Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

**O. 21 R. 138** 138. The costs of any application under these rules and of any proceedings  
(Allahabad) arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

**O. 21 R. 139** 139. (1) Where the liability of any garnishee has been tried and determined  
(Allahabad) under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution.

*Illustration.* — An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

*Note.* An order against the garnishee has the force of a decree which virtually becomes part and parcel of the original decree passed in the suit. It supplements the decree passed in the original suit.

**O. 21 R. 140** 140. All the rules in this Code relating to service upon either plaintiffs or  
(Allahabad) defendants at the address filed or subsequently altered under Order 7 or Order 8 shall apply to all proceedings taken under Order 21 or Section 47.

The following form shall be used under the provisions of Rule 131 of Order 21 :

Suit No.	of 19	<i>Plaintiff,</i>
<i>Versus</i>		<i>Defendant.</i>
To		
WHEREAS it is alleged that a debt of Rs.		is due from you to
the judgment-debtor :		

**O. 21 R. 139 (Allahabad)**

1. ('84) AIR 1984 All 1056 (1057).  
[See also ('88) AIR 1988 All 254 (255, 256).  
(Application for garnishee order allowed and

liability of garnishee held to exist — Order has force of decree — *Ad valorem* court-fee is payable on appeal from such order,)]



Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the schedule hereto attached;

Take notice that you are hereby required on or before the                      day of                      19                      to pay into this Court the said sum of Rs.                      or                      to deliver, or account to the Amin of this Court for the moveable property detailed in the attached schedule or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this                      day of                      19                      ."

Munsif Sub-Judge,  
at                      ,

## CALCUTTA

*Insert the following as Order XXIA :*

### ORDER XXIA.

1. Every person applying to a Civil Court to attach moveable property shall, in addition to the process-fee, deposit such reasonable sum as the Court may direct, if it think necessary for the cost of its removal to the court-house, for its custody, and if such property is live-stock, for its maintenance according to the rates prescribed in Rule 2 of this Order. If the deposit, when ordered be not made, the attachment shall not issue. The Court may, from time to time, order the deposit of such further fees as may be necessary. In default of due payment the property shall be released from attachment.

2. The following daily rates shall be chargeable for the custody and maintenance of live-stock under attachment :

Goat and pig	...	Annas 2 to annas 4.
Sheep	...	Annas 2 to annas 3.
Cow and bullock	...	Annas 6 to annas 10.
Calf	...	Annas 3 to annas 6.
Buffalo	...	Annas 8 to annas 12.
Horse	...	Annas 8 to annas 12.
Ass	...	Annas 8 to annas 5.
Poultry	...	Annas 2 to annas 3 pies 6.

*Explanation.* — Although the rates indicated above are regarded as reasonable, the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima. If any specimen of special value in any of the above classes is seized a special rate may be fixed by the Court. If any animal not specified is attached, the Court may fix the cost as a special case.

3. Where the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to Rule 43 Order 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached —

(a) in the charge of the judgment-debtor or decree-holder or of some other person, provided that the judgment-debtor, decree-holder, or other person enters into a bond in Form No. 15-A of Appendix E to this Schedule with one or more sureties for the production of the property when called for, or,

(b) in the charge of an officer of the Court if a suitable place for its safe custody be provided and the remuneration of the officer for a period of fifteen days paid in advance.

4. If attached property (other than live-stock) is not sold under the proviso to Rule 43 Order 21, or retained in the village or place where it is attached, it shall be brought to the court-house at the decree-holder's expense and delivered to the proper officer of the Court. In the event of the decree-holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then unless such payment has previously been

**O. 21 R. 140.**  
(Allahabad)

**O. 21A R. 1**  
(Calcutta)

**O. 21A R. 2**  
(Calcutta)

**O. 21A R. 3**  
(Calcutta)

**O. 21A R. 4**  
(Calcutta)

**O. 21A R. 4  
(Calcutta)**

made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment.

**O. 21A R. 5  
(Calcutta)**

5. When live-stock is attached it shall not, without the special order of the Court, be brought to the Court or its compound or vicinity, but shall be left at the village or place where it was attached in the manner and on the conditions set forth in Rule 3 of this Order :

Provided that live-stock shall not be left in the charge of any person under clause (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under clause (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance.

**O. 21A R. 6  
(Calcutta)**

6. When for any reason, the attaching officer shall find it impossible to obtain compliance with the requirements of the preceding rule so as to entitle him to leave the attached live-stock in the village or place where it was attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected.

**O. 21A R. 7  
(Calcutta)**

7. Whenever it shall appear to the Court that live-stock under attachment are not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may, if necessary, direct the attachment to cease and the live-stock to be returned to the person in whose possession they were when attached. The Court may order the decree-holder to pay any expenses so incurred in providing for the care and maintenance of the live-stock and may direct that any sum so paid, shall be refunded to the decree-holder by any other party to the proceedings.

**O. 21A R. 8  
(Calcutta)**

8. If under a special order of the Court live-stock is to be conveyed to the Court, the decree-holder shall make his own arrangement for such removal and if he fails to do so, the attachment shall be withdrawn and the property made over to the person in whose possession it was before attachment.

**O. 21A R. 9  
(Calcutta)**

9. Nothing in these rules shall prevent the judgment-debtor or any person claiming to be interested in attached live-stock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe custody, or contrary to any order of the Court.

**O. 21A R. 10  
(Calcutta)**

10. The Court may direct that any sums which have been legitimately expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the sale proceeds of the attached property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

**O. 21A R. 11  
(Calcutta)**

11. In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose, or to restore it to its owner if so ordered or failing in the case of live-stock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings.

**O. 21A R. 12  
(Calcutta)**

12. When property other than live-stock is brought to the Court, it shall immediately be made over to the nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court. If the property cannot from its nature or bulk be conveniently stored, or kept on the court premises or in the personal custody of the nazir, he may, subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical. If any premises are to be hired and persons are to be engaged for watching the property the Court shall fix the charges for the premises

and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept. All such costs shall be paid into Court by the decree-holder in advance for such period as the Court may from time to time direct. **O. 21A R. 12 (Calcutta)**

13. When attached live-stock is brought to Court under special order as aforesaid it shall be immediately made over to the nazir, who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court. **O. 21A R. 13 (Calcutta)**

14. If there be a pound maintained by Government or local authority in or near the place where the Court is held, the nazir shall, subject to the approval of the Court, be at liberty to place in it such live-stock as can be properly kept there, in which case the pound keeper will be responsible for the property to the nazir and shall receive from the nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description. **O. 21A R. 14 (Calcutta)**

15. If there be no good pound available, or, if in the opinion of the Court, it be inconvenient to lodge the attached live-stock in the pound, the nazir may keep them in his own premises or he may entrust them to any person selected by himself and approved by the Court. **O. 21A R. 15 (Calcutta)**

16. All costs for the keeping and maintenance of the live-stock shall be paid into Court by the decree-holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct. In the event of failure to pay the costs within the time fixed by the Court, the attachment shall be withdrawn and the live-stock shall be at the disposal of the person in whose possession it was at the time of attachment. **O. 21A R. 16 (Calcutta)**

17. So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor. **O. 21A R. 17 (Calcutta)**

#### LAHORE

*Add the following rule :*

104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11, subject to the provisions of O. 7 R. 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order. **O. 21 R. 104 (Lahore)**

#### OU DH

*Add the following rules :*

104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution. **O. 21 R. 104 (Oudh)**

*Note.* See the undermentioned cases.<sup>1</sup>

105. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him. **O. 21 R. 105 (Oudh)**

#### O. 21 R. 104 (Oudh)

1. ('84) AIR 1984 Oudh 11 (19) : 9 Luck 278.  
(89) AIR 1989 Oudh 86 (87, 89, 90). (Rule 104 and following rules do not involve question of

attachment — Effect of notice under S. 104 —  
"Debt," meaning of—Ascertainment of accounts is not necessary.)

**O. 21 R. 106**  
(Oudh)

106. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

**O. 21 R. 107**  
(Oudh)

107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

*Note.* See the undermentioned case.<sup>1</sup>

**O. 21 R. 108**  
(Oudh)

108. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

**O. 21 R. 109**  
(Oudh)

109. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order or the judgment may be set aside or reversed.

**O. 21 R. 110**  
(Oudh)

110. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction :

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

**O. 21 R. 111**  
(Oudh)

111. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

**O. 21 R. 112**  
(Oudh)

112. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force, and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by sub-rule (1) shall be appealable as orders made in execution.

*Illustration.* — An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

**O. 21 R. 113**  
(Oudh)

113. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order 7 or Order 8 shall apply to all proceedings taken under Order 21 or Section 47.

**O. 21 R. 114**  
(Oudh)

114. The following form shall be used under the provisions of Rule 104 of Order 21 :

EXECUTION CASE No.

OF 19

Decree-holder,

*Versus*

Judgment-debtor.

To

WHEREAS it is alleged that a debt of Rs. is due from you to the judgment-debtor :  
Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the

**O. 21 R. 107 (Oudh)**

1. ('86) AIR 1986 Oudh 167 (168). (No second appeal lies from an order of a Civil Court under

O. 21 R. 107, holding that a sum of money sought to be attached by the decree-holder is subject to a charge in favour of another person.)

schedule hereto attached; take notice that you are hereby required on or before the       day of 19       , to pay into this Court the said sum of Rs.       to deliver, or account to the nazir of this Court for the moveable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this       day of       19       .

Munsif.  
Subordinate Judge.  
At

#### PATNA

*Add the following rule:*

"104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11, subject to the provisions of O. 7 R. 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order."

**O. 21 R. 114**  
(Oudh)

#### SIND

*Add the following as Rule 104:*

Address for service filed to hold good during execution proceedings. (4), the address for service filed under Rule 19 of Order VII or Rule 11 of Order VIII, or, if the address has been subsequently altered under Rule 24 of Order VII or under Rule 12 of Order VIII, the amended address shall hold good during all execution proceedings.

**O. 21 R. 104**  
(Patna)

**O. 21 R. 104**  
(Sind)

(2). Every application for execution shall state the address for service given by the opposite party in the Court which passed the decree or the Court to which the decree was last transferred for execution and notices and processes shall issue to such address.

(3) Rules 22, 23, 24 and 25 of Order VII shall apply, so far as may be, to execution proceedings.

(4) If an appeal or an application for review or revision against the decree or order sought to be executed is pending at the time when the application for execution is filed, the provisions of Rule 38 of Order XXI shall, so far as may be, apply to such execution proceedings.

(5) Nothing in sub-rules (1) to (3) shall apply to the notice prescribed by Rule 22 of Order XXI."

## ORDER XXII.

### DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

#### *General. — Synopsis*

1. Survey of the Order.
2. Scope and applicability of the Order.

**1. Survey of the Order.** — This Order deals with the creation, assignment or devolution of interest during the pendency of suits. Such creation, assignment or devolution may be brought about by:

- (i) the death of a party (Rules 1 to 6);
- (ii) his marriage (Rule 7);
- (iii) his insolvency (Rule 8); or
- (iv) other circumstances, such as transfer *inter vivos*, etc. (Rule 10).

**Order 22**  
**General**

**Order 22**  
**General**  
**Notes 1-2**

*Death of a party.* — If the suit is one in which the "right to sue" does *not* survive, the death puts an end to the suit. If, on the other hand, it is a suit in which the '*right to sue*' survives, the death will *not* put an end to the suit (Rule 1). In the latter class of suits, that is, suits which are not put an end to on the death of a party, the following questions arise for consideration, *viz.*: What is the *procedure* to be followed in such suits? And what are the *consequences* of not following that procedure? The answer to the questions will depend upon (i) who is the party that died; and (ii) to whom or against whom does the right survive? From these standpoints the following six alternative cases are possible:

- (1) One of two or more plaintiffs may die and the right to sue may survive to the *surviving plaintiff or plaintiffs alone*.
- (2) One of two or more defendants may die and the right to sue may survive against the *surviving defendant or defendants alone*.
- (3) One of two or more plaintiffs may die and the right to sue may survive *either* to the surviving plaintiff or plaintiffs *along with third persons* or exclusively to third persons.
- (4) A sole plaintiff or sole surviving plaintiff may die in which case the right to sue must, if at all, survive to *persons who are not plaintiffs*.
- (5) One of two or more defendants may die and the right to sue may survive *either* against the surviving defendant or defendants *along with third persons* or exclusively against third persons.
- (6) A sole defendant or sole surviving defendant may die in which case the right to sue must, if at all, survive against *persons who are not defendants*.

Rule 2 provides for the *first two* of the above alternatives. Rule 3 applies to the *third and fourth*; and Rule 4 to the *fifth and sixth* alternatives. Rule 5 provides for determining the question as to who is the person to whom or against whom the right to sue survives, in case there should be a dispute about it. The provisions of Rules 3 and 4 do not apply when the death occurs between the conclusion of the *hearing* of the suit and pronouncement of judgment in it (Rule 6).

*Marriage.* — See Rule 7.

*Insolvency.* — Rule 8 deals with the insolvency of a *plaintiff*. The insolvency of a defendant does not fall within Rule 8, but comes under Rule 10.

The effect of an abatement under the provisions of any of the previous rules is dealt with by Rule 9; and sub-rule (2) thereof provides the remedy by the person aggrieved by the abatement. *Other* cases of creation, assignment and devolution are dealt with by Rule 10. It will be noted that under this rule *there is no abatement* and even a substitution is within the discretion of the Court.

**2. Scope and applicability of the Order.** — The provisions of this Order apply only to cases of creation, transfer or devolution of interest *during the pendency of suit*. Thus, there can be no substitution of legal representatives under this Order if the party is dead before the *institution* of the suit.<sup>1</sup> Nor can the provisions of the Order apply if the death occurs *after the suit has been disposed of*.<sup>2</sup> Rule 6 itself is an illustration of this principle.

**Order 22 (General) — Note 2**

1. ('20) AIR 1920 Sind 82 (88).
- ('82) AIR 1982 Sind 220 (220): 26 Sind L R 862.
2. ('89) AIR 1989 Lah 84 (84). (If a plaintiff sues

and dies after his suit has been dismissed, his legal representatives may appeal from the decree without making any application to be brought on the record in his place.)

*Applicability to appeals.* — By virtue of Rule 11 the provisions of this Order apply to appeals. But in so applying them the following points should be noted :

- (i) Since an appeal is but a continuation of the suit, the provisions of the Order will apply even though the death may have occurred *between* the date of the lower Court's decree and that of the filing of the appeal (*vide* Notes under the several rules).
- (ii) Though a suit on a personal action will abate on the death of a party during its pendency, yet if the suit is decreed, and, pending an appeal from the decree the death occurs, the appeal will not abate.<sup>3</sup> The reasons for this distinction have been discussed under Rr. 1, 3, 4 and 11.

The word "appeal" in Rule 11 does not include appeals before the Privy Council; and the provisions of this Order do *not* apply to such appeals. The reason is that judgments and orders of the Privy Council are, in effect, orders of the Sovereign and are of full force and effect despite the death of parties<sup>4</sup> and Courts in India have no power to treat an order of the Sovereign as a nullity.<sup>5</sup> However, if a party dies after the grant of leave to appeal to the Privy Council and before the transmission of papers to England, the High Court can order substitution of legal representatives to avoid technical objections. But this power exists *not* by virtue of this Order and there is no limitation of time for such substitution.<sup>6</sup>

*Applicability to execution proceedings.* — By virtue of Rule 12, the provisions in Rules 3, 4 and 8 of this Order do not apply to execution proceedings.<sup>7</sup> As to whether an *appeal* against an order made in execution proceedings is itself a proceeding in execution of a decree or order within the meaning of Rule 12, see Note 1 to that rule.

*Applicability to miscellaneous proceedings.* — By virtue of Section 141 of the Code, the provisions of this Order may be made applicable, whenever possible, to proceedings other than a suit or an appeal. For proceedings arising out of a reference to arbitration, see Schedule II, Para. 1, Note 17, *infra*. A conciliation proceeding under the Dekkhan Agriculturists' Relief Act (XVII of 1879) pending before a Sub-Judge has been held to be a proceeding in a Civil Court to which the provisions of this Order are applicable.<sup>8</sup> But they have been held to be inapplicable to proceedings in a Mamlatdar's Court under the Mamlatdars Act (Bombay Act III of 1876) on the ground that the said Act provides for a summary procedure in certain matters and that by implication the elaborate procedure contained in the Code was not intended to be applied to such proceedings.<sup>9</sup> The provisions of the Order apply to proceedings under the U. P. Encumbered Estates Act (25 of 1934).<sup>10</sup> This Order is also applicable to proceedings under the Chota Nagpur Tenancy Act, VI of 1908 : see Section 265 (3) of that Act.

*Applicability to revision proceedings.* — There is a conflict of decisions as to the applicability of this Order to applications for revision. It has been held by the High Courts of Madras and Calcutta that this Order applies to such applications.<sup>11</sup> But

3. ('39) AIR 1939 Nag 256 (258). (26 Bom 597 and 26 Mad 499, Followed.)

4. ('24) AIR 1924 Mad 695 (696) : 47 Mad 618.

5. ('09) 4 Ind Cas 454 (456) (Cal).

6. ('20) AIR 1920 Pat 89(91, 92) : 5 Pat L Jour 814.

7. ('24) AIR 1924 Rang 217 (218) : 2 Rang 91.

8. ('09) 4 Ind Cas 454 (456) (Cal).

9. ('85) AIR 1985 All 27 (28).

10. ('96) 19 Bom 202 (204).

9. ('93) 17 Bom 645 (647, 648). (Act III of 1876 (Bombay) has been repealed by Act II of 1906 (Bombay).)

10. ('39) AIR 1939 All 717 (717). (In such proceedings the landlord is to be considered as the plaintiff and the creditor who puts in his claim as the defendant.)

11. ('88) AIR 193 Mad 115 (116, 117).

('18) 21 Ind Cas 407 (407) (Cal).

**Order 22  
General  
Note 2**

a contrary view has been held by the Sind Judicial Commissioner's Court and the Oudh Chief Court.<sup>13</sup>

*Applicability to applications for leave to appeal.* — This Order does not apply to applications for leave to appeal to the Privy Council.<sup>18</sup>

*Death of person against whom insolvency petition has been filed—Proceedings, if can be continued against the estate.* — It has been held in the undermentioned cases<sup>14</sup> that a person against whom a petition in insolvency has been presented can be declared insolvent in spite of the fact that he dies before the application is decided.

*Effect of abatement.* — Where an action fails under this Order, all reliefs or claims incidental to the action also fail. Thus, if an appeal abates as regards an injunction sought for, the appellant cannot press the appeal so far as the costs incurred by him in the lower Court are concerned.<sup>15</sup>

**O. 22 R. 1**

**R. 1. [S. 361.]** The death of a plaintiff or defendant shall not cause the suit to abate<sup>17</sup> if the right to death if right to sue survives. sue<sup>3</sup> survives.<sup>4</sup>

[1877, S. 361; 1859, S. 99. See S. 146.]

*Synopsis*

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|---|--|
| 1. Legislative changes.                             | 11. Claim to guardianship.   |
| 2. Scope of the Rule.                               | 12. Right to letters of administration.                            |
| 3. "Right to sue," meaning of.                      | 13. Right to sue in representative actions.                        |
| 4. When right to sue survives.                      | 14. Suit under Section 92 of the Code. See Section 92, Note 30.    |
| 5. Right to sue in personal actions.                | 15. Suit by or against limited owners or reversioners.             |
| 6. Suit to establish right to personal office.      | 16. Suit under Sections 14 and 18 of the Religious Endowments Act. |
| 7. Right to sue in respect of torts.                | 17. Partial abatement.   |
| 8. Right to sue on contracts.                       | 18. Death of either party pending appeal.                          |
| 9. Right to sue for pre-emption.                    | 19. Suit or appeal against a dead person.                          |
| 9a. Right to sue for partition.                     | 20. No abatement by reason of death after decree.                  |
| 10. Application for leave to sue in forma pauperis. | 21. Appeal and revision.   |

*Other Topics (miscellaneous)*

Death of defendant in account suit — Right to sue whether survives. See Note 4.  
Death of defendant in an injunction suit — Abatement. See Note 7.

Death of plaintiff — Suit when abates. See Notes 5, 6 and 7.  
Hindu widow or daughter, suit for possession, whether survives. See Note 4.

**1. Legislative changes.** — This rule corresponds to Section 361 of the old Code without any change except that the four illustrations which had been given under the old Section have been omitted as being unnecessary.<sup>1</sup>

**2. Scope of the Rule.** — Where, during the pendency of a suit, a party dies, the first question to be decided is whether the right to sue survives or not.<sup>1</sup> If it does

12. ('88) AIR 1933 Sind 200(202):28 Sind L R 167.  
( '89) AIR 1939 Oudh 277(278): 184 Ind Cas 81(82)  
(Hence no rule of limitation governs the application for substitution of parties in a revision application.)

[See also ('20) AIR 1920 Sind 120 (121).]

13. ('34) AIR 1934 Sind 36(37):28 Sind L R 150.

14. ('32) AIR 1932 Lah 264 (264).

('28) AIR 1928 Mad 480 (481, 483): 51 Mad 495.  
[See also ('89) AIR 1938 Mad 25 (26, 27).]

15. ('24) AIR 1924 Rang 217 (218): 2 Rang 91.  
[See also ('37) AIR 1937 Nag 216 (217): 1 L R (1938) Nag 280.]

**Order 22 Rule 1—Note 1**

1. See the Report of the Special Committee.

**Note 2**

1. ('12) 17 Ind Cas 101(105, 106): 8 Nag L R 118.



not, there is an end of the suit. If it does, the suit can be continued, though the *trial* of the suit cannot be proceeded with immediately and without anything more. The reason is, that on the death of a party, the suit is in a state of suspense<sup>2</sup> and its trial cannot be taken up without following the procedure laid down in Rules 2, 3 or 4, as the case may be.

**O. 22 R. 1**  
**Notes 2-4**

**3. "Right to sue," meaning of.** — The words "right to sue" must be interpreted to mean "right to *seek relief*."<sup>1</sup>

#### Illustrations

1. *A* files a suit against *B* for damages. *A* dies during the pendency of the suit. Here *A*'s right to sue, as to the survival of which a question might arise, is the *right to claim damages from B* which *A* had at the time of his death.

2. In the above suit, suppose *A* gets a decree for damages and *B* appeals against the decree and during the pendency of the appeal *B* dies. Here *B*'s "right to sue," about the survival of which a question might arise, is to have the decree of the lower Court set aside, which is a very different thing from *A*'s right to sue.<sup>3</sup>

3. Suppose in the above case *B*'s appeal is allowed and *A* prefers a second appeal and during the pendency thereof *A* dies. Here *A*'s "right to sue," about the survival of which a question might arise, is the right to have restored the benefit of the first Court's decree in his favour, and not his original right to claim damages against *B*.<sup>3</sup>

4. Suppose *A*'s suit in the first Court is dismissed and *A* appeals and during the pendency thereof he dies. The right to sue will remain the same as the one on which he instituted the suit.<sup>4</sup>

In each of the above cases a person claiming that the right to sue of the deceased plaintiff or appellant has survived to him must show that he asserts the right to the same relief which the deceased plaintiff or appellant asserted at the time of his death.<sup>5</sup>

**4. When right to sue survives.** — The general rule is that all rights of action and all demands whatsoever existing in favour of or against a person at the time of his death survive to and against his representatives. For illustrations, see the under-mentioned cases.<sup>1</sup> There are, however, exceptions to this general rule. Rights intimately

2. ('29) AIR 1929 Mad 802 (803) : 52 Mad 938.

#### Note 3

1. ('02) 26 Bom 597 (603).
- ('94) 22 Cal 92 (98).
- ('14) AIR 1914 Mad 708 (709) : 38 Mad 1064.
2. ('02) 26 Bom 597 (607).
3. ('17) AIR 1917 Upp Bur 14 (14) : 2 Upp Bur Rul 105.
4. ('02) 26 Bom 597 (601, 602).
5. ('09) 3 Ind Cas 995 (996) : 36 Cal 799.

#### Note 4

1. ('26) AIR 1926 Cal 490 (494) : 53 Cal 132. (Suit to enforce the right to a *pala* or worship.)
- ('34) AIR 1984 Mad 448 (451). (Cause of action for breach of trust survives against legal representative of a deceased trustee.)
- ('35) AIR 1985 Lah 478 (479) : 155 Ind Cas 610 (611). (Appeal on suit for specific performance.)
- ('99) 4 Cal W N 280 (282, 283). (Reference to arbitration about matters in respect of which the right to sue will survive.)
- ('04) 27 Mad 112 (116). (Reference to arbitration about matters in respect of which the right to sue will survive—Rights in property survive.)
- ('16) AIR 1916 Mad 611 (612, 613) : 89 Mad 882. (Suit by a daughter to recover possession as her

father's heir — Right to sue survives to her father's brother's heirs.)

('96) 23 Cal 636 (638, 639). (Suit by the reversionary heir of a Hindu to recover property from trespassers.)

('01) 1901 Pun Re No. 12, p. 44. (Suit to set aside a gift of land.)

('15) AIR 1915 Mad 655 (656). (Suit for possession of property.)

('08) 5 Bom L R 1041 (1044, 1046). (Suit by a minor who on attaining majority sued to have his rights declared respecting property which by a consent decree and conveyance to which he was no party, his grandmother, father and uncle conveyed to the defendants.)

('19) AIR 1919 All 189 (190) : 41 All 515. (Suit for specific performance of contract to sell immovable property.)

('68) 10 Suth W R 59 (59). (Suit for money received and for account against an agent — Cause of action survives on death of defendant.)

('72) 17 Suth W R 475 (476). (Suit by a Hindu widow to recover possession of her husband's estate.)

('16) AIR 1916 All 84 (85, 86) : 38 All 111. (Suit for possession.)

**O. 22 R. 1**  
**Notes 4-5**

connected with the *individuality* of the deceased will not survive.<sup>2</sup> One aspect of this exception is expressed by the maxim *actio personalis moritur cum persona* — a personal right of action dies with the person.

The general rule and the exception abovementioned have also been recognized by the Legislature in the following enactments dealing with particular classes of cases and they may be usefully referred to as illustrating the principles applicable to the generality of cases.

(1) Section 37 of the Contract Act lays down that "promises bind the legal representatives of the promisor in case of the death of such promisor before performance, *unless a contrary intention appears from the contract.*" Such a contrary intention will be presumed when the contract is of a nature involving *special skill* or *personal confidence*, etc.

(2) Section 306 of the Succession Act of 1925 provides that "all demands whatsoever, and all rights, to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other *personal* injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

It is the *original party's* rights and disabilities that have to be considered and the mere fact that the legal representative could not, in his individual capacity, have brought a suit for the relief claimed does not cause abatement of the pending suit.<sup>3</sup>

**5. Right to sue in personal actions.** — In cases of *personal* actions, that is, in actions where the relief sought is *personal* to the deceased, the "right to sue" will not survive to his representatives.<sup>1</sup> Thus, a suit for damages for breach of a contract of betrothal (except to the extent of the actual expenses incurred when the betrothal was in force)<sup>2</sup> and a suit for dissolution of marriage together with the claim for damages against the co-respondent<sup>3</sup> are suits involving claims of a personal nature which will not survive on the death of either party to his representative. A suit by a Hindu widow under the Dayabhaga Law for partition in lieu of her maintenance will not survive on her death,<sup>4</sup> but if, by an award or a compromise, a fixed sum has been awarded to her in lieu of her interest, a suit to recover the sum will be a suit to recover *property* and will survive to her legal representatives.<sup>5</sup> Similarly, if what was once a personal claim has matured into a *decree*, the benefit of the decree will survive to the legal representatives.<sup>6</sup>

(38) AIR 1938 Nag 298 (299) : I L R (1939) Nag 526. (Suit for accounts of dissolved partnership — Death of plaintiff — Right to sue survives.)

2. Holland's Jurisprudence, 3rd Edn., page 271. (89) AIR 1939 Lah 492 (494). (Right to get compensation for malicious prosecution.)

3. ('24) AIR 1924 Lah 45 (46) : 4 Lah 72.

**Note 5**

1. ('08) 80 All 49 (51).

(35) AIR 1935 All 106 (107). (Suit by members of a Municipal Board to restrain the defendant from recording his vote in arbitration — The claim is personal one.)

('01) 25 Bom 574 (579, 582).

('19) AIR 1919 Lah 18 (18) : 1919 Pun Re No. 87.

('28) AIR 1928 Lah 119 (119) : 9 Lah 306.

('18) AIR 1918 Mad 879 (880) : 41 Mad 442. (Suit for partition by minor — Claim by minor is personal to the minor.)

2. ('20) AIR 1920 Bom 225 (225) : 44 Bom 446.

3. ('09) 1906 Pun Re No. 60, page 221.

4. ('07) 5 Cal L Jour 310 (315).

[See also ('31) AIR 1931 Lah 675 (676). (Suit by a limited owner for partition of her estate from co-sharers.)]

5. ('01) 28 Cal 155 (162, 163).

6. ('27) AIR 1927 All 762 (768).

('10) 5 Ind Cas 758 (759, 768) : 38 Mad 162.

('21) AIR 1921 Lah 52 (58) : 2 Lah 189.

('87) 9 All 181 (184) (FB).

('95) 19 Mad 845 (846, 847, 848). (After decree

**6. Suit to establish right to personal office.** — A right to a *personal office* does not survive on the death of the claimant and a suit to establish such a right abates on the death of the plaintiff.<sup>1</sup> But if *emoluments* are attached to the office the right to sue will, on the principles mentioned in Note 4 above, survive and the suit will not abate.<sup>2</sup>

**O. 22 R. 1**  
**Notes 6-7**

**7. Right to sue in respect of torts.** — The maxim *actio personalis moritur cum persona* is, as a general rule, applicable to actions in respect of torts and therefore, on the death of either party to such action, the right to sue will be extinguished.<sup>1</sup> Thus, the maxim will apply to the following cases —

- (1) Suits for damages for injury to reputation such as defamation,<sup>2</sup> malicious prosecution,<sup>3</sup> malicious arrest<sup>4</sup> and malicious search.<sup>5</sup>
- (2) Suits for damages for obstruction to plaintiff's right of way over defendant's land.<sup>6</sup>
- (3) Suits for damages for illegal distraint for cess.<sup>7</sup>
- (4) Suits for damages for refusal to deliver the keys of a temple and to allow worship being performed.<sup>8</sup>
- (5) Suit by A for recovery of custody of his minor daughter left in the defendant's custody.<sup>9</sup>
- (6) Suit for an injunction restraining defendant from preventing the plaintiff's standing at a particular place in a temple.<sup>10</sup>

Where, however, the tort is one relating to or affecting the *estate* of the deceased, the maxim does not apply and the right to sue will survive to his representatives.<sup>11</sup> Thus, it will survive where the tort committed has injured the estate of the deceased<sup>12</sup> or benefited the estate of the wrongdoer.<sup>13</sup> But the injury or the benefit must be the *direct* result of the wrong<sup>14</sup> and the damage caused by the injury must be liquidated

for partition in minor's suit for partition, right survives.)

(199) AIR 1939 Lah 492 (494). (Person after obtaining decree for compensation for malicious prosecution dying during execution proceedings — Execution proceedings do not abate and can be continued by his heir.)

#### Note 6

1. ('95) 22 Cal 92 (99).
- (190) AIR 1930 Lah 703 (705) : 12 Lah 1.
2. ('26) AIR 1926 Cal 490 (494) : 53 Cal 182.

#### Note 7

1. (1909) 1909 App Cas 383, United Collieries Limited v. Simpson.
2. ('15) AIR 1915 Lah 878 (378) : 1915 Pun Re No. 62.
3. ('22) AIR 1922 Upp Bur 7 (7, 8) : 4 Upp Bur Rul 78.
- (1926) AIR 1926 All 610 (611, 618) : 48 All 630.
- (1928) 18 Bom 677 (679, 680).
- (1928) AIR 1928 Bom 408 (408, 409) : 47 Bom 716.
- (1928) 28 Mad 487 (488).
- (1916) AIR 1916 Mad 1068 (1069).
- (1921) AIR 1921 Mad 1 (8, 7, 8, 11) : 44 Mad 357.
- (1926) AIR 1926 Mad 248 (248, 244) : 49 Mad 208.
- (1920) AIR 1920 Pat 841 (843) : 4 Pat L Jour 676. [But see ('04) 81 Cal 998 (999, 1000). (This is not followed even in Calcutta. See AIR 1920 Pat 841 and AIR 1926 All 610.)]
4. ('89) 18 Bom 677 (679, 680).

5. ('18) AIR 1918 Mad 1100 (1101).

6. ('22) AIR 1922 Upp Bur 7 (7, 8) : 4 Upp Bur Rul 73.

7. ('11) 12 Ind Cas 716 (717) : 36 Bom 174.

(1912) 17 Ind Cas 226 (227) (Mad).

8. ('98) 8 Mad L Jour 180 (181, 182).

9. ('01) 25 Bom 574 (579, 582).

10. ('10) 5 Ind Cas 937 (939) : 34 Mad 76.

11. (1878) 4 C P D 40 (44, 45, 47), Twycross v. Grant.

(1921) AIR 1921 Mad 1 (9) : 44 Mad 357.

12. See case in Foot-Note (11) above.

13. ('82) AIR 1932 Oudh 165 (166, 167) : 8 Luck 35.

(1970) 2 N W P H C R 103 (104).

(1888) 24 Ch D 439 (476), Phillips v. Hamfrey.

(189) 18 Bom 677 (680).

(1878) L R 6 H L 377, Peak v. Gurney. (Referred to in 18 Bom 677; 9 Bom 373; 8 Cal 887 and 21 All 209.)

(1921) AIR 1921 Mad 1 (8) : 44 Mad 357.

(1912) 17 Ind Cas 226 (227) (Mad).

(1912) 14 Ind Cas 491 (492) (Mad).

(1864) 1864 Suth W R Misc 10 (10). (Claim for wasilat (mesne profits) can be enforced against the heirs of the original ejector.)

(1922) AIR 1922 Upp Bur 7 (7, 8) : 4 Upp Bur Rul 73.

14. (1888) 24 Ch D 439 (454), Phillips v. Hamfrey.

(1921) AIR 1921 Mad 1 (8) : 44 Mad 357.

**O. 22 R. 1**  
**Notes 7-9**

and certain.<sup>15</sup>

**8. Right to sue on contracts.**—A right to sue in respect of a contract will, on the general principles referred to in Note 4, survive to the representatives of the promisee. Thus, in a suit on a bond or to enforce specific performance of a contract to sell or recover property, if the plaintiff dies, the right to sue will survive to his legal representatives.<sup>1</sup> The right to sue will survive against the *promisor's representatives* unless a contrary intention appears from the contract such as the contract being incapable of being performed by persons other than the deceased. See Section 37 of the Contract Act and the illustrations thereto.

**9. Right to sue for pre-emption.**—Rights of pre-emption are of two different kinds, *viz.*—

- (1) those incidental to the *ownership of property*; and
- (2) those which are purely *personal*.

Rights of the former kind will survive while those of the latter kind will not. In deciding the question whether the right to sue in pre-emption suits survives or not, it is necessary to see whether the right claimed is one incidental to the *ownership of property* or only a *personal* right. The answer to the question will, in turn, depend upon the origin of the right. It may be founded on Mahomedan law or on custom or it may have been given by statute.

**Pre-emption under Mahomedan law.**—Under the law applicable to the *Sunni* Mahomedans, the right of pre-emption does not survive on the death of the pre-emptor before decree.<sup>1</sup> Under the law applicable to the *Shafis* the right would appear to survive to the heirs of the pre-emptor on his death before decree.<sup>2</sup> Under the law applicable to other sects of Mahomedans there is a conflict of authority between the Allahabad and Bombay High Courts. The Allahabad High Court<sup>3</sup> holds that the right in such cases is incidental to and arising out of ownership of land and that it therefore survives to the heirs of the pre-emptor though it cannot be transferred. The same view prevails in the Punjab.<sup>4</sup> But according to the Bombay High Court, the right is a *personal* one and does not survive to the heirs or other legal representatives of the pre-emptor<sup>5</sup> except in so far as it falls within the provisions of Section 306 of the Indian Succession Act.<sup>6</sup> In Madras where the principle of an absolute transfer of all rights under a sale prevails, a right of pre-emption is not recognized,<sup>7</sup> except as a matter of custom in some places such as Malabar.<sup>8</sup>

**Pre-emption under customary law.**—Where the right claimed is one based on a custom, the question of its survival will have to be decided on evidence as to the custom.<sup>9</sup> Generally speaking, a right of pre-emption based on *wasib-ul-ars* is an incident of proprietary possession and will survive unless such survival is expressly

15. (1888) 24 Ch D 489 (454), *Phillips v. Hamfrey*.  
(21) AIR 1921 Mad 1 (8) : 44 Mad 857.  
(1878) L R 6 H L 877 : *Peak v. Gurney*, (Referred to in 18 Bom 677; 9 Bom 878; 8 Cal 887 and 21 All 209.)

**Note 8**

1. ('16) AIR 1916 All 159 (159). (On bond.)  
(19) AIR 1919 All 189 (190) : 41 All 515. (Specific performance.)  
(26) AIR 1926 Bom 97 (100, 102) : 49 Bom 862 (Do.)

**Note 9**

1. [See ('97) 20 All 88 (89).]  
2. [See ('12) 12 Ind Cas 720 (720) : 36 Bom 144.

(Contended but not questioned or decided.)

3. ('98) 20 All 148 (150, 151).  
(06) 28 All 424 (426, 427). (In this case the party who was admittedly entitled to pre-empt was a Hindu.)  
4. ('98) 1898 Pun Re No. 98, page 847.  
(07) 1907 Pun Re No. 188, page 686 (FB).  
5. ('14) AIR 1914 Bom 120 (122) : 38 Bom 188.  
6. ('11) 12 Ind Cas 720 (720) : 36 Bom 144.  
7. ('70) 6 Mad H O R 28 (80, 81).  
8. ('97) 20 Mad 805 (806, 812). (Not disputed before High Court.)  
9. ('08) 85 Cal 575 (592, 593, 594).  
(97) 20 Mad 805 (806, 812).

excluded by local usage or other specific provisions.<sup>10</sup> In Bombay, however, even a customary right of pre-emption has been held to be a personal one.<sup>11</sup>

**O. 22 R. 1**  
**Notes 10-15**

**Pre-emption under statute.** — Where the right claimed is one conferred by statute, the question whether it survives or not will be governed by the provisions of the particular statute conferring the right. Thus, under the Oudh Laws Act (XVIII of 1876) the right of pre-emption survives to the pre-emptor's heirs.<sup>12</sup> It can also be devised though not alienated to a stranger.<sup>13</sup>

**9a. Right to sue for partition.** — In the case of a Hindu Mitakshara joint family, the filing of a suit for partition by one of the coparceners effects a severance of the joint status so far as he is concerned, and if he dies during the pendency of the suit his legal representatives can be brought on the record and can continue the suit.<sup>1</sup>

**10. Application for leave to sue in forma pauperis.** — The right to apply for leave to sue in *forma pauperis* is purely a personal one depending upon the pauperism of the petitioner. On his death, therefore, the right does not survive.<sup>1</sup> Further, the legal representative may or may not be a pauper.<sup>2</sup> If he is, he may file a fresh application in his own right.<sup>3</sup> If he is not, he has no right to sue in *forma pauperis*.<sup>4</sup>

Where the leave is granted, the plaint gets registered as a suit, and if the plaintiff dies thereafter, his legal representative can no doubt continue the suit if the right to sue survives. He can further continue the suit *as a pauper* if he is himself a pauper.<sup>5</sup> If he is not a pauper, he should pay the court-fee, otherwise the suit will be struck off.<sup>6</sup> This power to enquire into the pauperism of a legal representative is no doubt not contained in Order 22<sup>7</sup> but exists in a Court by virtue of its power to dispauper the original plaintiff himself at any stage of the suit. In making an order for or against the legal representative, however, the Court should first see whether he is a legal representative in the capacity of an heir entitled personally or beneficially to the estate of the deceased or whether he is only coming in in a representative capacity, having no personal or beneficial interest. In the former case, his own property can be taken into account.<sup>8</sup> In the latter case, only the estate of the deceased should be considered and not his individual property.<sup>9</sup>

If a *defendant* in an application for leave to sue in *forma pauperis* dies, there being no suit, Order 22 does not apply. Nor can Section 141 or Section 146 of the Code be invoked for imposing the penalties contained in Order 22, without express provision to

[See ('05) 82 Cal 988 (990).]

('69) 6 Bom H C R A C 268 (264).]

10. ('97) 20 All 148 (151).

('09) 3 Ind Cas 820 (824, 827) : 31 All 623.

('08) 1908 All W N 285 (286).

11. ('14) AIR 1914 Bom 120 (122) : 88 Bom 183.

12. ('98) 1898 Pun Re No. 98, page 347.

13. ('04) 7 Oudh Cas 158 (159).

#### Note 9a

1. ('86) AIR 1936 Mad 155 (156) : 59 Mad 698.

(In this case it was held that the same principle will apply to a suit for partition filed by a *tavazhi* in a joint Marumakkatayam family.)

#### Note 10

1. ('06) 88 Cal 1163 (1165).

('88) AIR 1938 Nag 884 (835, 836) : 80 Nag L R 84.

('14) AIR 1914 Oudh 884 (884) : 18 Oudh Cas 64.

('21) 64 Ind Cas 68 (64) (Cal).

('28) AIR 1928 Mad 278 (278, 279) : 51 Mad 697.

(AIR 1925 Mad 765, Distinguished—Since death after registration as suit.)

('11) 11 Ind Cas 724 (725) : 36 Bom 279. (Death after registration as suit.)

2. ('06) 88 Cal 1163 (1168).

3. ('14) AIR 1914 Oudh 884 (884) : 18 Oudh Cas 64.

('21) 64 Ind Cas 68 (64) (Cal).

4. (25) AIR 1925 Mad 819 (819, 820).

5. ('25) AIR 1925 Mad 819 (820).

('33) AIR 1933 Nag 834 (836) : 30 Nag L R 84.

6. ('31) AIR 1931 Mad 824 (824, 825).

('33) AIR 1933 Nag 834 (836) : 30 Nag L R 84.

7. ('11) 11 Ind Cas 724 (725) : 36 Bom 279.

8. ('31) AIR 1931 Mad 824 (824, 825).

9. ('77) 3 Mad 3 (4). (Next friend of minor.)

('25) AIR 1925 Mad 765 (765 to 768). (Executor — 86 Bom 279, Dissented.)

('28) AIR 1928 Mad 66 (67, 68).

('84) 7 Mad 890 (891). (Administratrix.)

**O. 22 R. 1**  
**Notes 10-15**

that effect. Consequently, the legal representatives of the deceased defendant can be brought in at any time.<sup>10</sup> *Vide also* Notes under Rules 3 and 4, *infra*.

**11. Claim to guardianship.** — An application under the Guardians and Wards Act (VIII of 1890) or otherwise for the appointment of a guardian for the person or property or both of a minor, is not a proceeding *inter partes*. It is the Court's duty to look after the interests of the minor and the parties simply set the Court in motion. The policy of the law therefore is not to allow such applications to lapse by the death of parties.<sup>1</sup>

Where, however, the application is to enforce the applicant's *personal right* to guardianship, the application will abate on the applicant's death.<sup>2</sup> Thus, an application which was based on the petitioner's appointment in a testamentary disposition by the minor's father, was held to abate on the petitioner's death on the ground that the claim was a matter of personal preference and trust and would not therefore survive to the representatives of the petitioner.<sup>3</sup>

**12. Right to letters of administration.** — A right to the grant of letters of administration is a *personal* right and does not survive.<sup>1</sup> The heir can, however, apply afresh.<sup>2</sup> Where pending an application by an executor for the probate of a will, the executor dies, his widow cannot continue the application by asking for *letters of administration* instead.<sup>3</sup> The reason is that the right asserted by the alleged representative must be the *same* as that asserted by the deceased at the time of his death.

**13. Right to sue in representative actions.** — See Order 1 Rule 8, Note 24 for a full discussion. See also Order 30 Rule 4.

**14. Suit under Section 92 of the Code.** — See Section 92, Note 30.

**15. Suit by or against limited owners or reversioners.** — *Suit by or against limited owners.* — A limited owner under the Hindu law is not a mere life-estate holder<sup>1</sup> but represents the entire inheritance in certain circumstances.<sup>2</sup> A suit relating to the estate by or against such limited owner is, therefore, not one on any cause of action *personal* to herself and if she dies pending such suit, the right to sue will survive to the reversioners.<sup>3</sup> See also Note 63 to Section 11, and also Note 5 above.

*Suit by or against reversioners.* — A suit by or against a reversioner in respect of the estate of a Hindu widow is one brought or defended in a *representative capacity* and on behalf of all the reversioners.<sup>4</sup> Consequently, on the death, pending suit, of

(18) AIR 1918 Mad 862 (863, 864) : 41 Mad 624.  
(Liquidator.)

(94) 18 Bom 287 (241).

10. ('88) 7 Bom 373 (376).

(29) AIR 1929 Sind 186 (186).

**Note 11**

1. ('24) AIR 1924 Mad 484 (484) : 47 Mad 459.

(17) AIR 1917 Lah 885 (886).

2. ('28) AIR 1928 Lah 456 (457, 458).

3. ('99) 28 Bom 719 (720, 721, 722).

**Note 12**

1. ('19) AIR 1919 Cal 197 (197) : 45 Cal 862.

(09) 86 Cal 799 (801).

[See ('82) AIR 1982 Cal 206 (207). (Appeal from order refusing grant of probate — Where the judgment appealed against may operate as

one in rem different considerations will arise and legal representative may be added.)]

2. ('19) AIR 1919 Cal 197 (197) : 45 Cal 862.

3. ('09) 8 Ind Cas 995 (996) : 89 Cal 799.

**Note 15**

1. ('88) 9 Cal 244 (248).

2. ('16) AIR 1916 P O 117 (117) : 39 Mad 684 : 48 Ind App 207 (PC).

3. ('96) 28 Cal 686 (688, 689).

(16) AIR 1916 All 84 (85) : 88 All 111.

[See however ('81) AIR 1981 Lah 675 (676).

(Suit by a Hindu widow for partition of her estate from co-sharers held to be a suit to enforce only her personal rights.)]

4. See for full discussion Note 68a to S. 11.

[See also ('16) AIR 1916 P O 117 (118) : 39 Mad 684 : 48 Ind App 207 (PC).]

such reversioner, the next reversioner will be entitled to continue the suit or to defend it and there is no abatement.<sup>5</sup> Where, however, on the death of the reversioner, events happen, such as the death of the limited owner, which change the *nature of the relief* to be granted, there can be no continuation of the suit.<sup>6</sup>

Under certain statutes or customary law prevailing in certain places, the right to control or question the alienation made by a collateral is given to the person who will become immediately interested on the death of such collateral. A suit based on such a right can, on the death of the plaintiff, be continued by the person who becomes so interested on such death.<sup>7</sup> But, where the right to question an alienation is, by law, given only to the *descendants* of the alienor, a suit by a descendant cannot be continued by collaterals other than those who can show themselves to be descendants of the person whose acts are questioned.<sup>8</sup>

#### 16. Suit under Sections 14 and 18 of the Religious Endowments Act. —

A suit under Section 14 of the Religious Endowments Act (XX of 1863) is a representative suit and on the death of the *plaintiff* any one of the persons interested may get himself substituted and continue the suit without fresh leave.<sup>1</sup> But a suit under Section 14 of the Act against the defendant who is a sole surviving member of a committee for his removal *for neglect of duty* is purely a *personal* claim against the defendant and on the death of the latter the right to sue will not survive against his heir.<sup>2</sup>

**17. Partial abatement.** — An abatement may be total or partial. It may be partial either as regards the *parties* to the suit (Rules 3 and 4) or as regards the *subject-matter* or reliefs.

The latter kind of partial abatement will arise where there are two or more reliefs claimed in the suit and on the death of a party the "right to sue" survives with respect to some of them but does not survive with respect to the others.

#### Illustrations

1. A files a suit against B, a trustee, under Section 92 of the Code for the removal of B and for the settlement of a scheme. Pending the suit, B dies. The suit will abate as regards the former relief but may be continued as regards the latter.<sup>1</sup>

2. A files a suit against B, a trustee, under Section 92 of the Code, for his removal and for setting aside an alienation of trust property by him to a stranger. Pending the suit B dies. The suit abates as regards the first relief but continues as regard the second.<sup>2</sup>

**18. Death of either party pending appeal.** — A "right to sue" which would have survived had the death of a party occurred during the pendency of a suit, will survive on such death taking place during the pendency of an appeal from the decree in the suit. (*Vide* Notes under Rule 4.)

5. ('15) AIR 1915 P C 124 (126, 127) : 38 Mad 406 : 42 Ind App 125 (PC).

('19) AIR 1919 Mad 911 (920) : 41 Mad 659 (FB).

('12) 17 Ind Cas 101 (106) : 8 Nag L R 113.

('19) AIR 1919 Mad 479 (480).

('81) AIR 1981 Lah 79 (80) : 12 Lah 275.

*The following cases are no longer law in view of the decision in A I R 1915 P O 124 :*

('10) 5 Ind Cas 42 (49) : 33 Mad 842.

('14) AIR 1914 Mad 481 (482) : 15 Ind Cas 213 (218, 214) : 37 Mad 406.

('12) 16 Ind Cas 839 (841, 842) : 36 Mad 570. (Overruled in AIR 1919 Mad 911 (FB).)

('12) 16 Ind Cas 865 (865) (Mad).

('04) 27 Mad 588 (591).

('12) 15 Ind Cas 461 (462, 463) (Mad).

6. ('13) 18 Ind Cas 329 (330, 331) 1913 Pun Re No. 65, p. 247.

('86) 1 Agra 49 (49).

7. ('05) 1905 Pun Re No. 58, page 199.

('96) 21 Cal 997 (1004) : 21 Ind App 163 (PC).

8. AIR 1981 Lah 293 (294) : 13 Lah 116.

#### Note 16

1. ('18) AIR 1918 Mad 560 (562) : 41 Mad 237.

2. ('12) 16 Ind Cas 908 (909) : 40 Cal 323.

#### Note 17

1. ('26) AIR 1926 Mad 162 (163) : 48 Mad 688.

('16) AIR 1916 Mad 318 (320).

('21) AIR 1921 P C 123 (124) : 48 Cal 493 : 17 Nag L R 37 : 48 Ind App 12 (PC).

2. ('14) AIR 1914 Mad 708 (709) : 38 Mad 1064.



**O. 22 R. 1**  
**Notes 18-19**

In cases where it would not have so survived had the death occurred pending the *suit*, the question whether it survives or not if the death occurs pending appeal, will depend upon the *result* of the suit. If the suit has resulted in a *decree in favour of the plaintiff's claim*, then the claim will have become perfected by the decree and attached to the estate. Thereafter, it becomes a question of benefit to the estate of the plaintiff which his legal representatives are entitled to uphold, or a detriment to the estate of the defendant which his legal representatives are entitled to try and get rid of; consequently, the "right to sue" survives.<sup>1</sup> In such cases the fact that the lower Court's decree has already been executed will not affect the question, since the legal representative can get restitution if he succeeds.<sup>2</sup>

But if in the first Court the result was a *dismissal of the suit*, the plaintiff, in appealing against it is only seeking to enforce the very claim which he unsuccessfully sought to enforce in the suit. The appeal, therefore, partakes of the character of the suit and the "right to sue" will not survive on the death of either party.<sup>3</sup> The appeal cannot be continued even in respect of costs or other reliefs which are merely incidental to the main relief.<sup>4</sup> (See also Order 22, General, Note 2.) If the first Court has decreed the suit in part, then an appeal by the plaintiff in respect of the part disallowed will partake of the nature of an appeal from a dismissal of the suit.<sup>5</sup>

If the "right to sue" in an appeal does not survive, then the memorandum of cross-objections filed by the respondent cannot be heard and must also be dismissed.<sup>6</sup>

**19. Suit or appeal against a dead person.** — It has been seen in Note 2 to Order 22, General, that this Order applies only to cases of death during the *pendency of the suit* and not to cases of death occurring *before the institution* of the suit. A suit against a person who is dead at the time of the institution thereof is void and of no legal effect<sup>1</sup> and it is immaterial whether the death was *known* at the time or not.<sup>2</sup> Such a suit cannot be amended into one against his legal representatives.<sup>3</sup> But an *appeal* filed against a dead party can, according to the High Courts of Madras and Lahore, be amended by bringing in the legal representatives on the record.<sup>4</sup> According to the Sind and Upper Burma Judicial Commissioner's Courts, however, the Court has

**Note 18**

1. ('87) 9 All 131 (134).
- ('34) AIR 1934 Nag 119 (121) : 30 Nag L R 186.
- ('02) 26 Bom 597 (602 to 605, 607, 608).
- ('02) 26 Mad 499 (500).
- ('14) AIR 1914 Mad 708 (709) : 38 Mad 1064.
- ('21) AIR 1921 Lah 52 (53) : 2 Lah 189.
- ('20) AIR 1920 Pat 809 (810).
2. ('02) 26 Bom 597 (604, 608).
3. ('18) AIR 1918 Mad 1100 (1101).
- ('20) AIR 1920 Pat 841 (842) : 4 Pat L Jour 676.
- ('19) AIR 1919 Lah 18 (18) : 1919 Pun Re No. 87.
- ('80) AIR 1980 Lah 703 (705) : 12 Lah 1.
- ('02) 26 Bom 597 (601, 602). (*Obiter*).
- ('17) AIR 1917 Upp Bur 14 (14) : 11 Upp Bur Rul 105. (Where first Court decreed plaintiff's claim but Appellate Court dismissed it, in second appeal, *held*, death does not cause abatement since plaintiff is seeking to restore the decree of first Court in his favour.)
- ('87) AIR 1987 Nag 218 (217) : I L R (1938) Nag 280. (Personal action like suit for damages for malicious prosecution — Dismissal of suit in first Court or in Court of Appeal—Plaintiff seeking to enforce same claim in appeal or second appeal—Appeal or second appeal abates on death

of either party and cannot be continued even in respect of costs.)

4. ('10) 5 Ind Cas 937 (938, 939) : 34 Mad 76.
- ('37) AIR 1937 Nag 216 (217) : I L R (1938) Nag 280. (The same principle applies to the dismissal of the suit in appeal and the second appeal would abate on the death of either party.)
5. ('21) AIR 1921 Mad 405 (405) : 44 Mad 828.
- ('34) AIR 1934 Nag 119 (120) : 30 Nag L R 186.
- ('15) AIR 1915 Lah 378 (378) : 1915 Pun Re No. 62, p. 273.
6. ('21) AIR 1921 Mad 405 (406) : 44 Mad 828.
- ('29) AIR 1929 Lah 807 (808) : 11 Lah 1.

**Note 19**

1. ('88) AIR 1988 Mad 454 (455).
- ('08) 81 Mad 86 (89).
- [See also ('92) AIR 1982 Lah 592 (594).]
2. ('08) 81 Mad 86 (86, 89).
3. ('08) 81 Mad 86 (89).
- ('88) AIR 1988 Mad 454 (455).
- ('24) AIR 1924 Bom 109 (111).
- ('19) AIR 1919 Cal 257 (258).
4. ('25) AIR 1925 Mad 1210 (1210) : 49 Mad 18 (FB).
- ('82) AIR 1982 Lah 305 (306).



no jurisdiction to bring in the legal representative in such a case<sup>5</sup> although, if the legal representative is already on record in another capacity, the memorandum of appeal can be amended so as to describe him as the legal representative of the deceased.<sup>6</sup>

**O. 22 R. 1**  
**Notes 19-21**

The principle of the rule that a suit against a dead person is a nullity does not apply to execution proceedings. Thus, where an execution application is presented against a judgment-debtor who is dead at the time of the presentation of the application, the application can be amended by the substitution of the heirs of the deceased.<sup>7</sup>

Where the legal representative of a party dying subsequent to decree is allowed to file an appeal against the decree without notice to the respondent, the latter can, at the hearing, raise the objection that the appellant is not really the legal representative and the appeal will be dismissed if there is no application to bring the right legal representative on record.<sup>8</sup>

**20. No abatement by reason of death after decree.**—When a suit is decreed, the decree determines and settles the claims of the parties. The claim is perfected by the judgment<sup>1</sup> and the decree is properly capable of transfer, devolution or inheritance like any other property.<sup>2</sup> Hence, there is no abatement by death subsequent to the decree.<sup>3</sup> But this principle does not apply to the case of death after a decree dismissing a suit on a *personal claim*: *vide* Note 17.

**21. Appeal and revision.**—An order refusing an application to add a person as a legal representative and directing abatement of the suit *on the ground that the right to sue does not survive*, is appealable as a decree.<sup>1</sup>

An order *adding* or refusing to add a person as a legal representative of a deceased party may be open to revision under Section 115 of the Code.<sup>2</sup>

## R. 2. [S. 362.] Where there are more plaintiffs or defendants than one, and any of them dies, and

**O. 22 R. 2**

Procedure where one of several plaintiffs or defendants dies and right to sue survives.

where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court

shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

[1877, S. 362; 1859, S. 100.]

5. ('20) AIR 1920 Sind 82 (88).
- ('19) 21 Ind Cas 306 (307, 308) (Upp Bur).
- ('32) AIR 1932 Sind 220 (220) : 26 Sind L R 362.
6. ('20) AIR 1920 Sind 82 (88).
7. ('38) AIR 1938 Cal 684 (687).
8. ('23) AIR 1923 Mad 367 (368).

### Note 20

1. ('87) 9 All 131 (134) (FB).
- ('02) 26 Bom 597 (607, 608).
- ('02) 26 Mad 499 (500).
- ('04) 28 Bom 201 (208). (In a partition suit a decree granting partition effects a division in status and puts an end to survivorship so that on the death of the plaintiff his heirs get the property by inheritance and can come on record as his legal representatives.)

- ('96) 19 Mad 345 (347, 348).
- ('24) AIR 1924 Mad 309 (310).
2. ('20) AIR 1920 Pat 809 (810).
- ('34) AIR 1934 All 1029 (1030).
3. ('87) 9 All 131 (134).
- ('02) 26 Bom 597 (605, 607, 608).
- ('27) AIR 1927 Oudh 156 (157, 158) : 2 Luck 464.
- ('94) 18 Bom 224 (226). (No abatement by death during execution proceedings.)

### Note 21

1. ('28) AIR 1928 Oudh 362 (364, 365) : 3 Luck 628 (FB).
- ('16) AIR 1916 Mad 1068 (1069).
- ('19) AIR 1919 Mad 479 (480, 481).
2. ('19) AIR 1919 All 189 (190) : 41 All 515.
- ('16) AIR 1916 All 84 (86) : 38 All 111.

O. 22 R. 2  
Note 1*Synopsis*

1. Scope.
2. Right to sue surviving to surviving plaintiffs.
3. Right to sue surviving against surviving defendants.
4. "Suit" includes appeal.

1. **Scope.** — In order that this rule may apply, it is necessary that —

- (1) there should be *more than one* plaintiff or *more than one* defendant in the suit, and
- (2) on the death of one of the plaintiffs or one of the defendants the right to sue should survive to the surviving plaintiffs *alone* or against the surviving defendants *alone*, respectively, even though they might have been on the record in *another capacity*.<sup>1</sup>

The word "survive" has not been used in any technical sense. It has been used in its ordinary sense of "outlive." This rule, therefore, applies to cases of every kind of devolution on death.<sup>2</sup> It is not necessary that the survival should be by reason of any circumstance antecedent to the suit.<sup>3</sup>

The word "alone" in the rule means "exclusively," *i. e.*, to the exclusion of other persons.<sup>4</sup> It, however, does not mean that no one else should be entitled to sue or be liable to be sued: it only means that the survivor or survivors should be entitled to sue or be liable to be sued independently of others, *i. e.*, without joining others.<sup>5</sup>

No application is necessary for making the necessary entry under this rule. It is the duty of the Court to do so.<sup>6</sup>

The following points of distinction between this rule and Rules 3 and 4 may be noted —

- (i) There can be no abatement if the facts come within the provisions of this rule;<sup>7</sup> whereas if the facts fall within the provisions of Rules 3 or 4 and the procedure laid down therein is not adopted, the suit will abate.
- (ii) If the conditions of this rule are satisfied, the suit can be proceeded with even if it had been filed against a dead person along with others who are his legal representatives;<sup>8</sup> whereas Rules 3 and 4 will not apply if the party was dead at the time of institution of the suit.

**Order 22 Rule 2 — Note 1**

1. ('21) AIR 1921 Oudh 209 (218); 24 Oudh Cas 374.

('34) AIR 1934 Pat 427 (428).

('08) 30 All 49 (51). (Right to sue not surviving—Suit abates.)

('31) AIR 1931 All 349 (349, 350): 53 All 521. (But the rule does not apply if the survival is to one in the opposite array—Thus, one of several defendants preferred second appeal, the other defendants not having joined him — The appellant died but no application was made within ninety days for bringing his legal representatives on record — The co-defendants contended that they were *pro forma* respondents in the second appeal, that the right to sue survived to them and that there was no abatement — *Held*, that the co-defendants were not appellants, that O. 22 R. 2 did not apply and that the appeal abated.)

2. ('29) AIR 1929 Sind 225 (226): 24 Sind L R 167.

3. ('06) 4 Cal L Jour 568 (571, 572).

('27) AIR 1927 Lah 501 (508). (If the right to sue survives against the surviving respondents, even

by reason of any cause which arises after the institution of the suit the case would fall within the purview of Order 22 Rule 2.)

4. ('80) 1880 Pun Re No. 30, page 67.

5. ('24) AIR 1924 Rang 376 (376): 2 Rang 486.

[See ('86) AIR 1936 Pat 548 (549): 15 Pat 326. (The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendant could alone be sued in the absence of the deceased plaintiff or defendant respectively.)]

[See however ('87) AIR 1937 Lah 455 (456). (Where the legal representative of the deceased defendant was also liable and not only the surviving defendant, it was held that this rule did not apply.)]

6. ('29) AIR 1929 All 347 (347).

('33) AIR 1933 Nag 95 (99): 29 Nag L R 12.

('29) AIR 1929 Sind 225 (226): 24 Sind L R 167.

7. ('80) AIR 1980 Cal 370 (372).

('29) AIR 1929 All 347 (347).

8. ('29) AIR 1929 Lah 440 (440).

- (iii) The application of this rule or of Rules 3 and 4 *infra* depends on whether the right to sue fully vests in the surviving plaintiffs or is fully available against the surviving defendants. Thus, in all cases where the right to sue is fully represented by the surviving plaintiff or defendant already on record, this rule will apply; and when it would not be fully represented unless some person not already on record is added as a party, Rules 3 or 4 *infra* will apply.<sup>9</sup>

Suppose, there are several defendants to a suit. One of them dies. His legal representatives are already on the record as defendants in another capacity. Can it be said that in such cases the right to sue survives against the surviving defendants alone within the meaning of this rule, so that it is not necessary to make an application to bring them on the record as legal representatives under Rule 4 *infra*? It has been held by the Bombay High Court<sup>10</sup> that where the interest of a defendant in the subject-matter of the suit does not *cease* on his death and his legal representatives *as such* have an interest in the subject-matter, an application to bring them on the record is necessary. On this question, however, there is a conflict of decisions for which see Note 12 to Rule 4, *infra*.

**2. Right to sue surviving to surviving plaintiffs.** — Where joint purchasers of property sue for possession and pending the suit one of them dies, the right to sue will survive to the others if the purchase is joint and indivisible but not if it is of *distinct* though undivided shares.<sup>1</sup>

As to the survival of the right to sue on the death of a partner in suits by a firm, see O. 30 R. 4; and as to the survival of such right on the death of plaintiff in a suit under Section 92 of the Code, see Section 92, Note 30. See also the undermentioned cases.<sup>2</sup>

9. ('83) AIR 1933 Nag 95 (97, 99): 29 Nag LR 12.  
(‘34) AIR 1934 Pat 559 (561). (Suit by two brothers—Death of one pending suit leaving no son—Other brother having sons and being karta of the family—He can apply for substitution and continue suit and there is no abatement.)  
(‘83) AIR 1933 All 291 (291).

- (‘32) 1932 Mad WN 491 (493). (Hindu joint family.)

[See also ('33) AIR 1933 Pat 464 (467, 468): 12 Pat 778. (Two co-widows impleaded to represent estate of their husband—Death of one of them pending appeal—Application for substitution of other widow is not necessary and O. 22 R. 2 applies.)]

10. ('88) AIR 1938 Bom 6 (8): ILR (1938) Bom 64. (The cases contemplated by O. 22 R. 2 are those where, e. g., suits are filed by or against executors or trustees, or against joint tortfeasors, or against the members of a joint Hindu family on the death of one of whom his interest in the subject-matter would cease—The rule does not contemplate any defence being made by the legal representatives of a deceased defendant.)

#### Note 2

1. ('06) 3 All L Jour 80 (85, 87).
2. ('29) AIR 1929 Mad 524 (525), (Where a Registrar refuses to register a will and a suit is brought by two of the legatees thereunder for registration of the will, it must be regarded as having been filed in a representative capacity on behalf

of all the legatees, so that on the death of one of the legatees, the other is entitled to continue the suit.)

- (‘33) AIR 1933 Lah 654 (655). (Suit by some landlords that certain tenancy had extinguished and for declaration that certain person has no occupancy right—Death of some plaintiffs pending suit—Legal representatives not brought on record—Suit is for benefit of all landlords and does not abate either wholly or in part.)

- (‘34) AIR 1934 Cal 328 (333): 61 Cal 80. (Suit by committee appointed by Government under S. 7 of Act XX of 1863—Death of member of committee pending suit—Suit does not abate and surviving members can continue.)

- (‘26) AIR 1926 Lah 167 (168): 7 Lah 12. (The creditor can maintain a suit on behalf of all for setting aside as fraudulent a transfer by the debtor; hence on the death of some of the creditors who were parties originally to such suit the right to sue survives to the others.)

- (‘81) 1881 Pun Ro No. 109, page 252.

- (‘34) AIR 1934 Pat 559 (561). (Suit for ejectment by two brothers—Death of one pending suit leaving no son—Other brother having sons but they not plaintiffs to suit—The surviving plaintiff can apply as manager of the joint family to continue suit—There is no abatement—AIR 1928 Pat 250, Distinguished.)

- (‘85) AIR 1985 Cal 418 (415). (In an appeal by the defendants against a decree in a representative

**O. 22 R. 2**  
**Notes 3-4**

**3. Right to sue surviving against surviving defendants.** — Where the defendants are jointly and severally liable to the plaintiff, and one of them dies, his legal representatives need not be brought on record.<sup>1</sup> Thus, in the following cases, no legal representatives of a deceased defendant need be brought on record —

(1) Suit against several joint tort-fensors.<sup>2</sup>

(2) Suit on a mortgage executed by the members of a joint Hindu family.<sup>3</sup>

The legal representatives of a defendant who has, before his death, assigned his rights to another defendant, need not be brought on record.<sup>4</sup>

As to the right to sue surviving against the surviving defendants in cases coming under O. 1 R. 8, see Note 24 to that rule.

**4. "Suit" includes appeal.** — The word "suit" includes an appeal. (See Rule 11, *infra*.) This rule will therefore apply also where the right to appeal survives to the surviving appellants *alone* or against the surviving respondents *alone*.<sup>1</sup>

For cases where the right to appeal survives to surviving appellants alone, see the undermentioned cases<sup>2</sup> and for cases where the right survives against the surviving respondents alone, see the cases cited below.<sup>3</sup>

suit by several plaintiffs instituted with the permission of the Court under O. 1 R. 8, C. P. O., no substitution of a legal representative is necessary if one of plaintiffs-respondents dies pending the appeal.)

('89) AIR 1989 All 526 (528). (Reversioners' right to challenge alienation by widow is not joint but individual—Suit by two nearest reversioners for declaration that alienations by widow are null and void — During pendency of appeal filed by them from decree in suit, one of them died but his legal representatives not brought on record — Surviving reversioner held solely entitled to prosecute appeal.)

('39) AIR 1939 Oudh 196 (203). (A transferring his property to B—Then, both A and B suing C for declaration — A dying during pendency of suit — As A has transferred all his rights in the subject-matter of the suit to B, he is not a necessary party to the suit and his death does not cause the suit to abate.)

**Note 3**

1. ('20) AIR 1920 Pat 801 (802).

('24) AIR 1924 Rang 127 (128) : 1 Rang 618.

[But see ('22) AIR 1922 Cal 408 (409) : 49 Cal 524. (But where a suit was brought against a firm and the alleged sole proprietor died but no steps were taken to bring his legal representative on record, held the suit abated.)

('87) AIR 1987 Lah 455 (456).]

2. ('16) AIR 1916 Lah 188 (185) : 1915 Pun Re No. 106.

('27) AIR 1927 Cal 182 (189) : 53 Cal 992.

3. ('80) AIR 1930 Bom 367 (368).

('96) 20 Bom 549 (552). (But on the death of the mortgagee in a suit for redemption against him and sub-mortgagee, the right to sue does not survive to the sub-mortgagee alone.)

4. ('66) 6 Suth W R Ref 2 (3).  
( '88) 1888 Bom P J 191.

**Note 4**

1. ('81) 1881 Pun Re No. 109, p. 252.

('25) AIR 1925 Rang 95 (96) : 2 Rang 445.

('85) AIR 1985 All 106 (107).

('86) AIR 1986 Pat 548 (549) : 15 Pat 326.

('88) AIR 1988 Cal 634 (636). (Where there are several defendants to a suit, it is possible for one defendant to press an appeal as against the whole decree upon a point which is a common to all the defendants and the appeal does not abate on the death of one of the defendants.)

('06) 4 Cal L Jour 568 (570). (Appeal against decree in favour of Hindu coparceners — One of them dying during appeal — S. 362 of 1882 Code (now O. 22 R. 2) applies.)

('29) AIR 1929 All 347 (347).

[See ('84) AIR 1934 Nag 165 (165) : 31 Nag L R 81. (Appellant dying three months after second appeal — Son who was co-plaintiff and co-appellant in first appeal made respondent— Application after eight months by son to be brought on record as representative — Appeal held abated — Fact that son was respondent was immaterial.)]

2. ('08) 25 All 27 (28). (Dissenting from 22 All 222).

('08) 27 Bom 284 (287).

(26) AIR 1926 Cal 462 (463). (Defendants— Appellants — Common ground—Death of one.)

('16) AIR 1916 Lah 401 (402).

('24) AIR 1924 Rang 376 (376) : 2 Rang 496.

3. ('26) AIR 1926 Lah 607 (608) : 7 Lah 399.

('21) AIR 1921 Oudh 203 (218) : 24 Oudh Cas 374.

('18) AIR 1918 Pat 54 (55).

('86) 1886 Pun Re No. 86, p. 192.

('21) 59 Ind Cas 238 (239) (Lah).

**R. 3. [Ss. 363, 365, 366.] (1) Where one of two or more** **O. 22 R. 3**

**Procedure in case of death of one of several plaintiffs or of sole plaintiff.**

plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone,<sup>5</sup> or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application<sup>7</sup> made in that behalf, shall cause the legal representative<sup>10</sup> of the deceased plaintiff to be made a party<sup>9</sup> and shall proceed with the suit.

(2) Where within the time limited<sup>8</sup> by law no application is made under sub-rule (1), the suit shall abate<sup>18</sup> so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs<sup>24</sup> which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

[1877, Ss. 363, 364, 365, 366; 1859, Ss. 101, 102.]

### *Synopsis*

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### *Other Topics (miscellaneous)*

Application after time. See Note 8.

Death of pro forma plaintiffs. See Note 2.

Order of abatement, if necessary. See Note 18.

Survival to defendant. See Note 5.

Who can apply. See Notes 7 and 11.

#### **1. Legislative changes. —**

1. Section 363 of the old Code dealing with the case of death of *one of several plaintiffs* provided that the Court "*may cause the legal representative*" of the

**O. 22 R. 3**  
**Notes 1-8**

deceased plaintiff to be made a party; Section 365 which dealt with the death of a sole plaintiff provided that the legal representative may apply to be brought on the record and "the Court shall thereupon enter his name." Under the present rule "the Court, in all cases, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party." See Note 7, *infra*.

2. The words "the Court may pass an order that the suit shall abate" which occurred in Section 366 of the old Code have been substituted by the words "the suit shall abate."

3. After the words "the suit shall abate" the words "so far as the deceased plaintiff is concerned" have been newly added in order to make it clear that the abatement shall, in the first instance, be only so far as the deceased plaintiff is concerned and not of the whole suit. See Notes 18 and 23, *infra*.

**2. Scope and applicability of the Rule.** — In order that this rule may apply, the following conditions must be satisfied —

1. The death must occur *pending* the suit. Thus the rule does not apply where a plaintiff dies *after decrees*.<sup>1</sup>
2. The right to sue must survive to a "legal representative" as defined by Section 2, sub-section (11).<sup>2</sup>
3. The right to sue must survive either to *other* persons jointly with the surviving plaintiffs or to those *other* persons exclusively.
4. The deceased plaintiff must have been a *necessary party* to the suit. Otherwise, or, if he has no interest in the suit, his legal representatives need not be made parties and the rule will not apply.<sup>3</sup>

Where a plaintiff dies, the suit cannot be dismissed for default of appearance under Order 9. The provisions of Order 22 will apply to such cases.<sup>4</sup> See Note 1 to O. 9 R. 8, *ante*.

The principle of the rule has been held to apply to proceedings in revision<sup>5</sup> and to cases before the Deputy Commissioner under the Chota Nagpur Tenancy Act.<sup>6</sup> But it does not apply to proceedings in an application for probate.<sup>7</sup> The rule applies to proceedings under the U. P. Encumbered Estates Act of 1934.<sup>8</sup>

As to the applicability of the rule to appeals, see Note 3 below.

**3. Rule applies to appeals.** — The provisions of this rule apply also to appeals (*vide* Rule 11, *infra*). Where an appellant dies during the pendency of the appeal and his right of appeal does not survive to the surviving appellant alone, his legal representatives can and should be brought on record; and if no application

**Order 22 Rule 3 — Note 2**

1. ('81) 8 Mad 236 (288).  
(1927) AIR 1927 Oudh 156 (157) : 2 Luck 464.  
(1927) AIR 1927 Rang 199 (200).  
See Note 5 *infra*.
2. ('36) AIR 1936 Pat 123 (124) : 15 Pat 82.  
(Assignee from a person is not his legal representative.)
3. ('21) AIR 1921 Lah 357 (358).  
(1922) AIR 1922 Lah 641 (643) : 13 Lah 483.  
(Partition suit between two branches of Hindu family — Son of plaintiff dying — Suit does not abate.)
- (1914) AIR 1914 All 118 (118).
4. ('35) AIR 1935 Nag 189 (190) : 31 Nag L R 874. (Where the suit is dismissed the dismissal

can be set aside without an application under O. 9 R. 9 by the legal representative — Legal representative's application to be brought on record falls under this rule.)

5. ('18) 21 Ind Cas 407 (407) (Cal). (Note. There is a conflict of decisions as to the applicability of Order 22 to revision proceedings — See Order 22, General, Note 2.)

6. ('28) AIR 1928 Pat 29 (29) : 2 Pat 243.

7. ('32) AIR 1932 Cal 206 (207). (Probate appeal by legatees — Legal representative of legatees can be substituted in appeal.)

8. ('39) AIR 1939 All 717 (717). (In such proceedings, the landlord is to be considered to be the plaintiff and the creditor who puts in his claim as the defendant.)

therefor is made within the prescribed time, the appeal will abate so far as the deceased appellant is concerned.<sup>1-2</sup>

**O. 22 R. 3**  
**Notes 3-6**

Where two independent appeals were filed against the same decree, one by the plaintiff and the other by one of the defendants, and during the pendency of the appeals the plaintiff died and his legal representatives were impleaded in his appeal but not in the defendant's appeal, it was held by the High Court of Madras<sup>3</sup> that the latter appeal abated and that the impleading of the legal representative in the plaintiff's appeal would not enure for the benefit of the other appeal.

In applying the rule to appeals, the interpretation of the words "right to sue" as given in Note 3 to Rule 1 should be remembered and it will follow that, even in cases where the *suit* would have abated by reason of the right to sue not surviving on the death of the plaintiff, the right to *appeal* may survive.<sup>4</sup> See Note 3 to Rule 1.

**3a. Applicability of Rule to revision proceedings.** — See Order 22, General, Note 2.

**4. Rule does not apply to execution proceedings.** — See Rule 12, *infra* and Notes thereto.

**5. Where right to sue survives to persons other than the surviving plaintiff or plaintiffs alone.** — This rule will apply only where the right to sue does *not* survive, where there are *several* plaintiffs, to the surviving plaintiffs alone<sup>1</sup> but survives either to the surviving plaintiffs jointly with *others*<sup>2</sup> or exclusively to *others*. If the right to sue survives to the surviving plaintiff *alone* the case is not within this rule<sup>3</sup> but is governed by the provisions of Rule 2.

Where the right to sue survives to a *contesting defendant*, the rule cannot apply inasmuch as he cannot continue the suit against himself.<sup>4</sup> The case is, however, different if the defendant on whom the right to sue survives is only a *pro forma* defendant.<sup>5</sup>

See also Notes to Rule 2 above.

**6. Death of a pauper applicant.** — As already pointed out in Note 10 to Rule 1, the right to apply for permission to sue in *forma pauperis* is a purely *personal* right which does not survive at all. On the death therefore of the petitioner in such an application, this rule will not apply.<sup>1</sup> But, it has been held that the legal representative is entitled to be brought on the record and to continue the suit on payment of court-fee; or he may file a fresh application for leave to sue as a pauper.<sup>2</sup> See also O. 22 R. 1, Note 10.

#### Note 3

- 1-2. ('86) 1886 All W N 90 (90, 91).
- ('85) AIR 1935 All 640 (641). (But where the surviving appellant alone can impugn the entire decree, the entire decree may be set aside.)
3. ('81) AIR 1981 Mad 277 (277).
4. ('87) 9 All 181 (184) (FB). (Whether the legal representative would be able to enforce the whole judgment is a different matter.)
- ('02) 26 Bom 597 (605, 608). (Where claim has been perfected by judgment, nature of relief claimed on appeal stands on a different footing and there will be no abatement.)
- ('21) AIR 1921 Lah 52 (58) : 2 Lah 189. (Suit to set aside sale of ancestral land decreed — Appeal — Plaintiff dying during appeal — Right to continue appeal survives to representative.)

#### Note 5

1. ('29) AIR 1929 All 347 (347).
2. (1900) 22 All 222 (223, 224).
3. ('28) AIR 1928 All 845 (848) : 50 All 792 (FB).
- ('35) AIR 1935 Lah 879 (880).
4. ('10) 8 Ind Cas 859 (859) (Mad.).
5. ('12) 14 Ind Cas 544 (547) (Mad).

#### Note 6

1. ('06) 38 Cal 1163 (1168).
- ('14) AIR 1914 Oudh 384 (384) : 18 Oudh Cas 64. (Legal representative may apply afresh.)
- ('28) AIR 1928 Mad 278 (278, 279) : 51 Mad 697. (But in such a case the Court may order legal representative to be brought on record and allow him to continue the proceeding by transforming it into a suit by payment of the requisite court-fee.)
2. ('86) AIR 1986 Pat 591 (593) : 15 Pat 788.



**O. 22 R. 8  
Notes 7-9**

**7. "On an application made in that behalf."** — The Court cannot, under this rule, add a legal representative *suo motu*. An application must be made for the purpose.<sup>1</sup> The application can be made even by a defendant or respondent interested in bringing the legal representative on the record.<sup>2</sup> Where there are several legal representatives it is not necessary that the application need be made by *all* of them.<sup>3</sup> Further, even an application made by a person who is ultimately found not to be a legal representative has been held to be sufficient compliance with the requirements of the rule, if it has been made *bona fide*.<sup>4</sup> But where *A* applies to be made a party as legal representative and the application states that *B* is not the legal representative, *B* cannot seek to counteract his own failure to apply in time by relying on *A*'s application.<sup>5</sup>

Where a party dies after decree, his legal representative can file an appeal against the decree without making a separate application for impleading him as a party; the appeal itself may be regarded as an application for the purpose.<sup>6</sup>

**8. Limitation for application under this Rule.** — The period of limitation for filing an application to bring the legal representatives on record under this rule is ninety days from the date of the death of the plaintiff under Article 176 of the Limitation Act as amended by Act XXVI of 1920 and this is so even if the death had occurred before the amending Act was passed.<sup>1</sup>

The onus is on the applicant to prove that the application is within time.<sup>2</sup>

Where one of the legal representatives has applied in time to be made a party and the application has been granted, the other legal representatives may be brought on the record subsequently.<sup>3</sup>

**9. "Shall cause the legal representative of the deceased plaintiff to be made a party."** — The Court is bound to implead the legal representatives as parties on an application made in that behalf,<sup>1</sup> unless there is a dispute as to who is the legal representative, in which case, the question should be decided by it under Rule 5.<sup>2</sup>

Where an application to add a person as the legal representative of a deceased plaintiff is filed, but the Court, without expressly adding the petitioner as a party allows him to prosecute the suit or appeal, the petitioner will be deemed to have been brought on the record.<sup>3</sup> But the same result will not follow by the mere fact that a *vakalatnama* is filed by a pleader on behalf of the legal representative.<sup>4</sup>

**Note 7**

1. ('34) AIR 1934 All 465 (468).
- ('33) AIR 1933 All 111 (111).
- ('86) AIR 1936 Pat 266 (266). (Minor legal representative—Still, application is necessary.)
2. ('26) AIR 1926 All 156 (157).
3. ('12) 15 Ind Cas 366 (367); 6 Low Bur Rul 52. (Where possible all legal representatives should apply to be made parties, but an application by one legal representative is sufficient for him to be made a party.)
- ('86) 10 Bom 220 (228). (If an application has been made by one of the heirs of the deceased appellant in time the abatement is saved and the respondent is entitled to have the other heirs put on the record. It is not necessary that all of them should have applied within the time.)
4. ('10) 5 Ind Cas 514 (515) (Mad).
- ('89) AIR 1939 Mad 148 (149). (Such application is sufficient to save suit from abatement.)
5. ('19) AIR 1919 Nag 160 (151, 152); 15 Nag

**L R 21.**

6. ('82) 1882 All W N 73 (73).

**Note 8**

1. ('21) AIR 1921 Mad 650 (651).
- ('24) AIR 1924 Bom 416 (417). (But Court can allow amendment of the application so as to make it one under O. 22 R. 9.)
- ('28) AIR 1928 Nag 166 (167).
2. ('87) 1887 All W N 60 (60).
3. ('12) 13 Ind Cas 318 (319) (Mad).
- ('88) AIR 1938 Rang 284 (284).

**Note 9**

1. ('01) 26 Bom 317 (319).
- [See also ('27) AIR 1927 Mad 707 (706). (Impleading legal representatives in a suit arising out of claim petition does not amount to impleading them in second appeal from the decree.)]
2. ('94) 17 Mad 209 (211).
3. ('98) 1898 All W N 181 (181).
4. ('11) 9 Ind Cas 977 (977, 978) (All).



It has been held that where on the death of the father who was a co-plaintiff in a suit, his sons refuse to be substituted as his legal representatives and are joined as *pro forma* defendants, the requirements of law are complied with and the suit does not abate.<sup>5</sup>

A Court to which a case has been sent on remand has jurisdiction to act under this rule.<sup>6</sup>

Where a suit is dismissed for default in ignorance of the plaintiff's death and subsequently an application is filed by his legal representative to be brought on the record, the Court can set aside the order of dismissal and restore the suit to the file under Section 151 and substitute the legal representative's name for that of the deceased plaintiff.<sup>7</sup>

**10. Legal representative.** — The expression "legal representative" was not defined under the old Code. Under the English law, the primary meaning of the expression is "executor or administrator" though it may, under special circumstances, be controlled by the context.<sup>1</sup> The same strict meaning was given to the expression in some cases under the old Code<sup>2</sup> while in other cases a wider meaning was given so as to cover all persons *representing the estate of a deceased person*.<sup>3</sup> The present definition in Section 2, clause (11) of the Code is very wide<sup>4</sup> and gives effect to the latter view. Under that definition the following persons are legal representatives —

1. A person who, in law, represents the estate of a deceased person.<sup>5</sup>
2. A person who intermeddles with the estate of a deceased.<sup>6</sup>
3. Where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.<sup>7</sup>

The term "next of kin" is peculiar to the English law of inheritance and does not mean the same thing as the term "legal representative" under the Code.<sup>8</sup>

(1) *Person who, in law, represents the estate of a deceased person.* — There are certain cases which are governed by the Succession Act, 1925, in which the executor or administrator alone can represent the estate of a deceased person.<sup>9</sup> In such cases

5. ('89) AIR 1939 Pat 225 (228).

6. ('04) 7 Oudh Cas 17 (18).

7. ('35) AIR 1935 Nag 189 (190); 31 Nag L R 374.

#### Note 10

1. (1820) 6 Madd 159, Price v. Strange.

('04) 8 Cal W N 843 (851).

2. [See ('95) 22 Cal 903 (908).]

[See also ('97) 20 Mad 51 (53). (Executor was brought on record as legal representative.)]

3. ('04) 8 Cal W N 843 (851).

('79) 4 Cal 897 (908, 919). (It includes the heir.)

4.. ('84) AIR 1934 Lah 1 (3).

('37) AIR 1937 Sind 318 (320). (Residuary legatee under the will of a Hindu residing in Sind is 'legal representative' even before obtaining letters of administration.)

[See also ('12) 17 Ind Cas 101 (106): 8 Nag L R 118. (Term as used in O. 22 has a wide significance.)]

5. ('19) AIR 1919 Mad 510 (518): 42 Mad 76. (He need not be necessarily the beneficial owner of that estate.)

('38) AIR 1938 Nag 85 (86): 29 Nag L R 118. (On the death of the ward, Court of Wards can continue suit as legal representative of the ward.)

6. ('16) AIR 1916 Mad 1022 (1024).

('24) AIR 1924 All 717 (718). (Definition of legal representative is only for purposes of procedure in instituting and defending suits.)

('14) AIR 1914 Lah 144 (145): 1918 Pun Re No. 115. (Intermeddler with part of estate is liable to the extent of property possessed.)

('27) AIR 1927 Bom 474 (477): 51 Bom 771. (Heirs of intestate Parsi who intermeddle with his estate are his legal representatives.)

[See ('88) 10 All 479 (484).]

[See also ('17) AIR 1917 Pat 92 (95).]

7. See under sub-heading "representative suits."

8. ('36) AIR 1936 Lah 578 (579) (*Obiter*.)

9. ('38) AIR 1938 Bom 6 (9): 1 L R (1938) Bom 64. (Heir of a Parsi is not his legal representative—18 Bom 397, Relied on.)

See S. 211 of the Succession Act, 1925.

[See also ('84) 8 Bom 241 (256). (Case under the Probate and Administration Act, 1881, which has now been repealed by the Succession Act, 1925.)]

('82) 4 All 192 (195).

('25) AIR 1925 Sind 2 (3, 4). (In the case of Christians and Parsis "legal representative" means primarily executor or administrator (including one *de son tort*) but in the absence of a will, means heir or next of kin.)]

**O. 22 R. 3**  
**Note 10**

they alone are his legal representatives.<sup>10</sup> In cases not governed by the Succession Act there may or may not be an executor or administrator. Where there is an executor or administrator he will be the legal representative of the deceased person; where the will is with regard to *part* of the property of the testator, the executor cannot be his legal representative with regard to the properties of the deceased not dealt with by the will.<sup>11</sup> Where there are no executors or administrators, the heir or the legatee will be the legal representative of the deceased person in respect of the property respectively got by him.<sup>12</sup> In other words, the term "legal representative," as defined in this Code, only denotes those classes of persons on whom the status of a representative is fastened *by reason of the death* of a person whose estate they are held to represent.<sup>13</sup> But an assignee from the deceased of a certain property is not his legal representative, for, he does not get any estate of the deceased by reason of his death.<sup>14</sup> Similarly, the Crown getting by escheat the property of a person on his death is not a legal representative, as it does not get the estate as *representing* the deceased person but in its *paramount* right;<sup>15</sup> so also a zamindar who, on the death of a tenant, gets under the village custom his interest by escheat, is not his legal representative.<sup>16</sup> Again, the Official Assignee or Receiver of an insolvent's estate is not a "legal representative" of the insolvent.<sup>17</sup>

(2) *Intermeddlers*. — The term "intermeddle" has been used to mean an intermeddling with the assets of a deceased person in such a way as to denote an assumption of the authority, or an intention to exercise the functions of an executor or administrator.<sup>18</sup> In other words, it has been used to mean what is known as an executor *de son tort*.<sup>19</sup> It is therefore essential, in order to constitute a person an intermeddler, that there should be an *intention* on his part to act as a legal representative and to *represent the estate* of the deceased.<sup>20</sup> A trespasser or a person who claims a title in himself adversely to the estate of the deceased cannot, therefore, be an intermeddler within the meaning of the definition.<sup>21</sup> He will, however, be a legal representative if he intends to act as a legal representative and to represent the estate

10. ('04) 8 Cal W N 849 (856).

[See also ('97) 21 Bom 102 (105). (But an administrator, however, appointed under S. 10 of Regulation VIII of 1827, without leave being granted to him to sue is not the legal representative nor is he entitled to continue an appeal.)]

11. ('29) AIR 1929 Lah 546 (546).

12. ('04) 8 Cal W N 849 (856). (Heirs.)

('93) 17 Bom 758 (770).

('86) AIR 1936 Oudh 7 (9): 12 Luck 1. (Universal legatee is legal representative.)

[See ('35) AIR 1935 All 890 (891). (In this case it was held that a person who would have got the property of the deceased if he had left any would be his legal representative and a creditor would be entitled to get a decree against such a person in respect of a debt due by the deceased although in the absence of assets of the deceased in the hands of the judgment-debtor, the decree cannot be executed against him — On this question, however, there is a conflict of decisions for which see Note 4 to Section 52 *ante*.)]

[See also ('37) AIR 1937 Sind 318 (320).]

13. ('29) AIR 1929 Oudh 858 (854).

14. ('29) AIR 1929 All 444 (446). (His case comes under O. 22 R. 10.)

('86) AIR 1936 Pat 128 (124): 15 Pat 82.

[See ('03) 30 Cal 961 (964).]

[See also ('25) AIR 1925 Cal 467 (468). (But he may be substituted under R. 10, *infra*.)]

15. [See ('60) 8 Moo Ind App 500 (525, 527) (PC).]

16. ('14) AIR 1914 Oudh 208 (208).

17. ('35) AIR 1935 Mad 151 (152): 58 Mad 403.

18. Halsbury, Vol. 14, page 147.

('88) AIR 1938 Mad 684 (686). (A mere alienee from a legal representative is not a legal representative.)

19. Halsbury, Vol. 14, pp. 147 to 151. See also meaning of "*executor de son tort*" in Wharton's Law Lexicon.

[See also ('18) AIR 1918 Nag 78 (74).]

20. Halsbury, Vol. 14, pp. 147 and 148.

('33) AIR 1933 Cal 865 (869).

[See also ('26) AIR 1926 Cal 825 (826). (Person merely taking away deceased person's property, while there is legal representative present, is not executor *de son tort*.)]

21. [See ('26) AIR 1926 Cal 825 (825). (Merely taking away a portion of the property of the deceased does not make such person, while there is a legal representative present, an executor *de son tort*.)]

as such.<sup>22</sup> It depends, in each case, upon the particular facts of that case whether he intends to do so. An intermeddler is a legal representative only for the purposes of the procedure in instituting and defending suits and only to the extent of the property with which he had intermeddled.<sup>23</sup> It has been held in the undermentioned case<sup>24</sup> that an intermeddler cannot sue on behalf of the estate though a suit may be brought *against* him as representing the estate.

Where it is alleged on behalf of the plaintiff that the defendant is the legal representative of the deceased debtor in that he has intermeddled with the estate of the deceased, the burden is on the plaintiff to prove that the defendant has intermeddled with the property of the debtor at the time of his death.<sup>25</sup>

The definition in Section 2 clause (11) merely means that a person who intermeddles with the estate may be treated as the legal representative. It does not mean that such a person is to be preferred to a person who is found to be the true legal representative of the deceased.<sup>26</sup>

(3) *Representative suits*. — In representative suits the legal representative must be a person on whom the estate devolves *on the death* of the party suing or sued.<sup>27</sup> Where, on the death of a trustee, a new trustee is elected or appointed, the latter is not the legal representative of the deceased trustee, inasmuch as the estate did not devolve on him *on the death* of the former trustee, but by virtue of his appointment or election which has no retrospective operation.<sup>28</sup> In a suit by a *Hindu widow* for the benefit of the estate, the estate will devolve on the death of the plaintiff on the next reversioner who will therefore be the legal representative of the plaintiff.<sup>29</sup> In a suit by a *reversioner* in respect of an estate held by a Hindu female, the reversioner plaintiff sues on behalf of the whole reversionary body. In other words, all the reversioners are represented in the suit by the plaintiff reversioner, and on the latter's death, other reversioners may be brought on the record for the purpose of continuing

22. ('18) AIR 1918 Pat 216 (216).

[See also ('79) 4 Cal 342 (345, 346). (Party who takes possession of the estate of a deceased Hindu treated for some purposes as his representative.)

('03) 30 Cal 1044 (1057). (Do.)

('24) AIR 1924 Cal 362 (362). (Person possessing judgment-debtor's property is his legal representative.)

('17) AIR 1917 Mad 979 (980). (Person in possession of estate belonging to deceased can represent deceased defendant.)

23. ('24) AIR 1924 All 717 (718). (But not for the purpose of succession to the property of the deceased.)

24. ('88) AIR 1938 Nag 298 (299) : I L R (1939) Nag 526. (Decision proceeds on the ground that under the English law, an executor *de son tort* is liable to all the trouble of an executorship without any of the profits or advantages and that he cannot bring an action himself in the right of the deceased but actions may be brought against him.)

25. ('84) AIR 1984 Rang 196 (197). (Proof of possession by defendant of property which deceased owned some time prior to his death is not enough.)

26. ('89) AIR 1989 Pat 117 (118).

27. ('17) AIR 1917 Mad 578 (588) : 40 Mad 177.

28. ('26) AIR 1926 Mad 540 (541).

('24) AIR 1924 Lah 251 (251).

('82) AIR 1982 Cal 783 (784). (Suit by mohunt on behalf of doity.)

('22) AIR 1922 Mad 402 (403) : 45 Mad 703.

('21) AIR 1921 Mad 124 (124). (Where a trustee sued on behalf of a trust impleading his co-trustee as party defendant and the plaintiff died pending suit, the defendant trustee can apply to be transposed as plaintiff to continue the suit. There is no question of abatement and O. 22 R. 3 is inapplicable.)

[See however ('30) AIR 1930 All 348 (349). (Religious endowment — Successor in management is legal representative of previous manager.)]

29. ('98) 20 All 341 (343, 344).

('16) AIR 1916 All 34 (35, 36) : 38 All 111.

('10) 7 Ind Cas 97 (97) : 33 All 15.

('96) 23 Cal 636 (638).

(1900) 23 Mad 125 (133).

('16) AIR 1916 Mad 611 (612, 613) : 39 Mad 382.

('93) 1893 Pun Re No. 97, page 386.

[See ('12) 15 Ind Cas 461 (463) (Mad). (Where, however, the suit is in her personal capacity and not as representing the estate, the reversioner is not the legal representative.)

('18) AIR 1918 P O 156 (158) : 42 Mad 581 : 46 Ind App 64 (P O).

('19) AIR 1919 Oudh 258 (259) : 22 Oudh Cas 260. (A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to any.

**O. 22 R. 3**  
**Notes 10-11**

the suit.<sup>30</sup> This, however, is not because the succeeding reversioners are legal representatives of the deceased reversioner (for there was no estate vested in him which devolved on his death to the succeeding reversioners), but under the provisions of O.1 Rules 8 and 10.<sup>31</sup> See Note 24 to O.1 R. 8. It has been held that a *benamidar* is in some sense a trustee for the real owner and his son who has some interest can succeed to the trusteeship and can be considered to be his legal representative within the meaning of Section 2, clause (11).<sup>32</sup>

When a person's name is entered on the record as representing the estate of a deceased person, there is no determination of any question as to the *capacity* in which the name is entered. It may be afterwards shown that the person was substituted in a representative character, for instance, as representing the members of a joint Hindu family.<sup>33</sup>

The right to enforce a partnership contract does not vest in the surviving partner *alone*.<sup>34</sup> But though the rights of a deceased partner may devolve on his representative, the right to sue survives to the surviving partners in the absence of any statutory authority to the contrary; the latter may therefore continue the suit as legal representatives of the deceased partner.<sup>35</sup>

It is not necessary that the legal representative should be in actual possession of the assets of the deceased. It is sufficient if he is entitled to the possession thereof, i.e., if he is a person on whom the estate would devolve.<sup>36</sup>

If A allows his *benamidar*, B, to sue in *his own name*, he cannot, on the death of B, claim to come in as B's legal representative.<sup>37</sup> A District Judge taking possession of the assets of a deceased person under Section 64 of the Administrator-General's Act, II of 1874, is not the legal representative of the deceased.<sup>38</sup>

If a legal representative dies, his own legal representatives who have received assets of the previous deceased, will represent him.<sup>39</sup>

**11. Two or more legal representatives.** — The expression "legal representative" must, where there are more legal representatives than one, be read in the plural.<sup>1</sup> As a general rule, all the legal representatives should be brought on record

thing which she may have done herself to the prejudice of these reversionary heirs.])  
[See also ('72) 17 Suth W R 475 (476).]

30. ('15) AIR 1915 P C 124 (125, 126) : 38 Mad 406 : 42 Ind App 125 (PC).

[See ('36) AIR 1936 Lah 652 (654) : ILR (1937) Lah 525. (Representative suit by presumptive reversioner for declaring alienation by widow ineffectual as against reversioners — On his death, right to sue survives to next presumptive heir and not personal heirs of deceased reversioner.)]

[See also ('10) 5 Ind Cas 42 (49) : 33 Mad 842. (A declaratory suit brought by reversioner on behalf of himself and all the reversioners was held to be a representative suit.)]

31. ('19) AIR 1919 Mad 479 (480).

See also the following analogous cases :

('19) 15 Ind Cas 399 (402) (Mad).

('29) AIR 1929 Mad 524 (525). (Where on refusal by registering officer to register the will, two of the legatees bring a suit for registration, the suit must be regarded as in a representative capacity and on the death of any of the plaintiffs the other will be his legal representative so far as the

right to continue the suit is concerned, though not so far as specific rights of the deceased under the will are concerned — This view, it is submitted, is not correct — See Note 24 to O. 1 R. 8.)

[See however ('89) AIR 1939 All 672 (678) : I L R (1939) All 718. (Brothers suing as reversioners — One of them dying — The others are his legal representatives.)]

32. ('87) AIR 1937 Mad 101 (103).

33. ('38) AIR 1938 All 256 (258) : ILR (1938) All 425. (The person is entered merely to represent the estate.)

34. ('97) 21 Bom 412 (421).

35. ('87) 9 All 486 (490).

36. ('81) AIR 1931 Nag 173 (175) : 27 Nag L R 247. (Plea that he has no assets of the deceased is confined to execution only.)

('89) AIR 1939 Pat 47 (48).

[See also ('85) AIR 1935 All 390 (391).]

37. ('30) AIR 1930 Mad 221 (222).

38. ('99) 1899 All W N 221 (221). (For purpose of execution of decree against the deceased.)

39. (1900) 22 All 867 (869, 870).

**Note 11**

1. ('94) 16 All 211 (212).

and if any of them refuses to join as plaintiff or appellant he must be made a defendant or a respondent.<sup>3</sup> Where, however, some of them are omitted to be brought on the record, there is a conflict of views as to whether the suit or appeal abates. According to the High Court of Allahabad<sup>3</sup> and the Judicial Commissioner's Court of Sind,<sup>4</sup> it does. According to the High Court of Calcutta the term "legal representative" means all the representatives of whom the representative applying *knew or ought to have known*. Where one or more of the legal representatives are unknown or are unwilling to join in the application, a *bona fide* application by all the representatives who are willing to join will be sufficient compliance with this rule.<sup>5</sup> The High Courts of Bombay,<sup>6</sup> Lahore<sup>7</sup> and Madras,<sup>8</sup> and the Judicial Commissioner's Courts of Nagpur<sup>9</sup> and Oudh<sup>10</sup> hold that a *bona fide* application by all those representatives who are willing to join is enough and will save the suit or appeal from abatement. In cases where the legal representatives are added after notice to the defendants or respondents and they do not raise any objection as to there being other legal representatives, even the Allahabad High Court agrees that it is not open to the defendants or respondents to subsequently contend that the suit or appeal has abated by reason of the fact that all the representatives were not brought on record.<sup>11</sup> Further, where the legal representatives of a deceased person constitute a joint Hindu family and the manager of the family is brought on the record as representing the family, it is not necessary to bring on record the other members of the family.<sup>12</sup>

See also Note 9 to Rule 4, *infra*.

**12. Wrong person as legal representative.** — It is the duty of the defendant to enquire and ascertain who the legal representatives of the deceased plaintiff are.<sup>1</sup> Consequently, an objection that any person is not the legal representative of a deceased

2. ('18) 20 Ind Cas 866 (867) (All).

3. ('08) 30 All 117 (118).

('94) 16 All 211 (212).

[See however ('38) AIR 1938 All 91 (98). (Abates only as regards those who were not made parties—Question of abatement must be considered with reference to subject-matter.)]

4. ('25) AIR 1925 Sind 2 (3, 4).

5. ('29) AIR 1929 Cal 26 (27). (But where there was no evidence that if the true legal representative had been informed that the application was to be made he would not have been willing to join it, *held* that the suit abated.)

('39) 43 Cal WN 1088 (1091). (Some of the heirs of sole appellant brought on record—Appeal abates unless existence of other heirs is unknown.)

[See also ('38) AIR 1938 Cal 498 (500). (Death of plaintiff pending suit — Order substituting two persons as heirs — Subsequent discovery of other heirs by Court—Suit does not abate.)]

6. ('86) 10 Bom 220 (223).

7. ('20) AIR 1920 Lah 238 (239) : 1 Lah 481. (Death of a Mahomedan appellant—Sons alone had themselves brought on the record as his legal representatives without joining the deceased's widow and daughters — The sons *bona fide* believed that they alone were the legal representatives as the parties were governed by customary law and not by Mahomedan law ; the appeal does not abate.)

[See also ('27) AIR 1927 Lah 94 (95). (But where the interest involved in the suit or appeal cannot be sufficiently represented in the absence of

the omitted legal representatives, omission to implead all will be fatal to the suit or appeal.)

('39) AIR 1939 Lah 439 (444) : ILR (1939) Lah 438. (Death of appellant—One only of his legal representatives brought on record within time — Appeal does not abate — Application to bring other legal representatives on record can be made after limitation.)]

8. (1900) 23 Mad 125 (132).

('27) AIR 1927 Mad 1071 (1071, 1072). (Where some legal representatives come on the record and they contend that some other persons are not legal representatives even though their contention may be found to be untrue, that would not make the whole of the suit or any portion of the suit abate.)

9. ('23) AIR 1923 Nag 101 (102) : 18 Nag L R 21.

10. ('17) AIR 1917 Oudh 34 (35) : 20 Oudh Cas 67. (The legal representatives who are unwilling to be made co-plaintiffs may be added as defendants even after period under Art. 176, Limitation Act.)

11. ('28) AIR 1928 All 532 (533) : 50 All 857.

12. ('38) AIR 1938 All 256 (258) : I L R (1938) All 425.

('86) AIR 1986 Pat 3 (5). (Suit on mortgage—One of legal representatives of Hindu mortgagee minor—Minor forming joint family with major brothers—Major brothers made parties — Minor is properly represented.)

#### Note 12

1. ('21) AIR 1921 Lah 60 (60).

('08) 26 Mad 224 (228).

**O. 22 R. 3**  
**Notes 12-13**

plaintiff must be taken by them at the earliest possible opportunity and if no such objection is so taken and a person has been impleaded as the legal representative of the deceased plaintiff, it is not open to the defendants to subsequently contend that the true legal representatives have not been brought on record and that therefore the suit must abate.<sup>2</sup> See also Note 7, *supra*.

See Note 63b to Section 11 and Sections 50 and 52, and the undermentioned case.<sup>3</sup>

See also Note 10 to Rule 4, *infra*.

**13. Joint Hindu family and legal representatives.** — It has been held by the High Courts of Lahore<sup>1</sup> and Bombay<sup>2</sup> and the Chief Court of Oudh<sup>3</sup> that where a coparcener in a joint Hindu family dies, the survivors are not his legal representatives, inasmuch as they take the estate by *survivorship* and not by *succession*. The High Court of Patna has, on the other hand, held that they are his legal representatives within the meaning of Section 2 (11) of the Code.<sup>4</sup> It has been held by the Allahabad High Court that the last portion of the definition of a "legal representative" in Section 2 (11) is wide enough to cover the case of a coparcener who gets property by survivorship on the death of a coparcener who sues or is sued in a representative character.<sup>5</sup> But it has been held that by force of Section 53, where a son or other descendant of a Hindu has joint family property in his hands which is liable for the debts of the ancestor, such son or other descendant is a "legal representative" of the ancestor.<sup>6</sup>

Where, however, the deceased coparcener was the *managing member* of the family representing the family, the succeeding managing member is, according to the High Courts of Bombay<sup>7</sup> and Madras,<sup>8</sup> a "person who, in law, represents the estate of a deceased person" and is therefore his legal representative. The Oudh Judicial Commissioner's Court also has held that where a suit is brought by the manager of a joint Hindu family and the plaintiff dies pending the suit, the substitution of the persons who become the managing members of the family after him is sufficient to save the suit from abatement and it is not necessary to bring on record all the members of the family.<sup>9</sup>

In the case of a *separated Hindu*<sup>10</sup> or in a suit by a member of a joint Hindu family on a *personal* contract made with him, his *heirs* will be his legal

2. ('08) 27 Bom 162 (182, 186, 187).

('21) AIR 1921 Lah 60 (60).

('08) 26 Mad 224 (228).

3. ('88) AIR 1938 Mad 43 (48). (Decree against wrong legal representative does not bind the real representative.)

**Note 13**

1. ('21) AIR 1921 Lah 84 (85) : 2 Lah 114.

2. ('18) AIR 1918 Bom 165 (166) : 42 Bom 504.

3. ('87) AIR 1937 Oudh 327 (328) : 18 Luck 241. (Legal representatives — Hindu law — Personal money decree against B—On death of B, decree-holder A, trying to execute it against sons of B and against C, brother of B, contending that B and C were joint and hence C was legal representative of B—*Held*, C could not be legal representative of B in presence of B's sons and C's property could not be proceeded against.)

4. ('25) AIR 1925 Pat 123 (124) : 8 Pat 853.

[See however ('85) AIR 1935 Pat 275 (288) : 14

Pat 732 (FB). (Hindu sons are not the legal representatives of their deceased father within the definition given in S. 2 (11)—Per Agarwala, J.)]

5. ('88) AIR 1938 All 163 (164). ('Legal representative' need not be a legal heir of the deceased person.)

[See also ('35) AIR 1935 All 390 (391).]

6. ('86) AIR 1936 Bom 456 (458, 459).

('87) AIR 1937 Mad 785 (785). (Creditor can file administration suit against undivided son of Hindu debtor.)

7. ('81) AIR 1981 Bom 484 (489) : 55 Bom 709.

8. ('25) AIR 1925 Mad 456 (457).

[See also ('82) 1932 Mad W N 491 (492, 498).]

9. ('17) AIR 1917 Oudh 84 (85) : 20 Oudh Cas 67. [See ('07) 10 Oudh Cas 121 (125, 126). (In this case the Court held on the facts that the persons who claimed to be managers were not such and refused to allow them to continue the suit.)]

10. ('04) 27 Mad 106 (109).

representatives.<sup>11</sup> The institution of a suit for partition by an adult coparcener effects a division in status. In the case of a minor's suit for partition, the division in status would be effected from the date of the suit conditional on the Court being able to find that the suit when filed was for the benefit of the minor. Where the minor plaintiff dies after the institution of the suit for partition and before the Court has found that the partition is for his benefit, according to the High Court of Madras, the suit does not abate, but it is open to his legal representative to proceed with the trial and obtain a decree on his showing that the suit, when instituted, was for the benefit of the minor.<sup>12</sup> But the High Court of Bombay has taken a contrary view that the heirs of the minor are not entitled to continue the suit.<sup>13</sup> After a preliminary decree for partition even the minor plaintiff becomes a divided member, and, on his death, his heirs will be his legal representatives.<sup>14</sup>

See also the undermentioned case.<sup>15</sup>

**14. Legal representatives of deceased plaintiff or appellant already on record in another capacity.** — Where the legal representatives of a deceased plaintiff or appellant are already on the record, though in another capacity, an application to bring them in as legal representatives is unnecessary.<sup>1</sup> As to whether such an application is necessary in the case of the death of a defendant or respondent, see Note 12 to Rule 4, *infra*.

**15. Determination of the question as to who is the legal representative.** — Where a dispute arises as to who is the legal representative, the Court should, under Rule 5, determine the question.<sup>1</sup> The effect of such a determination is, however, only limited for the purposes of the suit and is not to be conclusive of his rights.<sup>2</sup>

**16. What pleas may be taken by a legal representative.** — When a party dies his legal representative is appointed merely in order that the suit might proceed and a decision arrived at. It is the rights and disabilities of the *original parties* that have to be considered and not those of the legal representatives themselves.<sup>1</sup> All that the representative can therefore do is to take up the suit at the stage at which it was left when the original plaintiff died, and to continue it.<sup>2</sup> He must rely on the same cause of action and on the same title as the deceased plaintiff.<sup>3</sup> It is not open to him to assert his own *individual* or hostile title in the suit.<sup>4</sup> Likewise, the defendant is not

11. ('19) AIR 1919 All 189 (190) : 41 All 515.  
(‘38) AIR 1938 Bom 451 (453). (Pro-note in favour of manager of Hindu joint family — If holder dies, a succession certificate may be granted to his heirs who may then recover upon the pro-note as his legal representatives.)

12. ('33) AIR 1933 Mad 890 (903, 912, 913) : 57 Mad 95 (F.B.). (Overruling AIR 1918 Mad 379.)

13. ('35) AIR 1935 Bom 54 (61).

14. ('96) 19 Mad 345 (346).

[See also ('15) AIR 1915 Mad 1065 (1065).]

15. ('35) AIR 1935 Mad 431 (432). (Right of Hindu son to question alienation arises by reason of his being member of joint family and not as legal representative of his deceased brother during whose lifetime the cause of action arose.)

#### Note 14

1. ('28) AIR 1928 Lah 898 (894) : 10 Lah 531.

(‘28) AIR 1928 Lah 43 (44).

(‘39) AIR 1939 All 672 (673) : I L R (1939) All 713.

[See also ('26) 95 Ind Cas 236 (237) (Lah.). (Letter to Court informing of party's death and the

fact that his representatives were on the record already was held sufficient.)

(‘36) AIR 1936 Pat 548 (550) : 15 Pat 326.]

[See however ('84) AIR 1934 Nag 165 (166) : 31 Nag L R 81. (Death of appellant — Legal representative on record as respondent — It was held that application for substitution as appellant was necessary.)]

#### Note 15

1. ('94) 17 Mad 209 (211).

2. ('23) AIR 1923 Nag 209 (209).

#### Note 16

1. ('24) AIR 1924 Lah 45 (46) : 4 Lah 72.

(‘18) 19 Ind Cas 255 (256) (All). (Thus, an estoppel affecting a party deceased affects his legal representative also.)

2. ('22) AIR 1922 Mad 49 (50).

3. ('95) 22 Cal 92 (98, 99).

4. ('22) AIR 1922 Mad 49 (50).

(‘30) AIR 1930 Mad 593 (593). (Legal representative of plaintiff cannot agitate in that suit his own claim against the other plaintiffs in the case.)



**O. 22 R. 3**  
**Notes 16-18**

entitled to raise against the legal representative any defence other than those which he could have raised against the deceased plaintiff.<sup>5</sup>

**17. Minor as legal representative.**—A minor is not disentitled to be made a party as the legal representative of a deceased plaintiff; but he must be represented by a next friend.<sup>1</sup>

**17a. Insolvent legal representative.**—See the undermentioned case.<sup>1</sup>

**18. "The suit shall abate so far as the deceased plaintiff is concerned."**  
—If on the death of a plaintiff or appellant, no application to implead his legal representatives is filed within the prescribed time, the suit or appeal will abate.<sup>1</sup> But if such application has been made but rejected, the suit or appeal will not abate.<sup>3</sup> It is immaterial that the application was made by a wrong person, if it was made *bona fide*.<sup>3</sup>

The impleading of the legal representative in an interlocutory matter in the suit will be enough to save the suit from abatement.<sup>4</sup> But the impleading of a legal representative in a *cross-appeal* will not save the *appeal* from abatement.<sup>5</sup>

Under the old Section the Court had to pass an *order* that the suit or appeal abated. Under the present rule, however, the abatement takes place automatically and no separate order to that effect is necessary,<sup>6</sup> so that, any decree passed in the suit in disregard or in ignorance of an abatement will, to that extent, be set aside on appeal.<sup>7</sup>

An abatement under this rule will be only so far as the deceased plaintiff is concerned. If it is a case of death of a sole plaintiff the abatement will be of the entire suit.<sup>8</sup> If, on the other hand, it is a case of death of one of two or more plaintiffs the abatement will, *in the first instance*, be only so far as he is concerned.<sup>9</sup> The effect of such abatement on the whole suit or on the rights of the other parties will depend upon the nature of the suit and of the reliefs claimed (*vide* Note 23, *infra*). Apart

5. ('96) 19 Mad 845 (847).

**Note 17**

1. ('24) AIR 1924 Mad 818 (814).

**Note 17a**

1. ('88) AIR 1988 Mad 420 (421) : I L R (1988) Mad 578 (FB). (Legal representative insolvent at date of death of appellant—Official Receiver applying to continue appeal but afterwards withdrawing his application—Legal representative cannot afterwards continue appeal, reason being that once Official Receiver intervenes the property vests in him and his subsequent withdrawal does not re-vest the property in the insolvent.)

**Note 18**

1. ('69) 11 Suth W R 543 (548).

('33) AIR 1933 Rang 234 (234).

('17) AIR 1917 Low Bur 182 (183).

('96) 1896 All W N 91 (91, 92).

[See also ('80) AIR 1980 Oudh 8 (5) : 5 Luck 241. (If a portion of the plaintiff's claim is admitted by the defendant that portion does not abate.)]

2. ('21) AIR 1921 Nag 28 (24) : 17 Nag L R 45.

3. ('10) 5 Ind Cas 514 (515) (Mad).

4. ('25) AIR 1925 Pat 145 (145).

[See also ('84) AIR 1984 Mad 448 (450). (Death of one appellant who was also impleaded in

cross-objection—Application by co-appellant to bring his legal representative—A second application in the cross-objection is not necessary.)]

5. ('19) AIR 1919 Lah 318 (318, 319).

6. ('26) AIR 1926 All 217 (220) : 48 All 884 (FB). (AIR 1922 All 209, Overruled—AIR 1920 All 284, upheld.)

('80) AIR 1980 All 379 (380). (But this automatic abatement does not follow where party dies before conclusion of hearing.)

('81) AIR 1931 All 154 (155) : 58 All 374.

('25) AIR 1925 Lah 598 (598).

('26) AIR 1926 Lah 234 (235) : 7 Lah 73.

('17) AIR 1917 Mad 285 (288).

('87) AIR 1987 Bom 401 (406) : I L R (1987) Bom 602.

7. ('29) AIR 1929 Lah 119 (120).

[See ('20) AIR 1920 Cal 845 (845). (The case was remanded to decide the effect of the death of the party on the whole case.)]

8. ('80) 5 Cal 139 (141).

9. ('85) AIR 1985 All 640 (641). (Suit for possession of land and demolition of buildings thereon made by defendants, decreed—Appeal by all defendants—Death of one of appellants but legal representative not brought on record—Appeal does not abate entirely.)

[See ('06) 8 All L Jour 80 (84, 85).]



from any such effect the abatement will be limited to the extent that the deceased plaintiff is concerned.<sup>10</sup>

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**Notes 18-19**

**19. Death after preliminary and before final decree.** — In suits requiring a preliminary and a final decree, can there be an abatement on the ground that no application was filed in time to implead legal representatives on the death of a plaintiff or of a defendant after the preliminary, but before a final decree? It was held in the undermentioned cases<sup>1</sup> by the High Court of Allahabad, that the suit would abate, the reason being that a suit is "pending" till a final decree is passed. The said Court did not accept the position that the principle laid down by the Privy Council in *Lachmi Narain v. Balmakund*, A. I. R. 1924 Privy Council 198 was applicable to such cases. In order to avoid this difficulty, O. 22 R. 12 has now been amended by that Court so as to make Rules 3, 4 and 8 inapplicable to proceedings after the preliminary decree.<sup>3</sup>

The view of the other High Courts is that the rule does not apply to such cases and that there can be no abatement of a suit on account of the death of a party after a preliminary and before a final decree.<sup>3</sup>

But, as no decree can be passed against a dead person, where after a preliminary decree, the defendant dies and the Court passes a final decree against him without bringing his legal representatives on the record, the final decree is a

10. ('98) 22 Bom 718 (721).

('28) AIR 1928 Lah 737 (737, 738).

('01) 25 Mad 426 (428).

[See also ('21) AIR 1921 All 84 (85).]

#### Note 19

1. ('81) AIR 1931 All 490 (497) : 54 All 25 (FB).

('81) AIR 1931 All 154 (155) : 53 All 374.

('17) AIR 1917 All 429 (429) : 39 All 551.

('22) AIR 1922 All 396 (396, 397).

('27) AIR 1927 All 272 (272) : 49 All 310.

('30) AIR 1930 All 779 (782, 783) : 52 All 910.

('30) 1930 All L Jour 999 (1002).

('15) AIR 1915 All 88 (88) : 37 All 226.

2. ('84) AIR 1934 All 465 (468).

[See also ('35) AIR 1935 All 180 (181). (The Allahabad amendment of Rule 12, *infra* is not, however, retrospective.)]

3. ('88) AIR 1938 Rang 818 (819, 820) : 11 Rang 446.

('29) AIR 1929 Cal 430 (430) : 57 Cal 285. (AIR 1921 Cal 551 and AIR 1926 Cal 808 *held* not to be good law.)

('08) 30 Cal 609 (612).

('30) AIR 1930 Lah 329 (330).

('28) AIR 1928 Mad 914 (918) : 51 Mad 701 (FB).

(AIR 1923 Mad 237 and AIR 1924 Mad 786, *Overruled*.)

('29) AIR 1929 Nag 142 (144) : 27 Nag L R 119 (FB).

('29) AIR 1929 Nag 206 (207).

('27) AIR 1927 Oudh 561 (561).

('27) AIR 1927 Oudh 156 (157, 158) : 2 Luck 464.

('81) AIR 1931 Pat 57 (57). (Authority of AIR 1919 Pat 430 (FB) doubted.)

('83) AIR 1933 Pat 27 (28).

('86) AIR 1936 Cal 540 (541). (Death of some

plaintiffs after preliminary decree for ascertainment of mesne profits — Suit does not abate by reason of non-substitution of deceased plaintiffs' legal representatives within time.)

('35) AIR 1935 Lah 712 (714). (*Obiter*.)

('37) AIR 1937 Lah 164 (166) : 17 Lah 817.

('37) AIR 1937 Lah 615 (616). (Order 22 Rr. 3, 4 and 5 do not apply to a case of defendant dying after passing of preliminary decree.)

('37) AIR 1937 Sind 208 (209) : 30 Sind L R 428.

(But where pending an appeal from the preliminary decree one of the respondents dies and no application is made within time to bring on record his legal representatives, the appeal will abate.)

[See ('29) AIR 1929 Cal 648 (649). (Death of one of several mortgagors after preliminary decree and before final decree — Legal representatives not brought on record — Suit does not abate with respect to mortgagors on record.)]

('25) AIR 1925 P C 117 (117) : 4 Pat 507 : 52 Ind App 188 (PC) (Under the Code of 1882, proceeding for ascertainment of mesne profits was a proceeding in execution and O. 22 R. 12 applied — Hence substitution not necessary.)]

[See also ('23) AIR 1923 Cal 626 (628, 629) : 50 Cal 650. (Compromise decree in mortgage suit — No abatement on death after such decree.)]

('09) 3 Ind Cas 999 (1000) (Cal).

('23) AIR 1923 Oudh 156 (157).

('21) AIR 1921 Pat 185 (186). (Proceeding for ascertainment of mesne profits under a decree under the Code of 1882 is one in execution and not in the suit and the provisions of O. 22, R. 3 of the Code of 1908 are inapplicable to such a proceeding.)

**O. 22 R. 8**  
**Notes 19-23**

nullity.<sup>4</sup> See Note 8 to Section 52 *ante*. But, where there are several defendants one of whom dies after the preliminary decree and a final decree is passed without bringing his legal representatives on the record, the final decree will be valid as against the other defendants.<sup>5</sup>

**20. Death after final decree.** — See Notes to Rule 12.

**21. Suits under Section 92 of the Code.** — See Note 30 to Section 92 *ante*.

**22. Suits under Order 1 Rule 8 of the Code.** — See Note 24 to Order 1, Rule 8 and the undermentioned case.<sup>1</sup>

**23. Effect of abatement on the rights of parties.** — As pointed out in Note 18 *supra*, an abatement under the rule will, *in the first instance*, be only so far as the deceased party is concerned and not of the whole suit or appeal.<sup>1</sup> The effect of this limited abatement on a suit or appeal will depend upon the nature of the right or relief claimed in the suit or appeal. If such right or relief is an *indivisible* one existing in all the plaintiffs *jointly* or in or against all the appellants *jointly*, the whole suit or appeal, as the case may be, will fail by reason of an abatement with respect to one of them.<sup>2</sup> But if such right or relief is divisible or exists individually in each, an abatement with respect to one or some alone will not cause the entire suit or appeal to fail.<sup>3</sup>

In appeals to which Order 41 Rule 4 is applicable, *i. e.*, where the appeal proceeds on grounds common to all the appellants so that any one of them could have prosecuted the appeal without the others, an abatement with respect to one of them

1. ('05) 9 Cal W N 171 (174, 175).

(88) AIR 1933 Cal 798 (799). (Preliminary mortgage decree against widow of mortgagor—Afterwards widow ceasing to be heir of mortgagor on account of re-marriage—Final decree without proper legal representative is not nullity but is only voidable — Suit does not abate.)

[But see ('10) 5 Ind Cas 272 (278) (Cal).

(27) AIR 1927 Bom 156 (157). (Notice issued to heirs before passing of final decree — Objection raised only before execution Court — Omission to mention their names in the decree can be rectified in execution.)

(26) AIR 1926 Sind 20 (21).

(80) AIR 1930 Cal 422 (423, 424) : 57 Cal 148.]

4. ('85) 39 Cal W N 1284 (1288).

(86) AIR 1936 Cal 698 (699).

5. ('89) AIR 1989 Cal 403 (407) : I L R (1989) 1 Cal 498.

**Note 22**

1. ('89) AIR 1989 Lah 572 (575, 576). (Person appointed by order of Court under O. 1 R. 8 to defend suit on behalf of class — Death of such person — His legal representatives need not be brought on record.)

**Note 23**

1. ('80) AIR 1980 All 211 (212).

2. ('20) AIR 1920 Cal 168 (169).

(85) 155 Ind Cas 610 (611) (Lah).

(26) AIR 1926 Lah 474 (476).

(82) 88 Pun L R 38 (39).

(82) AIR 1932 Lah 281 (286) : 13 Lah 70.

(82) AIR 1932 Pat 827 (829) : 11 Pat 588.

(86) AIR 1935 Lah 478 (479). (Contract to sell

land in favour of two persons—Shares not specified — Decree dismissing suit by vendees for specific performance—Appeal by both—Death of one — Heirs not impleaded — Appeal abates in toto.)

[See ('83) AIR 1933 Pat 270 (271). (But in the case of joint Hindu family, if the father is already on record, he will represent the interests of the sons.)]

3. ('23) AIR 1923 Nag 101 (102) : 18 Nag L R 21. ('83) AIR 1933 Lah 988 (940). (No abatement of whole suit if shares are ascertainable and separate suits could be brought.)

(82) AIR 1932 Cal 134 (134) : 58 Cal 1341.

(89) AIR 1938 Lah 179 (182) : 14 Lah 218. (Each plaintiff having well-defined share in the subject-matter of suit.)

(28) AIR 1928 All 345 (348, 350) : 50 All 792 (FB). (Suit for pre-emption—AIR 1928 All 211; AIR 1925 All 108; AIR 1927 All 543, Overruled.)

(25) AIR 1925 Mad 235 (236). (Where one of the appellants (defendants) is dead, the appeal will not abate though his representative is not brought on record, if the remaining appellants are independently entitled to the reliefs sought.)

(27) AIR 1927 Lah 668 (664). (Suit against trespasser of common property—Any co-sharer can alone sue.)

(17) AIR 1917 Lah 371 (371) : 1917 Pun Re No. 49. (Suit for ejectment and arrears of rent — Death of co-plaintiff — His legal representatives not brought on record—Suit abates only in respect of the deceased.)

(18) AIR 1918 Lah 117 (118).

(86) AIR 1936 Lah 578 (579, 580).

will not cause the appeal to fail.<sup>4</sup> But if the nature of the appeal is such that it cannot be heard in the absence of any of the appellants, the provisions of Order 41, Rule 4 cannot be invoked and the whole appeal will fail.<sup>5</sup> One test of determining whether the failure to bring in the legal representative of a deceased appellant will cause the entire appeal to fail is : can the appeal be decided, without bringing the legal representatives of the deceased party on the record, without bringing into existence two decrees contrary to each other?<sup>6</sup>

Where an appeal has abated, the respondent cannot claim its being heard even though he might have filed a memorandum of cross-objections. He must file a separate appeal.<sup>7</sup>

As pointed in Note 18 *supra*, a judgment given in ignorance of an abatement is null and void.<sup>8</sup> The remedy of the legal representative in such cases is not to sue again on the same cause of action but to have the suit revived.<sup>9</sup>

See also Notes to Rule 9 *infra*.

**24. Award of costs.** — The provision for the award of costs contained in this rule should not be taken in a restricted sense. The power to award costs in proper cases exists in Courts and this power is not restricted by this rule.<sup>1</sup> The rule only extends or recognizes the power in cases of abatement under the rule.

The power can also be exercised by an Appellate Court.<sup>2</sup> See also Note 16 to Section 35 *ante*.

**25. Revision.** — A applied to be added as the legal representative of a deceased plaintiff. It was found that A was not the legal representative. The Court thereupon, on that application itself, impleaded as legal representative another person who did not seek, and was not sought, to be impleaded. It was held that the order was liable to revision.<sup>1</sup>

A applied to be added as the legal representative of a deceased plaintiff. He was directed to file a separate suit to establish his claim as such. Such a suit was not filed. The Court thereupon ordered the first suit to abate. It was held that the order of abatement was made without jurisdiction and could be set aside in revision.<sup>2</sup>

(‘89) 146 Ind Cas 945 (946) (Lah). (Shares of parties ascertainable—No total abatement.)

4. (‘02) 25 All 27 (28, 29).

(‘88) AIR 1933 All 733 (734).

(‘85) 155 Ind Cas 602 (603) (All).

(‘84) AIR 1934 Cal 703 (704) : 61 Cal 879.

(‘92) AIR 1932 Cal 134 (135) : 58 Cal 1841.

(‘88) AIR 1933 Lah 933 (934).

(‘11) 10 Ind Cas 27 (28) (All).

(‘09) 27 Bom 284 (286).

(‘26) AIR 1926 Cal 1073 (1074).

(‘18) AIR 1918 Mad 794 (801) : 40 Mad 846.

(‘16) AIR 1916 Oudh 188 (192).

(‘14) AIR 1914 Lah 882 (883) : 1914 Pun Re No. 88.

(‘18) AIR 1918 Lah 227 (228) : 1918 Pun Re No. 84.

[See (‘35) AIR 1935 All 640 (641).]

[See also (‘26) AIR 1926 Lah 431 (432).]

[But see (‘24) AIR 1934 Lah 206 (207, 208) : 15 Lah 667.]

5. (‘28) AIR 1928 Cal 184 (184, 185).

(‘09) 4 Ind Cas 885 (886) (All).

(‘19) AIR 1919 Cal 410 (411).

(‘28) AIR 1928 Cal 824 (824).

(‘80) AIR 1980 Lah 174 (175).

(‘27) AIR 1927 Pat 44 (44).

(‘88) AIR 1933 Cal 787 (788).

[See also (‘21) AIR 1921 Cal 722 (724).

(‘88) AIR 1933 Pat 702 (703).]

[See however (‘29) AIR 1929 Cal 519 (520, 521) : 56 Cal 622.]

6. (‘85) AIR 1935 Pat 4 (5). (If the result of hearing and deciding the appeal would be to bring into existence two decrees contrary to each other, the appeal would abate as a whole.)

7. (‘66) 3 Bom H C R A C 81 (81, 82).

8. (‘25) AIR 1925 Bom 290 (291).

(‘23) AIR 1923 All 414 (414).

9. (‘09) 3 Ind Cas 739 (740) : 33 Mad 167.

#### Note 24

1. (‘20) AIR 1920 Mad 289 (290) : 43 Mad 284.

2. (‘82) 8 Cal 440 (441, 442).

[See also (‘34) AIR 1934 All 1 (4) : 55 All 687.

(Appeal by two plaintiffs in a suit under S. 92—One dead and surviving appellant not solvent—Order for costs made against estate of deceased appellant also.)]

#### Note 25

1. (‘19) AIR 1919 Nag 150 (152) : 15 Nag LR 21.

2. (‘83) 1883 Bom P J 6 (7).

**O. 22 R. 3**  
**Note 26**

**26. Appeal.** — An order on an application under this rule allowing<sup>1</sup> or refusing to allow<sup>2</sup> a person to be brought on the record as the legal representative of a deceased party is not appealable. The reason is that such an order does not adjudicate upon the *rights of parties* on any point or points in controversy in the suit and is therefore not a *decree*,<sup>3</sup> nor is such an order an appealable one under the provisions of Section 104 and O. 43 R. 1. Under the old Code, an order under this rule whether a person should be brought on record as a legal representative of the deceased party was sometimes held to be one under Section 367 of the old Code (corresponding to Rule 5 of this Order) and was therefore held to be appealable under Section 588, clause 18 of that Code.<sup>4</sup> Under the present Code there is no appeal from an order under Rule 5 and the said cases would, therefore, be no longer law. An order bringing on record the legal representative of a deceased appellant is not a "judgment" within the meaning of Clause 15 of the Letters Patent.<sup>5</sup>

In *Niranjana Nath v. Afzal Hussain*,<sup>6</sup> a Full Bench of the Lahore High Court observed as follows: "When the order of the Court merely recognizes an abatement, which has already taken place on account of the death of a plaintiff not followed by an application within six months [the period of limitation now is ninety days under Article 176 of the Limitation Act] to implead his legal representative, and does not determine any matter in controversy between the parties, it cannot be regarded as a decree. If, on the other hand, the order of abatement is the result of an adjudication upon the rights of the parties with respect to a matter in controversy, and is not passed upon an application for the revival of the suit made under O. 22 R. 9 [an order under O. 22 R. 9 refusing to set aside the abatement of a suit is an *appealable* order under O. 43 R. 1 clause (k) and hence cannot be a decree: *vide* Section 2, clause 2], it amounts to a decree and is appealable as such." As an instance of the latter type of orders was mentioned the case in which the suit abates not automatically on the failure of the legal representative to apply for substitution of his name within the period of limitation but as the result of an adjudication by the Court that the right to sue did not survive after the death of the plaintiff. It was also pointed out that where the Court holds that the result of the abatement of a suit with regard to one of the plaintiffs owing to his legal representatives not having applied within the period of limitation to be brought on the record is to cause an abatement of the suit with regard to the other plaintiffs also, there would be an adjudication on the rights of the parties and the order would amount to a decree whether it is called a dismissal of the suit or an *abatement*.

An order directing an abatement is not appealable by a person who is not a party to the suit.<sup>7</sup> Nor is an order rejecting an application that the suit might be

**Note 26**

1. ('25) AIR 1925 All 431 (432) : 47 All 741.
2. ('15) AIR 1915 All 158 (158) : 37 All 272.  
(Order under O. 22 R. 5.)  
(81) 3 All 844 (845).
- (26) AIR 1926 Mad 586 (591) : 49 Mad 450 (F B).  
(Order under O. 22 R. 5 — AIR 1920 Mad 424, Overruled.)
- (16) AIR 1916 Mad 523 (524) : 39 Mad 488.
- (24) AIR 1924 Mad 622 (623). (Applications by rival claimants for coming on record were made — One application was allowed and the other was dismissed as time barred.)
- (24) AIR 1924 Mad 813 (814).
- (81) AIR 1981 Lah 235 (236). (Order under O. 22 R. 5.)

- (24) AIR 1924 Oudh 114 (114).
- (20) AIR 1920 Lah 8 (8, 9) : 1 Lah 498.
3. ('32) AIR 1932 All 466 (466).
- (20) AIR 1920 Lah 8 (9) : 1 Lah 498.
- (24) AIR 1924 Mad 813 (814).
4. ('95) 18 Mad 496 (497).
- (07) 10 Oudh Cas 121 (125).
5. ('38) AIR 1938 Mad 417 (417) : 56 Mad 689.
6. ('16) AIR 1916 Lah 245 (247) : 1916 Pun Re No. 128 (F B).
7. ('20) AIR 1920 Lah 8 (9) : 1 Lah 498. (The decision, however, seems to suggest that a party can appeal from such an order.)  
[See ('26) AIR 1926 Mad 586 (591) : 49 Mad 450 (F B). (Question left open.)]

declared to have abated, open to appeal.<sup>8</sup> It has been held in the undermentioned case<sup>9</sup> that an order of rejection of a petition for substitution under this rule does not *ipso facto* cause the suit to abate.

**O. 22 R. 3**  
**Note 26**

A decree dismissing the suit will be appealable by a party thereto.<sup>10</sup>

Where a suit automatically abates in the absence of an application under this rule, within time, it has been held by the Lahore High Court<sup>11</sup> that an application thereafter for substitution must be deemed to be made under Rule 9 *infra*, and that an order on such application would be appealable under the provisions of Order 43.

See also Note 21 to Rule 1, *ante*.

**R. 4. [S. 368.]** (1) Where one of two or more defendants dies and the right to sue does not survive against

**O. 22 R. 4**

Procedure in case of death of one of several defendants or of sole defendant.

the surviving defendant or defendants alone,<sup>5</sup> or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an

application made in that behalf,<sup>6</sup> shall cause the legal representative of the deceased defendant to be made a party<sup>8</sup> and shall proceed with the suit.

(2) Any person so made a party may make any defence<sup>15</sup> appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited<sup>7</sup> by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.<sup>17</sup>

[1877, S. 368; 1859, S. 104.]

**Local Amendments**

**CALCUTTA**

(1). At the end of sub-rule (3) delete the period and *add* the words: "except as hereinafter provided."

(2). *Insert* the following as sub-rule (4):

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or has failed to appear and contest the suit at the hearing; and judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

**MADRAS**

(1). *Remove* the period at the end of sub-rule (3) and *add* the following: "except as hereinafter provided."

[See also ('95) 17 All 172 (174).]

8. ('95) 17 All 286 (288).

9. ('21) AIR 1921 Nag 28 (24) : 17 Nag L R 45.

10. ('95) 18 Mad 496 (498).

[See also ('20) AIR 1920 Lah 8 (9) : 1 Lah 498.]

11. ('24) AIR 1924 Lah 424 (424).

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**Notes 1-2**

(2). Insert the following as new sub-rule (4):

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

*Synopsis*

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and applicability of the Rule.</li> <li>3. Rule applies to appeals.</li> <li>3a. Applicability of Rule to revision proceedings. See O. 22, General, Note 2.</li> <li>4. Rule does not apply to execution proceedings.</li> <li>4a. Suit against municipality.</li> <li>4b. Suit against devasthanam.</li> <li>5. Where right to sue survives against persons other than the surviving defendant or defendants.</li> <li>6. "On an application made in that behalf."</li> <li>7. Limitation to implead legal representative.</li> <li>8. "Shall cause the legal representative of the deceased defendant to be made a party."</li> <li>9. Two or more legal representatives.</li> <li>10. Wrong person as legal representative.</li> <li>11. Joint Hindu family and legal representative.</li> <li>12. Legal representatives already on record in another capacity.</li> <li>13. Succession Act and legal representative.</li> </ol> | <ol style="list-style-type: none"> <li>14. Pro forma defendant or respondent.</li> <li>15. What pleas may be taken by a legal representative.</li> <li>16. Effect of decree against legal representative of deceased defendant.</li> <li>17. "The suit shall abate as against the deceased defendant."</li> <li>18. Death after preliminary and before final decree. See Note 19 to Rule 3.</li> <li>19. Decree against a dead person.</li> <li>20. Order 41 Rule 20 and abatement.</li> <li>21. Order 1 Rule 8 and abatement. See Note 24 to Order 1 Rule 8.</li> <li>22. Where suit or appeal abates against deceased defendant or respondent only.</li> <li>23. When suit or appeal abates against all, as a whole.</li> <li>24. Inherent power to add legal representative after abatement.</li> <li>25. Appellate Court and abatement.</li> <li>26. Award of costs.</li> <li>27. Re-hearing of suit or appeal.</li> <li>28. Revision.</li> <li>29. Appeal.</li> </ol> |
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**1. Legislative changes. —**

1. Under Section 368 of the old Code, the plaintiff had to make an application specifying the person whom he alleges to be the legal representative of the deceased defendant. It was, however, open to the person to object that he was not the legal representative. The real legal representative could also make the application to have himself impleaded. The present provision is more general in the matter of the application and lays down that "the Court shall, on an application made in that behalf, cause the *legal representative* of the deceased defendant to be made a party." See Note 16 *infra*.

2. The words "as against the deceased defendant" in sub-rule (3) are new.

**2. Scope and applicability of the Rule. —** This rule deals with the death of a defendant in a pending suit. It will be interesting to note the position of this rule in relation to Rule 2 on the one hand, and in relation to Rule 10 on the other. If a case falls within Rule 2, this rule is excluded;<sup>1</sup> and if a case falls within this rule, Rule 10 will be excluded.<sup>2</sup>

For the application of this rule the following conditions are necessary, *viz.* —

(1) There must be a *suit* (or an appeal). Thus, the rule has been held to be inapplicable to an investigation into an application for permission to sue in *forma pauperis*,<sup>3</sup> and to proceedings by contributories under Section 214 of the Companies Act, 1882.<sup>4</sup> But it has been held to apply to proceedings under Section 21A of the Punjab Alienation of Land Act.<sup>5</sup>

(2) The death of the defendant must be *pending the suit*. Thus, the rule will not apply if such death was either before the institution of the suit<sup>6</sup> or after decree in suit.<sup>7</sup> In the former case, if the deceased was the sole defendant, the suit will have to be dismissed as being against law.<sup>8</sup> If he was one of two or more defendants, his name will have to be removed from the record and the suit proceeded with against the other defendants, if need be, after an order under O. 1 R. 10.<sup>9</sup> The suit or appeal must be pending in a Court having *jurisdiction* to entertain it. Otherwise, there can be no question of abatement of the suit or appeal.<sup>10</sup>

(3) The right to sue should survive but not against the surviving defendants *alone*. Thus, if the right to sue does not survive at all the rule will not apply.<sup>11</sup> And if it survives against the surviving defendants *alone*, Rule 2, and not this rule, will apply.<sup>12</sup>

**3. Rule applies to appeals.** — This rule applies also to the case of the death of a respondent in a pending appeal.<sup>1</sup> The words "right to sue" in this rule should be taken to mean "right to appeal" in cases where a party dies after decree in the suit, but pending appeal.<sup>2</sup> But where the appeal has been filed in a Court not having *jurisdiction* to entertain it, there can be no abatement.<sup>3</sup>

Under the old Code it was held by the Allahabad High Court in a number of cases that the provisions of Section 368 were limited to the case of the death of a respondent, who was a defendant in the lower Court,<sup>4</sup> and held that a defendant-appellant need not apply under the Section for impleading the legal representatives of

(27) AIR 1927 All 272 (272) : 49 All 310. (Right to sue includes the right to continue the suit.)

(92) 16 Bom 27 (28).

3. ('88) 7 Bom 378 (376).

4. ('96) 18 All 156 (158).

5. ('85) AIR 1935 Lah 443 (444).

6. ('08) 81 Mad 86 (88).

(37) AIR 1937 Lah 794 (795). (Suit originally instituted in wrong Court and on return of plaint, plaintiff re-presented in proper Court—Death of some of the defendants in the interval — No question of abatement arises.)

7. ('05) 28 Mad 361 (362). (Where a defendant dies after an *ex parte* decree against him, his legal representatives cannot apply to set it aside unless plaintiff has clearly brought them on record as legal representatives under S. 234 (S. 50).)

8. ('14) AIR 1914 Cal 895 (896).

(19) AIR 1919 Cal 257 (258).

(16) AIR 1916 Mad 440 (441).

(28) 1928 Mad W N 240 (241).

(20) AIR 1920 Sind 82 (88).

[See ('98) 16 Mad 319 (320).]

9. ('26) AIR 1926 Lah 153 (153, 154).

(28) AIR 1928 Lah 359 (360) : 9 Lah 526.

10. ('35) AIR 1935 All 92 (93).

11. ('21) AIR 1921 Lah 390 (391).

(35) AIR 1935 All 106 (107).

(38) AIR 1938 Cal 61 (63) : 36 Cal W N 1007 (1009, 1010).

12. ('06) 4 Cal L Jour 568 (570, 571).

(33) AIR 1933 Nag 95 (99) : 29 Nag L R 12.

(34) AIR 1934 Pat 427 (428, 429). (Father marrying under Special Marriage Act, III of 1872 — Son born to such father is governed by personal law in the matter of distribution of his estate — Suit against such father and son — Father dying — Right to sue survives against son.)

### Notes 3

1. ('80) 4 Bom 654 (655).

(98) 22 Bom 718 (721).

(04) 31 Cal 487 (494) : 31 Ind App 71 (PC).

(80) 1880 Pun Re No. 30, p. 67.

2. ('84) AIR 1984 All 1029 (1030).

3. ('35) AIR 1935 All 92 (93).

4. ('87) 9 All 118 (119).

(85) 7 All 784 (788).



**O. 22 R. 4**  
**Notes 3-4b**

a deceased plaintiff-respondent.<sup>5</sup> It is now, however, well settled that the rule applies to the case of the death of a respondent whether he was a plaintiff or a defendant in the original suit.<sup>6</sup> The question whether the abatement is partial or total will, in the case of a suit, depend on the nature of the right claimed; but in an appeal it will have to be decided with reference to the nature of the *decree appealed against*.<sup>7</sup> As to this, see Notes 22 and 23, *infra*.

The provisions of sub-rule (4), framed by the High Court of Madras, are applicable to appeals also. Thus, where on the death of one of the respondents, the appellant fails to bring on record his legal representative, the Appellate Court has jurisdiction to exempt his being brought on record and the appellate decree has the same force and effect as if it had been passed before he died.<sup>8</sup>

**3a. Applicability of Rule to revision proceedings.** — See Order 22, General, Note 2.

**4. Rule does not apply to execution proceedings.** — This rule does not apply to execution proceedings.<sup>1</sup> Rule 12 contains a specific declaration to this effect. For fuller discussion, see Notes to O. 22 R. 12.

**4a. Suit against municipality.** — A certain Municipality was superseded by the Government and a Special Officer was appointed. A suit was brought against the Municipality represented by the Special Officer and was decreed. The defendant appealed against the decree making the Special Officer as representing the Municipality respondent to the appeal. The administration of the Municipality was then restored to the Commissioners. It was held by the Patna High Court in the undermentioned case<sup>1</sup> that it was not necessary to bring the Commissioners on the record as the legal representatives of the Special Officer, as the appeal was against the Municipality which was a Corporation and the Commissioners were not the representatives of the Special Officer. The decision proceeds on the ground that the Municipality continues to be a Corporation notwithstanding the appointment of a Special Officer. But this decision is inconsistent with the decision in the undermentioned case of the Lahore High Court.<sup>2</sup> In that case, a suit was filed against a Municipality and then the Municipality was superseded and an Administrator was appointed. It was held that a decree passed against the Municipality in such a suit without bringing on record the Administrator or other person as the legal representative of the Municipality was a nullity.

**4b. Suit against devasthanam.** — See the undermentioned case.<sup>1</sup>

5. ('85) 7 All 693 (697, 698, 700, 701). (Per Mahmood, J., *Contra*)

6. (1900) 22 All 430 (438).

('05) 28 Mad 498 (499).

7. ('30) AIR 1930 Lah 651 (653).

[See also ('33) 141 Ind Cas 239 (240) (Pat).]

8. ('85) AIR 1985 Mad 236 (238) : 58 Mad 752. (This power is discretionary and will rarely be exercised in the case of a single respondent.)

**Note 4**

1. ('81) AIR 1981 Bom 425 (427). (The proper procedure in execution is regulated by O. 21, R. 16 in case of a deceased decree-holder and O. 21 R. 22 and S. 50 in case of deceased judgment-debtor.)

('23) AIR 1923 Lah 560 (568). (Appeal from order in execution proceedings—O. 22 R. 11 not

applicable.)

('11) 10 Ind Cas (405) (406) (Lah).

('39) AIR 1939 Sind 284 (285) : I L R (1939) Kar 509.

('85) AIR 1985 Pat 117 (117) : 18 Pat 777.

[See ('88) AIR 1988 Nag 308 (308). (Failure to bring legal representative of the judgment-debtor on record does not necessarily make proceedings a nullity.)]

**Note 4a**

1. ('87) AIR 1987 Pat 588 (588).

2. ('88) AIR 1988 Lah 83 (84).

**Note 4b**

1. ('87) 1987 Mad W N 465 (477). (Suit against devasthanam—Defendant represented by trustee—Trustee ceasing to be such subsequently—Omission to bring on record another trustee does not cause abatement.)



**5. Where right to sue survives against persons other than the surviving defendant or defendants.** — The rule does not apply if the right to sue survives against the surviving defendants *alone*. In other words, it is necessary that the right to sue should either survive to *other* persons alone or to other persons along with the surviving defendants. For some illustrative cases, see the cases cited below.<sup>1</sup> See also Notes to Rule 2 and Note 5 to Rule 3, *ante*.

**O. 22 R. 4  
Notes 5-7**

**6. "On an application made in that behalf."** — Under the old Code it was for the plaintiff to bring the proper legal representatives of a deceased defendant on record and he was to choose the representative at his own risk.<sup>1</sup> Even the last paragraph in Section 368 was only subsequently added to the Section. Before that addition, it was held that the Court could not, except on the application of the plaintiff or the appellant, place on record the representative of a deceased sole defendant or respondent and that the representative of the deceased defendant or respondent could not apply under that Section.<sup>2</sup> Under the present rule it is open to any person interested to apply for the addition of the proper representative.<sup>3</sup> But even under the present rule, in the absence of a proper application by anybody else, the duty of applying for bringing in the proper legal representatives on record ultimately rests on the plaintiff<sup>4</sup> as the consequence of not applying in time will be the abatement of the suit. Such an application is not obviated by the mere fact that a legal representative has been impleaded in another independent proceeding.<sup>5</sup>

Even under the old Code where the Court was to simply enter the name of the person nominated by the plaintiff, it was held that it had, in some cases, power to add other persons jointly with those nominated by the plaintiff.<sup>6</sup> Under the present Code the Court has power to determine who is the legal representative.

**7. Limitation to implead legal representative.** — Under the Limitation Act of 1877 there was a sharp conflict of opinion on the question as to the period within which an application to implead the legal representatives of a deceased respondent in an appeal had to be filed.<sup>1</sup> Under the present Code such applications,

#### Note 5

1. (1900) 22 All 430 (433). (Suit for joint possession decreed — Appeal—One respondent died— Legal representative not brought on record — Held right to appeal does not survive against surviving respondents alone.)
- (1904) 31 Cal 487 (494) : 31 Ind App 71 (PC). (Suit for taking accounts and winding up the affair of a partnership — Right to sue does not survive against surviving partners alone — If legal representative is not added, suit cannot proceed against other partners alone and should therefore be dismissed as a whole.)
- (1921) AIR 1921 Lah 160 (161). (Three defendants were sued jointly as representing the estate of their late father—The lower Court dismissed the suit and the plaintiffs appealed — During the pendency of the appeal one of the defendants-respondents died and the application to bring his legal representative on the record was made nearly two years later — Held, that the appeal abated inasmuch as the right to sue did not survive only against the two defendants on the record.)

#### Note 6

1. (1918) 21 Ind Cas 897 (400) (Cal).

(190) 1890 Pun Re No. 5, p. 12.

2. (185) 9 Bom 56 (58).

(185) 9 Bom 151 (155). (However in case of conflict between Ss. 368 and 372 (corresponding to Rr. 4 and 10 of this Order) S. 372 prevails.)

(182) 12 Cal L Rep 45 (46).

3. (1923) AIR 1923 Mad 679 (682).

4. (1932) AIR 1932 Nag 144 (146); 28 Nag L R 69. [See (1933) AIR 1933 Cal 314 (315).]

[See also (1933) AIR 1933 Mad 920 (925). (Application under Rule 5 can be treated as one under Rule 4.)]

5. (1927) AIR 1927 Mad 707 (708).

[See however (1925) AIR 1925 Mad 777 (777). But order that is made bringing the legal representative of the deceased respondent on the record in the memorandum of objections will enure for the whole of the proceedings including the appeal.]

(1919) AIR 1919 Mad 1026 (1027). (Appeal and memorandum of objections are not independent proceedings.)

6. (185) 8 Mad 300 (303).

#### Note 7

1. In the following cases Article 178 was held applicable :

**O. 22 R. 4  
Notes 7-9**

whether in a suit or in an appeal, to implead legal representatives are governed by Article 177 of the Limitation Act (IX of 1908).<sup>3</sup>

Has the Court power to excuse delay and accept an application made after the period of limitation? It has been held that Section 5 of the Limitation Act does not apply to an application under this rule.<sup>3</sup> But an abatement can be set aside for *sufficient cause under Rule 9, infra*, so that in such cases the strict procedure would be to declare the suit or appeal to have abated and to allow the plaintiff or appellant, as the case may be, to apply under Rule 9.<sup>4</sup> As to what is sufficient cause, See Rule 9.

**8. "Shall cause the legal representative of the deceased defendant to be made a party."** — On the death of a defendant in a suit the Court should bring the legal representative on the record before proceeding further with it. The suit may be described to be in a state of suspension till then, and no orders excepting formal, or processual can be passed.<sup>1</sup> If the suit is disposed of without impleading the legal representatives of a deceased party, retrial will be ordered.<sup>2</sup>

Where the Court makes an order for the substitution of the names of the heirs of a deceased defendant or respondent, it is no part of the duty of the plaintiff or appellant to see that the record of the Court is corrected in terms of the order. This is a ministerial function which the Court's establishment is charged to perform.<sup>3</sup>

If it is necessary in any case that some person who is not an heir *ex concessis* of a deceased defendant should be substituted instead, it is not enough that the name of the person is substituted or added in the cause title. But it is necessary that the plaint should also be amended making the necessary allegations on which the liability of the added person is based.<sup>4</sup>

**9. Two or more legal representatives.** — Supposing that a defendant dies

('88) 10 All 260 (262, 268).

('88) 10 All 264 (267, 269) (FB).

('88) 10 All 270 (271) (FB).

('86) 9 Mad 1 (3, 4, 5) (FB). (Karnan, J., dissenting.)

('06) 29 Mad 529 (580). (28 Mad 498, Overruled).

[See ('10) 5 Ind Cas 420 (421) : 84 Mad 292.

('86) 10 Bom 668 (665). (Art. 171-B, Limitation Act (1877) not applied.)

('85) 11 Cal 694 (695, 696). (Art. 171B applied.)]

In the following cases Article 175C was held applicable :

('89) 11 All 408 (413, 415).

('07) 29 All 535 (586).

('07) 84 Cal 1020 (1039).

2. ('24) AIR 1924 Lah 816 (818). (But an application for bringing legal representative of a deceased person who was not a defendant or respondent on date of his death is governed by Art. 181 and not by Art. 177.)

('88) AIR 1988 Lah 856 (858) : 14 Lah 548. (If no application is made in time, suit abates automatically.)

3. ('14) AIR 1914 All 94 (95) : 86 All 285.

('22) AIR 1922 Lah 181 (181).

4. ('29) AIR 1929 Lah 129 (180) : 10 Lah 818. (Application specifically under Rr. 4 and 9—Certain circumstances adduced as sufficient cause to excuse delay—Prayer that application be admitted and delay excused under S. 5 of the Limitation Act—Held, application was in sub-

stance to set aside abatement.)

[See ('39) AIR 1939 Sind 86 (37) : 26 Sind L R 81.]

**Note 8**

1. ('31) AIR 1931 Lah 73 (74). (The state of suspension by lapse of time under Art. 177 merges into state of abatement.)

('29) AIR 1929 Pat 101 (101). (Examination of witnesses on commission—Death of party pending examination—Commissioner executing commission all the same—Illegal.)

('02) 12 Mad L Jour 188 (189).

2. ('70) 14 Suth W R 837 (838).

('76) 25 Suth W R 108 (108).

('24) AIR 1924 Lah 83 (84). (It is illegal for the Court to continue to hear a suit against a dead person and pass a decree against that person where it has notice of such death.)

('16) AIR 1916 Mad 574 (575) : 28 Ind Cas 83 (84) : 89 Mad 886. (But an unsuccessful appellant cannot insist on having a re-hearing of the case because it turns out that at the time of hearing, the respondent was dead when the representatives of the deceased themselves do not want it.)

[See also ('27) AIR 1927 Lah 200 (215) : 8 Lah 54. (Refusal to bring in legal representative is a denial of natural justice which will make foreign judgment unenforceable.)]

3. ('87) AIR 1937 Bom 401 (406) : I L R (1937) Bom 602 (If it is not performed or neglected, the fault will not lie with the appellant.)

4. ('88) AIR 1938 Cal 814 (815).

leaving two or more legal representatives, the question arises whether all of them should be impleaded and what is the effect of a failure to do so. On this question the Allahabad,<sup>1</sup> Bombay,<sup>2</sup> Madras,<sup>3</sup> Patna,<sup>4</sup> Lahore<sup>5</sup> and Peshawar<sup>6</sup> Courts have held that even if one of them alone is impleaded, he sufficiently represents the estate and the suit does not abate. Further, according to the Lahore High Court,<sup>7</sup> a *bona fide* application to bring in all those representatives who can be ascertained by the exercise of due care and industry will save abatement. According to the Rangoon High Court<sup>8</sup> if the person impleaded as a matter of fact represented the estate and no objection as to the want of proper representation is taken at the time, there will be no abatement and the decree will bind the estate. According to the Nagpur view the plaintiff can get relief against the legal representative impleaded, though it will not bind the other representatives.<sup>9</sup> The Sind Court<sup>10</sup> has held that all the legal representatives should be brought on record in time; otherwise the suit will abate. But even in that Court an objection that all the representatives have not been brought on record should be taken at the proper time; otherwise the defendants will be estopped from taking it at any subsequent stage.<sup>11</sup> In any event, if some of the legal representatives are specifically dispensed with, the suit cannot proceed as against them; and if the suit cannot proceed in their absence, the whole suit will abate.<sup>12</sup>

It has been held by the Madras High Court<sup>13</sup> that where all the legal representatives are brought on the record but, subsequently, one of them dies and *his* legal representatives are not brought on the record, the proceedings are not vitiated.

See also Note 11 to Rule 3, *ante*.

**10. Wrong person as legal representative.** — An application to implead somebody other than the proper legal representative of a deceased defendant is not valid and a decree obtained against such person will *ordinarily* be not binding on the true representative or on the estate of the deceased defendant.<sup>1</sup> But such a decree will be binding in the following circumstances, *viz.* —

(i) where the plaintiff acted *bona fide*;

#### Note 9

1. ('28) AIR 1928 All 532 (538) : 50 All 857.
2. ('24) AIR 1924 Bom 420 (421). ('35) AIR 1935 Bom 287 (290).
3. ('02) 26 Mad 230 (234). ('89) 12 Mad 90 (91).
4. ('28) AIR 1928 Mad 1199 (1199, 1200). (Where one or some only of several legal representatives of a deceased defendant are brought on record in time, there is no abatement and an effective decree can be passed against the estate of the deceased, especially where the others are later on also added as parties though after the prescribed time.)
- [See ('12) 18 Ind Cas 318 (318) (Mad). (Where some of the legal representatives of a deceased respondent are brought on the record in time, there is no bar to bringing the other representatives on the record subsequently.)]
- [See also ('36) AIR 1936 Mad 336 (337) : 59 Mad 660. (Death of party—Other side taking proper steps to bring on record legal representatives to best of his knowledge — Merely because all representatives are not brought on record suit does not abate.)]
5. ('25) AIR 1925 Pat 551 (551, 552) : 4 Pat 320.
6. ('36) AIR 1926 Pat 276 (276).

[See also ('34) AIR 1934 Pat 427 (428). (Suit against father and son—Father dying—Right to sue surviving against the son—No application for bringing him on record as legal representative necessary.)]

5. ('13) 18 Ind Cas 44 (46) (Lah).
6. ('38) AIR 1938 Pesh 4 (5).
7. ('27) AIR 1927 Lah 6 (7, 8) : 7 Lah 438. ('35) AIR 1935 Lah 712 (713).
8. ('23) AIR 1923 Rang 114 (116) : 4 Upp Bur Rul 150.
9. ('23) AIR 1923 Nag 101 (102) : 18 Nag L R 21.
10. ('25) AIR 1925 Sind 2 (3, 4). ('26) AIR 1926 Sind 20 (21).
11. ('30) AIR 1930 Sind 147 (148).
- [See also ('33) AIR 1933 Cal 325 (328) : 60 Cal 87. (Objection as to non-representation or want of complete representation of the interest of the deceased defendant held barred by failure to take the objection earlier.)]
12. ('17) AIR 1917 Cal 98 (98).
13. ('36) AIR 1936 Mad 336 (338) : 59 Mad 660. (In this case there was the additional factor that the plaintiff did not know about the death of one of the legal representatives.)

#### Note 10

1. ('20) AIR 1920 All 323 (328) : 42 All 497 (504).

**O. 22 R. 4**  
**Notes 10-12**

- (ii) where the decree obtained is free from fraud or collusion;
- (iii) where the person wrongly impleaded was so impleaded in a representative capacity and the decree was passed against him as representing the estate of the deceased;
- (iv) where the plaintiff was not aware of any fact which displaced the apparent title of the person; and
- (v) where the real legal representative had not intervened during the pendency of the suit.<sup>2</sup>

Thus, a decree obtained after impleading a person having a *prima facie* claim to be considered the legal representative of a deceased defendant<sup>3</sup> or after impleading a person who, but for some other facts of which the plaintiff is not aware, would be such legal representative,<sup>4</sup> will be binding on the estate. In such cases, however, conditions (iv) and (v) must be satisfied, that is, the true representatives must not have intervened or applied to be made parties pending the suit<sup>5</sup> and the plaintiff must not, during such pendency, have been otherwise made aware that the person whom he has impleaded is not the true legal representative. Where the plaintiff was in a position to know who the real heirs were on making inquiries which he failed to make, it has been held that his application to substitute a wrong person as the heir of the deceased cannot save the suit from abatement.<sup>6</sup> Where a wrong person has been impleaded as the legal representative the Court can, on being apprised of the fact of the existence of the legal representative, strike out the former's name and substitute the latter's name on the record.<sup>7</sup>

See also Section 11 Note 63b; Section 50 Note 14; Section 52 Notes 4 to 6 and Order 22 Rule 3 Note 12.

**11. Joint Hindu family and legal representative.** — When the deceased defendant is a member of a joint Hindu family it must be shown, before the other members can be impleaded as legal representatives, that *prima facie* the deceased had an estate which survived to the other members.<sup>1</sup> See also the undermentioned decision.<sup>2</sup>

**12. Legal representatives already on record in another capacity.** — It may be taken as fairly well settled that where the legal representatives of a deceased

(24) AIR 1924 All 717 (718).

(13) 18 Ind Cas 391 (382) (Bom).

(16) AIR 1916 Mad 726 (727).

2. ('29) AIR 1929 Mad 482 (485).

(33) AIR 1933 Nag 73 (74): 29 Nag L R 89. (Failure to make detailed enquiries does not necessarily mean want of *bona fides*.)

[See also ('09) 4 Ind Cas 1059 (1060): 33 Mad 6. (Principle applied to execution proceedings.)]

[See however ('33) AIR 1933 Mad 43 (48). (Decree against wrong legal representative not in possession of estate is bad though not fraud.)]

3. ('91) 14 Mad 454 (457).

(25) AIR 1925 Oudh 330 (334): 28 Oudh Cas 177.

[See also ('32) AIR 1932 Lah 426 (427): 14 Lah 78.]

4. ('28) AIR 1928 Mad 243 (244, 245).

(80) AIR 1980 Mad 980 (986): 54 Mad 212.

(83) AIR 1983 Lah 380 (381): 14 Lah 696. (Suit instituted against legal representative.)

5. ('31) AIR 1931 Cal 782 (784, 785).

6. ('37) AIR 1937 Pat 612 (618). (Although there

was no motive for impleading the wrong person.)

[See also ('39) AIR 1939 Lah 277 (279). (It cannot be laid down as a general rule that where the proper legal representative is not made a party, but there is nothing to show fraud or collusion, the representation of the estate by such person will bind the proper legal representatives—But it was held in the peculiar circumstances of the case that the decree obtained against a wrong person as the legal representative bound the true legal representatives.)]

7. ('83) 12 Cal L Rep 45 (46). (Court refused to substitute *suo motu*.)

(15) AIR 1915 Lah 144 (144).

#### Note 11

1. ('80) AIR 1980 Mad 575 (576).

2. ('39) AIR 1939 All 626 (636). (Defendant in suit dying during pendency of suit leaving father, brothers, widow and daughter — His father brought on record in his place and not his widow — Representation is defective — Even if it is assumed that the defendant was sued as manager

defendant are already on the record in the suit, though in another capacity, no application is necessary under this rule to implead them as legal representatives, and the suit will not abate by reason of the absence of such an application.<sup>1</sup> It is enough if the plaintiff, at some time or other during the hearing of the suit, states the fact and gets it noted on the record.<sup>2</sup> Where, however, only *some* of the legal representatives are on the record but not all, it has been held by the Patna and Lahore High Courts that an application is necessary under this rule and that in its absence the suit will abate.<sup>3</sup> In the undermentioned case<sup>4</sup> it was held by the Bombay High Court that even where the only heir of a deceased defendant is already on the record in another capacity, an application under this rule is necessary. According to the High Court of Madras, where the legal representative already on the record sufficiently represents the estate, the suit will not abate by reason of the absence of an application under this rule and the decree passed in the suit will bind the estate.<sup>5</sup>

See also Note 14 to Rule 3.

**13. Succession Act and legal representative.** — Where the deceased is governed by the Succession Act, his legal representatives are his executors or administrators and not his heirs.<sup>1</sup> Even though no representation is taken out for his estate, the plaintiff cannot, on that ground, add his heirs as legal representatives.<sup>2</sup> The only course open to the plaintiff will be to move the Court to have an administrator appointed.<sup>3</sup> On the death of an executor, the estate of the testator devolves on the residuary legatee and hence a suit or appeal filed against the executor will abate if upon his death, an application for bringing on record the residuary legatee is not made within the period of limitation.<sup>4</sup> See also Note 10 to Rule 3.

**14. Pro forma defendant or respondent.** — Where the deceased defendant or respondent *had no interest* in the litigation, the rule does not apply and the failure to bring his legal representatives on the record within time will not cause the suit or appeal to abate.<sup>1</sup> Thus, there will be no abatement for failure to bring in the legal

of joint family, if father is not the manager, his impleadment is not sufficient.)

#### Note 12

1. ('26) AIR 1926 Lah 607 (608) : 7 Lah 399. (Dissenting from A I R 1926 Lah 37.)
- ('33) AIR 1933 Lah 710 (711).
- ('33) AIR 1933 Lah 765 (766).
- ('21) 59 Ind Cas 238 (239) (Lah).
- ('29) AIR 1929 Mad 152 (152) : 51 Mad 347 (348).
- ('21) AIR 1921 Oudh 209 (213) : 24 Oudh Cas 874.
- ('20) AIR 1920 Sind 82 (83).
- ('29) AIR 1929 Sind 225 (226) : 24 Sind L R 167.
- ('32) AIR 1932 Lah 426 (427) : 14 Lah 78.
- ('36) AIR 1936 Pat 548 (550) : 15 Pat 326. (Where all the heirs are already on record application for substitution is not necessary — In such a case R. 2 applies—AIR 1928 Pat 250, Distinguished.)
- ('38) AIR 1938 Oudh 259 (259).
- ('39) AIR 1939 Oudh 155 (155) : 14 Luck 453. (Suit for partition — Of two respondents, father and son, if father dies, appeal does not abate as son is already on record though no application for substitution is made.)
- [See ('16) AIR 1916 Mad 699 (699, 700).]
- [See however ('26) 95 Ind Cas 236 (237) (Lah). (Letter to Registrar mentioning death and fact

that legal representatives were already on record—Subsequent payment of court-fee — Abatement—Setting aside—Limitation Act, S. 5 —Death of respondent—Appellants diligent — Letter written within time to the Deputy Registrar mentioning his death and informing the Court that the legal representatives were already on the record may be treated as sufficiently complying with the necessity for formal application.)]

2. ('29) AIR 1929 Mad 152 (152) : 51 Mad 347. ('80) AIR 1930 Mad 579 (581).
- ('38) AIR 1938 Oudh 259 (259).
3. ('25) AIR 1925 Pat 123 (124) : 9 Pat 853. ('33) AIR 1933 Lah 356 (359) : 14 Lah 543. ('28) AIR 1928 Pat 250 (252, 253) : 7 Pat 285.
4. ('38) AIR 1938 Bom 6 (8) : 1 L R (1938). Bom 64.
5. ('30) AIR 1930 Mad 69 (71, 72).

#### Note 13

1. ('94) 18 Bom 337 (340, 342). (Inferred.)
2. ('25) AIR 1925 Rang 186 (187) : 3 Rang 46.
3. ('94) 18 Bom 337 (342).
- ('25) AIR 1925 Rang 186 (187) : 3 Rang 46.
4. ('36) 164 Ind Cas 197 (200) : 62 Cal 998.

#### Note 14

1. ('28) AIR 1923 Cal 382 (384).

**O. 22 R. 4** representative of a deceased defendant or respondent, who was only a *pro forma*  
**Notes 14-16** defendant or respondent<sup>2</sup> or who was not a proper or necessary party to the suit or appeal.<sup>3</sup>

**15. What pleas may be taken by a legal representative.** — A legal representative must continue the litigation on the *cause of action sued upon* and cannot set up a new or individual right.<sup>1</sup> He cannot set up a plea open to him personally.<sup>2</sup> But he can take up any plea which may be appropriate to his character as legal representative.<sup>3</sup> Thus, he can rely on any one of the alternative defences of the deceased<sup>4</sup> even though it may not have been raised by him specifically.<sup>5</sup> But he cannot take up a new and inconsistent plea<sup>6</sup> or a plea contrary to the one taken up by the deceased.<sup>7</sup> See also Note 16 to Rule 3 and Note 7 to Section 50.

**16. Effect of decree against legal representative of deceased defendant.**

— A decree obtained against the legal representative of a deceased defendant is binding on the estate. If the person against whom the decree has been obtained is a limited owner, such as a Hindu widow, the question whether the decree is or is not binding on the reversioner will depend upon the question whether the suit was one which affects the *whole inheritance* or only on a cause of action *personal* to the widow.<sup>1</sup> In the latter case the decree is not binding on the reversioners.<sup>2</sup> Whereas in the former case, *i. e.*, when the decree has been fairly and properly obtained against the widow in her representative capacity, it is binding on the reversioners.<sup>3</sup> Where the person against whom the decree has been obtained is not the legal representative of the deceased, it has been held by the Bombay High Court that the decree is not binding on the persons rightly entitled to the estate, even though the plaintiff acted under a *bona fide* mistake and was not aware of the existence of the true legal representative.<sup>4</sup> However this may

('88) AIR 1933 Lah 406 (407).

('26) AIR 1926 Cal 247 (248).

('26) AIR 1926 Cal 512 (513).

('14) AIR 1914 Mad 708 (709) : 38 Mad 1064. (The test to decide whether a right survives is whether the result of the adjudication will affect the deceased party.)

('26) AIR 1926 Lah 189 (189). (The only point in dispute in the case did not affect the deceased defendant.)

('38) AIR 1938 Cal 541 (543). (No abatement as a whole.)

('85) AIR 1935 Cal 202 (203).

[See ('88) AIR 1938 Cal 639 (640). (Where the legal representative of a *pro forma* respondent who is dead is not brought on record, the appeal does not abate in toto.)

2. ('01) 28 All 22 (24).

('23) AIR 1923 All 211 (213) : 45 All 286.

('24) AIR 1924 Cal 998 (1001).

('23) AIR 1923 Lah 350 (351).

('23) AIR 1923 Lah 647 (647).

('25) AIR 1925 Lah 651 (652).

('27) AIR 1927 Lah 779 (779).

3. ('38) AIR 1938 Lah 406 (407).

('26) AIR 1926 Lah 444 (444). (Appeal held to abate so far as legal representatives of the deceased respondent were concerned.)

('27) AIR 1927 Lah 418 (419).

('29) AIR 1929 Lah 673 (674).

('30) AIR 1930 Lah 477 (478).

('38) AIR 1938 All 291 (291).

[See ('32) AIR 1932 Lah 641 (642) : 13 Lah 433.]

**Note 15**

1. ('27) AIR 1927 Nag 162 (163).

('35) AIR 1935 Mad 52 (54).

2. ('25) AIR 1925 Mad 59 (59).

('97) 19 All 480 (482).

('99) 21 All 277 (279).

('99) 21 All 356 (358).

[See also ('18) AIR 1918 Cal 151 (152). (But after a widow's death the reversioner was clothed with the full rights of a proprietor as the heir of a last male owner and could reopen the matters settled against the widow.)]

3. ('30) AIR 1930 All 848 (849). (Legal representative a manager of mutt—Preliminary decree on a mortgage by deceased defendant manager allowed to be challenged.)

4. ('18) 19 Ind Cas 401 (403) (Bom).

5. ('16) AIR 1916 Mad 1139 (1139).

6. ('21) AIR 1921 Cal 343 (344).

7. ('24) AIR 1924 Mad 245 (246).

**Note 16**

1. ('81) 7 Cal 357 (366).

2. ('99) 26 Cal 285 (299, 300).

3. ('98) 20 All 341 (348, 344).

('81) 6 Cal 479 (482).

('85) 11 Cal 45 (51, 52).

('86) 13 Cal 288 (291).

('96) 23 Cal 636 (638).

('04) 8 Cal W N 843 (851).

('09) 1 Ind Cas 62 (64) (Cal).

4. ('27) AIR 1927 Bom 68 (66, 67) : 50 Bom 302.

be, where the legal representative stands by and allows a stranger to enter into possession of the property, a decree obtained *bona fide* against the latter will be binding on the former.<sup>5</sup> Moreover, if the Court has *decided* that a person is the proper legal representative and passes a decree against him, it is binding on the estate even though it may subsequently turn out that he is not the proper legal representative.<sup>6</sup> See also Notes 63 and 63b to Section 11, Note 14 to Section 50 and Notes 5 and 6 to Section 52.

**O. 22 R. 4**  
**Notes 16-18**

**17. "The suit shall abate as against the deceased defendant."** — If a sole defendant dies and no application is made within the period of limitation, for bringing on record his legal representatives, the suit abates.<sup>1</sup> But if one of several defendants or respondents dies and no application is made within the period of limitation for bringing on record his legal representatives, the suit or appeal will, in the first instance, abate not in its entirety but only so far as the deceased defendant or respondent is concerned.<sup>2</sup> But such abatement may under certain circumstances result in the whole suit or appeal failing.<sup>3</sup> On this subject, see Note 22 below. Under the old Code a specific order of abatement was necessary and it was held that such an order ought not to be passed without notice to the plaintiff.<sup>4</sup> Under the present Code, however, the abatement takes place automatically and no separate order therefor is necessary.<sup>5</sup>

Where a suit abates it is, so to speak "dead or at an end"<sup>6</sup> and a decree passed in the face of such abatement is a nullity so far as the legal representative is concerned.<sup>7</sup>

**18. Death after preliminary and before final decree.** — See Note 19 to Rule 3.

5. ('78) 3 Cal L Rep 157 (158).

6. ('01) 25 Bom 337 (347) : 27 Ind App 216 (PC).

**Note 17**

1. ('22) AIR 1922 Cal 408 (409) : 49 Cal 524.

('24) AIR 1924 Lah 316 (317, 318). (And no failure by the persons concerned to object to action taken on an application presented after expiry of such time would alter the fact of abatement.)

('36) AIR 1936 Pat 110 (110). (One of the defendants to mortgage suit dying during pendency of suit—No application made to bring on record legal representatives within limitation — Legal representatives cannot be added as judgment-debtors in execution proceedings—AIR 1934 All 1027, Followed.)

2. ('98) 22 Bom 718 (721).

('33) AIR 1933 Lah 682 (684).

('33) AIR 1933 Lah 805 (805, 806). (Suit or appeal must be dismissed as against him — The assets of the deceased in the hands of the heir will not be liable for the suit claim.)

('10) 5 Ind Cas 325 (327) (All).

('27) AIR 1927 All 331 (332).

('35) AIR 1935 Lah 443 (444). (Where an applicant under S. 21A of the Punjab Alienation of Land Act omits to implead the legal representatives of one of the necessary parties thereto who is dead, the application abates under O. 22, R. 4 (8).)

('38) AIR 1938 Nag 42 (42) : ILR (1938) Nag 370. (And his legal representative cannot be affected by any decision made in the appeal.)

3. ('02) 26 Bom 203 (206).

4. ('17) AIR 1917 P C 156 (160) : 45 Cal 94 : 1917 Pun Re No. 104 : 44 Ind App 218 (PC).

5. ('26) AIR 1926 All 217 (220) : 48-All 334 (FB). (AIR 1922 All 209, Overruled.)

('33) AIR 1933 Lah 356 (358) : 14 Lah 543.

('26) AIR 1926 Lah 234 (235) : 7 Lah 73.

('28) AIR 1928 Lah 746 (747).

('37) AIR 1937 Bom 401 (406) : ILR (1937) Bom 602.

('37) AIR 1937 Nag 88 (89). (Suit abates automatically if no application is filed within limitation — Application to set aside abatement within sixty days of abatement is proper and not premature even if made before order of Court that suit has abated.)

('34) AIR 1934 Lah 442 (443) : 15 Lah 879.

6. ('28) AIR 1928 Cal 234 (235). (Attachment before judgment — Death of defendant before decree — Heirs not impleaded — Abatement — Application to implead heirs and restore suit ordered — Effect — Attachment not revived.)

7. ('21) AIR 1921 Lah 219 (219, 220).

('31) AIR 1931 Lah 73 (74).

('26) AIR 1926 Cal 1053 (1054). (Party dying during suit — Representative not substituted — Estate of the party is not bound by the decision — Application for leave to appeal by representative does not bind the estate.)

('26) AIR 1925 Lah 87 (88). (A co-decree-holder had died before the decision of the lower Appellate Court and his legal representatives had not been brought on the record — Held no decree could have been passed *qua* his share in the land in



O. 22 R. 4  
Note 19

**19. Decree against a dead person.** — See also Note 8 to Section 52. A decree passed *against a dead person* without impleading his legal representatives is a nullity.<sup>1</sup> This does not mean that a party who was heard and against whom a decree has been passed on the merits can take advantage of the death of another party and claim a re-hearing on the merits.<sup>2</sup> In an Allahabad case<sup>3</sup> the plaintiff obtained an *ex parte* decree against a defendant who had been dead before the decree, but of whose death plaintiff had no knowledge. It was held that on the decree being held inexecutable the plaintiff might apply to have the case re-opened after impleading the legal representatives.

Where a suit is filed against several defendants one of whom is dead, it cannot be said in such a case that there is no valid plaint and the Court has power, under O. 1 R. 10 *ante*, to implead, if necessary, the legal representatives of the deceased person.<sup>4</sup> Where some of several defendants had been dead when the decree was passed, the others may object to the execution on the ground that the decree is a nullity.<sup>5</sup>

A decree passed by the Privy Council is an order of the Sovereign, and even if passed against a deceased respondent without impleading his legal representatives, it is not a nullity.<sup>6</sup>

dispute—Therefore he or his heir need not have been impleaded as respondents to the second appeal.)

('22) AIR 1922 Lah 78 (78).

**Note 19**

1. ('32) 138 Ind Cas 444 (445) (Lah). (Appeal heard and judgment pronounced after death of respondent—Judgment is nullity and judgment of the original Court remains in full force.)

('18) AIR 1918 All 226 (227) : 40 All 423.

('23) AIR 1923 All 211 (213) : 45 All 286.

('30) AIR 1930 All 636 (637).

('10) 5 Ind Cas 897 (898) : 32 All 301.

('04) 1904 All W N 44 (45).

('02) 26 Bom 317 (319).

('09) 4 Ind Cas 137 (138) (Bom). (Death taking place after close of evidence but before arguments.)

('88) 1888 Bom P J 5.

('11) 11 Ind Cas 782 (782) (Low Bur).

('17) AIR 1917 Low Bur 182 (183).

('78) 8 Cal L Rep 192 (193).

('18) 20 Ind Cas 506 (506) (Cal).

('16) AIR 1916 Mad 656 (656) : 38 Mad 682.

('28) AIR 1923 Mad 212 (214).

('24) AIR 1924 Mad 713 (713, 714).

('12) 16 Ind Cas 688 (688) (Mad).

('20) 1920 Oudh 57 (58).

('86) 1886 Pun Re No. 81, page 54.

('11) 11 Ind Cas 869 (870) (Lah).

('12) 15 Ind Cas 882 (883) : 5 Sind L R 260.

('68) 10 Suth W R 455 (456).

('70) 14 Suth W R 397 (398).

('76) 25 Suth W R 108 (108).

('28) AIR 1923 All 141 (144) : 45 All 198. (But a decree passed against A as the legal representative of B is not against a deceased person, although A was brought on the record as B's representative long after the period of limitation had expired.)

('25) AIR 1925 Lah 494 (494) : 6 Lah 313.

('98) AIR 1998 Mad 115 (117).

('39) 5 Cutt L Tim 15 (16). (But the question

whether the whole decree is a nullity depends on the question whether the failure on the part of the plaintiff to bring the representative-in-interest of the deceased on the record affected his right to proceed with the suit.)

[See ('84) AIR 1984 Lah 442 (443) : 15 Lah 879. (Death of respondent — Representatives not brought on record — Appeal automatically abates—Appellant must apply under R. 9 — If owing to ignorance of death appeal is heard and accepted application by legal representatives for review becomes necessary—Accepting of such application has not the effect of setting aside abatement.)

('29) AIR 1929 Cal 527 (527). (An order passed against a dead person would be a nullity; but where an order was passed in favour of a dead person, it is not altogether and in all circumstances a nullity.)]

[See also ('87) AIR 1987 Lah 63 (64). (Where the defendant dies long before institution of proceedings relating to award under Co-operative Societies Act, the award passed against him is a nullity and therefore cannot be executed.)]

[See however ('28) AIR 1928 Cal 676 (677). (Order of remand passed in ignorance of death of one of the respondents — Held order not a nullity.)]

[But see ('28) AIR 1928 Lah 784 (786). (Decree passed after the defendant's death but before time for bringing the legal representatives on record had expired—Decree not nullity but only erroneous and liable to be set aside.)]

2. ('80) AIR 1980 Mad 719 (720).

('25) AIR 1925 Pat 434 (434) : 4 Pat 187.

[See also ('18) AIR 1918 Cal 512 (515, 517).]

3. ('04) 1904 All W N 44 (45).

4. ('84) AIR 1984 All 25 (26, 27).

('87) AIR 1987 Lah 794 (795). (No question of abatement in such a case.)

5. ('24) AIR 1924 Pat 839 (840). (82 All 301, Followed.)

6. ('82) AIR 1982 Pat 261 (262, 263) : 11 Pat 445.



See also the undermentioned decision.<sup>7</sup> See also Note 19 to Rule 3 *ante*.

**O. 22 R. 4**  
**Notes 19-22**

**20. Order 41 Rule 20 and abatement.** — Rule 20 of Order 41 does not override the provisions of Order 22 and will not prevent an abatement.<sup>1</sup>

**21. Order 1 Rule 8 and abatement.** — See Note 24 to Order 1 Rule 8.

**22. Where suit or appeal abates against deceased defendant or respondent only.** — As under Rule 3, an abatement under this rule will in the first instance be only so far as the deceased defendant or respondent is concerned.<sup>1</sup> If the deceased was the sole defendant or respondent the abatement puts an end to the suit or appeal. But if he is one of many defendants or respondents the effect of the partial abatement on the whole suit or appeal will depend upon the nature of the suit or appeal. If, on account of the partial abatement, it becomes, for any reason, impossible to proceed with the suit or appeal to its final conclusion the entire suit or appeal will fail.<sup>2</sup> But if the suit or appeal can proceed to a final adjudication in the absence of the legal representatives of the deceased defendant or respondent, the partial abatement will not affect the rest of the suit or appeal.<sup>3</sup> Such a final adjudication is possible in cases where the interest of the deceased defendant or respondent can be separated from those of the others. In such cases a decree can be given against the latter without affecting the rights of the legal representatives of the former.<sup>4</sup> The abatement, therefore, will not result in a total failure of the suit or appeal. Thus, in the following cases,

('20) AIR 1920 Pat 89 (91, 92) : 5 Pat L Jour 314.

('27) AIR 1927 Mad 1088 (1089).

('37) AIR 1937 Bom 433 (443).

('37) AIR 1937 Pat 321 (322) : 16 Pat 316.

7. ('23) AIR 1923 All 141 (144) : 45 All 198. (In this case, it was held that a final decree which was passed against A as the legal representative of B could not be treated as a nullity by the executing Court merely because B had died before the preliminary decree itself and his legal representative had not been impleaded at the time of the preliminary decree — It was held that under such circumstances, the final decree could be set aside but could not be treated as a nullity by the executing Court.)

#### Note 20

1. ('26) AIR 1926 Cal 335 (336).

('31) AIR 1931 Nag 184 (186) : 27 Nag L R 220.

#### Note 22

1. ('12) 14 Ind Cas 535 (536) (Lah).

('15) 26 Ind Cas 523 (524) (Oudh).

('20) AIR 1920 Cal 264 (266).

2. ('38) AIR 1938 Nag 42 (43) : ILR (1938) Nag 370. (Foreclosure decree in favour of three persons—Appeal against decree—One of them dying—Legal representatives not brought on record—Whole appeal abates.)

('35) AIR 1935 Pat 241 (242). (In an appeal against a decree for partition, when one of the co-sharer respondents dies and his heirs are not impleaded in time, the appeal abates as a whole, because no decree for partition can be passed in the absence of even a single co-sharer.)

('36) AIR 1936 Sind 169 (171) : 30 Sind L R 242. (Ordinarily suit for partition must abate as a whole—AIR 1925 Sind 2, Followed.)

3. ('07) 30 Mad 67 (68).

('25) AIR 1925 Bom 122 (123, 125) : 49 Bom 118.

('34) AIR 1934 All 716 (717).

('33) AIR 1933 Sind 384 (385). (Suit for partial partition of property by heirs of deceased Mahomedan is competent—Hence if suit for partition against one of defendants abates it does not abate as a whole.)

('06) 33 Cal 580 (582). (Liability joint and several—Whole suit does not abate.)

('23) AIR 1923 Lah 252 (252).

('17) AIR 1917 Lah 450 (451).

('38) AIR 1938 Nag 42 (43) : ILR (1938) Nag 370.

('36) AIR 1936 Sind 169 (171) : 30 Sind L R 242.

(Suit by alienee from Mahomedan co-sharer — One of the defendants claiming portion in his own right — Defendant against whom suit has abated alleged to have no interest therein—Suit for partition, so far as that portion is concerned, can proceed.)

('35) AIR 1935 Pat 333 (334) : 15 Pat 1. (Mortgage suit—Person in possession of property being only proper but not necessary party impleaded—Death of such person, and legal representative not brought on record — Suit abates against such person alone but not against other defendants.)

('38) AIR 1938 Cal 634 (636).

('39) 5 Cutt L Tim 15 (16).

4. ('25) AIR 1925 All 108 (114) : 47 All 100.

('33) AIR 1933 Lah 556 (557). (Two respondents in appeal being co-owners each entitled to half-share in property — Death of one of them and failure of appellant to implead legal representative within time—Appeal does not abate wholly.)

('38) AIR 1938 Lah 1001 (1001, 1002). (Appeal by mortgagee — Death of one of puisne mortgagees respondents and legal representative not brought on record—Appeal does not abate in its entirety.)

**O. 22 R. 4** abatement as regards the deceased was held not to affect the rest of the suit or  
**Notes 22-23** appeal—

(1) Where the suit is for the recovery of a specific sum of money from the deceased defendant and for a specific sum from each of the other defendants.<sup>5</sup>

(2) Where the suit relates to distinct plots of land in the hands of the several defendants including the deceased defendant,<sup>6</sup> or where it relates to specified shares<sup>7</sup> or to shares which are ascertained or ascertainable.<sup>8</sup>

(3) Where the liability sought to be enforced against the defendants is *joint and several*.<sup>9</sup> Thus, the liability of co-promisors is joint and several<sup>10</sup> as also the liability of a surety.<sup>11</sup> In the case of suits to enforce such liability the suit does not abate *in toto* on the death of one of the promisors or the surety as the case may be. The liability of joint wrongdoers or tort-feasors is joint and several and the suit or appeal will abate only so far as the deceased defendant is concerned.<sup>12</sup> On the same principle, a suit for ejectment of trespassers will abate only so far as the deceased defendant is concerned and may be proceeded with against the rest.<sup>13</sup> The same principle applies to suits for rent against fixed-rate tenants<sup>14</sup> or joint holders of a holding,<sup>15</sup> as their liability is likewise joint and several.

In short, therefore, the test to see whether the suit or appeal abates as a whole or only in part is to find out if the suit could, in the first instance, have been instituted and prosecuted with the deceased defendant left out.<sup>16</sup> In other words, if separate suits are maintainable against the defendants severally, then the abatement will be only in part in spite of the other defendants having been impleaded in the same suit.<sup>17</sup>

**23. When suit or appeal abates against all, as a whole.** — Where the absence of the legal representatives of the deceased from the record renders it impossible

(28) AIR 1928 All 172 (175, 176, 177): 50 All 559 (FB).

(31) AIR 1931 All 235 (286).

(24) AIR 1924 Lah 98 (94).

(25) AIR 1925 Lah 381 (384, 385): 6 Lah 238.

(30) AIR 1930 Lah 709 (710). (Death of one tort-feasor — Suit does not abate.)

(25) AIR 1925 Nag 299 (301): 21 Nag L R 38.

(25) AIR 1925 Nag 289 (240). (One of the decree-holders respondents dying—Presumption is that both decree-holders were equally interested to recover the amount—Extent of interest thus being ascertainable the whole appeal does not abate.)

(36) AIR 1936 Nag 292 (293): ILR (1937) Nag 428.

(38) AIR 1938 Lah 35 (38): ILR (1937) Lah 746.

(37) AIR 1937 Lah 220 (221).

(35) AIR 1935 Bom 287 (290).

(39) AIR 1939 All 626 (636).

(35) AIR 1935 Lah 853 (854): 16 Lah 747.

(38) AIR 1938 Oudh 62 (63).

5. (24) AIR 1924 Rang 127 (128): 1 Rang 618.

(31) AIR 1931 Pat 164 (168): 10 Pat 341.

6. (28) AIR 1928 Cal 289 (290).

(26) AIR 1926 Cal 193 (208).

(26) AIR 1926 Cal 252 (254).

(26) AIR 1926 Lah 264 (266): 7 Lah 376.

7. (26) AIR 1926 All 128 (129): 48 All 81.

(28) AIR 1928 Lah 252 (252).

(26) AIR 1926 Lah 264 (266): 7 Lah 376.

(30) AIR 1930 Lah 88 (34).

(31) AIR 1931 Lah 486 (487): 12 Lah 318.

(36) AIR 1936 Pat 548 (550): 15 Pat 326.

(35) AIR 1935 Lah 322 (324).

(38) AIR 1938 Lah 35 (38): ILR (1938) Lah 746. (Defendants having defined interest in suit, their shares in the estate being specified.)

8. (27) AIR 1927 Lah 783 (784).

(28) AIR 1928 Lah 572 (575, 576): 10 Lah 7. (FB).

(30) AIR 1930 Lah 126 (127).

9. (06) 33 Cal 580 (582).

10. (22) AIR 1922 Lah 182 (183).

(25) AIR 1925 Pat 434 (434, 435): 4 Pat 187.

11. (03) 25 All 206 (208).

12. (24) AIR 1924 Lah 348 (349): 5 Lah 54.

(34) AIR 1934 Lah 941 (942): 155 Ind Cas 869 (870).

(21) AIR 1921 Pat 350 (350, 351).

(28) AIR 1928 All 555 (555).

13. (10) 8 Ind Cas 268 (269) (Mad).

(34) AIR 1934 All 716 (717).

14. (12) 17 Ind Cas 89 (89, 90): 34 All 604.

15. (20) AIR 1920 Pat 801 (802).

(25) AIR 1925 Pat 480 (481): 4 Pat 53.

(26) AIR 1926 Pat 504 (505): 5 Pat 233.

(26) 94 Ind Cas 80 (31) (Cal).

[See (33) AIR 1933 Pat 195 (196). (Rent suit against two tenants — One dying before decree and his legal representative not brought on record — As against the other decree can be executed as a money decree but not as a rent decree.)]

16. (24) AIR 1924 Nag 123 (123).

(33) AIR 1933 Sind 384 (385).

17. (27) AIR 1927 Lah 851 (852).

to proceed with the suit or appeal as against the rest, the suit or appeal will fail *in toto*.<sup>1</sup> Such impossibility may arise from the suit or appeal becoming imperfectly constituted for want of necessary or essential parties;<sup>2</sup> or from the undesirable possibility of having two inconsistent or contradictory decrees in one and the same suit;<sup>3</sup> or from the futility of proceeding further in a matter in which the decree, if given, cannot be effectually executed by reason of the outstanding right of the legal representative of the deceased.<sup>4</sup>

### Note 23

1. ('81) AIR 1931 Nag 184 (186) : 27 Nag LR 220.  
( '26) AIR 1926 Cal 898 (894, 895) : 53 Cal 752.  
(1900) 22 All 430 (433).  
( '04) 81 Cal 487 (494) : 31 Ind App 71 (P C).  
( '07) 5 Cal L Jour 393 (397).  
( '38) AIR 1938 Sind 239 (240) : ILR (1939) Kar 156. (Suit for partition against brothers—Appeal against order passed in execution—Death of one brother pending appeal — Whole appeal abates.)  
( '37) AIR 1937 Sind 208 (209) : 30 Sind L R 428. (Appeal from preliminary decree — Respondent who is necessary party dying pending appeal—Appeal abates in its entirety.)  
( '85) AIR 1935 Oudh 329 (330, 331) : 11 Luck 5. (Appeal in partition suit.)  
( '35) AIR 1935 Oudh 36 (37) : 10 Luck 387. (Suit for partition among co-sharers—Appeal — Death of some respondents—Legal representatives not brought on record—Appeal abates as a whole.)  
( '38) AIR 1938 Bom 6 (9) : I L R (1938) Bom 64. (Suit by some partners of a firm for dissolution and for accounts—Nature of suit is such that if one defendant dies and his legal representative is not brought on the record, suit abates as a whole.)  
( '39) AIR 1939 All 698 (699).
2. ( '28) AIR 1928 Lah 572 (575, 576, 582) : 10 Lah 7 (F B).  
( '34) 147 Ind Cas 1187 (1188) (Lah). (Death of co-sharer whose representative not brought on record in time.)  
( '25) AIR 1925 All 623 (624).  
( '26) AIR 1926 All 234 (235) : 48 All 251.  
( '30) AIR 1930 All 762 (764, 767).  
( '18) AIR 1918 Cal 286 (287).  
( '20) AIR 1920 Cal 264 (267).  
( '22) AIR 1922 Lah 101 (102).  
( '26) AIR 1926 Lah 216 (216, 217).  
( '26) AIR 1926 Lah 332 (333).  
( '26) AIR 1926 Lah 474 (476).  
( '11) 9 Ind Cas 940 (940) (Mad).  
( '12) 16 Ind Cas 688 (688) (Mad).  
( '26) AIR 1926 Mad 379 (380).  
( '32) AIR 1932 Mad 212 (213).  
( '31) AIR 1931 Pat 17 (18) : 9 Pat 693.  
( '16) AIR 1916 Lah 366 (368).  
( '05) 3 Low Bur Rul 168 (169).  
( '28) AIR 1928 Rang 258 (259, 260) : 1 Rang 189.  
( '14) AIR 1914 Lah 123 (125) : 1915 Pun Re No. 41.  
( '35) AIR 1935 Pat 241 (242). (Appeal—Death of one of respondents not making representation of the interests involved, incomplete — No abatement—But if representation is incomplete, appeal abates as a whole.)  
[See also ( '25) AIR 1925 Mad 237 (238).]
3. ( '25) AIR 1925 All 141 (141).  
( '26) AIR 1926 All 128 (129, 130) : 48 All 81.  
( '26) 96 Ind Cas 932 (932) (Lah).  
( '27) AIR 1927 All 331 (332).  
( '27) AIR 1927 All 776 (777).  
( '20) AIR 1920 Cal 264 (267).  
( '24) AIR 1924 Cal 399 (399, 400).  
( '26) AIR 1926 Cal 835 (335, 336).  
( '28) AIR 1928 Lah 869 (869, 870).  
( '32) AIR 1932 Lah 281 (286) : 13 Lah 70.  
( '32) AIR 1932 Lah 624 (626) : 14 Lah 234.  
( '31) AIR 1931 Nag 184 (186) : 27 Nag L R 220. (In this case there was no possibility of conflicting decrees—Hence partial abatement only.)  
( '30) AIR 1930 All 869 (871). (No question of contradictory decree arises in this case—Hence partial abatement only.)  
( '19) AIR 1919 Cal 200 (201).  
( '39) AIR 1939 All 698 (699). (Joint act of defendants being cause of action for suit and joint relief sought for against all defendants — Suit dismissed by lower Court—Death of one of defendants pending appeal and his legal representative not brought on record—Appeal abates as a whole.)  
( '35) AIR 1935 Pat 430 (430). (Appeal—Death of one of several respondents — Right capable of being exercised only collectively — Legal representative not impleaded—Appeal abates as a whole.)  
( '36) AIR 1936 Oudh 209 (211). (Where a joint decree has been given in favour of the respondents, the entire appeal abates if the appellant fails to bring the legal representatives of a deceased respondent on the record, as otherwise the decision may result in two conflicting decisions with regard to the same subject-matter.)  
( '37) AIR 1937 Pat 612 (614).  
( '35) AIR 1935 Pat 4 (5).  
( '36) AIR 1936 Pat 191 (193).  
( '35) AIR 1935 Cal 644 (644). (Application by insolvent for discharge dismissed — Appeal — Heirs of one of deceased creditors not brought on record — Appeal abates as a whole as such heirs are necessary parties—But if receiver is on record, appeal does not abate.)  
[See also ( '26) AIR 1926 Cal 667 (668).]
4. ( '29) AIR 1929 P C 58 (60) : 56 Ind App 80 : 51 All 267 (P C).  
( '26) AIR 1926 All 128 (129) : 48 All 81.  
( '24) AIR 1924 Cal 346 (346).  
( '26) AIR 1926 Lah 332 (332).  
( '27) AIR 1927 Mad 505 (506).  
( '22) AIR 1922 Pat 606 (607) : 1 Pat 699.

**O. 22 R. 4  
Note 23**

On the above principles the non-impleading of the legal representatives of a deceased defendant will result in total failure of the suit or appeal in the following cases:

(1) Where the interests of the defendants in the suit are *joint and indivisible* so that the interest of the deceased defendant cannot be separated from those of the rest,<sup>5</sup> such as the interests in a pre-emption suit<sup>6</sup> but not the rights arising from a sale in distinct shares.<sup>7</sup>

(2) Where a decree appealed from is joint and indivisible.<sup>8</sup> But a decree cannot be said to be joint and indivisible merely because it is on one sheet of paper.<sup>9</sup> The interest awarded in the decree must in *substance* be joint and indivisible.<sup>10</sup>

In this connexion the following distinction between a suit and an appeal should be noted. In a suit the nature of the abatement will depend upon the relief involved.<sup>11</sup> If the plaintiff sets up a joint and indivisible right and the defendants set up a separate or separable right, the point should be decided before deciding the nature of the

[See also ('25) AIR 1925 Cal 411 (412).]

5. ('30) 28 All L Jour 999 (1009).

('23) AIR 1923 Cal 289 (290).

('23) AIR 1923 Lah 182 (138).

('27) AIR 1927 Lah 28 (28).

('27) AIR 1927 Lah 87 (88).

('22) AIR 1922 Lah 181 (131).

('13) 18 Ind Cas 192 (188) : 1913 Pun Re No. 62.

('34) AIR 1934 Lah 429 (430). (Appeal from pre-emption suit—Death of one of joint vendees respondents—Legal representatives not brought on record—Appeal abates in toto.)

('36) AIR 1935 Pat 480 (430).

[See ('29) AIR 1929 Lah 256 (256).

('35) AIR 1935 Pesh 126 (127).]

6. ('25) AIR 1925 All 108 (115) : 47 All 100.

('34) AIR 1934 Lah 429 (430, 431).

('26) AIR 1926 All 152 (152, 153).

('10) 5 Ind Cas 897 (898) : 32 All 301.

7. ('81) 132 Ind Cas 895 (896) (Lah).

8. ('24) AIR 1924 All 95 (96).

('38) AIR 1938 Lah 356 (359) : 14 Lah 543. (Suit against defendants not as partners dismissed—One respondent dying during appeal — Appeal abating against him — Joint decree—Abatement of whole appeal must be decided by reference to decree.)

('38) AIR 1938 Pat 646 (647). (Declaratory decree obtained by three members of joint Hindu family —Death of one before hearing of appeal preferred by defendant and deceased's heirs not substituted in his place—Appeal is not maintainable.)

('32) AIR 1932 Pat 327 (328) : 11 Pat 538.

('34) AIR 1934 Pesh 14 (15).

('25) AIR 1925 All 141 (141).

('27) AIR 1927 All 331 (332).

('82) 135 Ind Cas 245 (246) (All).

('02) 6 Cal W N 196 (197).

('06) 10 Cal W N 981 (982).

('18) AIR 1918 Cal 286 (286, 287).

('18) AIR 1918 Cal 160 (160, 161).

('20) AIR 1920 Cal 782 (783).

('23) AIR 1923 Cal 294 (294). (Suit for possession—Shares of plaintiffs specified in plaint — Held even then the decree was joint.)

('20) AIR 1920 Lah 174 (174, 175).

('20) AIR 1920 Lah 67 (68) : 1 Lah 225.

('20) AIR 1920 Lah 72 (73).

('21) AIR 1921 Lah 160 (161).

('25) AIR 1925 Lah 494 (494) : 6 Lah 313.

('26) AIR 1926 Lah 137 (138).

('26) AIR 1926 Lah 37 (38, 39).

('27) AIR 1927 Lah 860 (860).

('17) AIR 1917 Mad 398 (399).

('82) AIR 1932 Mad 212 (213).

('29) AIR 1929 Nag 358 (360).

('25) AIR 1925 Pat 517 (518).

('25) AIR 1925 Pat 590 (591).

('11) 12 Ind Cas 871 (871) : 1911 Pun Re No. 60.

('18) 18 Ind Cas 256 (256) (Lah).

('17) AIR 1917 Lah 321 (322).

('19) AIR 1919 Lah 390 (391).

('86) AIR 1936 Oudh 209 (211). (Where a joint decree has been given in favour of all respondents, the entire appeal fails if the appellant fails to bring the legal representatives of a deceased respondent on the record, for, if the appeal were allowed to proceed against the other respondents, who are alive, there will be conflicting decisions on the same subject-matter.)

('39) AIR 1939 Oudh 241 (243). (Plots jointly assessed to land revenue purchased by A and B — Suit by them jointly to recover amount of revenue paid by them — Joint decree in their favour — During appeal B dying but his representatives not brought on record — Appeal held abated in toto.)

[See also ('15) AIR 1915 Cal 786 (786).]

9. ('30) AIR 1930 Lah 651 (653). (However in this case it was held that the decree if passed would be legally ineffectual and hence the appeal abated as a whole.)

10. ('26) AIR 1926 All 234 (236) : 48 All 251.

('27) AIR 1927 Lah 851 (852).

('82) AIR 1932 Cal 184 (186) : 58 Cal 1841. (One of several tenants can institute a suit under Sec. 104H, Bengal Tenancy Act, for getting a declaration that he was occupancy riyat and that the entry in a record of rights on the basis that he was tenure-holder was wrong—Consequently, the failure to implead in time the legal representatives of one of the plaintiffs-respondents in time does not have the effect of rendering the entire appeal bad.)

11. ('30) AIR 1930 Lah 651 (653).

('23) AIR 1923 Cal 289 (289).

abatement.<sup>12</sup> In an appeal, however, the nature of the abatement will have to be decided not upon the nature of the relief involved in the suit but upon the nature of the relief *awarded by the decree* appealed against.<sup>13</sup> Thus, if the decree awarded joint possession the abatement will affect the whole appeal even though the plaintiff had asked for separate possession in the plaint.<sup>14</sup> Even in cases where the plaintiff *could have* asked for a joint and several relief, if he chooses to ask for a joint relief and on dismissal of the suit he files an appeal, the appeal will abate *in toto* on the death of one of the defendants-respondents, if his legal representatives are not brought on the record in time.<sup>15</sup>

**O. 22 R. 4**  
**Notes 23-26**

**24. Inherent power to add legal representative after abatement.** — Even after a suit or appeal has abated, the Court has inherent power to add the legal representatives of the deceased defendant or appellant in proper cases.<sup>1</sup> The proper procedure in such cases would be to just declare that the suit had abated, then to set the abatement aside for valid reasons and then add the legal representatives and proceed with the suit or appeal.<sup>2</sup> It should, however, be noted that such a course will not be adopted unless very strong grounds are made therefor.<sup>3</sup>

**25. Appellate Court and abatement.** — The Court to appoint the legal representative of a deceased defendant or respondent will be the Court in which the suit or appeal was pending when the death took place.<sup>1</sup> Similarly, the Court to declare an abatement will be the Court in which the suit or appeal was pending when the abatement took place.<sup>2</sup> Where, however, such Court proceeds to a decision on the merits in spite of an abatement that has taken place, the Appellate or second Appellate Court, as the case may be, may set aside the decision and either declare the abatement<sup>3</sup> or remand the matter for disposal according to law.<sup>4</sup>

**26. Award of costs.** — If a suit abates on the ground that the legal representatives of a deceased defendant are not impleaded within time, there is no

(‘30) AIR 1930 All 762 (764, 767).

12. (‘23) AIR 1923 Cal 289 (290).

13. (‘30) AIR 1930 Lah 651 (653).

(‘33) AIR 1933 Lah 356 (359) : 14 Lah 543.

[See also (‘36) AIR 1936 Pat 191 (192). (There may be cases in which a suit might not have abated but an appeal will abate — Thus, where in a suit on a handnote the trial Court has refused to grant interest *pendente lite* and the plaintiff appeals and one of the defendants-respondents dies pending the appeal, the whole appeal abates as otherwise there is the possibility of there being two contradictory decrees in the same suit, viz., a decree granting interest *pendente lite* against some defendants and another decree refusing such interest against other defendants — But, in such a case, the liability on the handnote being joint and several, if the death had occurred in the trial Court the entire suit would not have abated.)]

14. (‘23) AIR 1923 Cal 294 (294).

(‘34) AIR 1934 Pesh 14 (15). (Where share of the respondents could be ascertained from revenue papers.)

15. (‘26) 92 Ind Cas 85 (36) (Lah).

(‘21) 62 Ind Cas 714 (715) (Cal). (Suit for damages against several joint wrongdoers—Suit dismissed—Plaintiff appeals—One of the wrongdoers dies—His representative must be made a party—It is not open to the plaintiff-appellant to prose-

cute his appeal only against some of the wrongdoers at his choice.)

(‘26) 94 Ind Cas 253 (253) (Lah).

(‘17) AIR 1917 Cal 647 (647). (Where a suit brought against several joint promisors is dismissed, the plaintiff cannot appeal against some only releasing his claim against the others.)

[See also (‘26) AIR 1926 Cal 667 (668).]

#### NOTE 24

1. (‘11) 11 Ind Cas 559 (560) : 35 Bom 393. (Case of partial abatement.)

2. (‘22) AIR 1922 Bom 449 (449) : 47 Bom 92.

3. (‘05) 28 Mad 359 (360).

[See also (‘32) AIR 1932 Mad 527 (527). (Where deceased respondent's legal representative himself applies to be brought on record, he may be impleaded and abatement set aside even without an application by him for setting aside abatement.)]

#### NOTE 25

1. (‘29) AIR 1929 All 319 (320).

(‘19) AIR 1919 Cal 242 (242).

2. [See also (‘28) AIR 1928 Cal 654 (655).]

3. (‘29) AIR 1929 Lah 256 (256).

4. (‘12) 16 Ind Cas 688 (688) (Mad).

(‘25) AIR 1925 Bom 290 (291).

[See also (‘28) AIR 1928 Lah 784 (786, 787).

(Decree was passed before time for bringing legal representatives on record had expired.)

(‘01) 1901 All W N 187 (187). (Do.)]

**O. 22 R. 4** provision in the rule entitling the legal representatives to come to Court and ask for costs.<sup>1</sup>  
**Notes 26-29**

**27. Re-hearing of suit or appeal.** — Where a decree is passed against a deceased respondent without impleading his legal representatives, it is competent for the Court to entertain an application for impleading the legal representatives and to re-open and re-hear the suit or appeal.<sup>1</sup>

**28. Revision.** — No revision lies from an order that a deceased plaintiff's legal representatives are not necessary parties to an application to set aside an *ex parte* decree.<sup>1</sup>

**29. Appeal.** — Under the old Code an order of abatement was appealable, not as a decree but as an order under Section 588 (18).<sup>1</sup> Under the present Code, where the facts fall within the four corners of the rule, an order of abatement thereunder is not open to appeal. The only remedy is that provided by Rule 9. But when the *suit is dismissed* as having abated and the propriety of the dismissal on that ground is questioned, an appeal will lie as if from a decree.<sup>2</sup> Thus, where on abatement of a suit so far as the deceased is concerned, the Court dismissed the whole suit an appeal would lie.<sup>3</sup> No appeal lies from an order bringing in certain persons as legal representatives of a deceased defendant.<sup>4</sup> Such an order is also not a 'judgment' within the meaning of the Letters Patent (Clause 10 of the Letters Patent of the Allahabad High Court) and no appeal lies from it under the Letters Patent.<sup>5</sup>

See also Note 26 to Rule 3 *supra*.

**O. 22 R. 5**

**Determination of question as to legal representative.**

**R. 5.** [S. 367.] Where a question arises as to whether any person is or is not the legal representative<sup>3</sup> of a deceased plaintiff or a deceased defendant, such question shall be determined<sup>4</sup> by the Court.

[1877, S. 367; 1859, S. 103.]

### Local Amendment

#### MADRAS

Add the following as a proviso :

"Provided that an appellate Court before determining it, may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question."

#### Note 26

1. ('12) 15 Ind Cas 869 (370) (Mad). (But defendants entitled to costs in case of abatement by plaintiff's death.)

#### Note 27

1. ('27) AIR 1927 Oudh 221 (221) : 2 Luck 592. (Plaintiff was ignorant of respondent's death—Application for substitution treated as under Order 22 Rule 9.)

#### Note 28

1. ('26) AIR 1926 Pat 29 (30). ('35) AIR 1935 Pat 121 (121).

#### Note 29

1. ('08) 25 All 206 (207).

2. ('17) AIR 1917 Mad 285 (286).

('85) AIR 1935 Pat 121 (121). (No revision lies.)

('81) AIR 1981 Pat 353 (353) : 10 Pat 471.

3. ('88) AIR 1988 Cal 689 (640). (An order that the appeal abates not only with regard to the respondent who has died but with regard to all respondents is appealable.)

[See ('20) AIR 1920 Lah 388 (340) : 1 Lah 592. (A I R 1916 Lah 245, relied on).]

4. ('26) AIR 1925 All 431 (432) : 47 All 741.

5. ('37) AIR 1937 All 192 (194) : I L R (1937) All 381.

('39) AIR 1939 Nag 89 (40). (Dismissal of cross-objections as having abated is decree.)

*Synopsis***O. 22 R. 5**  
**Notes 1-4**

1. Legislative changes.
2. Scope of the Rule.
3. Legal representative. See Note 10 to Rule 3.
4. "Shall be determined."
5. "By the Court."
6. Objection as to the representative character.
7. Effect of order under this Rule.
8. Power of Court to correct its own order.
9. Suit to establish title as legal representative.
10. Appeal.
11. Revision.

*Other Topics (miscellaneous)*

Determination obligatory. See Notes 1, 4 and 6.

Wrong order — Remedies against. See Notes 6, 8 and 9.

**1. Legislative changes. —**

1. Under Section 367 of the old Code the Court had the *option* of either determining who is the legal representative of a deceased party or of staying the suit until the question has been determined in a separate suit.<sup>1</sup> Under the present rule the Court *shall* determine the question and has no option in the matter.

2. The words "at or before the hearing" which occurred in the old Section have been omitted.

3. The provisions of the old Section, in terms, applied only to the case of the death of a *plaintiff*.<sup>2</sup> But the present rule will apply to the case of the death of a *plaintiff* as well as to the case of the death of a *defendant*.

**2. Scope of the Rule. —** As has been observed in Note 1 above, where a dispute as to who is the legal representative arises, it is the duty of the Court under this rule to decide it.<sup>1</sup> The decision, however, should be limited for the purpose of carrying on the suit and cannot have the effect of conferring any right to heirship or to property.<sup>2</sup>

The rule applies to appeals<sup>3</sup> but not to execution proceedings.<sup>4</sup> Nor does it apply to a case where a party dies after the preliminary decree but before the final decree in the suit.<sup>5</sup> See also Note 19 to Rule 3 *ante*.

**3. Legal representative. —** See Note 10 to Rule 3.

**4. "Shall be determined." —** See Notes 1 and 2 above. For the purpose of determining as to who is the legal representative, the Court must, when necessary, hold an enquiry in which evidence may be adduced<sup>1</sup> and must come to a conclusion as to who is the legal representative according to the rights of the parties.<sup>2</sup> It cannot

**Order 22 Rule 5 — Note 1**

1. ('85) 1885 All W N 7 (7).
- ('09) 2 Ind Cas 479 (479) (Mad).
- ('87) 9 All 447 (450).
- ('94) 1894 Pun Re No. 66, page 218. (Old Code, S. 368.)
- ('88) 1888 Pun Re No. 29, page 78. (Do.)
2. ('18) 21 Ind Cas 397 (400) (Cal).
- [See also ('88) 10 All 223 (232) (FB).]

**Note 2**

1. ('18) AIR 1918 Bom 175 (177): 42 Bom 535.
- ('18) AIR 1918 Bom 100 (101): 43 Bom 168.
- (Even though it might have primarily passed an order bringing some person on record as legal representative.)
- ('19) AIR 1919 Mad 971 (971).
- ('21) AIR 1921 Nag 28 (25): 17 Nag L R 45.

- ('22) 4 Lah L Jour 814 (816).
- ('39) AIR 1939 Pat 117 (118).
2. ('08) 27 Bom 162 (169).
3. ('88) 10 All 223 (234) (FB).
4. ('77) 2 Cal 327 (333): 4 Ind App 66 (PC).
- [See also ('89) AIR 1939 Sind 234 (235): I L R (1939) Kar 509. (Order on application in execution to bring legal representatives of deceased decree-holders is appealable under Sec. 47 and O. 22 Rr. 12, 3 and 4 do not apply.)]
5. ('37) AIR 1937 Lah 615 (616).

**Note 4**

1. ('19) AIR 1919 Mad 510 (512): 42 Mad 76.
- ('25) AIR 1925 Mad 456 (457).
- ('37) AIR 1937 Pat 530 (531).
2. ('88) 10 All 223 (239).
- ('12) 16 Ind Cas 798 (799) (Mad).



**O. 22 R. 5**  
**Notes 4-7**

simply make all the claimants parties without making any such enquiry.<sup>3</sup> A lengthy or elaborate enquiry is, however, unnecessary for the purpose<sup>4</sup> and where there is no dispute as to his being the legal representative, the mere fact that no steps were taken to have him declared as such, does not vitiate the decision in the case.<sup>5</sup>

**5. "By the Court."** — The "Court" here means the Court before which the question as to who is the legal representative arises. It will be the trial Court, when the question arises in the suit; or the Appellate Court, if the question arises in appeal. An Appellate Court cannot delegate its powers to the trial Court. All that it can do is to direct the trial Court to take evidence on the question and remit the same. The *decision* must be by the Appellate Court.<sup>1</sup> This principle has, in Madras, been embodied in a rule framed by the High Court as a proviso to this rule.

**6. Objection as to the representative character.** — The procedure laid down in this rule should be followed not only when two or more persons claim in opposition to each other but also when the representative character of a person who alone claims is denied by the other side.<sup>1</sup>

The objection should, however, be taken at the earliest possible moment.<sup>2</sup> But when the legal representative is appointed without notice to the other side, the latter can at the hearing raise objection to the representative character of the person so appointed.<sup>3</sup>

**7. Effect of order under this Rule.** — An order under this rule will enable the person to represent the estate in the suit and will make an adjudication therein binding on the estate.<sup>1</sup> To this extent and in this sense it is final.<sup>2</sup> The mere admission of a person as legal representative for the purpose of further prosecution of the suit will not, however, conclusively establish his right to do so if his legal position is one of the main or vital issues in the suit itself.<sup>3</sup> Further, as has been seen in Note 2 above, an order appointing a person as a legal representative for the suit will not have the effect of deciding that he is the *heir* of the deceased party.<sup>4</sup>

See also Note 13 to Section 11.

(<sup>25</sup>) AIR 1925 Mad 456 (457).

(<sup>34</sup>) AIR 1934 Oudh 837 (840). (A case of execution appeal.)

3. (<sup>21</sup>) 4 Lah L Jour 314 (316).

(<sup>87</sup>) 9 Ail 447 (451). (This was so even under the old Code.)

(<sup>91</sup>) 15 Bom 145 (147). (Do.)

4. (<sup>22</sup>) AIR 1922 Lah 175 (176).

(<sup>88</sup>) 1888 Pun Re No. 29, page 78.

5. (<sup>22</sup>) AIR 1922 All 228 (226) : 44 All 407.

**Note 5**

1. (<sup>22</sup>) AIR 1922 Pat 197 (197).

(<sup>18</sup>) AIR 1918 Mad 1103 (1107).

**Note 6**

1. (<sup>95</sup>) 18 Mad 496 (497).

(<sup>08</sup>) 30 All 348 (349).

2. (<sup>18</sup>) AIR 1918 P C 156 (159) : 42 Mad 581 : 46 Ind App 64 (PO).

(<sup>88</sup>) AIR 1938 Cal 325 (328) : 60 Cal 87.

3. (<sup>28</sup>) AIR 1928 Mad 367 (368).

**Note 7**

1. (<sup>28</sup>) AIR 1928 Rang 114 (116) : 4 Upp Bur Rul 150.

(<sup>22</sup>) AIR 1922 Mad 457 (477) : 46 Mad 190 (FB). (Where a person who is not the legal representa-

tive is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to continue the litigation, the benefit of that litigation may be taken advantage of by the proper legal representative and the representative on record will be accountable to him.)

2. (<sup>28</sup>) AIR 1928 All 532 (533) : 50 All 857.

(<sup>80</sup>) 4 Bom 654 (656). (Persons so introduced as legal representatives of deceased respondent may or may not be the real legal representatives of the deceased respondent.)

[See (<sup>89</sup>) AIR 1939 Nag 147 (148) : ILR (1939) Nag 165. (A decision under O. 22 R. 5, as to whether a person is not a legal representative though not *res judicata*, is final so far as the suit in which it is made is concerned, not on the ground of *res judicata*, but because of S. 47.)]

3. (<sup>28</sup>) AIR 1928 Nag 209 (209).

(<sup>06</sup>) 28 All 109 (111).

(<sup>08</sup>) 27 Bom 162 (169).

4. (<sup>10</sup>) 8 Ind Cas 999 (1087) : 1910 Pun Re No. 97.

(<sup>28</sup>) AIR 1928 Rang 114 (116) : 4 Upp Bur Rul 150.



**8. Power of Court to correct its own order.** — As already pointed out in Note 6 above, where a person has been appointed legal representative without notice to the other side, the latter can afterwards object to the representative character of that person and the Court can after enquiry correct the order already passed.

**9. Suit to establish title as legal representative.** — As to whether a decision under this rule can be re-adjudicated upon in a separate suit, see Note 13 to Section 11 *ante*, and the undermentioned cases.<sup>1</sup>

**10. Appeal.** — See also Note 26 to Rule 3 *ante*. An order under Section 367 of the old Code (corresponding to this rule) was appealable as an order, under Section 588, clause (18) of that Code.<sup>1</sup> Under the present Code no appeal lies from such an order either as a decree or as an appealable order.<sup>2</sup> Nor is such an order a 'judgment' within the meaning of the Letters Patent (Clause 10 of the Letters Patent of the Allahabad High Court).<sup>3</sup>

But as to whether an objection to an order under this rule can, under Section 105 of the Code, be a valid ground of attack in an appeal from the decree, see Note 6 to Section 105.

**11. Revision.** — A decision under this rule amounts to the decision of a "case" within the meaning of Section 115 and is open to revision.<sup>1</sup> Thus, if a Court simply adds a legal representative without holding an enquiry into the dispute and deciding it, it acts with material irregularity in the exercise of its jurisdiction and a revision will lie.<sup>2</sup>

**O. 22 R. 6**  
**Notes 8-11**

**R. 6. [New.]** Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

**O. 22 R. 6**

[R. S. C., O. 17 R. 1, last portion.]

**Note 9'**

1. ('39) AIR 1939 Lah 580 (581). (Decision under this rule is not *res judicata*.)
- ('37) AIR 1937 All 192 (194): ILR (1937) All 381. (Question can be re-agitated.)
- ('37) 169 Ind Cas 798 (799) (Oudh). (Decision that certain person is legal representative of deceased party not *res judicata*.)

**Note 10**

1. ('30) 12 All 200 (202).
- ('07) 10 Oudh Cas 121 (125).
- [See also ('06) 9 Oudh Cas 354 (356).]
2. ('12) 18 Ind Cas 70 (70, 71) (Cal).
- ('38) AIR 1938 Bom 396 (397) : 57 Bom 641.

('20) AIR 1920 Lah 8 (9) : 1 Lah 493.

('26) AIR 1926 Lah 181 (181).

(13) 20 Ind Cas 950 (951) (Mad).

('19) AIR 1919 Mad 971 (971).

('24) AIR 1924 Mad 622 (623).

('13) 20 Ind Cas 898 (899) : 16 Oudh Cas 350.

('26) AIR 1926 Oudh 158 (159).

('16) AIR 1916 Nag 89 (90) : 13 Nag L R 32.

('35) AIR 1935 Lah 934 (935).

3. ('37) AIR 1937 All 192 (194): ILR (1937) All 381.

**Note 11**

1. ('35) AIR 1935 Lah 934 (934).

2. ('25) AIR 1925 Mad 456 (457).

('24) AIR 1924 Mad 813 (815).

**O. 22 R. 6**  
**Notes 1-2**

*Synopsis*

1. Scope and applicability of the Rule.
2. No abatement by reason of death after hearing.

**1. Scope and applicability of the Rule.** — This rule is new and embodies an exception to the principle that the Court has no jurisdiction to pass a decree for or against a dead man.<sup>1</sup> It is based on the principle that a judgment pronounced at any time after the conclusion of the hearing shall be construed to be operative as if it had been delivered on the day on which the hearing was closed.<sup>2</sup>

Even under the old Code it had been generally held that the death of a party after the hearing but before pronouncement of the judgment will not make the judgment invalid.<sup>3</sup> The Chief Court of the Punjab, however, took a different view.<sup>4</sup> This rule gives effect to the former class of decisions.

For the application of the rule, it is immaterial whether the death is or is not brought to the notice of the Court.<sup>5</sup>

Where, however, the legal representative brought on the record is under a legal disability and no guardian or next friend is appointed to act for him, the decree is a nullity as against him and the rule cannot be invoked to validate the same.<sup>6</sup>

The principle of the rule will apply to proceedings in arbitration.<sup>7</sup>

Where an *ex parte* decree was passed against two plaintiffs and an order was made for the setting aside of the decree on condition that the defendant deposited a certain sum of money in Court within a stated time, it was held that the fact that one of the plaintiffs died in the interval between the conditional order and the final order setting aside the *ex parte* decree on the required amount being deposited within the time allowed, did not affect the validity of the latter order and that the principle of this rule applied.<sup>8</sup>

**2. No abatement by reason of death after hearing.** — The principle of the rule will not apply unless the "hearing" had been *concluded* before the death.<sup>1</sup> Thus, the rule will not apply where the party died on the day fixed for the hearing but before the hearing.<sup>3</sup>

The "hearing" contemplated by the rule is such a hearing as is provided for by Order 18 and includes arguments; and where anything remains to be done or furnished by either party as a basis of consideration which is to end in the judgment and decree capable of execution, "the hearing" cannot be said to have been concluded under the

**Order 22 Rule 6 — Note 1**

1. ('12) 15 Ind Cas 882 (883) : 5 Sind L R 260. ('89) AIR 1939 Pat 534 (535).
2. ('94) 19 Bom 807 (809). ('88) AIR 1938 All 111 (112). (In such a case no application for substitution is necessary — But according to Allahabad High Court Rules, legal representative intending to appeal must apply for permission to appeal.) ('05) 9 Cal W N 710 (719). ('08) 26 Mad 101 (102). ('27) AIR 1927 Oudh 561 (561). ('16) AIR 1916 Lah 183 (185) : 1915 Pun Re No. 106.
3. ('99) 21 All 814 (815, 816). ('95) 19 Bom 807 (809). ('97) 21 Bom 814 (819). ('84) 19 Cal 518 (538) : 19 Ind App 108 (P C).

('07) 6 Cal L Jour 547 (555).

('08) 26 Mad 101 (102).

4. ('98) 1898 Pun Re No. 20, p. 53. (Decree for or against person dying after hearing but before judgment is bad and must be set aside.)

('86) 1886 Pun Re No. 81, p. 54. (Under the old Code judgment without legal representative on death after hearing and before judgment is not void but may be irregular.)

5. ('18) AIR 1918 Upp Bur 9 (10) : 8 Upp Bur Rul 46.

6. ('24) AIR 1924 All 892 (898) : 46 All 744.

7. ('24) AIR 1924 Lah 725 (726, 727).

('10) 6 Ind Cas 170 (172) (Cal).

8. ('85) AIR 1985 Cal 506 (507) : 62 Cal 1057.

**Note 2**

1. ('09) 4 Ind Cas 187 (187, 188) (Bom).
2. ('20) AIR 1920 Oudh 57 (58).

rule.<sup>3</sup> Thus, the rule will not apply if the party died before the completion of arguments.<sup>4</sup> It has been held that where during the interval between the last hearing of a suit and the date on which the judgment is pronounced, the Court makes a local inspection of the site in suit and makes a reference to it in the judgment, the hearing of the suit cannot be said to have "concluded" on that day of hearing.<sup>5</sup>

Where a defendant dies after the conclusion of the hearing and before delivery of judgment in the suit, and the plaintiff appeals against the decree, there can be no abatement of the appeal and the plaintiff can make the legal representative of the defendant a party to the appeal. It is not necessary that he should make an application for bringing on record the legal representative of the defendant.<sup>6</sup>

**O. 22 R. 6**  
**Note 2**

**R. 7. [S. 369.]** (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

**O. 22 R. 7**

(2) Where the husband is by law liable for debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

**1. Scope of the Rule.** — A died pending suit and his wife was brought on the record as his legal representative. The suit was decreed against her. Pending appeal, she married again. The lower Court's decree was confirmed in appeal and the decree was sought to be executed against the second husband. It was held that this was not a case where the husband was liable for the debts of the wife and that the decree could not be executed against the second husband.<sup>1</sup>

**R. 8. [S. 370.]** (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court

**O. 22 R. 8**

**When plaintiff's insolvency bars suit.**

[But see ('09) 8 Ind Cas 739 (740) : 33 Mad 167. (In this case there was nothing on record to show the fact and time of death.)]

3. ('17) AIR 1917 Nag 99 (101) : 14 Nag L R 71. ('19) AIR 1919 Pat 430 (432) : 4 Pat L Jour 240 (F B).

[See also ('30) AIR 1930 Sind 259 (260) : 25 Sind L R 107.]

4. ('02) 26 Bom 317 (319).

('19) AIR 1919 Mad 685 (689). (Where a party to a suit had died after the arguments had only been partly heard, a judgment pronounced afterwards without his legal representatives having been brought on record is a nullity.)

5. ('36) AIR 1936 Lah 578 (580).

6. ('33) AIR 1933 Lah 710 (710, 711).

**Order 22 Rule 7 — Note 1**

1. ('68) 9 Suth W R 442 (443).

**O. 22 R. 8**  
**Notes 1-2**

otherwise directs) to give security for the costs thereof within such time as the Court may direct.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

**Procedure where assignee fails to continue suit or give security.**

[ 1877, S. 370; 1859, S. 106. ]

### *Synopsis*

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|--|---|
| 1. Legislative changes.                                | 9. Suit instituted after adjudication.  |
| 2. Scope and applicability of the Rule.                | 9a. "Which the assignee or receiver might maintain for the benefit of his creditors." |
| 3. Applicability of the Rule to appeals.               | 10. Limitation.   |
| 4. Applicability of the Rule to execution proceedings. | 11. Costs payable by plaintiff prior to insolvency.                                   |
| 5. "Insolvency" must be existing.                      | 12. Costs of successful defendant.  |
| 6. Plaintiff's insolvency. See Note 2.                 | 13. Cause of action arising after insolvency.   |
| 7. Defendant's insolvency. See Note 2.                 | 14. Appeal.   |
| 8. Insolvency of pauper applicant.                     |   |

#### **1. Legislative changes. —**

1. The word "bankruptcy" which occurred in paragraphs 1 and 2 of the old Section 370 has been omitted.
2. The words "appointed under Section 351" which occurred in paragraph 1 of the old Section have been omitted.
3. The words "shall not bar the suit" have been changed into "shall not cause the suit to abate."
4. The words "unless for any reason the Court otherwise directs" occurring in the present sub-rule (1) are new.
5. The word "order" at the end of paragraph 1 of old Section has been changed into "direct."
6. The words "may dismiss the suit and award to the defendant," etc., which occurred in paragraph 2 of the old Section have been changed into "may make an *order* dismissing the suit and awarding to the defendant," etc.

**2. Scope and applicability of the Rule.**—This rule applies where the *plaintiff* in a pending suit becomes insolvent.<sup>1</sup> It does not apply where the *defendant* becomes an insolvent.<sup>3</sup> In the latter case the procedure to be followed is governed by the

#### **Order 22 Rule 8 — Note 2**

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|---|--|
| 1. ('84) AIR 1984 All 1011 (1012). (Insolvency occurring before suit and appeal—Rule does not apply.)         | 2. (1864) 1 Bom HCR 251 (257). (He may apply to stay the suit under S. 49 of the Indian Insolvency Act.)                 |
| ('87) AIR 1987 Mad 915 (917). (Rule applies only when the insolvency takes place pending the suit or appeal.) | ('29) AIR 1929 Bom 202 (204). (Defendant to a suit adjudicated — Decree in suit against him — He is entitled to appeal.) |

provisions of Rule 10, *infra*. There must have been an *actual* insolvency in which an assignee or receiver is appointed; the rule has no application to a case where there has been merely an *application* for a declaration of insolvency and a vesting order is made.<sup>3</sup>

On the insolvency of the plaintiff the only person entitled to continue the suit is the Official Receiver or Official Assignee. The insolvent has no right to do so.<sup>4</sup> Nor can any person claiming to have derived title under him continue the suit, especially if he had not taken any steps to assert his interests till then.<sup>5</sup>

It is only the *individual right* of the insolvent in the suit that is affected by his insolvency. Thus, the adjudication of the guardian of a minor party does not debar him from continuing to act as guardian.<sup>6</sup>

On the insolvency of the plaintiff the Court should not straightway dismiss the suit but should give *notice* to the Official Receiver or the Official Assignee, as the case may be, in whom the property of the insolvent vests, to appear and state whether he wishes to continue the suit.<sup>7</sup> If he expresses his wish to do so, it will be necessary to make an order directing him to give security for costs within a specified time.<sup>8</sup> But the order to give security can only be made after notice to the receiver and after he expresses his willingness to continue the suit. Thus, where on the plaintiff's adjudication the Court straightway passed an order that the Official Assignee should give security for costs within a time and should be made a party within a further time and that in default the suit should be set down for dismissal, it was held that such an order was irregular.<sup>9</sup> A time should be fixed within which to give security.<sup>10</sup>

Where the receiver declines to continue the suit or appeal, or to give security, the suit or appeal will abate, even without an application for dismissal by the other side.<sup>11</sup>

This rule does not apply to suits or proceedings under the Agra Tenancy Act, III of 1926: see Schedule II, list 1.

**3. Applicability of the Rule to appeals.** — The provisions of the rule apply to appeals.<sup>1</sup>

**4. Applicability of the Rule to execution proceedings.** — The rule does not apply to execution proceedings. A judgment-debtor cannot object to execution being taken against him on the ground of the decree-holder's insolvency. But the receiver or

3. ('29) AIR 1929 Bom 202 (204).

4. ('28) 109 Ind Cas 589 (599) (Mad).

5. ('28) AIR 1928 Cal 215 (215).

6. ('80) AIR 1930 Lah 205 (205).

7. ('20) AIR 1920 Mad 736 (737).

8. ('27) AIR 1927 Cal 76 (77): 53 Cal 844.

9. ('75) 12 Bom H C R 257 (261). (But if the Official Assignee having notice of the order does not give security, he will not be entitled to further notice of the setting down of the suit for dismissal.)

[See also ('92) 16 Bom 404 (406, 407).]

10. ('70) 18 Suth W R 431 (432).

11. ('28) AIR 1928 Lah 596 (597): 10 Lah 208. [See ('85) AIR 1935 Bom 378 (379): 60 Bom 69. (The mere fact that receiver does not take steps to continue suit will not amount to his 'declining' to do so and will not cause an abatement of the suit.)]

[See also ('36) AIR 1936 Lah 83 (84). (Where the receiver does not choose to continue the suit and is not brought on the record as the representative of the insolvent, the receiver has no interest in the suit which he can transfer to another so that the latter can come in under O. 22 R. 10 and continue the suit (assuming that Rule 10 can apply to such an assignee)—Order refusing application of assignee to continue suit falls under Rule 8 and not Rule 10.)]

**Note 3**

1. ('28) AIR 1928 Lah 596 (597): 10 Lah 208.

('33) AIR 1933 All 388 (389): 55 All 509.

('34) AIR 1934 All 1011 (1012). (But this rule does not apply to an appeal in a case where the insolvency has occurred before the filing of the appeal.)

('70) 18 Suth W R 431 (432).

('13) 18 Ind Cas 922 (922) (All).

**O. 22 R. 8**  
**Notes 4-11**

the Insolvency Court can step in and get the fruits of the execution handed over to him.<sup>1</sup>

An insolvent is entitled to make an application for execution of a decree obtained by him before an order for his adjudication was passed.<sup>2</sup>

See also Notes to Rule 12 *infra*.

**5. "Insolvency" must be existing.** — The rule does not, as has been seen in Note 2 above, apply unless an adjudication has *actually* taken place.<sup>1</sup> Where a suit is instituted or continued by the receiver and pending that suit the adjudication is annulled, the receiver can nevertheless continue the suit unless the property is diverted from him and re-vested in the quondam insolvent.<sup>2</sup>

**6. Plaintiff's insolvency.** — See Note 2 above.

**7. Defendant's insolvency.** — See Note 2 above.

**8. Insolvency of pauper applicant.** — The rule does not apply to the adjudication of a petitioner pending his application for permission to sue in *forma pauperis*. Such an application cannot be dismissed on the ground of the adjudication.<sup>1</sup> If the petitioner is adjudicated after he obtains leave to sue in *forma pauperis*, the receiver can come in and continue the suit in the same way as the insolvent could have done.<sup>2</sup>

**9. Suit instituted after adjudication.** — After adjudication the insolvent has no right over property which has vested in the receiver. In respect of such property, therefore, he has no right to institute a suit and a suit so instituted cannot be continued by the receiver under this rule.<sup>1</sup> Suppose the plaintiff was adjudicated pending a suit, has he got the right to appeal against a decree in the suit? According to the Bombay High Court, he can appeal.<sup>2</sup> The High Court of Madras<sup>3</sup> has, on the other hand, held that he cannot appeal.

**9a. "Which the assignee or receiver might maintain for the benefit of his creditors."** — In the undermentioned case<sup>1</sup> where the trial Court had passed against an insolvent a decree for maintenance, and the insolvent appealed from the decree, it was doubted whether the appeal was one "which the assignee or receiver might maintain for the benefit of the creditors" of the insolvent although the appeal, if successful, might incidentally benefit them.

**10. Limitation.** — There is no limitation for the receiver to appear and apply on the adjudication of the plaintiff for being allowed to continue the suit.<sup>1</sup>

**11. Costs payable by plaintiff prior to insolvency.** — If a receiver elects to continue the suit he must give security only for the costs already incurred up to the time of his electing to continue the suit and not for *subsequent cost* as to which he will be personally liable.<sup>1</sup> The order for furnishing the security must be passed at the time

**Note 4**

1. ('24) AIR 1924 Lah 615 (616).
- ('30) AIR 1930 Lah 205 (205, 206).
2. ('39) AIR 1939 Mad 196 (198).

**Note 5**

1. ('29) AIR 1929 Bom 202 (204).
- (1900) 27 Cal 217 (219).
2. ('07) 82 Bom 821 (838, 836).

**Note 8**

1. ('25) AIR 1925 Mad 791 (791).
2. ('18) AIR 1918 All 177 (177).

**Note 9**

1. ('14) AIR 1914 Mad 895 (895).
- ('89) AIR 1939 Mad 196 (197).
2. ('29) AIR 1929 Bom 202 (204).
3. ('26) AIR 1926 Mad 556 (556, 557): 49 Mad 461 (F B).
- ('26) AIR 1926 Mad 1214 (1214).
- [But see ('21) AIR 1921 Mad 402 (408).]

**Note 9a**

1. ('87) AIR 1987 Mad 915 (917).

**Note 10**

1. ('22) AIR 1922 All 361 (362): 48 All 621.

**Note 11**

1. ('26) AIR 1926 Bom 533 (534).

of the receiver electing to continue the suit and not afterwards.<sup>2</sup> An order that the receiver need not furnish security is not appealable.<sup>3</sup> **O. 22 R. 8**  
**Notes 11-14**

**12. Costs of successful defendant.**—In England the executors and trustees in bankruptcy continuing a suit filed by the bankrupt will be personally liable for all costs from the beginning of the suit.<sup>1</sup> In India, however, such personal liability extends only for the costs incurred after the receiver comes on the record.<sup>2</sup>

**13. Cause of action arising after insolvency.**—Where the suit is filed in respect of a cause of action arising after adjudication the insolvency is by itself no ground for demanding security for costs.<sup>1</sup>

**14. Appeal.**—An order under this rule is not appealable.<sup>1</sup>

**R. 9.** [Ss. 371, 372A.] (1) Where a suit abates or is dismissed under this Order,<sup>3</sup> no fresh suit shall be brought on the same cause of action. **O. 22 R. 9**  
**Effect of abatement or dismissal.**

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply<sup>5</sup> for an order to set aside the abatement<sup>4</sup> or dismissal; and if it is proved that he was prevented by any sufficient cause<sup>8</sup> from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act,<sup>7</sup> 1877, shall apply to applications under sub-rule (2).

[1877, S. 371.]

### Synopsis

1. Legislative changes.
2. Scope and applicability of the Rule.
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2. ('27) AIR 1927 Mad 511 (511, 512).

3. ('31) AIR 1931 Rang 286 (286); 9 Rang 478.

#### Note 12

1. ('78) 4 App Cas 733 (735), Boynton v. Boynton. (Referred in 20 Bom 167.)

(1869) L R 8 Eq 612 (618), Cook v. Hathway. (Referred in 20 Bom 167.)

(1884) 28 Ch D 53 (55), Borneman v. Wilson. (Referred in 20 Bom 167.)

(1882) 20 Ch D 780 (785), Watson v. Holliday. (Affirmed in (1888) 48 L T 545; 52 L J Ch 548; 31

W R 536—Do.)

Daniel's Chancery Practice, page 1175, 6th Ed.

2. ('26) AIR 1926 Bom 583 (534).

#### Note 13

1. ('19) AIR 1919 Cal 719 (720): 46 Cal 156.

#### Note 14

1. ('36) AIR 1936 Lah 83 (84, 85). (If the lower Appellate Court entertains an appeal, it will be exercising a jurisdiction not vested in it by law and revision will lie.)

**O. 22 R. 9**  
**Notes 1-8**

**1. Legislative changes. —**

This rule embodies the provisions of Sections 371 and 372A of the old Code — sub-rules (1) and (2) correspond to Section 371 and sub-rule (3) corresponds to Section 372A.

The following changes between the present rule and the above Sections of the old Code may be noted —

1. The words "The plaintiff or person claiming to be the legal representative of a deceased plaintiff or the assignee or receiver in the case of an insolvent plaintiff" have been substituted for the words "but the person claiming to be the legal representative of the deceased or bankrupt or insolvent plaintiff."

2. The words "applicable to appeals" which occurred in Section 372A have been omitted.

**2. Scope and applicability of the Rule. —** The rule is a disabling one and should therefore be strictly construed.<sup>1</sup> Its application is limited to abatement or dismissal under one or other of the rules of this Order and does not extend to abatement on account of some other cause.<sup>2</sup> Thus, an application under sub-rule (2) cannot be made when the abatement is by reason of the fact that the right to sue does not survive.<sup>3</sup>

This rule does not apply to proceedings before the High Court on reference under Section 66 (2) of the Income-Tax Act.<sup>4</sup>

**3. No fresh suit shall be brought on the same cause of action. —** An abatement under Rule 3 or Rule 4 bars a fresh suit on the *same cause of action*.<sup>1</sup> If the fresh suit is, however, on a different cause of action<sup>2</sup> or if the plaintiff in the latter suit does not claim under a devolution of interest from the plaintiff in the former suit,<sup>3</sup> the suit is not barred by this rule. Where the legal representatives of a deceased plaintiff applied to be brought on record, but on the objection of the defendant the Court disallowed the application and dismissed the suit and the legal representatives thereupon filed a fresh suit on the same cause of action, it was held that it was not

**Order 22 Rule 9 — Note 2**

1. ('31) AIR 1931 Lah 79 (80): 12 Lah 275.
2. ('20) AIR 1920 Lah 8 (9): 1 Lah 493.
3. ('16) AIR 1916 Mad 1068 (1069).
4. ('25) AIR 1925 Lah 208 (208).
4. ('80) AIR 1980 Pat 81 (82): 9 Pat 240.

**Note 3**

1. ('09) 8 Ind Cas 739 (740): 33 Mad 167. (The legal representative of a plaintiff after whose death a suit is dismissed cannot sue on the same cause of action and for the same relief on the allegation that the decree was a nullity.)
- ('88) AIR 1938 Lah 752 (753).
- ('28) AIR 1928 Nag 220 (221). (Nor can the fresh suit be brought on the ground that in the former suit the Court acted under some other provision of law ignoring the abatement.)
- ('81) 3 Mad 81 (82). (Suit abated under the Code of 1859. New suit brought while the Code of 1877 was in force. *Held*, Code of 1859 did not provide for prohibiting a new suit on abatement of the old suit. The prohibition under the Code of 1877 cannot affect an abatement under the old Code. So new suit was not barred.)
- ('87) AIR 1937 Mad 101 (103). (Suit to recover possession by benamidar for owner—Benamidar

dying pending suit — No legal representative brought on record — Fresh suit by owner — Abatement of previous suit is bar to fresh suit on same cause of action.)

2. ('29) AIR 1929 All 306 (307, 308).
- ('88) AIR 1938 Lah 109 (110): 14 Lah 880. (Suit by mortgagor for redemption — Vendee from mortgagor made a *pro forma* party—Vendee died and his legal representatives not brought on record — Subsequent suit by mortgagor against vendee for unpaid purchase money is not barred.)
- ('87) AIR 1937 Oudh 248 (249): 13 Luck 199. (Cause of action for ejectment of tenant is different from cause of action for recovery of rent.)
3. ('81) AIR 1931 Lah 79 (80): 12 Lah 275. (Where a reversioner sued challenging an alienation and he having died the suit abated and subsequently another reversioner sued on the same cause of action *held*, that the later suit was not barred.)
- ('16) AIR 1916 Bom 278 (279): 40 Bom 248. (A, a member of a joint Hindu family, sues B for redemption of a mortgage of ancestral property, but not in a representative capacity—A dies—A's heirs are not brought on the record and the suit



open to the defendants to object to the suit on the ground that it was barred under this rule.<sup>4</sup>

The dismissal of a suit for failure to deposit the costs of service of summons on the proposed legal representatives will not bar a fresh suit.<sup>5</sup>

It has been held by the High Court of Bombay<sup>6</sup> that the bar under this rule has not got the same effect as *res judicata* and that it does not extinguish the right. The High Court of Madras<sup>7</sup> has held, distinguishing the Bombay decision, that an order of abatement operates as a judgment in favour of the defendant and that if it is not vacated by an application under this rule, it is conclusive of the defendant's rights to the property. The High Court of Lahore<sup>8</sup> also takes the same view as that of the Madras High Court.

**4. Setting aside abatement.** — The Court can set aside the abatement of a suit if it is moved by an application under sub-rule (2).<sup>1</sup> The remedy provided for in sub-rule (2) applies where the suit has abated under Rule 3 or Rule 4<sup>2</sup> or where it has been dismissed under Rule 8.<sup>3</sup>

An order setting aside an abatement should be passed only after notice to the other side. If it is passed without notice, the other side can raise their objections to the order at the hearing of the suit or appeal.<sup>4</sup>

See also the undermentioned case.<sup>5</sup>

**5. Who may apply under this Rule.** — If the abatement was under Rule 3, the application under this rule may be made by the legal representatives of the plaintiff. But a legal representative cannot apply under this rule if he had already applied to be brought on record within time and his application had been dismissed.<sup>1</sup> If the abatement is under Rule 4, the plaintiff may make the application. If the suit has been dismissed under Rule 8, the receiver or assignee in insolvency may apply.

Where there are more plaintiffs or appellants than one, each one of them can make the application.<sup>2</sup>

The reversioners or any one of them can apply to set aside an abatement caused by the death of the widow-plaintiff.<sup>3</sup>

The legal representative of a respondent wishing to bring himself on the record need not apply to set aside the abatement of the appeal.<sup>4</sup>

**6. Minor and abatement.** — Where an application made on behalf of A, a minor, to be brought on the record in the place of B, the deceased plaintiff, is

abates—Subsequently A's son and grandsons institute another suit for redemption of the same mortgage—The second suit is not barred.) ('89) AIR 1989 Lah 580 (581). (Suit by reversioner to set aside alienation by widow—Its abatement does not bar fresh suit by another reversioner for same relief.)

4. ('19) AIR 1919 Mad 572 (578).

5. ('88) 9 Cal 163 (165).

6. ('04) 6 Bom L R 638 (639).

7. ('20) AIR 1920 Mad 580 (581).

8. ('88) AIR 1988 Lah 752 (753).

#### Note 4

1. ('85) AIR 1985 Lah 712 (713).

2. ('17) AIR 1917 P O 156 (160); 45 Cal 94; 1917 Pun Be No. 104; 44 Ind App 218 (P O).

3. (See (1900) 27 Cal 217 (219). (But a person in respect of whose property a vesting order was made on an application to declare him an insol-

vent, but the proceedings in insolvency are subsequently annulled and he is not declared an insolvent, is not an insolvent, so as to make R. 8 applicable, and to treat a dismissal for default as an order under R. 8—In such a case the suit can be restored under O. 9 R. 9.)

4. ('28) AIR 1928 Mad 1148 (1149).

[See also ('26) AIR 1926 Lah 422 (422).]

5. ('36) AIR 1936 Lah 618 (619). (Application by A — Another application by B by way of objections to A's application—Latter application dismissed for default and even the appeal which gave rise to the proceedings, abating—B cannot apply for revival of his application.)

#### Note 5

1. '21) AIR 1921 Nag 23 (24); 17 Nag L R 45.

2. '26) AIR 1926 Pat 276 (277).

3. '26) 98 Ind Cas 1068 (1069) (Oudh).

4. '32) AIR 1932 Mad 527 (527).

**O. 22 R. 9  
Notes 6-8**

dismissed and *A* thereafter makes a second application, it can, in proper cases, be treated as an application under this rule for setting aside the abatement.<sup>1</sup>

**7. Limitation.** — Under Article 171 of the Limitation Act, 1908, an application to set aside abatement should be filed within sixty days from the date of the abatement.<sup>1</sup> If the petitioner was prevented by any sufficient cause from making the application within the said period the delay in filing the application may be excused under Section 5 of the Limitation Act.<sup>2</sup> If no application is made within sixty days or within the extended time under Section 5 of the Limitation Act, the abatement becomes final and conclusive.<sup>3</sup>

**8. "Sufficient cause."** — An applicant for setting aside an abatement must show that he had sufficient cause for not taking timely steps to continue the suit.<sup>1</sup> As a matter of practice such cause must be alleged in the petition. It is, however, not legally necessary to do so; all that is necessary is that he should satisfy the Court that there was sufficient cause.<sup>2</sup> The question as to what is sufficient cause depends upon the facts and circumstances of each case.<sup>3</sup> The test to be adopted in determining it is to see whether the mistake or carelessness was real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise, or whether the negligence was culpable or the applicant had acted *mala fide* or irreparable injury would result to the other side by the granting of the application; in the former case the application must be granted;<sup>4</sup> in the latter case, it must be dismissed.<sup>5</sup>

**Note 6**

1. ('24) AIR 1924 Bom 416 (417).

**Note 7**

1. ('11) Ind Cas 559 (560) : 35 Bom 393.  
( '17) AIR 1917 Lah 321 (322) : 1917 Pun Re No. 96.  
( '19) AIR 1919 Cal 294 (295). (And not six months after death of plaintiff.)  
2. ('14) AIR 1914 All 94 (95) : 36 All 235.  
( '88) AIR 1988 Lah 356 (358) : 14 Lah 543. (It is the duty of applicant to explain every day's delay.)  
( '82) AIR 1982 All 459 (460) : 54 All 280.  
( '26) AIR 1926 Cal 175 (175, 176). (When an application is put in to set aside abatement, a Court should first investigate if the party was lawfully prevented from making the application in time and whether in the circumstances he was entitled to the benefit of Section 5.)  
( '82) AIR 1982 All 698 (699).  
( '86) AIR 1986 Sind 169 (170) : 30 Sind L R 272. (Burden lies on person claiming relief under S. 5, Limitation Act, to prove sufficient cause for delay.)  
( '89) AIR 1989 Lah 439 (445) : ILR (1989) Lah 433. (Applications for extension of time under S. 5 should be more liberally construed in favour of minors than other litigants.)  
( '85) AIR 1985 Lah 712 (713).  
( '88) AIR 1988 Bom 6 (9) : ILR (1988) Bom 64. [See ('85) AIR 1985 Lah 443 (444). (Punjab Alienation of Land Act (1900), S. 21A — Application under S. 21A filed within time but legal representative of one of parties not brought on record — Provisions of C. P. O. apply and time can be extended under S. 5, Limitation Act.)  
[See also ('20) AIR 1920 All 284 (285) : 42 All 540.]  
3. ('22) AIR 1922 Lah 80 (80).  
( '26) AIR 1926 Lah 284 (285) : 7 Lah 73.  
( '28) AIR 1928 Lah 470 (471).  
[See also ('25) AIR 1925 Bom 122 (123) : 49

Bom 118.]

**Note 8**

1. ('16) AIR 1916 Cal 285 (285, 286).  
( '22) AIR 1922 Cal 335 (336, 337) : 49 Cal 62.  
( '22) AIR 1922 Cal 408 (409) : 49 Cal 524.  
( '23) AIR 1923 Lah 230 (231).  
( '26) AIR 1926 Lah 234 (235) : 7 Lah 73.  
( '17) AIR 1917 Lah 10 (11) : 38 Ind Cas 7 (8) : 1916 Pun Re No. 118.  
( '15) AIR 1915 Mad 132 (133).  
( '25) AIR 1925 Mad 494 (496). (Where no explanation is furnished for the delay of over six months in taking proceedings to set aside an abatement of suit an order excusing such delay is without jurisdiction.)  
2. ('28) AIR 1928 Lah 746 (747).  
3. ('18) AIR 1918 Oudh 304 (305) : 21 Oudh Cas 68.  
( '26) AIR 1926 Lah 137 (138).  
( '26) 97 Ind Cas 142 (142) (Lah).  
( '39) AIR 1939 Pat 623 (624).  
[See also ('28) AIR 1928 Lah 280 (232).  
( '34) AIR 1934 Lah 934 (934). (Plaintiff and defendant living fifteen miles apart and related by marriage—Plaintiff dying after decision of suit — Defendants-appellants not bringing legal representative on record—Abatement of appeal — Abatement cannot be set aside on ground of want of knowledge of plaintiff's death on part of defendant.)]  
4. ('27) AIR 1927 Pat 410 (410). (Appellant acting diligently — Delay excused.)  
( '88) AIR 1988 Lah 765 (766).  
( '88) AIR 1988 Sind 36 (37) : 26 Sind L R 81. (Plaintiff Hindu alert in making inquiries—Defendants Mahomedans living at several places—Delay was excused and abatement was set aside.)  
[See ('20) AIR 1920 Lah 508 (509).]  
5. ('28) AIR 1928 Mad 404 (406).

In the following instances the abatement was set aside under this rule on the ground of sufficient cause —

**O. 22 R. 9**  
**Note 8**

(1) Where, by virtue of an order of the Court, the petitioner *bona fide* believed that no separate application was necessary to implead the legal representatives.<sup>6</sup>

(2) Where the legal representatives of a deceased appellant *bona fide* believed that the co-appellants were prosecuting the appeal and challenging the entire decree.<sup>7</sup>

(3) Where the petitioner was a Government servant and had sent the necessary papers to the vakil but the papers were received by the latter on the last day of limitation after the rising of the Court.<sup>8</sup>

For other instances, see the undermentioned cases.<sup>9</sup>

Can ignorance of law be pleaded as a sufficient cause for the purposes of this rule? On this question it has been held that while mere ignorance of law without anything more, will not constitute "sufficient cause" for the purposes of this rule,<sup>10</sup> it cannot be laid down as an inflexible rule that it can never be a sufficient cause for excusing the delay.<sup>11</sup> Thus, where the original period of limitation prescribed had been shortened by an amending Act and, in ignorance thereof the application was made after the expiry of the shorter period, it was held that there was sufficient cause.<sup>12</sup>

On the question whether the fact that the applicant under this rule was ignorant of the *death of the party* whose legal representatives had to be brought on the record, would constitute a sufficient cause for setting aside an abatement, it has been held that if the ignorance is due to carelessness or want of diligence on the part of the petitioner it will not constitute a sufficient cause.<sup>13</sup> Where, on the other hand, it is not

6. ('19) AIR 1919 Lah 147 (148) : 1919 Pun Re No. 20. (Court had made an order allowing the parties on record to represent all the persons interested under O. 1 R. 8.)

(25) AIR 1925 Pat 765 (770) : 4 Pat 448.

7. ('09) 2 Ind Cas 412 (413) : 86 Cal 418.

8. ('28) AIR 1923 All 44 (47, 48) : 45 All 66.

9. ('36) AIR 1936 Lah 710 (711). (Delay in applying for substitution—Number of parties very large and appeal remaining pending for a long time—No negligence in applying—Held that in the peculiar circumstances of the case delay should be condoned.)

(39) 43 Cal W N 1143 (1145). (Doubtful construction of Act and ignorance of new amendment—Held, there was sufficient cause.)

(88) AIR 1938 Bom 408 (410) : ILR (1938) Bom 704. (Discretion to be judicially exercised—Discretion exercised after considering all facts and circumstances will not be interfered with by Appellate Court—Words "sufficient cause" in S. 5, Limitation Act, to be liberally construed—Death of opponent in Native State or foreign place—Difficulties in tracing legal representatives—Reasonable delay should be condoned : Per B. J. Wadia, J.)

10. ('89) 11 All 408 (414, 415).

(33) AIR 1933 Lah 356 (358) : 14 Lah 543. (Mere ignorance of law that an application is necessary.)

(84) 147 Ind Cas 1187 (1188) (Lah).

(20) AIR 1920 Lah 174 (174).

(85) 1885 Pun Re No. 89, page 79.

(12) 15 Ind Cas 708 (709) (Lah).

(14) AIR 1914 Lah 123 (124) : 1915 Pun Re No. 41.

(16) AIR 1916 Lah 866 (867, 868) : 1916 Pun Re No. 3.

(15) AIR 1915 Lah 334 (336). (A careless mistake of law held to be no sufficient cause.)

(29) AIR 1929 Nag 74 (75).

(1900) 8 Oudh Cas 13 (17).

11. ('86) 1886 Pun Re No. 81, page 170.

(89) 1889 Pun Re. No. 43, page 148.

[See also ('39) 43 Cal W N 1143 (1145).]

(88) AIR 1938 Bom 408 (410) : ILR (1938) Bom 704. (Ignorance of law of a Native State or foreign place (where deceased was domiciled) according to the law of which the legal representatives have to be brought on record may be sufficient cause.)

12. ('23) AIR 1923 Bom 40 (40).

(28) AIR 1923 Lah 475 (475).

(21) AIR 1921 Mad 650 (651).

13. ('24) AIR 1924 Lah 461 (461, 462).

(33) AIR 1933 Lah 556 (557). (Death of respondent in appeal—Appellant, municipal committee, not impleading legal representative within time—Time cannot be extended under S. 5 in absence of good ground.)

(26) AIR 1926 Lah 187 (188).

(14) AIR 1914 Oudh 411 (411).

(22) AIR 1922 Lah 61 (61).

(22) AIR 1922 Cal 385 (336, 387) : 49 Cal 62.

(18) AIR 1918 Oudh 304 (305) : 21 Oudh Cas 68.

(25) AIR 1925 Oudh 306 (307).

(24) AIR 1924 Pat 126 (127).

**O. 22 R. 9**  
**Note 8**

due to any want of reasonable diligence on his part or it is due to events beyond his control, it will constitute sufficient cause.<sup>14</sup> Thus, where the ignorance was due to the fact that the applicant was herself a pardanashin lady,<sup>15</sup> or that the deceased was a pardanashin lady,<sup>16</sup> or that the applicant lived far away from the place where the deceased lived,<sup>17</sup> the abatement was set aside. It was held in the undermentioned case<sup>18</sup> that ignorance on the part of the appellant of the death of the respondent is "sufficient cause" within the meaning of this rule and that the appellant is not required to inquire from day to day as to whether the respondent is dead or alive.

The negligence or forgetfulness of an agent specially appointed to look after the suit or appeal is not a sufficient cause to set aside an abatement.<sup>19</sup> But the *collusion* of the agent with the opposite side will be a sufficient ground for setting aside the abatement.<sup>20</sup> Where the applicant gave instructions in time to her vakil to bring on record the legal representatives, but owing to a mistake of the vakil in failing to notice the change effected in the period prescribed for such an application the application was not filed in time, it was held that the delay should be excused.<sup>21</sup>

The fact that succession to the estate of the deceased is in doubt or is in dispute will not be a sufficient cause for not filing an application in time.<sup>22</sup>

Where an application to add legal representatives is filed after the period of limitation has expired, the Court may either first set aside the abatement by getting an application filed for the purpose and then substitute the legal representatives,<sup>23</sup> or in

(24) AIR 1924 Pat 607 (607).

(11) 12 Ind Cas 871 (871) : 1911 Pun Re No. 60.

(15) AIR 1915 Lah 998 (898, 899).

(15) AIR 1915 Lah 982 (883).

(17) AIR 1917 Lah 10 (11) : 1916 Pun Re No. 118.

(30) AIR 1980 All 779 (783) : 52 All 910.

(28) AIR 1923 Lah 132 (133). (No reason shown as to what prevented ascertainment of death—Delay not excused.)

(27) AIR 1927 Mad 707 (707).

(35) 155 Ind Cas 610 (611) (Lah).

(35) AIR 1935 Lah 682 (684). (The fact that the appellant is a corporation does not entitle it to any special privileges in the matter.)

[See (35) AIR 1935 Lah 478 (478). (In this case it was held that ignorance of the death of the party in question is not 'sufficient cause'—The question as to the ignorance being due to carelessness or want of diligence is not adverted to.)]

[See also (35) 1935 Oudh W N 371 (872). (Ordinarily, ignorance of the death of the opposite party is not a sufficient cause—But there may be special circumstances which make the ignorance sufficient cause.)]

14. (19) AIR 1919 Lah 819 (820, 821).

(32) AIR 1932 All 459 (460) : 54 All 280.

(25) AIR 1925 Pat 123 (124) : 8 Pat 853.

(37) AIR 1937 Bom 401 (407) : I L R (1937) Bom 602. (Ignorance of death on part of agent of plaintiff or appellant — Numerous parties involved in case and more efficient watch not possible—There is sufficient cause for setting aside abatement.)

(38) AIR 1938 Mad 218 (218) : I L R (1938) Mad 275.

[See also (37) 1937 Pun Re No. 42, p. 91.

(38) AIR 1938 Lah 916 (920). (Application to bring on record legal representative filed four days beyond limitation — Applicant not know-

ing date of deceased's death — Time was extended.)]

15. (32) AIR 1932 Lah 148 (149).

[See also (34) AIR 1934 Lah 998 (998).]

16. (25) AIR 1925 Pat 162 (164).

(24) AIR 1924 Pat 319 (320).

17. (28) AIR 1923 Lah 546 (547).

(38) AIR 1938 Lah 224 (225). (And where means of communication were scarce.)

(24) AIR 1924 Lah 429 (429) : 5 Lah 70.

(26) 91 Ind Cas 560 (561) (Oudh).

(07) 1907 Pun Re No. 113, page 522.

(18) AIR 1918 Lah 314 (314).

(29) AIR 1929 Lah 684 (685).

[See also (39) AIR 1939 Pat 628 (624). (Conduct of appeal in hands of agent who was neither living in the village nor had any touch with the village where the deceased respondent lived — Abatement set aside.)]

18. (38) AIR 1938 Pat 125 (126) : 17 Pat 84.

19. (10) 7 Ind Cas 391 (392) (Cal).

[See also (37) AIR 1937 Nag 97 (98) : I L R (1937) Nag 507. (Negligence of pleader is no ground for condoning delay though plaintiff was minor and next friend was a pardanashin lady.)]

20. (19) AIR 1919 Cal 156 (157).

21. (21) AIR 1921 Mad 650 (651).

22. (16) AIR 1916 Cal 285 (286).

(16) AIR 1916 Mad 869 (871).

[But see (24) AIR 1924 Oudh 88 (84) : 26 Oudh Cas 244. (But the fact that the legal representatives were minors who would not have obtained execution without obtaining a succession certificate is sufficient reason to excuse the delay.)]

23. (04) 9 Cal W N 369 (370).

exceptional cases, even treat the application as one to set aside the abatement and pass necessary orders thereon.<sup>24</sup> Where such an application is allowed without objection, the time will be deemed to have been extended and the legal representatives to have been properly brought on the record.<sup>25</sup> Where the lower Court has considered all the circumstances and has decided that there is no sufficient cause<sup>26</sup> or has extended the time for substitution,<sup>27</sup> the Appellate Court will not interfere with the decision.

Where an application has been made under this rule within time, a *bona fide* mistake therein can be corrected after the limitation period.<sup>28</sup>

**9. Formal order of abatement, if necessary before setting aside abatement.** — In cases under the old Code it was held that when a formal order of abatement had not been passed, the proper procedure on an application to revive the suit was to pass first an order of abatement and then an order setting aside the abatement.<sup>1</sup>

Under the present Code an abatement takes place automatically without any order and such abatement can be set aside on application under this rule even where no formal order declaring the abatement has been passed.<sup>2</sup> See Note 11.

**10. Cause of action in the revived suit.** — When a suit is revived under this rule it must be continued on the *same cause of action*; no new cause of action can be introduced into it.<sup>1</sup>

**11. Substitution without setting aside abatement.** — Strictly speaking, where an abatement has taken place, it should first be set aside before a substitution of the legal representative is ordered.<sup>1</sup> This rule is strictly applied in the Patna High Court.<sup>2</sup> In Bombay<sup>3</sup> and Allahabad<sup>4</sup> a more liberal interpretation is adopted and the substitution of the legal representatives without first setting aside the abatement has been held to be a mere irregularity which does not vitiate the decision. In a Calcutta case<sup>5</sup> where such substitution was ordered without objection by the other side, it was

24. ('24) AIR 1924 Cal 633 (634) : 51 Cal 690.

('34) AIR 1934 Lah 315 (315).

('38) AIR 1938 Nag 85 (86) : 29 Nag L R 118.

('38) AIR 1938 Sind 36 (37) : 26 Sind L R 81.

25. AIR 1925 Lah 599 (599).

26. ('26) 92 Ind Cas 724 (725) (Mad).

('36) AIR 1936 Sind 169 (171) : 30 Sind L R 242. (Lower Court refusing to condone delay—Appellate Court will interfere only when discretion not exercised judicially or is exercised arbitrarily.)

27. ('24) AIR 1924 Lah 339 (342).

('35) AIR 1935 Lah 712 (713). (Discretion is open to interference by Appellate Court only if it has been exercised in a perverse or an unjudicial manner.)

('38) AIR 1938 Bom 408 (410) : I L R (1938) Bom 704.

28. ('27) AIR 1927 Oudh 170 (172).

#### Note 9

1. ('85) 9 Bom 275 (279).

('04) 9 Cal W N 869 (870).

2. ('26) AIR 1926 All 217 (220) : 48 All 334 (FB).

('30) AIR 1930 All 379 (380). (AIR 1922 All 209, Dissented.)

('24) AIR 1924 Bom 416 (417). (If no formal order application for substitution may, in suitable cases, be taken as one to set aside abatement.)

('27) AIR 1927 Lah 865 (865). (One of the defendants in a suit died and his legal representatives were not brought on the record in time — The Court passed an order that the suit abated as against him and also decided at the same time that this partial abatement resulted in the total abatement of the suit — *Held*, that though that portion of the order which decided that the suit had abated in toto may be a decree, the order declaring the partial abatement was one which could be set aside on an application under O. 22 R. 9.)

('39) AIR 1939 Lah 572 (577).

('37) AIR 1937 Bom 401 (406) : I L R (1937) Bom 602.

[But see ('22) AIR 1922 All 209 (210) : 44 All 459.]

#### Note 10

1. ('94) 21 Cal 997 (1004, 1005) : 21 Ind App 163 (PC).

('95) 22 Cal 92 (98).

#### Note 11

1. ('16) AIR 1916 Cal 690 (690).

2. ('23) AIR 1923 Pat 417 (418) : 2 Pat 168.

('36) AIR 1936 Pat 266 (266).

3. ('22) AIR 1922 Bom 449 (449) : 47 Bom 92.

('27) AIR 1927 Bom 156 (156, 157).

4. ('32) AIR 1932 All 698 (699).

5. ('24) AIR 1924 Cal 633 (634) : 51 Cal 690.

**O. 22 R. 9** held that the decision could not, in an appeal from the final order, be objected to on that ground.  
**Notes 11-14**

An application for substitution may, in substance, be treated as an application to set aside the abatement.<sup>6</sup> This, however, should not be done when the merits of the case are against the petitioner.<sup>7</sup>

**12. Remand.** — Where an Appellate Court finds that there was an abatement in the lower Court, it should not proceed to set aside the abatement but should remand the case for disposal under this rule.<sup>1</sup>

Where an Appellate Court finds that the lower Court's refusal to set aside abatement is wrong and remands the application for re-hearing, the remand is not a final order.<sup>2</sup>

**13. Appeal.** — No appeal lies from an order *setting aside* an abatement.<sup>1</sup> As to whether an order setting aside abatement affects the decision on the merits within the meaning of Section 105, see Note 6 to Section 105, *ante*. Under the Code of 1877 no appeal was allowed even from an order *refusing to set aside* an abatement. But under the Code of 1882 as well as the present Code an appeal is allowed from such an order.<sup>2</sup> But no such appeal will lie when there has been no application to the Court to set aside the abatement.<sup>3</sup> It has been held by the Calcutta High Court<sup>4</sup> that an order refusing to set aside an abatement of an appeal cannot be appealed against. But the contrary view has been held by the Patna High Court.<sup>5</sup> See also Note 14.

**14. Letters Patent Appeal.** — The Allahabad<sup>1</sup> and Calcutta<sup>2</sup> High Courts have held that an order of a *single Judge* declining to set aside or setting aside an abatement in an appeal is a "judgment" within the meaning of Clause 10 of the Letters Patent (Allahabad) and Clause 15 of the Letters Patent (Calcutta) and that therefore a Letters Patent appeal is competent from such an order. But the Bombay High Court<sup>3</sup> has held that an order setting aside an abatement under this rule is not a "judgment" within the meaning of Clause 15 of the Letters Patent and that no appeal lies from such an order.

An order setting aside an abatement passed by a *Division Bench* of the High Court cannot, according to the Madras High Court, be set aside by another Bench of the High Court. The remedy is by way of review.<sup>4</sup>

6. ('20) AIR 1920 All 284 (285) : 42 All 540.

('24) AIR 1924 Lah 424 (424).

('28) AIR 1928 Lah 746 (747).

('37) AIR 1937 Lah 455 (457).

7. ('24) AIR 1924 Mad 718 (714).

('30) AIR 1930 Cal 422 (424) : 57 Cal 148.

#### Note 12

1. ('25) AIR 1925 Bom 290 (291).

2. ('25) AIR 1925 All 268 (268, 264) : 47 All 885.

#### Note 13

1. ('17) AIR 1917 All 434 (435).

('25) AIR 1925 Cal 478 (474) : 52 Cal 472. (An order setting aside an abatement cannot be questioned in an appeal from the decree.)

('24) AIR 1924 Mad 718 (715). (An order setting aside abatement passed without jurisdiction is liable to revision.)

('26) AIR 1926 Cal 444 (445). (Order setting aside abatement without considering the limitation for making application for setting aside is liable

to revision.)

('38) AIR 1938 Bom 408 (409) : I L R (1938) Bom 704.

2. ('84) AIR 1984 Lah 315 (315). (Application to bring on record legal representative of deceased party after expiry of time is application to set aside abatement—Order refusing to set aside abatement is appealable.)

('24) AIR 1924 Lah 424 (424).

('25) AIR 1925 Lah 456 (456, 457).

3. ('12) 18 Ind Cas 968 (963) : (1911) Pun ReNo. 95.

4. ('20) AIR 1920 Cal 532 (538).

5. ('88) AIR 1988 Pat 125 (126) : 17 Pat 84. (AIR : 1925 Pat 162, Followed.)

('39) AIR 1939 Pat 623 (624).

#### Note 14

1. ('28) AIR 1928 All 44 (46) : 45 All 66.

2. ('22) AIR 1922 Cal 385 (387) : 49 Cal 62.

3. ('88) AIR 1988 Bom 408 (409) : I L R (1988) Bom 704.

4. ('16) AIR 1916 Mad 180 (181).

**15. Revision.** — Generally speaking no revision lies from an order under this rule.<sup>1</sup> But where the order is passed without jurisdiction<sup>2</sup> or without adverting to the bar of limitation involved,<sup>3</sup> a revision will lie.

**O. 22 R. 9  
Note 15**

**R. 10.** [S. 372.] (1) In other cases of an assignment,<sup>4</sup> creation<sup>8</sup> or devolution<sup>9</sup> of any interest<sup>5</sup> during the pendency of a suit,<sup>13</sup> the suit may, by leave of the Court,<sup>18</sup> be continued by or against the person to or upon whom such interest has come or devolved.

**O. 22 R. 10**

*Procedure in case of assignment before final order in suit.*

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

[1877, S. 372. See S. 146.]

### *Synopsis*

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope and applicability of the Rule.</li> <li>3. Other cases of assignment, creation or devolution of interest pending suit.</li> <li>4. Assignment of interest.</li> <li>5. "Interest."</li> <li>5a. "Attachment of decree."</li> <li>6. Trial Court can bring assignee on record pending an appeal.</li> <li>7. Transfer of decree.</li> <li>8. Creation of interest.</li> <li>9. Devolution of interest.</li> <li>10. Insolvency of defendant.</li> <li>11. Representative suits. See Note 9.</li> <li>12. Annulment of order of adjudication.</li> </ol> | <ol style="list-style-type: none"> <li>13. "During the pendency of a suit."</li> <li>14. Application under this Rule, when to be made.</li> <li>15. Execution proceedings.</li> <li>15a. Sub-rule (2). See Note 5a.</li> <li>16. Laches.</li> <li>17. No new suit.</li> <li>18. "By leave of the Court."</li> <li>19. Effect of adding new parties under this Rule.</li> <li>19a. Suit against municipality. See Note 4a to Rule 4.</li> <li>20. Appeal.</li> <li>21. Letters Patent Appeal.</li> <li>22. Limitation.</li> </ol> |
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### *Other Topics (miscellaneous)*

No application — Effect of. See Notes 2, 9 and 14.

Sub-rule (2). See Note 8.

Personal actions. See Notes 9 and 10.

### **1. Legislative changes. —**

1. The words "given either with the consent of all parties or after service of notice in writing upon them and hearing their objections, if any," which occurred in the old Section have been omitted.
2. The words "or devolved" in the present sub-rule (1) are new.
3. The words "either in addition to or in substitution for the person from whom it has passed, as the case may be" which occurred in the old Section have been omitted.
4. Sub-rule (2) is new.

**2. Scope and applicability of the Rule. —** The rule is an enabling one.<sup>1</sup> It is based on the principle that the trial of a suit cannot be arrested merely by reason of a

### **Note 15**

1. ('14) AIR 1914 Mad 116 (116).
- ('88) AIR 1988 Nag 85 (87) : 29 Nag L R 118.
- ('21) 68 Ind Cas 280 (280) (All).
- ('88) AIR 1988 Pat 27 (28).

2. ('24) AIR 1924 Mad 713 (715).

3. ('26) AIR 1926 Cal 444 (445).

### **Order 22 Rule 10 — Note 2**

1. ('05) 28 Mad 157 (160).
- ('85) AIR 1985 Pat 488 (489) : 15 Pat 64.



**O. 22 R. 10**  
**Note 2**

devolution of the interest of a party in the subject-matter of the suit : that the person acquiring the interest may continue the suit with the leave of the Court : but that if he does not choose to do so the suit may be continued with the original party and the person acquiring the interest will be bound by, or can have the benefit of, the decree as the case may be.<sup>3</sup>

The rule applies to appeals in cases where the devolution takes place pending appeal.<sup>3</sup> Similarly, the rule also applies to second appeals.<sup>4</sup> It applies equally to cases of devolution of the interest of the *plaintiff* or of the *defendant*<sup>5</sup> and to the case of appellants as well as to that of respondents.<sup>6</sup>

In order that this rule may apply :

(1) There must be an *assignment, creation or devolution* of an interest in the subject-matter of the suit.<sup>7</sup>

(2) Such assignment, creation or devolution of interest must be by, or from, a *party* to the suit and not a stranger.<sup>8</sup> Thus, an assignee from the *heir* of a deceased plaintiff who was himself not brought on the record, cannot apply under this rule.<sup>9</sup>

(3) The person to whom the assignment, creation or devolution of interest takes place must be arrayed on the same side in the suit as the person from whom it has passed.<sup>10</sup>

The rule is a residuary one governing cases *which are not provided for by the previous rules* of the Order,<sup>11</sup> so that if any of these other rules apply to the facts of a particular case, the effect of that rule cannot be got rid of by a resort to this rule.<sup>12</sup> Where, however, there are two devolutions, *viz.*, one by the death of a party (coming under Rules 3 and 4) and the other by a transfer of his interest (prior to his death), the transferee has the right to be impleaded under this rule and the death of the plaintiff cannot take away the right.<sup>13</sup>

2. ('15) AIR 1915 Cal 103 (105).
- ('38) AIR 1938 Cal 481 (485).
- ('96) AIR 1936 Pat 420 (422) : 15 Pat 607.
- ('35) AIR 1935 Pat 488 (489) : 15 Pat 64.
- ('37) AIR 1937 Mad 915 (917). (Order 22 Rule 10 is only a permissive rule and does not impose a disability upon a person already on the record—Appeal by original party is competent.)
- ('21) AIR 1921 Cal 422 (423).
- [See ('39) AIR 1939 P C 170 (173) : I L R 1939 Bom 503 : I L R (1939) Kar 295 : 66 Ind App 210 (P C). (Party assigning whole of his interest *pendente lite*—Though he cannot ask for judgment in respect of that interest his assignee can.)]
3. ('96) 18 All 285 (287).
- ('84) AIR 1934 All 442 (444). (Assignment during pendency of suit—Appellate Court has no jurisdiction to implead assignee as party under this rule.)
- (1900) 22 All 281 (282, 283).
- ('85) 9 Bom 151 (156, 157).
4. ('88) AIR 1938 Mad 757 (758).
5. ('15) AIR 1915 Cal 771 (772).
6. ('96) 18 All 285 (287).
7. ('80) AIR 1930 Cal 118 (126, 127) : 57 Cal 170.
- ('17) AIR 1917 Pat 181 (188) : 2 Pat L Jour 199.
- ('80) AIR 1930 Pat 145 (146) : 8 Pat 900.
8. ('16) AIR 1916 Mad 523 (524) : 39 Mad 488. (A widow of the deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who

- instituted the suit.)
- ('25) AIR 1925 Mad 487 (488).
- [See ('36) AIR 1936 Lah 652 (656) : I L R (1937) Lah 525.]
9. ('25) AIR 1925 Mad 1166 (1166).
- ('86) AIR 1936 Pat 123 (125) : 15 Pat 82. ('Party' means party on record.)
- [See also ('36) AIR 1936 Lah 83 (84). (Insolvency of plaintiff during pendency of suit—Official Receiver not brought on record—Assignee from Official Receiver cannot continue suit under this rule.)]
10. ('83) 5 All 209 (212).
11. ('26) AIR 1926 Lah 181 (182).
- ('86) AIR 1936 Lah 652 (656) : I L R (1937) Lah 525.
12. ('23) AIR 1923 Mad 237 (237) : 45 Mad 872.
- ('25) AIR 1925 Mad 1166 (1167).
- ('27) AIR 1927 All 272 (272) : 49 All 810.
- ('84) AIR 1934 Lah 190 (190). (Transfer by defendant during pendency of suit to plaintiff's knowledge—Transferee not made defendant—Appeal against defendant abating for not bringing his legal representative on record—Transferee cannot be brought on record at that stage.)
- [See also ('38) AIR 1938 Sind 371 (373). (Devolution of interest by death—Rule has no application.)]
13. ('25) AIR 1925 Cal 467 (468). (The two devolutions are distinct—Where this is so the predominant right under one devolution cannot be defeated by the right under the other.)



It should be noted that there is no abatement under this rule.<sup>14</sup> The rule contemplates the *substitution* of a new party and not the *addition* of a new party.<sup>15</sup> See also the undermentioned case.<sup>16</sup>

**O. 22 R. 10**  
**Notes 2-8**

**3. Other cases of assignment, creation or devolution of interest pending suit.** — As has already been seen in Note 2, this rule provides for all cases not falling within the scope of the previous rules of the Order, such as Rules 2, 3, 4, 7 and 8.<sup>1</sup> The words "other cases," etc. mean cases other than those specifically provided for in the preceding rules.<sup>2</sup> Those words were in the undermentioned case<sup>3</sup> held to indicate that the rule did not apply to a case of death. But such a restricted interpretation does not appear to be warranted by the rule. It would seem to apply even to cases of death if such cases do not fall within the provisions of Rules 3 or 4 *ante*.<sup>4</sup>

As illustrations of "other cases of assignment, creation or devolution of interest" falling within this rule may be mentioned cases of transfer *inter vivos*<sup>5</sup> or cases where a mortgagee party in a suit releases the property to the mortgagor.<sup>6</sup> Where a suit is instituted against a widow for recovery of debt due by her husband and, pending the suit she gives birth to a posthumous son, the son can be brought on the record under the principle of this rule.<sup>7</sup> Where a suit was instituted against the G. I. P. Railway and pending the suit the line was taken over by the Government, it was held that the Government should be made a party under this rule.<sup>8</sup> But there is no "assignment, creation or devolution of interest" by a company going into liquidation.<sup>9</sup>

In *Manindra Chandra Nandy v. Ram Kumar*<sup>10</sup> the defendant in a suit for possession granted a lease of the suit property to another during the pendency of the suit. The suit was decreed and it was sought to make the lessee a party to the proceedings for the ascertainment of mesne profits. The lessee had surrendered the lease and did not claim to remain in occupation of the land. The allegation against the lessee was that he had removed mica from the land and was liable for damages. It was held by the Privy Council in the above circumstances that the lessee could not be proceeded against in the same suit and be made a party to the proceedings for the ascertainment of mesne profits. The reason given was that there was no assignment, creation or devolution of interest within the meaning of this rule. Their Lordships observed as follows in the course of their judgment: "The order (Order 22) contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of Rule 10 for all other cases. But they are all cases of devolution. There is, it should be noted in this rule, a significant change of language from that used in the earlier Code, where it is stated in Section 372 as follows: 'In other cases of assignment, creation or devolution of any interest pending

14. ('29) AIR 1929 All 444 (446).

15. ('88) 42 Cal W N 1188 (1185). (Application to add a party—This rule does not apply.)

16. ('88) 42 Cal W N 1188 (1185). (The language of O. 22 R. 10, is wholly inapplicable to a case where some one is seeking to come into the proceedings in order to put forward a claim adverse to that of the original parties in the proceedings.)

**Note 3**

1. ('06) 80 Bom 250 (258).

2. ('05) 9 Cal W N 171 (178).

3. ('86) AIR 1986 Lah 88 (84).

3. ('92) 16 Bom 27 (28).

4. ('05) 9 Cal W N 171 (178).

5. ('21) AIR 1921 Mad 599 (603) : 44 Mad 919 (FB).

6. ('27) AIR 1927 Lah 501 (504). (Where owing to an arrangement in the form of a sale or partition the interest of the deceased respondent vested in the surviving respondent the appeal may by leave of Court continue against the surviving respondent.)

6. ('80) AIR 1930 Pat 145 (146) : 8 Pat 900.

7. ('26) AIR 1926 All 285 (286).

8. ('26) AIR 1926 All 585 (586).

9. ('26) AIR 1926 Nag 308 (303).

10. ('22) AIR 1922 P C 804 (307) : 1 Pat 581 : 49 Ind App 220 (PC). (Reversing AIR 1916 Pat 118.)

**O. 22 R. 10**  
**Notes 3-5**

the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require.' The words 'in addition to' in the earlier Code have disappeared. But the matter does not rest upon this change. The liability, if any, of the appellant (the lessee) to pay damages for the removal of the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers and a case, if any, against the appellant (lessee) must rest upon his action and the direct relation established thereby between him and the plaintiffs."

So, it was held in *Rameshwar v. Mt. Ganpati*<sup>11</sup> that the "interest" referred to in Rule 10 is the interest of a person who was a *party* to the suit, and it is the transfer of the interest of such a person to the applicant that entitles him to continue the suit under this rule. Hence, it was held that where a suit had been brought by the next reversioner challenging an alienation by a Hindu widow and the plaintiff died pending the suit, the sister of the last male holder who had been brought into the line of heirs as a result of Act II of 1929 during the pendency of the suit could not claim to continue the suit under this rule because, it could not be said that the interest of the *plaintiff* had been transferred to her by the above Act.

The words "has come or devolved" connote an interest *in presenti*. A person who has a merely contingent interest cannot come in under this rule.<sup>12</sup>

See also Note 2 above.

**4. Assignment of interest.** — As pointed in Note 3 above, a transfer *inter vivos*, such as a sale,<sup>1</sup> or any other kind of transfer will come within the rule. It is also not necessary that such transfer should be direct.<sup>2</sup>

**5. "Interest."** — A right to maintain a suit,<sup>1</sup> the right to recover mesne profits given by a decree<sup>2</sup> and the rights and interests of a *patnidar*<sup>3</sup> are "interests" within the meaning of the rule. But the interest must be an interest in the *subject-matter* of the suit<sup>4</sup> or one which is vitally affected by the suit.<sup>5</sup> For instances where the rule was

11. ('86) AIR 1986 Lah 652 (656) : I L R (1987) Lah 525.

12. ('87) AIR 1987 Mad 200 (207).

**Note 4**

1. ('24) AIR 1924 Mad 648 (648).

('02) 5 Oudh Cas 91 (92).

('84) 8 Bom 323 (334, 335). (A mortgagee whose security was created prior to the suit and who made a further advance on the same security after the institution of the suit and agreed to buy the property after the termination of the suit was allowed to continue the defence when the mortgagor expressed his intention of abandoning it.)

2. ('18) 20 Ind Cas 685 (688) (Cal).

('22) AIR 1922 Oudh 289 (290) : 25 Oudh Cas 319.

(Deed of gift by pre-emptor of his property which gave him right to pre-empt along with the right to continue the pending suit for pre-emption creates an assignment within the meaning of the rule.)

**Note 5**

1. ('28) AIR 1928 Mad 246 (248).

2. ('16) AIR 1916 Pat 10 (11) : 1 Pat L Jour 427.

3. ('69) 12 Suth W R 122 (123).

4. ('08) 31 Mad 464 (466). (Transfer of assets and liabilities by one company to another — Money-decree obtained against former cannot be executed against latter as there is no transfer of any interest in the subject-matter of the suit—30 Cal 961, Followed.)

('87) AIR 1987 Mad 200 (207). ('Interest' means interest in the subject-matter of the litigation.)

('86) AIR 1986 Sind 166 (168) : 30 Sind L R 170. (Decree for money against legal representatives of deceased debtor — Execution sought against estate of deceased — Posthumous son born to deceased after decree—There is no devolution of any interest in the subject-matter of the suit or decree on the posthumous son.)

5. ('18) AIR 1918 Pat 606 (606). (Addition of parties is in the discretion of the Court.)

held not to apply on this ground, see the undermentioned cases.<sup>6</sup> The word "interest" includes also a portion of the interest.<sup>7</sup>

**O. 22 R. 10**  
**Notes 5-8**

A, the plaintiff in a suit, transferred his rights in the subject-matter of the suit by means of a sale deed in favour of B, whereupon B was added as a co-plaintiff to the suit. Then, B executed a deed in favour of C, his father, alleging that the sale deed by A was executed in his name only benami for his father and that even assuming that he had any rights under it, he relinquished them in favour of his father. It was held that the latter deed did not constitute any assignment, creation or devolution of any *interest* within the meaning of this rule.<sup>8</sup>

**5a. Attachment of decree.** — The mere attachment of a decree does not, except as provided for by sub-rule (2), amount to assignment, creation or devolution of any such interest as is mentioned in sub-rule (1) of this rule.<sup>1</sup>

Sub-rule (2) provides that the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1). The benefit indicated in sub-rule (2) is the right to oppose or support the pending appeal.<sup>2</sup>

See also Note 8 below.

**6. Trial Court can bring assignee on record pending an appeal.** — Where the suit is pending, the mere fact that an appeal is filed from an interlocutory order made in the suit will not deprive the Court of first instance of its jurisdiction to implead parties under this rule.<sup>1</sup>

**7. Transfer of decree.**—This rule does not apply to the transfer of a decree.<sup>1</sup> See also the undermentioned case.<sup>2</sup>

**8. Creation of interest.** — Under the old Code an attaching creditor of the decree pending appeal therefrom could not claim to be impleaded in the appeal.<sup>1</sup> But in view of the present sub-rule (2) he can. However, even under the present rule, a person who has attached property has been held not entitled to be impleaded, in a mortgage suit regarding the attached properties.<sup>2</sup>

6. ('03) 30 Cal 961 (964). (Where after a decree for money against it a company has assigned all its properties with liabilities, the assignee cannot be proceeded against as no property in suit has been assigned to him.)

('95) 22 Cal 259 (265). (In a suit on mere money claim the insolvency of defendant creates no assignment of interest within the meaning of this rule.)

('25) AIR 1925 Nag 423 (426). (Suit by widow for partition of widow's estate — The widow dying, no devolution of interest in the suit on the adopted son.)

7. ('21) AIR 1921 Mad 599 (600, 603, 605) : 44 Mad 919 (FB).

('38) AIR 1938 Mad 411 (413) : 56 Mad 459. (Mortgagee of deceased plaintiff's share is entitled to continue appeal.)

[But see ('84) AIR 1984 Mad 485 (488). (Rule will apply to assignment of fractional share, but will not apply to transfer of fractional interest such as in the case of a mortgagee.)]

8. ('86) AIR 1986 Oudh 224 (225).

#### Note 5a

1. ('36) AIR 1936 All 857 (858).
2. ('88) AIR 1938 Mad 757 (758).

#### Note 6

1. ('23) AIR 1923 Bom 303 (303).

#### Note 7

1. ('35) 39 Cal WN 961 (966). (Assignee of a decree need not therefore apply under the rule for recognition of his assignment. The law applicable to such a case is O. 21 R. 16.)

('38) AIR 1938 Cal 169 (171) : ILR (1937) 2 Cal 207. (Mortgage suit — Assignment after final decree — Substitution cannot be made—Assignee can apply for execution under O. 21 R. 16.)

2. ('96) 18 All 86 (87). (Decree transferred to another before appeal — Appellant only making original decree-holder respondent and not the assignee — In spite of notice of assignment, no steps taken to make assignee of decree respondent for a long time—Application then to substitute him as respondent was refused.)

#### Note 8

1. ('98) 20 All 38 (39).
2. ('26) AIR 1926 Nag 67 (68).

**O. 22 R. 10**  
**Notes 8-9**

An adoption does not create an interest within the meaning of this rule.<sup>3</sup>

It has been held that this rule will apply to a person acquiring the rights of a mortgagee on the principle of subrogation.<sup>4</sup>

**9. Devolution of interest.** — Where a suit is brought by or against a person in a representative character and a devolution of the representative interest takes place, the rule that is applicable is not Rule 3 or Rule 4 but Rule 10, whether such devolution is by virtue of the death of the person or for any other cause.<sup>1</sup> Thus, it will apply to a public trust which is represented at different stages of a suit by different representatives.<sup>2</sup> When a trustee dies or retires<sup>3</sup> or is removed from office<sup>4</sup> and another is appointed in his place, the estate "devolves" on the new trustee within the meaning of this rule. The fact that the original trustee was wrongly appointed as trustee will not make any difference.<sup>5</sup>

The following are illustrations of other cases of such devolution of interest —

1. One of four *uralans* of a Malabar *devaswam* sued for redemption of a *kanom*. The other *uralans* had been made party defendants. One of three latter died pending suit. It was held it was a case of devolution under this rule.<sup>6</sup>
2. The manager of an undivided Mitakshara family files a suit as manager of the family and dies pending suit. The succeeding manager can come in under this rule.<sup>7</sup>
3. The manager of an encumbered estate under the Chota Nagpur Encumbered Estates Act (VI of 1876) files a suit on behalf of the estate. Pending the suit the estate is released and restored to the owner. The owner can come in under this rule.<sup>8</sup>
4. A receiver appointed in a suit files a suit on behalf of the estate. Pending suit he is discharged and another receiver is appointed in his place. The latter can come in under this rule.<sup>9</sup>
5. A suit was instituted claiming a right of pre-emption and for possession of property as against the vendor. Pending the suit the vendor's rights devolved on another person under another decree. The latter *person* can be impleaded as defendant under this rule.<sup>10</sup>
6. When the Court of Wards assumes the management of the estate of a party to a suit during the pendency of the suit, there is a devolution of interest within the meaning of this rule.<sup>11</sup>

In cases of devolution other than by death, it should be noted that if the person on whom the estate devolves does not bring himself on record, the decree passed in the suit will be binding on him.<sup>12</sup>

3. ('18) AIR 1918 Nag 1 (6) : 15 Nag L R 24.

4. ('39) AIR 1939 Nag 215 (216). (Where a mortgage is split up each part should be treated as an independent mortgage and a person redeeming any part in full from the mortgagee decree-holder can claim the right of subrogation to that part and is entitled under this rule to be substituted as decree-holder to the extent of that right.)

**Note 9**

1. ('32) AIR 1932 Cal 788 (784).
2. ('22) AIR 1922 Mad 402 (408) : 45 Mad 708.
3. ('38) AIR 1938 Cal 329 (382) : 60 Cal 794.
4. ('26) AIR 1926 Mad 540 (541).
5. ('28) AIR 1928 Cal 651 (653).
6. ('24) AIR 1924 Mad 615 (615).
7. ('80) AIR 1980 Mad 561 (588) : 58 Mad 790.
8. ('06) 28 Cal 912 (918).

8. ('01) 28 Cal 171 (175).

9. [See ('21) AIR 1921 Cal 422 (428).]

10. ('87) 1887 Pun Re No. 29, p. 62.

[See also ('80) AIR 1980 Oudh 51 (52). (Suit for rent by person claiming to be zamindar—Another person found to be zamindar under decree passed during pendency of the rent suit—Latter can continue such suit.)]

11. ('85) AIR 1985 Oudh 486 (487).  
 [See ('88) AIR 1988 P O 49 (52) : 65 Ind App 57 : 17 Pat 1 : 82 Sind L R 290 (P O). (In this case the Privy Council observed that it was arguable whether Rule 10 will apply to such a case but did not express any definite opinion on the point.)]

12. ('21) AIR 1921 Cal 422 (428).  
 ('28) AIR 1928 Mad 246 (248).

Where the cause of action is purely a *personal* one there can be no devolution of interest.<sup>13</sup> An adoption creates no devolution of interest within the meaning of this rule.<sup>14</sup>

**O. 22 R. 10**  
**Notes 9-13**

**10. Insolvency of defendant.** — The rule applies also to the devolution of interest by operation of law. The insolvency of a defendant will cause a devolution of his estate on the Official Receiver or the Official Assignee as the case may be. But the question whether, on the adjudication of a defendant pending suit, the receiver in insolvency can come in under this rule will depend upon the "interest" involved in the suit.<sup>1</sup> If it is a suit *in personam*, such as for instance a mere money suit, no interest devolves on the receiver or assignee and he cannot come in under this rule.<sup>2</sup> But if it is a suit relating to the "estate," such as a suit to enforce a mortgage, the receiver or assignee is entitled to come in and should be impleaded.<sup>3</sup> If in such cases the receiver or assignee refuses to defend the suit, the insolvent cannot on that ground defend it.<sup>4</sup> If, however, the suit is of such a nature that it can go on without the insolvent defendant, the receiver need not be made a party.<sup>5</sup>

A person was adjudicated an insolvent during the pendency of a suit for maintenance against him. A decree was passed in the suit declaring the maintenance as a charge on the property of the defendant. It was held that as this rule was only permissive and did not impose any disability on a person already on the record, the insolvent could file an appeal against the decree.<sup>6</sup>

See also Note 14 to Order 34 Rule 1.

**11. Representative suits.** — See Note 9 above.

**12. Annulment of order of adjudication.**—Where, pending a suit instituted by the Official Assignee, the adjudication is annulled without any condition, the *quondam* insolvent is entitled to be substituted as plaintiff under this rule.<sup>1</sup>

**13. "During the pendency of a suit."** — The rule does not apply unless the assignment, creation or devolution of interest takes place *during the pendency of the suit*. Thus, it does not apply if the assignment, creation or devolution of interest takes place *before the suit is instituted*.<sup>1</sup> Where, however, the suit has been instituted, it is pending so long as the final decree has not been passed in it; the rule is thus applicable to cases of assignment, creation or devolution of interest, after the

13. ('84) AIR 1934 Pesh 89 (90). (Official Assignee's suit for avoidance of transfer by insolvent—Pending suit composition scheme accepted and insolvents' properties transferred to a trustee—Official Assignee's right of suit is personal and cannot devolve on the insolvent or on the trustee.)

('12) 16 Ind Cas 908 (909) : 40 Cal 323. (Suit against sole surviving member of committee appointed under S. 3 of the Religious Endowments Act—Death of member—Newly appointed member of committee not to be substituted—Cause of action purely personal.)

14. ('18) AIR 1918 Nag 1 (6) : 15 Nag L R 24.

**Note 10**

1. ('02) 25 Mad 406 (413, 421, 423).

2. ('95) 22 Cal 259 (266).

('14) AIR 1914 Sind 114 (114) : 8 Sind L R 325.

('88) AIR 1938 Nag 6 (9) : 28 Nag L R 340.

('02) 25 Mad 406 (421).

('85) AIR 1985 Rang 439 (445).

[See also ('91) 18 Cal 43 (44). (As to the interpretation of this decision, see 25 Mad 406.)]

3. ('27) AIR 1927 P C 108 (109) : 54 Cal 595 : 54 Ind App 190 (P C).

('35) AIR 1935 Lah 316 (317 318).

4. ('15) AIR 1915 Bom 298 (299) : 39 Bom 568.

5. ('30) AIR 1930 Cal 368 (390).

6. ('37) AIR 1937 Mad 915 (917).

**Note 12**

1. ('08) 32 Bom 321 (334).

**Note 13**

1. ('28) AIR 1928 All 120 (123).

('10) 7 Ind Cas 481 (482) (Cal).

('24) AIR 1924 Mad 648 (649). (Court auction held before suit—Sale confirmed pending suit—Held sale dates back — So no transfer pending suit—R. 10 does not apply.)

[See ('87) AIR 1937 Sind 47 (48). (Suit instituted against a person who was subsequently found

**O. 22 R. 10**  
**Notes 13-14**

preliminary and before final decree.<sup>2</sup> In fact the Courts which hold that Rules 3 and 4 do not apply to cases of death after the preliminary decree, hold that this rule applies to such cases.<sup>3</sup> The assignment of the rights of the plaintiff after a final decree has been passed in a mortgage suit although before sale under the decree is not an assignment during the "pendency of the suit."<sup>4</sup>

This rule does not authorize the addition of a party to the suit after decree<sup>5</sup>: and the rule has been held not to apply to cases of assignment of interest between the date of the decree and the date of the filing of the appeal,<sup>6</sup> though the assignee can be joined in the appeal.<sup>7</sup> Similarly, where a decree has been amended, the question whether the rule is applicable to cases of assignment, etc., of interest during the period between the original and the amended decree has been left undecided.<sup>8</sup>

See also Note 14 below.

**14. Application under this Rule, when to be made.**—The rule provides for a *continuation* of the suit by the assignee or other person on whom the interest has devolved. Therefore, on the one hand, an application under the rule can be made at any time when the suit is pending;<sup>1</sup> on the other hand, it cannot be made after a final decree has been passed.<sup>2</sup>

The fact that the assignee made no application when the suit was pending will not, however, debar him from filing an appeal from the decree as a person claiming under the party within the meaning of Section 146.<sup>3</sup> An application under this rule may also be made to the Appellate Court during the pendency of an appeal from the decree.<sup>4</sup> Thus, the assignee of the interest of a party in the subject-matter of a suit during the pendency of the suit can come in at the stage of appeal or second appeal and apply to continue the same.<sup>5</sup> A different view has, however, been held by the Oudh Chief Court.<sup>6</sup>

to be dead — Person in whom property of deceased vested can be joined as party under O. 1 R. 10—O. 22 R. 10 has no application, the person sued being dead before suit.))

2. ('01) 23 All 331 (334, 335, 338).

('24) AIR 1924 Cal 188 (189).

('29) AIR 1929 Nag 142 (144) (F B).

('30) AIR 1930 Nag 212 (213).

('37) AIR 1937 Lah 615 (616).

3. ('29) AIR 1929 Nag 142 (144) (F B). (Decisions of other High Courts are considered on this point.)

('21) AIR 1921 Nag 32 (33, 34) : 17 Nag L R 81.

4. ('38) AIR 1938 Cal 169 (170) : I L R (1937) 2 Cal 207. (Assignee can apply for execution of decree as a transferee under O. 21 R. 16.)

5. ('19) AIR 1919 Mad 755 (756) : 41 Mad 510.

('14) AIR 1914 P O 129 (131) : 42 Cal 72 : 41 Ind App 251 (P O). (It is doubtful whether this rule applies after final decree.)

('37) AIR 1937 Cal 336 (337). (Mortgage suit — Mortgagor declared insolvent after final decree — Rule does not apply.)

('38) 42 Cal W N 1183 (1185). (R. 10 can only apply before final decree or order has been passed (Per Costello, J.).)

6. ('85) AIR 1935 Lah 119 (120). (Assignment of interest during period intervening between date of trial Court decree and filing of appeal — Assignee cannot be joined even by virtue of S. 146.) [See also ('96) 18 All 86 (87).]

7. ('17) AIR 1917 Oudh 176 (177) : 20 Oudh Cas 31. (Under Section 146.)

8. ('23) AIR 1923 Mad 57 (58).

**Note 14**

1. ('30) AIR 1930 Cal 267 (269).

('15) AIR 1915 All 88 (88) : 37 All 226. (In suits requiring a preliminary and a final decree the application can be made at any time before the final decree.)

('03) 30 Cal 609 (611).

('16) AIR 1916 Pat 10 (11). (Decree directing ascertainment of mesne profits—Right to recover mesne profits assigned — Proceedings taken to ascertain mesne profits are proceedings in suit—Assignee should apply to Court for permission to sue.)

2. ('19) AIR 1919 Mad 755 (756) : 41 Mad 510.

('26) AIR 1926 Bom 406 (408).

('31) AIR 1931 Cal 51 (51) : 57 Cal 1143.

('18) AIR 1918 Mad 409 (410).

('26) AIR 1926 Mad 244 (245).

3. ('19) AIR 1919 Mad 755 (756) : 41 Mad 510.

4. ('24) AIR 1924 Cal 90 (91).

5. ('38) AIR 1938 Mad 757 (758). (Assignee of interest in subject-matter of suit pending suit in trial Court — Assignee can apply to continue second appeal against the decree in the suit.)

6. ('36) AIR 1936 Oudh 224 (225). (Assignment pending suit in trial Court—Application by assignee for addition in appeal—Not maintainable.)

**15. Execution proceedings.** — There is a conflict of views on the question whether the rule applies to execution proceedings. On the one hand, the facts that the rule relates to assignment before the final order in the suit, that it relates to assignments *pending suit* and that it provides for a continuation of the *suit*, have been relied on for holding that the rule does not apply to execution proceedings. On the other hand, the fact that Rule 12 makes no mention of this rule as one of those not applicable to execution has been relied upon for holding that by implication, this rule applies to execution proceedings also. The former view has been held by the Allahabad High Court,<sup>1</sup> and the latter view by the Calcutta High Court.<sup>2</sup> In Patna the applicability of the rule to execution proceedings has been doubted.<sup>3</sup> A Full Bench of the Madras High Court<sup>4</sup> held by a majority that the present rule was applicable to execution proceedings. But this decision has been explained away in a later case which has held the rule inapplicable to execution proceedings.<sup>5</sup>

**O. 22 R. 10**  
**Notes 15-18**

**15a. Sub-rule (2).** — See Note 5a above.

**16. Laches.** — This rule vests in the Court a discretion in the matter of allowing the suit to be continued by or against the assignee; and the permission may be refused on sufficient grounds. Thus, delay or laches will be a ground for refusing permission under this rule.<sup>1</sup>

**17. No new suit.** — So long as no final decree has been passed, the assignee can carry on the suit, and cannot in disregard thereof, file a new suit for the same relief.<sup>1</sup> And where an assignee is added in a pending suit the suit merely continues as against him and does not become a new suit.<sup>2</sup>

**18. "By leave of the Court."** — An assignee under this rule is not entitled to continue the suit as a *matter of right*. The leave of Court must first be obtained. The granting of the leave is, however, discretionary with the Court.<sup>1</sup> The discretion should be exercised judicially.<sup>2</sup> Unnecessary delay on the part of the applicant will be a good ground for refusing leave under this rule.<sup>3</sup> The assignee has the option of either getting impleaded or keeping quiet if he considers his interests already protected.<sup>4</sup>

**Note 15**

1. ('88) 10 All 97 (106).  
[See also ('30) AIR 1930 All 604 (604). (Not decided.)]
2. ('11) 11 Ind Cas 989 (940) : 39 Cal 220.  
[But see ('32) AIR 1932 Cal 423 (425). (Applicability of rule to execution proceedings doubted.)]
3. ('21) AIR 1921 Pat 180 (181).
4. ('21) AIR 1921 Mad 599 (601, 603) : 44 Mad 919 (F B).
5. ('27) AIR 1927 Mad 824 (824).

**Note 16**

1. ('24) AIR 1924 Cal 188 (189), ('33) AIR 1933 Cal 696 (699) : 60 Cal 940. (Preliminary decree in partition suit—No steps taken beyond appointment of commissioner—Application after 53 years to substitute persons as defendants in place of deceased defendant and for appointment of commissioner—*Held* though Court had discretion prayer should be refused.)
- ('25) AIR 1925 Lah 574 (575).
- ('18) AIR 1918 Pat 606 (606).

**Note 17**

1. ('79) 5 Cal 726 (731).

2. ('01) 23 All 331 (335).

**Note 18**

1. ('30) AIR 1930 Cal 888 (890). ('34) AIR 1934 Mad 337 (342) : 57 Mad 892. (The exercise of the discretion by the lower Court will not be easily interfered with in revision.) ('28) AIR 1928 Mad 607 (608). ('24) AIR 1924 Cal 188 (189, 190). (But the application will as a rule be allowed to avoid multiplicity of litigation.) ('36) AIR 1936 Pat 420 (422) : 15 Pat 607. (Leave should not be unreasonably refused.) ('35) AIR 1935 Mad 423 (423). (If fraud is alleged and proved against person applying under R. 10, court can refuse application.) ('38) 42 Cal W N 1183 (1184). (In exercising the discretion, Court has to look at the position and see what is contemplated and what is likely to happen.)
2. ('86) AIR 1986 Mad 714 (715).
3. ('86) AIR 1986 Lah 652 (657) : 1 L R (1987) Lah 525.
- ('86) AIR 1986 Mad 714 (715).
4. ('80) AIR 1980 All 880 (881).



**O. 22 R. 10**  
**Notes 18-20**

The leave should not be given without *notice* to the party concerned.<sup>5</sup> While the admission of assignment by such party is sufficient for giving the leave, it should not be refused merely because the assignment is challenged.<sup>6</sup> In such cases the Court should go into the question of the truth or validity of the assignment.<sup>7</sup> But where, in addition to the assignment being disputed, there has been long delay in making the application, leave may be refused.<sup>8</sup>

**19. Effect of adding new parties under this Rule.** — As already pointed out (in Note 17 above) the suit only *continues* against the assignee. He will be entitled to continue the further proceedings from that date but is bound by all orders passed up to that date.<sup>1</sup> Similarly, after the assignee is impleaded, the assignor, though on record, will be concluded by all legal and *bona fide* proceedings taken by or against the assignee.<sup>2</sup> Where a person is allowed to continue an appeal on an application by him under this rule and the appeal is dismissed with costs, he is liable for the full costs of the respondent in the appeal and not merely for the costs incurred from the date of his application under this rule.<sup>3</sup>

Generally speaking the assignee will not be allowed to set up a case inconsistent with the one set up by his assignor. But, in cases of institutions represented at different stages by different representatives, the Court has a discretion to allow amendments and new pleas in order to avoid multiplicity of suits.<sup>4</sup>

See also the undermentioned case.<sup>5</sup>

**19a. Suit against municipality.** — See Note 4a to Rule 4 *ante*.

**20. Appeal.** — Under the old Code there was a conflict of opinions regarding the appealability of an order granting or refusing permission under this rule.<sup>1</sup> This is no longer of any interest as the present O. 43 R. 1 (1) gives a right of appeal from an order granting, as well as from an order refusing, such leave.<sup>2</sup> In fact an appeal is the only remedy of a party aggrieved by such order.<sup>3</sup>

Where an order purports to be passed under this rule an appeal will lie, even though, on the facts, the order is improper.<sup>4</sup> But where the order is not one under this rule at all, no appeal will lie.<sup>5</sup> An application to *add* a party (as distinct from

5. ('12) 16 Ind Cas 567 (568, 569) (Cal).

6. ('15) AIR 1915 Cal 771 (773).

('84) AIR 1984 Mad 337 (342) : 57 Mad 892.

('19) AIR 1919 Cal 328 (328).

('25) AIR 1925 Oudh 143 (143).

7. ('26) AIR 1926 Cal 173 (174).

('34) AIR 1934 Mad 337 (342, 344) : 57 Mad 892.

('99) 8 Cal W N 754 (756).

8. ('25) AIR 1925 Lah 574 (575).

**Note 19**

1. ('20) AIR 1920 Mad 391 (396) : 43 Mad 37.

2. ('27) AIR 1927 P C 57 (59, 60) : 51 Bom 442 : 54 Ind App 111 (PC).

3. ('38) AIR 1938 Mad 411 (413) : 56 Mad 469.

4. ('22) AIR 1922 Mad 402 (408) : 45 Mad 703.

5. ('32) AIR 1932 Bom 462 (464). (Suit by inamdar against tenants for recovery of assessment—Decree for plaintiff—Subsequently third party purchasing the land — The vendee intervened in appeal and also filed second appeal — Both dismissed merely confirming first Court's decree—No liability on the vendee—Decree cannot be executed against him.)

**Note 20**

1. ('85) 7 All 681 (687).

('97) 19 All 142 (143).

(1900) 22 All 880 (881).

('02) 24 All 342 (346).

('02) 24 All 532 (537).

('99) 4 Cal W N 403 (404).

('01) 28 Cal 171 (174).

('08) 1908 Pun Re No. 57, page 265.

2. ('31) AIR 1931 Cal 594 (595).

('38) AIR 1938 Oudh 207 (209) : 8 Luck 477.

('35) AIR 1935 Oudh 486 (487). (Order to continue suit amounts to removal of original plaintiffs—Order cannot be partly appealable and partly non-appealable.)

('37) AIR 1937 Lah 615 (616).

[See also ('37) AIR 1937 Mad 200 (206). (Where an application under O. 1 R. 10 is treated by the Court as having been made also under O. 22, R. 10 an appeal lies against an order passed on the application.)]

3. ('27) AIR 1927 Cal 844 (844) : 54 Cal 716.

('27) AIR 1927 Nag 307 (308).

4. ('21) AIR 1921 Mad 599 (600, 607) : 44 Mad 919 (FB).

5. ('17) AIR 1917 Cal 560 (560).

('17) AIR 1917 Cal 627 (628).



substituting) does not come under this rule and an order allowing or refusing such an application is therefore not open to appeal.<sup>6</sup>

**O. 22 R. 10**  
**Notes 20-22**

No second appeal lies from an order under this rule.<sup>7</sup>

See also the undermentioned case.<sup>8</sup>

**21. Letters Patent Appeal.** — An order refusing the application of an assignee of the plaintiff under this rule is a "judgment" within the meaning of Clause 15 of the Letters Patent.<sup>1</sup>

**22. Limitation.** — The right to make an application under this rule is a right which accrues from day to day. There is, therefore, no limitation for the application which can be made at any time.<sup>1</sup>

Before the insertion of sub-section (2) to Section 22 of the Limitation Act of 1908, there was a conflict of opinion as to whether the Section applied to parties added under this rule. One view was that it did.<sup>2</sup> Another view was that it did not.<sup>3</sup> The insertion of sub-section (2) in Section 22 of the Limitation Act now makes it clear that that Section does not apply to parties added under this rule. See also the undermentioned case.<sup>4</sup>

**R. 11.** [S. 582.] In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

**O. 22 R. 11**

Application of Order  
to appeals.

### Local Amendment

#### CALCUTTA

Add the following :

"Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased, under O. 41 R. 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party."

('24) AIR 1924 Mad 648 (649).

6. ('88) 42 Cal W N 1188 (1185).

7. ('85) AIR 1985 Mad 428 (428).

8. ('86) AIR 1926 Lah 88 (84). (Plaintiff in suit declared insolvent during pendency of suit.— Official Receiver, in spite of notice, not taking steps to continue suit — Assignee from Official Receiver cannot come in under this rule as he is not an assignee from a party on the record — Order refusing the application of the assignee from Official Receiver to continue suit is therefore not one under this rule but one under R. 8 and is not appealable.)

#### Note 21

1. ('01) 24 Mad 252 (254).

#### Note 22

1. ('89) 8 Cal 420 (421).

('09) 30 Cal 609 (612).

('24) AIR 1924 Cal 90 (91).

('21) AIR 1921 Nag 32 (33, 34) : 17 Nag L R 81.

('27) AIR 1927 Oudh 156 (158) : 2 Luck 464.

('85) AIR 1935 Lah 316 (317).

2. ('98) 25 Cal 409 (412).

('07) 34 Cal 612 (617, 618) (FB).

('10) 5 Ind Cas 115 (116) (Cal).

3. ('80) 5 Cal 720 (724).

('07) 1907 Pun Re No. 8, page 23.

4. ('85) AIR 1935 Lah 316 (318). (Suit to enforce mortgage—Pending suit mortgagor adjudicated insolvent—Suit dismissed—Appeal—Application to implead Official Receiver as respondent but beyond limitation period — Held he can be impleaded under this rule.)

**O. 22 R. 11**  
**Note 1**

*Synopsis*

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Scope of the Rule.</li> <li>2. Abatement of appeals in personal actions.</li> <li>3. Appeal by several defendants on grounds common to all.</li> <li>4. Death of one of two representatives suing or sued in a representative capacity. See Note 24 to O. 1 R. 8.</li> </ol> | <ol style="list-style-type: none"> <li>5. Suit under Section 92.</li> <li>6. Guardian cases — Abatement of appeal.</li> <li>7. Appellate Court's power to declare abatement of suit.</li> <li>8. Appeal in suit for waqf property.</li> <li>9. Death during pendency of appeal to the Privy Council.</li> <li>10. Limitation for application for substitution.</li> </ol> |
|--|---|

*Other Topics (miscellaneous)*

Abatement of appeal against deceased party only. See Note 1.  
Application of Order to appeals. See Note 1.

**1. Scope of the Rule.**—The effect of this rule is to make the provisions of the previous rules applicable, as far as may be, to appeals.<sup>1</sup> See also Notes under the various rules. A decree passed without impleading the legal representatives of a party who has died pending appeal is a nullity.<sup>2</sup> Further, the result of not impleading in time the legal representative of a party who has died pending appeal will be to cause an abatement of the appeal so far as that party is concerned.<sup>3</sup> The fact that in another independent appeal from the same decree the legal representatives have been impleaded will not be enough.<sup>4</sup> But where the legal representative has, of his own accord, come on record, no further application by the appellant is necessary.<sup>5</sup> There will be no abatement when the deceased is only a *pro forma* respondent.<sup>6</sup> This rule, and consequently the provisions of the previous rules, do not apply when the devolution of interest takes place before the filing of the appeal, *i.e.*, after the decree in the suit and before the appeal is filed.<sup>7</sup>

The rule has been held to be inapplicable to an application under Section 21A of the Punjab Alienation of Land Act.<sup>8</sup>

**Order 22 Rule 11 — Note 1**

1. ('04) 31 Cal 487 (494) : 31 Ind App 71 (P C). ('83) AIR 1933 All 388 (389) : 55 All 509. (Rule 8 applies.) ('34) AIR 1934 All 1011 (1012). (Rule 8 (1) applies.) ('05) 28 Mad 369 (360). ('21) 59 Ind Cas 238 (289) (Lah). ('25) AIR 1925 Rang 95 (96) : 2 Rang 445. (Rule 2 applies.) ('27) AIR 1927 Bom 156 (157). (Rule 3 applies.) ('66) 3 Bom H O R 81 (81). (Do.) ('21) AIR 1921 Lah 160 (161). (Rule 4 applies.) ('26) AIR 1926 Pat 250 (252) : 7 Pat 285. (Do.) ('11) 12 Ind Cas 871 (871) : 1911 Pun Re No. 60. ('85) 8 Mad 300 (303). (Rule 5 applies.) ('09) 2 Ind Cas 412 (413) : 36 Cal 418. (Rule 9 applies.) ('85) 9 Bom 151 (157). (Rule 10 applies.) ('26) AIR 1926 Lah 329 (330). ('85) AIR 1935 Lah 478 (478) : 155 Ind Cas 610 (611). ('84) AIR 1934 All 1029 (1030). ('Right to sue' should be taken to mean right to appeal.)
2. ('02) 26 Bom 317 (319).
3. ('02) 26 Bom 303 (306).
3. ('27) AIR 1927 All 331 (332).
3. ('26) AIR 1926 Cal 193 (203).
3. ('14) AIR 1914 Mad 708 (709) : 38 Mad 1034.

3. ('86) 164 Ind Cas 935 (937) (Cal). (Appeals by defendant and plaintiff against same decree—Subject-matter different — Plaintiff-respondent dying during pendency — No substitution of heirs—Defendant's appeal abates.)
4. ('31) AIR 1931 Mad 277 (277).
5. ('19) AIR 1919 Mad 1026 (1027).  
[See also ('34) AIR 1934 Mad 448 (452). (Deceased a party both to appeal and cross-objections—Two separate applications to bring on record his legal representatives are not necessary in respect of the appeal and the cross-objections—Bringing on record of appeal will be sufficient for cross-objections also — The two proceedings are not distinct for this purpose.)]
6. ('01) 23 All 22 (24).
6. ('33) AIR 1933 Lah 406 (407).
6. ('25) AIR 1925 Lah 651 (652).
6. ('26) AIR 1926 Lah 189 (189).
6. ('27) AIR 1927 Lah 779 (779).
6. ('88) AIR 1938 Cal 639 (640). (Legal representative of *pro forma* respondent not brought on record—Appeal does not abate in toto.) ('85) AIR 1935 Cal 202 (203).
7. ('96) 18 All 86 (87).
7. ('26) AIR 1926 Lah 329 (330).
7. ('81) 8 Mad 286 (288).
8. ('80) AIR 1930 Lah 775 (775) : 11 Lah 706.

The rule has no application to appeals pending in Courts which have no jurisdiction to entertain them.<sup>9</sup>

**O. 22 R. 11**  
**Notes 1-6**

After abatement of an appeal, the trial Court has no jurisdiction to go on with the proceedings taken in pursuance of an order of the Appellate Court which was intended to operate, only during the pendency of the appeal.<sup>10</sup>

**2. Abatement of appeals in personal actions.** — As a general rule the right to appeal in a *personal* action does not survive on the death of either party.<sup>1</sup> But there are certain personal claims like a claim for damages with respect to which a suit and an appeal will stand on different footings. So long as such claims remain unconverted into a decree as, for instance, where the suit to enforce the claim is dismissed and there is an appeal against the dismissal, the appeal will abate on death of the party.<sup>2</sup> But if the suit has been *decreed* and the appeal is against the decree, the death of either party will not cause abatement of the appeal.<sup>3</sup> The principles underlying the above have been discussed in Rules 1, 3 and 4, *supra*. If the suit is decreed in the lower Court, but set aside in first appeal and the death takes place pending a second appeal, there will be no abatement.<sup>4</sup> The reason is that the claim having once been converted into a decree, the fact that the decree has been set aside in first appeal will not affect the survival of the right.

**3. Appeal by several defendants on grounds common to all.** — Where the appeal is by several defendants on a ground common to all of them and one of them dies and his legal representatives are not impleaded within time, the entire appeal can nevertheless proceed as a whole. The reason is that there is an abatement only so far as the deceased is concerned. But from the nature of the appeal any one of the appellants can get a reversal of the *whole* decree.<sup>1</sup>

**4. Death of one of two representatives suing or sued in a representative capacity.** — See Note 24 to Order 1 Rule 8.

**5. Suit under Section 92.** — Appeal by surviving plaintiff. See Note 30 to Section 92.

**6. Guardian cases — Abatement of appeal.** — Where the right to guardianship is based on a *personal* preference, the appeal relating to such right will abate on the death of the party;<sup>1</sup> otherwise it will not.<sup>2</sup>

9. ('85) AIR 1935 All 92 (92, 93).

10. ('86) AIR 1936 Lah 618 (619).

**Note 2**

1. ('19) AIR 1919 Lah 18 (19) : 1919 Pun Re No. 87.

('38) AIR 1938 Cal 61 (63).

('32) AIR 1932 Lah 121 (121) : 13 Lah 396. (Insolvency petition by creditor against debtor dismissed — Pending appeal against the order debtor dies — The appeal abates and proceedings cannot be resurrected against representatives of debtor.)

2. ('18) AIR 1918 Mad 1100 (1101, 1102).

('04) 27 Mad 588 (591).

('10) 5 Ind Cas 937 (938) (Mad). (The appellant cannot sue to sustain the appeal for costs alone.)

('20) AIR 1920 Bom 225 (225) : 44 Bom 446. (Suit for damages for breach of contract of marriage — Suit dismissed — Appeal by plaintiff — Pending appeal, plaintiff dies — Appeal abates — It was assumed, however, that the right of appeal in respect of the amount of pocket expenses incurred

while the contract was in execution could be proceeded with.)

('37) AIR 1937 Nag 216 (217) : ILR 1938 Nag 280. (The same principle applies to the dismissal of the suit in appeal and the second appeal would abate on the death of either party.)

3. ('02) 26 Bom 597 (608).

('03) 26 Mad 499 (500).

('89) AIR 1939 Nag 256 (258).

4. ('17) AIR 1917 Upp Bur 14 (15) : 2 Upp Bur Rul 105.

**Note 3**

1. ('03) 25 All 27 (28).

('98) 22 Bom 718 (721).

('03) 27 Bom 284 (286).

('11) 10 Ind Cas 27 (28) (All).

('18) AIR 1918 Lah 227 (228) : 1918 Pun Re No. 84.

('38) AIR 1938 Cal 634 (636).

**Note 6**

1. ('99) 28 Bom 719 (722).

2. ('17) AIR 1917 Lah 385 (386).

**O. 22 R. 11**  
**Notes 7-10**

**7. Appellate Court's power to declare abatement of suit.** — When the sole plaintiff-respondent dies in appeal and the defendant-appellant claims to be his legal representative, it is not the suit but the appeal that abates.<sup>1</sup>

**8. Appeal in suit for waqf property.** — Certain persons sued in their capacity as followers of a shrine for a declaration that certain property was *waqf* property. They succeeded in the suit and there was an appeal against the decree. Pending appeal one of the plaintiffs-respondents died. It was held that appeal did not abate.<sup>1</sup>

**9. Death during pendency of appeal to the Privy Council.** — The judgment of the Privy Council is an order of the Sovereign. Order 22 of the Code has no application to appeals before the Privy Council. Consequently, on the death of a party in an appeal pending before the Privy Council, no question of impleading legal representatives or of limitation therefor arises<sup>1</sup> and the judgment given without impleading legal representatives is not, on that ground, a nullity.<sup>2</sup>

**10. Limitation for application for substitution.** — Under the old Code and the old Limitation Act there was a good deal of controversy as to the Article of the Limitation Act applicable to applications for substitution under the Section corresponding to this rule.<sup>1</sup> But this is now of no practical importance as the limitation for all applications under this rule is specifically provided for in Articles 176 and 177 of the Limitation Act, 1908, under which the application should be filed within ninety days of the death of the party.

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**Local Amendment****MADRAS**

After Rule 11, add the following as Rule 11A :

**O. 22 R. 11A**  
**(Madras)**

"11A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a *quasi-judicial* act within the meaning of Section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications presented out of time shall be posted before a Judge for disposal."

**O. 22 R. 12**

**Application of Order to proceedings.**

**R. 12.** [New.] Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

**Note 7**

1. ('19) AIR 1919 All 855 (856) : 41 All 288.

**Note 8**

1. ('21) AIR 1921 Lah 890 (891).

**Note 9**

1. ('09) 4 Ind Cas 454 (456) (Cal).

2. ('20) AIR 1920 Pat 89 (91, 92) : 5 Pat L Jour 814.

('82) AIR 1982 Pat 261 (262) : 11 Pat 445.

**Note 10**

1. See the following cases :

('88) 10 All 264 (267, 269) (FB).

('07) 29 All 535 (536).

('86) 10 Bom 668 (665).

('85) 11 Cal 694 (696).

('86) 12 Cal 590 (593) (FB).

('07) 34 Cal 1020 (1022, 1023).

('05) 28 Mad 498 (499).

('84) 1884 Pun Re No. 135, page 357.

## Local Amendments

O. 22 R. 12  
Note 1

## ALLAHABAD

At the end of the rule *add* the words :

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

## OUDH

*Add* the following :

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

## Synopsis

## 1. Execution proceedings. | 2. Allahabad amendment.

**1. Execution proceedings.** — This rule is new. Under the old Code there was a great difference of opinion as to whether the provisions relating to abatement contained in the previous rules applied to execution proceedings. In several cases it was held that they did not<sup>1</sup> and the present rule affirms the view expressed in those cases.<sup>3</sup>

It should be noted that the only provisions specified as not applicable to execution proceedings are those contained in Rules 3, 4 and 8 and that, even as to these it is only in respect to the *abatement* of the proceedings that those rules do not apply.<sup>3</sup> In other words, the rule cannot be interpreted to mean that no substitution can be made in execution proceedings<sup>4</sup> and the Judicial Committee have specifically laid down that such substitution can be made.<sup>5</sup> On the death, therefore, of a decree-holder, pending an execution proceeding, can his legal representative get himself substituted and carry on the proceedings, or should he file a separate execution application? The Bombay,<sup>6</sup> Calcutta<sup>7</sup> and Nagpur<sup>8</sup> High Courts have held that he can continue the proceedings and that he need not present a separate execution application.

(‘86) 1886 Pun Re No. 108, page 248.

(‘87) 1887 Pun Re No. 42, page 91.

## Order 22 Rule 12 — Note 1

1. (‘81) 8 All 759 (765).

(‘80) 5 Cal L Rep 108 (111).

(‘84) 6 All 265 (259).

(‘78) 3 Bom 221 (222).

(‘95) 19 Bom 276 (281).

(‘96) 23 Cal 686 (689).

(‘83) 6 Mad 180 (181).

(‘92) 15 Mad 399 (400).

(‘08) 31 Mad 77 (79).

2. (‘82) AIR 1982 Mad 78 (82): 55 Mad 352 (FB).

(‘09) 3 Ind Cas 324 (326) (Cal).

(‘29) AIR 1929 Pat 200 (200). (By virtue of O. 22 R. 12, nothing in R. 8 applies to proceedings in execution of a decree or order and therefore a pending execution proceeding does not abate by reason of the death of any of the joint decree-holders.)

(‘81) AIR 1981 Bom 425 (427).

(‘26) AIR 1926 Cal 957 (958).

(‘81) AIR 1981 Bom 425 (427).

(‘85) AIR 1985 All 27 (28).

(‘32) AIR 1932 Pat 222 (223) : 11 Pat 546. (It is not necessary that in execution proceedings, representatives of a judgment-debtor should be brought on record within ninety days.)

(‘86) AIR 1986 Bom 456 (457). (On death of judg-

ment-debtor application for execution does not abate.)

(‘38) AIR 1938 Nag 528 (528). (Abatement does not apply to execution proceedings.)

(‘86) AIR 1986 Lah 519 (521). (Abatement—O. 22, Rr. 3, 4 and 8 are not applicable to execution proceedings.)

(‘39) AIR 1939 Sind 234 (235) : I L R (1939) Kar 509. (Application in execution to bring legal representatives of deceased decree-holder on record falls under S. 47, and is appealable and O. 22, Rr. 3 and 4 are not applicable.)

3. (‘29) AIR 1929 Pat 200 (200).

4. (‘32) AIR 1932 Mad 78 (76): 55 Mad 352 (FB).

(‘20) AIR 1920 All 171 (172) : 42 All 570.

(‘85) AIR 1985 Pat 117 (118) : 18 Pat 777.

[See also (‘24) AIR 1924 Mad 132 (132) : 47 Mad 63. (It is desirable to bring them on the record.)

(‘24) AIR 1924 Pat 507 (509). (Do.)]

5. (‘28) AIR 1928 P C 162 (164) : 55 Ind App 227 : 3 Luck 814 (PC).

6. (‘81) AIR 1981 Bom 428 (428).

(‘38) AIR 1938 Bom 358 (360, 361) : 57 Bom 616.

7. (‘09) 3 Ind Cas 324 (326, 327) (Cal).

(‘26) AIR 1926 Cal 957 (958).

8. (‘88) AIR 1988 Nag 528 (528). (The heirs need not take steps for substitution under O. 22 R. 8, but may apply to carry on the proceedings or may file a fresh application.)

**O. 22 R. 12  
Notes 1-2**

According to the Madras High Court,<sup>9</sup> the legal representative can be substituted under Section 146 and O. 21 R. 16 and allowed to *continue* the *application*. The High Court of Patna<sup>10</sup> has also taken the same view as that of the High Court of Madras. Thus, there is a consensus of judicial opinion that the deceased decree-holder's legal representative can carry on the execution proceeding started by the decree-holder and need not file a fresh execution application. Similarly, where a judgment-debtor dies during the pendency of an application for execution, a fresh application for execution is not necessary for proceeding against the legal representatives of the deceased.<sup>11</sup> Where such substitution is allowed there is no fixed time within which the application should be made.<sup>12</sup> But such an application for substitution will not be a step-in-aid of execution.<sup>13</sup>

There is a conflict of opinion as to the applicability of this rule to *appeals* against orders in *execution*. It has been held by the High Courts of Madras,<sup>14</sup> Allahabad,<sup>15</sup> Lahore<sup>16</sup> and Nagpur,<sup>17</sup> by the Chief Court of Oudh<sup>18</sup> and by the Sind Judicial Commissioner's Court,<sup>19</sup> that an appeal against an order made in execution proceedings is not itself a proceeding in execution of a decree or order, that this rule does not apply to appeals against orders made in execution proceedings and that such appeals are subject to the same rules in regard to abatement as any other appeals. The Calcutta High Court<sup>20</sup> has also held that where in an appeal relating to the execution of a joint decree one of the decree-holders respondents dies and his legal representatives are not brought on the record within the prescribed period of limitation, the appeal cannot proceed against the surviving respondents alone. The High Court of Patna<sup>21</sup> has, on the other hand, held that this rule applies to such appeals.

Under the old Code, proceedings for the ascertainment of mesne profits were proceedings in execution and therefore this rule applied to such proceedings.<sup>22</sup> Under the present Code, however, the position is different. See also Note 19 to Rule 3 and Note 13 to Rule 10 as to the procedure applicable to cases where a party dies between the preliminary and final decrees in a suit.

An application to set aside a sale is not a proceeding in execution for, after the sale and the subsequent deposit of the sale amount the execution is complete. Consequently, this rule does not apply to such applications.<sup>23</sup>

See also the Notes to the respective rules of the Order as to their applicability to execution proceedings.

**2. Allahabad amendment.** — The amendment of this rule made by the High Court of Allahabad has no retrospective effect.<sup>1</sup>

9. ('92) AIR 1982 Mad 78 (82): 55 Mad 852 (FB).  
(A I R 1927 Mad 184, Overruled.)

10. ('85) AIR 1985 Pat 117 (118): 18 Pat 777.

11. ('86) AIR 1986 Bom 456 (457).

('81) AIR 1981 Mad 808 (808, 813).

12. ('25) AIR 1925 All 66 (67).

13. ('27) AIR 1927 All 165 (167): 49 All 509 (FB).

('26) AIR 1926 Cal 957 (958).

14. ('32) AIR 1932 Mad 574 (575, 576): 55 Mad 1006.

('84) AIR 1984 Mad 664 (664).

('28) AIR 1928 Mad 772 (778): 51 Mad 858.

15. ('38) AIR 1938 All 888 (889): 55 All 509.  
(Rule 8 of this Order therefore applies to appeal against orders in execution.)

16. ('86) AIR 1986 Lah 1022 (1024): I L R (1987) Lah 80.

[See also ('21) AIR 1921 Lah 219 (220).]

[But see ('28) AIR 1928 Lah 560 (569).]

17. ('88) AIR 1988 Nag 502 (503, 506): I L R (1989) Nag 119. (Dissenting from AIR 1925 Nag 239.)

18. ('84) AIR 1984 Oudh 837 (840).

19. ('88) AIR 1988 Sind 239 (240): I L R (1989) Kar 166.

20. ('19) AIR 1919 Cal 1058 (1058).

21. ('29) AIR 1929 Pat 565 (568): 9 Pat 372 (FB).

22. ('25) AIR 1925 P C 117 (117): 4 Pat 507: 52 Ind App 188 (P C).

('21) AIR 1921 Pat 185 (186).

23. ('28) AIR 1928 Pat 29 (29, 30): 2 Pat 248.

**Note 2**

1. ('85) AIR 1985 All 180 (181). (Suit abating after preliminary decree — Unless abatement is set aside, final decree cannot be prepared even if amendment is passed in meantime.)

## ORDER XXIII.

### WITHDRAWAL AND ADJUSTMENT OF SUITS

**R. 1.** [S. 373.] (1) At any time after the institution of a suit<sup>10</sup> the plaintiff may, as against all or any of the defendants,<sup>21</sup> withdraw his suit or abandon part of his claim. O. 23 R. 1

Withdrawal of suit or abandonment of part of claim.

(2) Where the Court is satisfied —

(a) that a suit must fail by reason of some formal defect,<sup>25</sup> or

(b) that there are other sufficient grounds<sup>26</sup> for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit,<sup>31</sup> grant the plaintiff permission<sup>27</sup> to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit<sup>29</sup> in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission<sup>35</sup> referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit<sup>32</sup> in respect of such subject-matter<sup>33</sup> or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

[1877, S. 373; 1859, S. 97. See S. 11, O. 2 R. 2.]

### *Synopsis*

- |   |   |
|---|---|
| 1. Legislative changes.                                   | 13. Withdrawal of suit by plaintiff-respondent.                       |
| 2. Scope, object and applicability of the Rule.           | 14. Withdrawal of application for execution.                          |
| 3. Applicability of Rule to appeals.                      | 15. Withdrawal of application for entering up satisfaction of decree. |
| 4. Suits in Rent Courts.                                  | 16. Withdrawal of application for withdrawal of suit.                 |
| 5. Probate proceedings.                                   | 17. Withdrawal of suit on behalf of minor.                            |
| 6. Execution proceedings.                                 | 18. Withdrawal of suit by pauper plaintiff.                           |
| 7. Insolvency proceedings.                                | 19. Withdrawal of suit by some of several plaintiffs.                 |
| 8. Application for final decree.                          | 19a. Withdrawal of representative suits.                              |
| 9. Set-off.   | 20. Withdrawal of suit by vakil.                                      |
| 10. "At any time after the institution of a suit."        | 20a. Withdrawal of suit by benamidar.                                 |
| 11. Power of appellate Court to allow withdrawal of suit. |   |
| 12. Withdrawal of suit by plaintiff-appellant.            |   |

**O. 23 R. 1**  
**Notes 1-2**

21. "As against all or any of the defendants."
22. Effect of permission.
23. Withdrawal from suit pending arbitration.
24. Withdrawing from suit after suit has abated against some of the defendants.
25. "Formal defect."
26. "Other sufficient grounds."
27. "May grant permission."
28. Form of permission.
29. Dismissal of suit with liberty to bring a fresh suit.
30. Liberty to withdraw two suits in order to bring a consolidated suit.
31. "On such terms as it thinks fit."
32. Fresh suit must be between the same parties.
33. Same subject-matter.
34. Additional relief in fresh suit.
35. Effect of withdrawal without permission.
36. Erroneous order granting permission.
37. Effect of reversal of order granting permission.
38. Power of Court of Small Causes to allow withdrawal.
39. Appeal.
40. Letters Patent Appeal.
41. Revision.

*Other Topics (miscellaneous)*

Abandonment of part of a claim and effect. See Notes 11, 13, 19, 21 and 26.  
Cases not allowed to be withdrawn. See Note 10.  
Consent of defendant—Effect on withdrawal without permission. See Note 35.  
Court-fee. See Note 28.  
Grant of permission and *res judicata*. See Notes 3 and 22.  
Grant of permission not open to question in subsequent suit. See Note 36.  
"Non-suit" in India. See Note 26.  
Notice to other side. See Note 27.

Permission — Availability to one suit alone. See Note 27.  
Permission express or implied. See Note 28.  
Permission outside terms of this rule. See Note 26.  
Withdrawal of appeal in the absence of cross-objections. See Note 8.  
Withdrawal of suit after compromise. See Note 10.  
Withdrawal of suit after preliminary decree, when defendant objects. See Note 10.  
"Withdrawal of suit" and "withdrawal from suit"—Distinction. See Note 2.

**1. Legislative changes.**—Under the law before the Code of 1859, the Court's leave was not necessary for bringing a fresh suit where a suit had been withdrawn by the plaintiff.<sup>1</sup> Section 97 of the Code of 1859 gave power to the Court to permit a suit to be withdrawn with liberty to sue afresh, if it was satisfied that there were sufficient grounds for such a course. The words as to the suit failing by reason of some formal defects were first introduced in the Code of 1877.

**2. Scope, object and applicability of the Rule.**—The law as to the withdrawal of suits as enacted in the present rule is as follows —

(a) A plaintiff can withdraw a suit as a matter of right without the permission of the Court. But in this case he shall be precluded from suing again on the same cause of action. He cannot withdraw a suit reserving to himself a right to bring a fresh suit.<sup>1</sup>

(b) A plaintiff may, in the circumstances mentioned in sub-rule (2), be *permitted by the Court to withdraw* from a suit with liberty to sue afresh on the same cause of action.<sup>2</sup>

The rule does not apply to *alternative claims* on the same cause of action.<sup>3</sup> No permission to withdraw a suit can be granted where the deficiency in court-fee has not been paid.<sup>4</sup> The reason is that there is no proper suit till the deficiency in court-fee is made up.

A suit does not cease to exist in the eye of the law merely because an application is made by the plaintiff for the withdrawal of the suit. The suit does not cease to exist

**Order 23 Rule 1 — Note 1**

1. ('70) 7 Bom H C R A C 23 (24).

**Note 2**

1. ('28) AIR 1928 Rang 273 (274) : 6 Rang 494.  
(189) AIR 1939 Rang 878(880):1939 Rang LR 749.  
2. ('10) 6 Ind Cas 700 (701) (All).

[See also ('20) AIR 1920 Mad 1026 (1032).  
(Obiter.)]

3. ('26) AIR 1926 Bom 189 (192).

[But see ('24) AIR 1924 Bom 112 (126, 127) :  
48 Bom 259.]

4. ('34) AIR 1934 All 989 (990).



till an order is made by the Court on the application.<sup>5</sup> It is, therefore, open to the Court to consider and decide any objections that may be made to the withdrawal of the suit before passing orders on the application to withdraw the suit.<sup>6</sup>

Where, on the death of one of several co-plaintiffs in a case, his sons are sought to be added as legal representatives but on their refusal to be joined as co-plaintiffs, they are joined as *pro forma* defendants, there is no 'withdrawal of suit' by the legal representatives within the meaning of this rule.<sup>7</sup>

Where the Court dismisses a suit as against certain defendants on the ground of misjoinder of parties and causes of action, there is no 'withdrawal' or 'abandonment' by the plaintiff.<sup>8</sup>

**3. Applicability of Rule to appeals.** — The present rule applies also to appeals and an Appellate Court can therefore allow the withdrawal of an appeal with liberty to bring a fresh appeal or suit.<sup>1</sup> The High Court may allow a second appeal to be withdrawn.<sup>2</sup> The effect of the withdrawal, without liberty of an appeal, is to make the decree of the lower Court *res judicata* and the only executable decree in the case.<sup>3</sup>

In the undermentioned case<sup>4</sup> it was held by the Bombay High Court that the appellant is entitled as of right to withdraw his appeal, provided that the respondent has not acquired any interest thereunder, but that, if the respondent has obtained any rights under the appeal, it is not open to the appellant to withdraw his appeal without permission.

**4. Suits in Rent Courts.** — The rule does not apply to suits under the Bengal Tenancy Act, which is a complete Code in itself.<sup>1</sup> Nor will the withdrawal without permission of an application under Section 105 of the Act or of a suit under Section 106

5. ('84) AIR 1934 All 4 (8) : 55 All 825.

(32) AIR 1932 Mad 31 (32). (Application by karnavan of tarwad to withdraw appeal—Thereafter junior members applying to be made appellants—Until orders are passed on the application the matter must be deemed to be pending.)

[See also ('84) AIR 1934 Mad 337 (343) : 57 Mad 892. (The view that after application to withdraw the Court is *functus officio* except in regard to making order for costs is not correct.)]

6. ('84) AIR 1934 Mad 337 (343) : 55 Mad 892.

7. ('89) AIR 1939 Pat 225 (228).

8. ('85) AIR 1935 Mad 696 (697).

[See also ('35) AIR 1935 Cal 764 (765, 766). (Plaintiff not complying with Court's order to give value of property and put in deficit court-fee—Suit dismissed—It was held that the proper order to have passed was to reject the plaint and that a fresh suit was not barred.)]

#### Note 3

1. ('68) 9 Suth W R 328 (328).

('08) 1908 Pun W R No. 119 p. 403.

('01) 23 All 130 (132, 133).

('31) 132 Ind Cas 194 (195) (Oudh).

('67) 3 Mad H C R 368 (369). (Appeal cannot be withdrawn without the permission of the Court.)

[See however ('88) AIR 1938 Bom 442 (443) : I L R (1939) Bom 66. (Clearly the provision of sub-rule (2) as to withdrawal with leave to file a fresh suit would be inapplicable to an appeal — S. 107 of the Code does not apply because it deals with the rights and duties of the Appellate Court and does not confer upon

the parties to an appeal all the rights which the parties to a suit may enjoy.)]

2. ('88) 7 Bom 287 (289).

3. ('09) 3 Ind Cas 61 (63) : 5 Nag L R 88.

('91) 16 Bom 243 (248).

('91) 15 Bom 370 (373, 374).

('28) AIR 1928 All 679 (679) : 50 All 608.

[See also ('83) 6 Mad 43 (47).

('09) 4 Ind Cas 137 (138) (Bom). (Decree in favour of dead person without legal representative void—Appeal and withdrawal—Defendant-appellant not thereby estopped from pleading inexecutability.)]

4. ('88) AIR 1938 Bom 442 (443) : I L R (1939) Bom 66. (Suit on mortgage decreed for Rs. 2000 by trial Court—Appeal by defendant—Appellate Court referring case to trial Court to take accounts as per the provisions of Dekkhan Agriculturists' Relief Act—Accounts so taken and it was found that Rs. 11,000 were due to the plaintiff — The case again coming on before Appellate Court, appellant desiring to withdraw appeal — It was held that he was not entitled to do so but that the Appellate Court had power to allow him to do so—Appellate Court might, where appellant desires to withdraw and it has no jurisdiction to allow him to do so, transpose the appellant as respondent and the respondent as appellant and proceed with the appeal but is not bound to do so always.)

#### Note 4

1. ('69) 11 Suth W R 46 (46).

('69) 11 Suth W R 8 (4).

**O. 23 R. 1**  
**Notes 4-9**

of the Act bar a fresh suit in the Civil Court in respect of its subject-matter. The meaning of sub-rule (2) of O. 23 R. 1 is that the plaintiff shall be precluded from bringing a fresh suit in *that* or in any Court of *similar* or *co-ordinate jurisdiction*.<sup>3</sup>

But the rule applies to suits under the North-West Provinces Rent Act, 1851, inasmuch as the Rent Courts under that Act are governed by the Code in those matters on which the Act is silent.<sup>3</sup>

**5. Probate proceedings.** — The rule does not apply to applications for probate, inasmuch as Section 55 of the Probate and Administration Act (now Section 268 of the Succession Act of 1925) which provides that the provisions of the Civil Procedure Code should apply to proceedings for probate is limited by the words "so far as circumstances of the case permit."<sup>1</sup>

**6. Execution proceedings.** — The rule does not apply to execution proceedings,<sup>1</sup> including claim proceedings<sup>2</sup> as is made clear by Rule 4, *infra*. The undermentioned cases<sup>3</sup> holding the contrary view are no longer good law. See also Note 14 *infra*.

**7. Insolvency proceedings.** — This rule read with Section 141 applies to proceedings in insolvency.<sup>1</sup>

**8. Application for final decree.** — Where an application for final decree is withdrawn, it does not preclude a second application for the same purpose.<sup>1</sup> The reason is that O. 23 R. 1 applies only where a *suit* or part of a *suit* is withdrawn.

**9. Set-off.** — It is doubtful whether a defendant claiming a set-off can be allowed to withdraw his claim for set-off with liberty to sue again for the amount which formed the subject-matter of such claim.<sup>1</sup> But it has been held that where a defendant withdraws a plea of set-off he will not be debarred from raising the same plea in a subsequent suit against him by way of *defence*.<sup>2</sup>

Where the defendant in a suit makes a counter-claim to the suit, but the plaintiff withdraws his suit with liberty to file a fresh suit, the counter-claim can be continued as a plaint and can be proceeded with on the merits.<sup>3</sup>

('08) 35 Cal 990 (995).

('94) 21 Cal 514 (516, 517, 518).

('94) 21 Cal 428 (430).

('67) 7 Suth W R 302 (302).

(1864) 1864 Suth W R 47 (48) (FB).

See *however* Ss. 37 (2) and 147 of the Bengal Tenancy Act, VIII of 1885.

2. ('11) 9 Ind Cas 4 (4) (Cal). (Suit under S. 106 of the Bengal Tenancy Act.)

('18) 18 Ind Cas 180 (180) : 40 Cal 428. (Application under S. 105 of the Bengal Tenancy Act.)

(1900) 5 Cal W N (S N) cxl. (Application under S. 104, Bengal Tenancy Act.)

[But see ('28) AIR 1928 Cal 624 (626) : 50 Cal 626. (Civil suit barred by reason of provisions in S. 109, Bengal Tenancy Act.)]

3. ('83) 5 All 406 (418).

**Note 5**

1. ('17) AIR 1917 Pat 41 (42) : 2 Pat L Jour 535. ('82) AIR 1932 Lah 290 (291). (Permission held implied in this case. AIR 1920 Lah 494, Followed.)

[See ('96) 19 Mad 458 (459, 460).]

[See also ('10) 6 Ind Cas 912 (916, 917) (Cal).]

**Note 6**

1. ('92) 1892 Pun Re No. 87, page 148.

('92) 15 Mad 240 (241).

('91) 18 Cal 515 (518).

('91) 18 Cal 635 (639).

('91) 18 Cal 462 (466).

('95) 17 All 106 (111, 112) : 22 Ind App 44 (PC).

('12) 17 Ind Cas 752 (752) (Mad).

('14) AIR 1914 Mad 1 (1).

2. ('07) 4 Low Bur Rul 75 (75).

[See ('25) AIR 1925 Nag 2 (6) : 20 Nag LR 106.]

3. ('88) 10 All 71 (78).

('90) 12 All 179 (185).

('94) 16 All 75 (77).

('88) 1888 All W N 272 (278).

('91) 1891 All W N 92 (98).

('91) 1891 All W N 124 (125).

('70) 5 Mad H O R 298 (303).

**Note 7**

1. ('95) 17 All 156 (161).

**Note 8**

1. ('28) AIR 1928 Mad 1165 (1166).

**Note 9**

1. ('05) 32 Cal 654 (662, 668).

2. ('87) AIR 1987 Oudh 894 (895) : 18 Luck 823.

3. ('84) AIR 1984 Rang 160 (161).

10. "At any time after the institution of a suit." — Sub-rule (1) provides that *at any time* after the institution of a suit a plaintiff can withdraw his suit. As a general rule, a plaintiff can do this of his own accord and the order of the Court is not necessary for the purpose.<sup>1</sup> But the withdrawal must be made *before* judgment is passed in the case.<sup>2</sup> A plaintiff cannot also be allowed to withdraw his suit so as to deprive the defendant of any rights that may have accrued to him. Thus, where, in a partition suit, the defendant has become entitled under Section 3 of the Partition Act to purchase the plaintiff's share at a valuation to be fixed by the Court,<sup>3</sup> or where a preliminary decree has been passed in such a suit,<sup>4</sup> or in a suit for accounts,<sup>5</sup> the plaintiff cannot be permitted to terminate the suit by withdrawing it. Where, in such cases, the plaintiff desires to withdraw the suit, the proper course is to transpose the plaintiff as defendant and the defendant as plaintiff and proceed with the suit.<sup>6</sup>

Where in a scheme suit under Section 92 of the Code the plaintiff applies to withdraw the suit and it appears that his object is to prevent the Court from deciding the suit on the merits, the Court can under O. 1 R. 10 transpose some of the defendants as plaintiffs and proceed with the suit notwithstanding the withdrawal of the suit.<sup>7</sup>

A plaintiff who withdraws a suit under sub-rule (1), must do so unconditionally. He cannot abandon the suit and at the same time ask for a decision on the merits of the case.<sup>8</sup> He is also liable to pay such costs as the Court orders him to pay.<sup>9</sup> But the payment of the costs cannot be made a *condition precedent* to his withdrawing the suit.<sup>10</sup> As to costs in a wife's suit for dissolution of marriage which is withdrawn by her, see the undermentioned case.<sup>11</sup>

A withdrawal under sub-rule (1) may be in any form. Where the plaintiff enters into a compromise with the defendant but does not communicate the terms of the compromise to the Court, he should be held to have withdrawn his suit under this sub-rule.<sup>12</sup> Similarly, when a suit is dismissed at the request of the parties on a petition of compromise being filed, the dismissal operates as a withdrawal of the suit under this sub-rule.<sup>13</sup>

**Note 10**

1. ('08) 92 Bom 345 (347).
2. ('84) AIR 1934 Mad 485 (492). (Partition suit—Plaintiff's right to withdraw can be exercised until right in defendant had been legally created by preliminary withdrawal.)
3. ('16) AIR 1916 Mad 575 (577).
4. ('69) 2 Beng L R (S N) xi.
5. ('75) 1875 Pun Re No. 65, page 168.
6. ('29) 116 Ind Cas 823 (824) (Mad). (Even after evidence and arguments on the objection of pecuniary jurisdiction of the Court the plaintiff can withdraw portion of the claim.)
7. ('18) AIR 1918 All 866 (867).  
[See also ('25) AIR 1925 Bom 425 (427): 49 Bom 672. (Compromise effected—Subsequent withdrawal by plaintiff is not permissible.)]
8. ('12) 14 Ind Cas 259 (260) (Mad).
9. ('34) AIR 1934 Mad 485 (492).
10. ('20) AIR 1920 Mad 546 (546). (After withdrawal by plaintiff Court can transpose parties under O. 1 R. 10 and proceed with the suit.)  
[See also ('25) AIR 1925 Bom 425 (426): 49 Bom 672. (In a partition suit each party is in the position of plaintiff and one plaintiff cannot alone withdraw under sub-rule (4).)]
11. ('35) AIR 1935 Mad 445 (446).]
12. ('26) AIR 1926 All 582 (583). (Proper course is to transpose the parties.)
13. ('14) AIR 1914 Mad 369 (370).  
[See however ('39) AIR 1939 All 174 (175). (Mortgage suit—After preliminary mortgage decree, compromise arrived at between parties—Applications to Court before final decree for such compromise being certified *held* fell under R. 1 or R. 3 of O. 23.)]
4. ('26) AIR 1926 All 582 (583).
5. ('20) AIR 1920 Mad 546 (546).
6. ('20) AIR 1920 Mad 732 (735).
7. ('09) 3 Ind Cas 572 (573) : 5 Nag L R 121.
8. ('16) AIR 1916 Mad 575 (577).
9. ('25) AIR 1925 Oudh 699 (699). (The Court is not bound to order costs against plaintiff.)  
[See ('27) AIR 1927 Nag 399 (400).]  
[But see (1862) 1 Mad H C R 247 (247, 248). (Under the Code of 1859 he was not liable to pay any costs.)]
10. ('95) 17 All 156 (161).
11. ('98) 25 Cal 222 (229). (Costs allowed.)
12. ('01) 23 All 219 (220).
13. ('92) 1892 All W N 58 (58).
13. ('17) AIR 1917 Nag 1 (4).

**O. 23 R. 1**  
**Notes 10-12**

The language of sub-rule (2) implies that the Court can permit the withdrawal of a suit only while the suit is pending before it, i. e., before it passes a decree.<sup>14</sup>

**11. Power of Appellate Court to allow withdrawal of suit.** — A Court of appeal has power, in a proper case, to grant permission to withdraw a suit with liberty to file a fresh suit,<sup>1</sup> though such power should be used very cautiously.<sup>2</sup> A contrary view, however, has been taken by the Sind Judicial Commissioner's Court.<sup>3</sup> But it is submitted that this (the latter) view cannot be supported, seeing that in one case even the Privy Council on an appeal allowed the suit with reference to a portion of the subject-matter to be withdrawn with liberty to sue again.<sup>4</sup> But the Appellate Court has no power to allow a suit to be withdrawn *before the appeal has been admitted*.<sup>5</sup> So also where a suit is dismissed and the appeal from the decree of dismissal is also dismissed, the Appellate Court cannot, as part of the same order, allow the suit to be withdrawn with liberty to sue again.<sup>6</sup> But, where the trial Court had decreed the suit and the Appellate Court allowed the appeal and set aside the decree of the trial Court but did not expressly dismiss the suit, it was held that the Appellate Court's order passed at the same time, allowing the suit to be withdrawn with liberty to bring a fresh suit was not without jurisdiction. The decision proceeds on the ground that while there is a subsisting decree there can be no power to allow the withdrawal of the suit and the proper course for the Appellate Court in allowing withdrawal of a suit is to first set aside the decree of the lower Court.<sup>7</sup>

**12. Withdrawal of suit by plaintiff-appellant.** — A plaintiff-appellant is not entitled as a matter of right to withdraw his suit and he will not be permitted to do so if the effect of allowing him to withdraw it would be to deprive the defendant of

14. ('36) 163 Ind Cas 367 (369) (Cal),  
 [See also ('38) AIR 1938 Lah 294 (294). (No formal defect in plaint — Nor other sufficient cause shown—Suit reaching its final stage—Held, suit should not be allowed to be withdrawn at that stage.)]

**Note 11**

1. ('21) AIR 1921 All 65 (66).
- ('24) AIR 1924 All 260 (260).
- ('21) AIR 1921 Bom 278 (280) : 45 Bom 206.  
 (Dissenting from a contrary view expressed in 10 Ind Cas 818.)
- ('25) AIR 1925 Cal 711 (712).
- ('15) AIR 1915 All 128 (124) : 87 All 326.
- ('20) AIR 1920 Bom 109 (109) : 44 Bom 598.
- ('18) AIR 1918 Mad 1287 (1291) : 40 Mad 259 (F B). (Overruling A I R 1915 Mad 399.)
- Bourke A O C 99.
- ('09) 1 Ind Cas 604 (607) : 1909 Pun Re No. 21.
- ('26) AIR 1926 Nag 444 (445).
- ('29) AIR 1929 Mad 86 (87).
- ('12) 14 Ind Cas 719 (720) (Cal).
- ('16) AIR 1916 Cal 261 (262). (Withdrawal allowed as far as the decree in the appellant's favour was concerned.)
- ('95) 17 All 97 (98, 99).
- ('85) 8 All 82 (84).
- ('70) 14 Suth W R (O C) 17 (22).
- ('18) AIR 1918 All 425 (426) : 40 All 7.
- ('21) AIR 1921 Bom 278 (280) : 45 Bom 206.
- ('78) 20 Suth W R 163 (163, 164).
- ('20) AIR 1920 Bom 109 (109) : 44 Bom 598.
- ('72) 17 Suth W R 164 (165).
- ('85) AIR 1985 Mad 445 (446). (Appellate Court

having remitted issue to lower Court for finding it is not without jurisdiction to pass order on application under O. 23 R. 1.)

('37) 166 Ind Cas 290 (290) (Lah). (High Court can on appeal from remand order allow suit to be withdrawn.)

('36) 163 Ind Cas 367 (369) (Cal). (The power of an Appellate Court to allow withdrawal of suit proceeds from S. 107 (2) C. P. Code and it has the same powers as the trial Court.)

[See ('16) AIR 1916 Mad 674 (674). (In this case the question was left open.)]

2. ('26) AIR 1926 All 548 (549).

('18) AIR 1918 Nag 148 (149). (New case set up in second appeal—Leave to withdraw with liberty to sue will not be given, leave being sought too late.)

('34) AIR 1934 All 214 (215). (Permission to withdraw suit with liberty to bring fresh suit not asked in trial Court nor in lower Appellate Court till case is fully argued—Permission should not be granted.)

3. ('18) AIR 1918 Sind 82 (82) : 12 Sind L R 14.  
 ('19) AIR 1919 Sind 65 (66) : 18 Sind L R 72.

*Note.*—In these two Sind decisions, 10 Ind Cas 818 is relied on. But 10 Ind Cas 818 can be distinguished and hence cannot support the view expressed by the Sind Court in these decisions.

4. ('15) AIR 1915 P C 24 (27) : 42 Cal 897 : 42 Ind App 79 (P C).

5. ('11) 10 Ind Cas 818 (818) : 35 Bom 261.

6. ('17) AIR 1917 Cal 409 (410).

('88) AIR 1988 Lah 52 (58, 54).

7. ('86) 163 Ind Cas 367 (369) : 39 Cal W N 566 (589).

the benefit of the lower Court's adjudication in his favour.<sup>1</sup>

**O. 23 R. 1**  
**Notes 12-16**

**13. Withdrawal of suit by plaintiff-respondent.** — A plaintiff-respondent is not entitled, as a matter of right, to withdraw his suit pending the appeal but the Court may, in the exercise of its discretion, allow him to do so. A plaintiff sued the Government and some ryots, claiming a certain channel as his private property and praying for an injunction restraining interference with his rights. A decree was passed in the suit in plaintiff's favour. Against this decree the Government did not appeal but the ryots appealed. Then the plaintiff sought to withdraw his suit against the ryots, being satisfied with a decree against the Government. It was held that he could not be allowed to do so as the decree against the Government considerably prejudiced the rights of the other defendants, *viz.*, the ryots and that the proper course was to hear the appeal on the merits.<sup>1</sup>

**14. Withdrawal of application for execution.** — The provisions of Order 23 do not apply to execution proceedings (see Rule 4, *infra*). But a party setting the Court in motion has the right to withdraw the proceedings from the Court. Hence, a decree-holder may withdraw his application for execution and if the Court persists in selling the judgment-debtor's property after such withdrawal, it acts without jurisdiction.<sup>1</sup> But the procedure as to the Court allowing withdrawal with permission to sue afresh does not apply to execution proceedings.<sup>2</sup> Conversely, the withdrawal of an application for execution does not require the sanction of the Court to enable fresh proceedings to be taken.<sup>3</sup> A decree-holder cannot, of his own volition, withdraw from execution proceedings where a third party has acquired an interest or right in the property which is the subject-matter of the execution proceedings.<sup>4</sup> See also Note 6, *ante*.

**15. Withdrawal of application for entering up satisfaction of decree.** — Where a decree-holder applies to enter up satisfaction of a decree but afterwards wants to withdraw his application, it has been held that the Court should not allow him to do so, but should inquire into the matter under O. 21 R. 2. Allowing a withdrawal of the application without any such inquiry will amount to a refusal to exercise jurisdiction under Order 21 Rule 2 such as would justify interference by the High Court in revision.<sup>1</sup>

**16. Withdrawal of application for withdrawal of suit.** — A plaintiff applying to withdraw his suit unconditionally has a *locus penitentie* until his petition has been acted upon by the Court, and he can withdraw his petition at any time before an order is made as prayed for in his petition.<sup>1</sup>

**Note 12**

1. ('18) 20 Ind Cas 17 (18, 19) (Oudh).
- ('05) 29 Bom 18 (18).
- ('25) AIR 1925 Bom 425 (427) : 49 Bom 672.
- ('23) AIR 1923 Oudh 252 (253).
- ('21) 61 Ind Cas 881 (882) (Pat).
- ('30) AIR 1930 Pat 410 (411). (It would not be right to allow withdrawal of suit in the Letters Patent Appeal.)
- ('32) AIR 1932 Mad 81 (82). (Application for withdrawal of appeal by karnavan of a Malabar tarwad — Petition by anandravans to be impleaded—Karnavan's acts not in the interest of tarwad — Substitution ordered and appeal proceeded with.)
- [See also ('21) 68 Ind Cas 169 (171) (Cal). (Withdrawal of suit in second appeal by plaintiff-appellant depends upon the question if

concurrent decrees of two Courts have to be set aside. Where the decree is based upon a concurrent finding of fact, leave to withdraw cannot be granted.)]

**Note 13**

1. ('24) AIR 1924 Mad 79 (79, 80) : 46 Mad 811.

**Note 14**

1. ('22) AIR 1922 Pat 525 (526) : 1 Pat 232.
2. ('14) AIR 1914 All 184 (185) : 36 All 172.
3. ('86) 10 Bom 62 (65).
- [See also ('91) 1891 All W N 154 (155).
4. ('88) AIR 1938 Cal 615 (618).

**Note 15**

1. ('19) AIR 1919 Mad 198 (199).

**Note 16**

1. ('23) AIR 1923 Mad 246 (247).

**O. 23 R. 1**  
**Notes 17-19a**

**17. Withdrawal of suit on behalf of minor.** — Courts should be very jealous of the interests of minors, and should not allow a suit instituted on behalf of a minor to be withdrawn without being satisfied that the withdrawal is for the minor's benefit.<sup>1</sup> Where the next friend of a minor fraudulently withdraws a suit on behalf of the minor, the latter can sue again in respect of the same subject-matter.<sup>2</sup>

It has been held by the High Court of Madras<sup>3</sup> that the Court should not allow the unconditional withdrawal of a suit on behalf of a minor, by the minor's next friend, without liberty being reserved to bring a fresh suit. According to the High Court of Calcutta,<sup>4</sup> the withdrawal of a suit by the next friend of a minor has the same effect as the withdrawal by a person of full age.

**18. Withdrawal of suit by pauper plaintiff.** — The withdrawal of a suit by a pauper plaintiff amounts to failure in the suit within the meaning of O. 33 R. 11, and the plaintiff must pay the court-fees under that rule.<sup>1</sup>

**19. Withdrawal of suit by some of several plaintiffs.** — Where there are several plaintiffs in a suit the suit cannot be withdrawn without the consent of *all* the plaintiffs.<sup>1</sup> But one of several co-plaintiffs or co-appellants may withdraw *from* the suit or appeal so far as his own interest is concerned.<sup>2</sup>

The withdrawal of unnecessary plaintiffs *from* a suit does not cause the dismissal of the suit.<sup>3</sup>

**19a. Withdrawal of representative suits.** — It has been already mentioned in Note 10, *ante*, that ordinarily a party prosecuting an action may at any time withdraw it. But where the plaintiff sues in a representative character, it is not open to him to put an end to the litigation by withdrawing from the suit. He may, no doubt, go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue the litigation.<sup>1</sup>

(<sup>12</sup>) 15 Ind Cas 852 (859) (Mad). (Plaintiff cannot withdraw application except on very good grounds—Per Sadasiva Iyer, J.)

(<sup>10</sup>) 7 Ind Cas 892 (898) (Cal).

(<sup>74</sup>) 6 N W P H C R 66 (68).

[But see (<sup>67</sup>) 2 Agra 158 (159).]

**Note 17**

1. (<sup>34</sup>) AIR 1934 Oudh 257 (257). (Suit by person on his own behalf and on behalf of his minor brother to set aside alienation by father—Major withdrawing from suit—As the suit was for benefit of minor and as minor became a ward of the Court, it refused to allow minor's suit to be withdrawn.)

2. (<sup>19</sup>) AIR 1919 Lah 395 (396) : 1919 Pun Re No. 59.

(<sup>84</sup>) 10 Cal 357 (367). (Fraudulent withdrawal.)

(<sup>02</sup>) 29 Cal 735 (737). (Guardian grossly negligent of minor's interest—Minor can have suit reopened on review through another next friend.)

3. (<sup>04</sup>) 27 Mad 377 (379, 380).

4. (<sup>84</sup>) 10 Cal 357 (364, 365).

**Note 18**

1. (<sup>05</sup>) 29 Bom 102 (104, 105).

(<sup>07</sup>) 81 Bom 10 (15) (FB).

**Note 19**

1. (<sup>20</sup>) 55 Ind Cas 926 (927) (All).

(<sup>88</sup>) AIR 1938 Mad 824 (825) : 57 Mad 299. (Court can refuse to allow one of several plain-

tiffs to withdraw from suit, if such course is not consented to by other co-plaintiffs or would be prejudicial to their interests irrespective of the question whether or not sub-rule (4) governs sub-rule (1).)

(<sup>25</sup>) AIR 1925 Cal 637 (640) : 52 Cal 189. (Case in Revenue Court.)

(<sup>19</sup>) 52 Ind Cas 188 (184) (U P B R).

(<sup>22</sup>) AIR 1922 Pat 489 (490, 491) : 1 Pat 228.

(<sup>87</sup>) 1887 Pun Re No. 98, p. 209.

(<sup>28</sup>) AIR 1928 Mad 496 (496). (Two plaintiffs, one of whom a minor, represented by the other as guardian—Suit cannot be withdrawn.)

[See (<sup>83</sup>) AIR 1938 Bom 42 (44). (Minor and transferee from minor suing to set aside sale—Minor withdrawing without objection by transferee—Transferee cannot continue suit.)]

[See also (<sup>80</sup>) AIR 1930 Lah 719 (721). (Whether O. 23 R. 1, sub-rule (4), is controlled by any rules of Hindu law—*Quære*.)]

[But see (<sup>85</sup>) 1885 All W N 189 (190). (Pre-emption suit by several plaintiffs — One of them withdrawing — Rights of others not affected.)

(<sup>82</sup>) 9 Cal L Rep 332 (333).]

2. (<sup>27</sup>) AIR 1927 Bom 244 (244).

(<sup>08</sup>) 1908 Pun W R No. 119.

3. (<sup>21</sup>) 60 Ind Cas 592 (592) (U P B R).

**Note 19a**

1. (<sup>84</sup>) AIR 1934 All 4 (7) : 55 All 325.

**20. Withdrawal of suit by vakil.**—The authority to compromise an appeal, conferred on a vakil by a vakalatnama, does not authorize him to withdraw the appeal unconditionally.<sup>1</sup> But a vakalatnama which authorizes him to choose arbitrators, prefer objections to the award, file solenama, and do all necessary acts in connexion with the suit will include also an authority to withdraw a suit under this rule.<sup>2</sup>

**O. 23 R. 1**  
**Notes 20-21**

**20a. Withdrawal of suit by benamidar.**—Where a benamidar, in breach of trust, fails to carry on the suit and withdraws it, the real owner will be entitled to have the order of withdrawal vacated and to continue the suit.<sup>1</sup>

**21. "As against all or any of the defendants."**—Where there are several defendants to a suit, the plaintiff may withdraw his suit as against *some* of the defendants alone,<sup>1</sup> and if it is so withdrawn without the liberty of suing again being reserved, a subsequent suit against them will be barred.<sup>2</sup> In *Mahant Singh v. U Ba Yi*,<sup>3</sup> the plaintiff brought a suit against four persons as the trustees of a certain pagoda. Subsequently, these four persons were removed from their office as trustees and eight others were appointed to their place. Upon this, the plaintiff applied to the Court for striking out the names of the four persons whom he had originally impleaded as defendants in the suit and for substitution in their place of the eight new trustees and the Court complied with the plaintiff's request. It was found that the four old trustees were personally liable to the plaintiff and not in their capacity as trustees and that the new trustees were not liable to the plaintiff at all. The question arose as to whether the plaintiff could again sue the four persons whose names had been struck out at his instance. It was held by the Privy Council that the plaintiff was not entitled to sue them again and that a suit would be barred under this rule. In the course of their judgment their Lordships observed as follows :

"The appellant (plaintiff) indeed contended that he had not proceeded under O. 23 R. 1, in applying to substitute the new trustees for the old, but that his application was made under O. 1 R. 10 alone. Their Lordships cannot accept this view. The last named rule no doubt authorizes the Court to order the name of the party improperly joined to be struck out and that the name of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the Court to be just. If no terms are inserted in the order, then in their Lordships' view the effect of withdrawing the suit against some of the defendants is to be ascertained from O. 23 R. 1. That Order is not very happily worded, but its meaning is reasonably clear. Under its provisions the Court may give liberty to the applicant to institute a fresh suit after a withdrawal, but if it does not do so, the plaintiff is precluded from instituting a fresh suit in respect of the same subject-matter."

#### Note 20

(192) AIR 1932 Mad 31 (32). (Application by karnavan of a Malabar tarwad for withdrawal of appeal—Junior members allowed to prosecute the appeal.)

(135) AIR 1935 P C 185 (186, 187) : 62 Ind App 257 : 57 All 678 (PC). (U. P. Court of Wards Act, S. 55—Suit filed by Collector for possession of property as representing two widows—Application to withdraw by Collector—Nearest reversioner has right to be added as plaintiff and continue suit.)

(137) AIR 1937 Lah 601 (602). (Permission granted to limited persons to conduct suit on behalf of proprietary body—One of them withdrawing—It is for the Court to decide whether or not remaining plaintiffs should continue to prosecute suit or whether it will insist on the original number in which case the proprietary body should be required to appoint another person to conduct case as co-plaintiff.)

1. ('20) AIR 1920 Mad 232 (232). (Power to withdraw must be specifically given.)

[See however ('38) AIR 1938 All 450 (451). (Authority of defendant's counsel to enter into compromise or settlement includes authority to consent to withdrawal of suit with liberty to bring fresh suit.)]

2. ('12) 14 Ind Cas 190 (190) (Cal).

#### Note 20a

1. ('38) AIR 1938 Cal 874 (879).

#### Note 21

1. [See also ('21) 62 Ind Cas 25 (27) (Pat). (Some defendants exonerated—Claim for means profits—No joint decree but liability of each to be fixed in the decree.)]

2. ('10) 8 Ind Cas 860 (860) (Mad).

3. ('39) AIR 1939 P C 110 (112); 1939 Rang L R 358 : 66 Ind App 198 (PC).



**O. 23 R. 1**  
**Notes 21-23**

The above view has been followed in the undermentioned decision of the Oudh Chief Court.<sup>4</sup> But, the Madras High Court in an earlier decision<sup>5</sup> had held that where a plaintiff, having regard to the view of the Court that the suit is bad for misjoinder of parties and causes of action, elects to give up some of the defendants, there is no withdrawal or abandonment within the meaning of this rule and that a fresh suit against such defendants is not barred. The decision proceeds on the ground that in such cases, the plaintiff is really acting under compulsion of law and not out of voluntary choice. In view of the above decision of the Privy Council this decision of the Madras High Court cannot be considered to be good law. For the same reason, the undermentioned decisions<sup>6</sup> also in which it was held that the striking off of the name of a defendant from the array of parties at the instance of the plaintiff does not amount to a "withdrawal" of the suit, must be regarded as no longer good law.

**22. Effect of permission.**— The granting of the permission to withdraw with liberty to bring a fresh suit removes the bar of *res judicata* which would otherwise apply if a fresh suit on the same cause of action is brought.<sup>1</sup> It places the plaintiff in the same position as he would have been in, had he brought no suit at all.<sup>2</sup> But the granting of the permission to withdraw a suit with liberty does not imply the recognition of the maintainability of the second suit.<sup>3</sup> Thus, where a suit instituted with the leave of the Court under Clause 12 of the Letters Patent is withdrawn with liberty to bring a fresh suit, and an application is again made under Clause 12 of the Letters Patent for leave to institute the fresh suit, there is nothing to prevent the Court from dealing with the application and granting or refusing leave as it deems proper.<sup>4</sup>

A suit against a number of defendants was dismissed and the plaintiff appealed from the decree dismissing his suit. Pending the appeal, one of the defendants died and as no application for bringing on record his legal representatives was made within the period of limitation, the appeal abated as against him. The suit was then withdrawn with leave to bring a fresh suit. It was held that the legal representatives of the deceased defendant who had acquired a valuable right under the decree of the trial Court could not be affected by this order to which they were not parties.<sup>5</sup>

**23. Withdrawal from suit pending arbitration.**— After a reference to arbitration has been made by order of Court under Schedule II of the Code, the Court has no jurisdiction, whether before or after the award has been passed, to allow the

4. ('40) AIR 1940 Oudh 43 (44): 1939 Oudh WN 990 (992). (One of several defendants removed from array of defendants—Permission under O. 23 R. 1 not obtained—Attempt to re-implead him—His re-impleadment will be a fresh suit and will be barred—In circumstances of case suit had to be dismissed as against other defendants also.)

5. ('85) AIR 1935 Mad 696 (697).

6. ('10) 5 Ind Cas 725 (726) (Cal).

('14) AIR 1914 Bom 242 (242): 39 Bom 52. (Striking off of name of defendant, in this case, was held to be under O. 9 R. 5 rather than O. 23 R. 1.)

**Note 22**

1. ('87) 10 Mad 160 (164).

('94) 14 Mad 78 (80).

('25) AIR 1925 P O 55 (58): 52 Ind App 100: 27 Oudh Cas 894: 47 All 158 (P O).

('10) 8 Ind Cas 268 (269) (Mad). (Withdrawal of a suit with the leave of the Court does not bar

a fresh suit merely because some of the defendants do not consent.)

('14) AIR 1914 Oudh 284 (285). (Defendant cannot plead *res judicata* in the subsequent suit.)

('14) AIR 1914 Lah 70 (71). (Joint suit withdrawn with liberty to bring new suit—Separate suit by several plaintiffs not barred.)

('85) 1885 All W N 151 (151): 7 All 649.

('17) AIR 1917 Pat 188 (189). (Withdrawal of suit in appeal.)

2. ('11) 12 Ind Cas 828 (824) (Oudh).

('25) AIR 1925 Cal 845 (851): 52 Cal 894 (F B). (Per Suhrawardy, J.)

3. ('22) AIR 1922 Mad 447 (450): 45 Mad 90.

4. ('01) 24 Mad 298 (295).

5. ('85) AIR 1935 All 858 (854). (It was held that in the circumstances of the case, the necessary effect of the suit being barred against the representatives of the deceased was to bar it as against the other defendants also.)



suit to be withdrawn with liberty to bring a fresh suit.<sup>1</sup> And this is so even though the reference is invalid, and the award consequently void.<sup>3</sup> But where the reference to arbitration is private and out of Court and an application is made to the Court under Schedule II, Paragraph 20 of the Code, to file the award, the applicant may be allowed to withdraw the application.<sup>3</sup>

**O. 23 R. 1**  
**Notes 23-25**

**24. Withdrawing from suit after suit has abated against some of the defendants.** — An order granting permission to withdraw a suit with liberty to bring a fresh suit passed after the suit has abated, is without jurisdiction.<sup>1</sup> Where a suit abates as against a particular defendant by reason of his legal representatives not having been brought on the record within the period of limitation and the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, the fresh suit can only be brought against defendants who were *actually* on the record at the time of the permission and not against the legal representatives of the deceased defendant.<sup>3</sup>

**25. "Formal defect."** — The expression "*formal defect*" connotes defects of various kinds not *affecting the merits* of the case.<sup>1</sup> A defect which goes to the *root* of the plaintiff's claim is not a formal defect.<sup>3</sup> The "*formal defect*" need not necessarily be in the pleadings.<sup>3</sup>

The rule requires that the *Court* must be satisfied that the suit must fail by reason of some formal defect. Hence, mere objections by the defendant are not enough.<sup>4</sup>

The following are some examples of "*formal defects*" within the rule —

- (1) Omission to obtain the permission of the Insolvency Court for filing the suit.<sup>5</sup>
- (2) Misjoinder of parties or causes of action.<sup>6</sup>
- (3) Erroneous valuation of the subject-matter of the suit.<sup>7</sup>
- (4) The institution of a suit in a Court which has no jurisdiction to entertain the suit is a formal defect or at least one analogous to a formal defect so as to come within sub-rule (2) (b). But in such case the Court can only *return the*

#### Note 23

1. ('87) 9 All 168 (172).
- ('84) 6 All 211 (213).
- ('16) AIR 1916 Oudh 141 (141).
- ('08) 7 Cal W N 186 (187, 188).
- ('38) AIR 1938 All 56 (56, 57); I L R (1938) All 146.
- [See also ('38) AIR 1938 Lah 582 (583).]
2. ('25) AIR 1925 Mad 621 (624). (As award was absolutely void, the second suit was not incompetent.)
- [See ('28) AIR 1928 Mad 1085 (1086, 1087). (Award much wider than submission—Court refusing to pass decree on award—Permission to withdraw suit and sue again cannot be granted.)]
3. ('04) 31 Cal 516 (518).

#### Note 24

1. ('86) 40 Cal W N 1019 (1022).
2. ('14) AIR 1914 Mad 170 (170); 38 Mad 648.
- ('35) AIR 1935 All 858 (854).

#### Note 25

1. ('24) AIR 1914 Rang 249 (253); 2 Rang 66.
2. ('25) AIR 1925 Mad 617 (618).
- [See ('27) 1927 Mad W N 851 (851, 852).]
3. ('81) AIR 1981 Cal 268 (269).
4. ('25) AIR 1925 Oudh 140 (141).

- ('81) AIR 1931 Cal 336 (336). (Court should apply its mind to the question.)
- ('22) 64 Ind Cas 82 (82) (Cal). (Plaintiff's allegation of misjoinder of parties and causes of action found against—Leave not to be granted.)
- ('22) 64 Ind Cas 556 (558) (Cal). (Vague and mere allegation "*formal defect*" without specifying the same—Not sufficient.)
- ('28) 32 Cal W N 1244 (1245). (Formal defect—Not referred to by lower Court—Withdrawal bad.)
- ('18) AIR 1918 Pat 261 (262). (Sufficient grounds to be closely analogous to the grounds in cl. 1.)
- ('24) AIR 1924 Rang 249 (255); 2 Rang 66. (Court need not inquire whether suit must necessarily fail by reason of the formal defect—Reasonable apprehension of such failure is enough—In most cases, plaintiff's assertion of existence of such defects would be enough.)
- [But see ('18) AIR 1918 Pat 485 (486); 3 Pat L Jour 630. (Where the defendant himself alleges a "*formal defect*," the Court has jurisdiction to pass any order it pleases under this rule.)]
5. ('25) AIR 1925 Rang 105 (107); 2 Rang 643.
6. ('18) AIR 1918 All 425 (426); 40 All 7.
- ('94) 16 All 270 (283).
- [See also ('69) 12 Suth W R P C 48 (44) (P C).]
7. ('07) 29 All 471 (476).

**O. 23 R. 1**  
**Notes 25-26**

*plaint* for presentation to the proper Court under Order 7 Rule 10, and cannot act under this rule.<sup>8</sup>

The following are instances of defects which are *not* formal within this rule —

- (1) Where the suit is barred by limitation.<sup>9</sup>
- (2) Non-joinder of parties. The defect in this case can be remedied by the addition of the necessary parties.<sup>10</sup>
- (3) Omission to include all the causes of action which the plaintiff has against the defendant.<sup>11</sup>
- (4) Where a suit for a declaration of a public right of pathway is instituted without taking steps under Section 91 or O. 1 R. 8 or proving special damage.<sup>12</sup>

**26. "Other sufficient grounds."** — Courts in India have no general power of allowing a suit to be withdrawn with the liberty of suing again, apart from the provisions of the present rule<sup>1</sup> and the Court before granting leave under this rule must satisfy itself that the conditions therein specified exist.<sup>2</sup> In *Watson v. Collector of Rajshahi*,<sup>3</sup> their Lordships of the Privy Council observed as follows:

"There is a proceeding in those Courts called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them."

This passage from the judgment of their Lordships of the Privy Council conclusively shows that the failure of the plaintiff to prove his case is no ground for allowing him to withdraw his suit with the liberty of suing again for the same subject-matter.<sup>4</sup> The object of the rule is not to enable a plaintiff after he has failed to

8. ('19) AIR 1919 Mad 1071 (1075): 41 Mad 701.

9. ('18) AIR 1918 Sind 6 (8): 13 Sind L R 1.

[See also ('10) 6 Ind Cas 285 (285) (Mad). (*Obiter*.)]

10. ('16) AIR 1916 Mad 674 (674).

('84) AIR 1934 Cal 59 (60).

11. ('14) AIR 1914 All 457 (458).

('22) 66 Ind Cas 285 (286) (Lah). (Suit for interest due on mortgage — Bar of subsequent claim for principal no ground—Grant of leave prejudicial to defendant.)

12. ('25) AIR 1925 Cal 711 (718).

**Notes 26**

1. ('17) AIR 1917 Cal 880 (880).

('20) AIR 1920 Pat 68 (64).

('35) AIR 1935 Pat 438 (438).

('35) AIR 1935 Pat 251 (252). (Order of withdrawal with liberty passed in a case not covered by rule is without jurisdiction and revision lies.)

[See ('22) AIR 1922 Pat 44 (46): 1 Pat 90.

('26) AIR 1926 Mad 126 (127).

('17) AIR 1917 Cal 744 (744).

('18) AIR 1918 Pat 872 (873): 2 Pat L Jour 682.]

[See also ('81) AIR 1981 Mad 880 (881). (Except under express provisions, no power to give leave to sue afresh for a relief not granted.)]

2. ('10) 5 Ind Cas 556 (557) (All).

('18) AIR 1918 Nag 98 (94). (The Court must show in what way the grounds for withdrawal bring

the case within this rule.)

('18) AIR 1918 Pat 452 (453): 3 Pat L Jour 460.

('27) 1927 Mad W N 851 (851, 852).

('38) AIR 1938 Lah 582 (583).

3. ('69) 13 Moo Ind App 160 (170) (P C).

4. ('29) AIR 1929 Nag 72 (73). (Claim based on particular pro-note — After evidence plaintiff finding it to be based on the other note — He cannot be allowed to withdraw.)

('14) AIR 1914 P C 249 (252) (P C). (Damages claimed in plaint — Inability to prove same — Party not to be given liberty to bring fresh action.)

('26) AIR 1926 Cal 432 (432). (Failure of claim on account of mistaken view of law—Withdrawal cannot be permitted.)

('25) AIR 1925 Cal 711 (712).

('81) AIR 1981 Cal 107 (108).

('25) AIR 1925 Nag 101 (102). (Plaintiff fearing that he would fail on the case set up by him and desiring to withdraw in order to bring a fresh suit on entirely different allegations—Withdrawal cannot be granted.)

('25) AIR 1925 Mad 617 (618).

('27) 1927 Mad W N 851 (851, 852). (Practically plaintiff's side closed — Failure to substantiate relationship as reversioner—Pedigree not given —Not formal defect—No withdrawal.)

('26) AIR 1926 Pat 128 (128).

conduct his suit with proper care and diligence, and after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous bad conduct of the case so as to prejudice the opposite party.<sup>5</sup> The defect in the suit must be one not affecting the merits of the case, but having the effect of shutting out a fair trial on the merits and arising out of some error made in good faith by the plaintiff which can only be effectively set right by a trial *de novo*.<sup>6</sup> The defect must not be due to the plaintiff's own fault<sup>7</sup> nor one curable by amendment of the pleadings.<sup>8</sup> Further, after a judgment has been passed in the suit, the Court has no jurisdiction to allow the suit to be withdrawn with permission to the plaintiff to bring a fresh suit on the same cause of action.<sup>9</sup>

It has also been held in a series of cases that the expression "other sufficient grounds" should be construed *ejusdem generis* with "formal defect" in clause (a) of the sub-rule,<sup>10</sup> although the opinion has also been expressed that the expression should be

- ('25) AIR 1925 Oudh 291 (293) : 27 Oudh Cas 231. (Non-inclusion of prayer for possession in suit for possession — Suit cannot be allowed to be withdrawn with liberty to sue afresh.)
- ('18) AIR 1918 Cal 213 (213). (Failure to prove case—No ground to allow withdrawal with leave for fresh suit on alternative case.)
- ('19) AIR 1919 Cal 594 (535) : 46 Cal 168.
- ('15) AIR 1915 Oudh 62 (62, 63). (Pedigree relied upon by plaintiff found to be wrong — No sufficient ground for allowing withdrawal.)
- ('10) 5 Ind Cas 187 (188) (Cal).
- ('14) AIR 1914 All 457 (458).
- ('29) AIR 1929 Bom 320 (320).
- ('25) AIR 1925 Oudh 61 (62).
- ('13) 21 Ind Cas 76 (76) (All).
- ('18) AIR 1918 Mad 699 (699).
- ('69) 12 Suth W R P C 43 (44) (P C).
- ('74) 21 Suth W R 291 (291).
- ('10) 6 Ind Cas 629 (631) (Cal). (Dismissal of suit by first Court on the ground that there is no evidence—Court of Appeal cannot grant permission for withdrawal with liberty to institute a fresh suit.)
- ('17) AIR 1917 Cal 409 (410).
- ('27) AIR 1927 All 704 (705). (Failure to prove particular document not sufficient ground.)
- ('25) AIR 1925 Lah 497 (498). (Failure to produce evidence in time is not sufficient ground.)
- ('28) AIR 1928 Oudh 482 (484, 485) : 3 Luck 403.
- ('21) AIR 1921 Pat 42 (42) : 6 Pat L Jour 112. (Inability to produce some important evidence not sufficient ground.)
- ('13) 20 Ind Cas 542 (543) (Oudh). (Party, once having been allowed to produce evidence and having had trial, cannot be allowed to withdraw to sue afresh on merely a chance of his being able to produce additional evidence in support of the case upon which he has failed.)
- ('13) 21 Ind Cas 28 (24) : 37 Bom 682. (Failure to produce documents is not sufficient ground under this rule.)
- ('19) AIR 1919 Cal 129 (129). (Party desiring to adduce additional evidence is not sufficient ground to withdraw suit or appeal under this rule.)
- ('16) AIR 1916 Cal 255 (256) : 44 Cal 367. (Inability to produce necessary evidence in time,

not sufficient ground under this rule.)

[See also (1881) 3 All 528(529). (Whether the Court ought to withdraw from a former suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if proceeded with—*Quære*)]

5. ('22) AIR 1922 Nag 84 (85) : 18 Nag L R 30.
- ('12) 14 Ind Cas 33 (34) (Cal).
- ('18) AIR 1918 Pat 452 (453) : 3 Pat L Jour 460.
- ('35) AIR 1935 Nag 185 (189).
6. ('17) AIR 1917 Nag 121 (122).
7. ('31) AIR 1931 Cal 107 (108).
- ('35) AIR 1935 Oudh 495 (495). (Failure of plaintiff to produce document at proper time or any other default on his part cannot be regarded as sufficient ground.)
8. ('18) AIR 1918 Oudh 163 (163) : 21 Oudh Cas 66.
- ('27) 1927 Mad W N 851 (851, 852).
9. ('31) AIR 1931 Cal 336 (336).
- ('29) AIR 1929 Cal 88 (89) : 55 Cal 1067.
- ('11) 10 Ind Cas 813 (813) : 35 Bom 261.
- ('75) 24 Suth W R 23 (23).
- (1865) 2 Suth W R 297 (299).
10. ('26) AIR 1926 Bom 315 (316) : 50 Bom 192.
- ('26) AIR 1926 Mad 868 (868).
- ('25) AIR 1925 Lah 497 (498).
- ('28) AIR 1928 Mad 1085 (1086).
- ('25) AIR 1925 Mad 1268 (1269).
- ('25) AIR 1925 Mad 617 (618).
- ('30) AIR 1930 Lah 175 (176).
- ('29) AIR 1929 All 683 (685).
- ('28) AIR 1928 Oudh 482 (484) : 3 Luck 403.
- ('26) AIR 1926 Pat 128 (128).
- ('25) AIR 1925 Oudh 291 (293) : 27 Oudh Cas 231.
- ('18) AIR 1918 Lah 329 (330).
- ('17) AIR 1917 Cal 409 (410).
- ('16) AIR 1916 Cal 255 (256) : 44 Cal 367.
- ('18) AIR 1918 Mad 499 (499).
- ('18) AIR 1918 Pat 261 (262) : 3 Pat L Jour 651.
- ('22) AIR 1922 Cal 58 (59).
- ('10) 6 Ind Cas 629 (630) (Cal).
- ('10) 8 Ind Cas 868 (869) (Mad).
- ('09) 8 Ind Cas 61 (63) : 5 Nag L R 88.
- ('15) AIR 1915 Mad 480 (481).

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Note 26**

given a wider meaning.<sup>11</sup> Thus, it has been held that clause (b) is not confined to cases in which the Court considers that the suit must necessarily fail.<sup>12</sup>

The following have been held to be "sufficient grounds" for allowing the plaintiff to withdraw his suit with liberty to sue afresh —

- (1) The omission to file a power-of-attorney.<sup>13</sup>
- (2) Evidence being not available, for no fault of the plaintiff.<sup>14</sup>
- (3) The suit being premature and the cause of action accruing pending the suit.<sup>15</sup>
- (4) Where the plaintiff has failed to put in evidence, an important document essential to the success of his case. In this respect there is a distinction between a case where a plaintiff wants to get time in order to produce a large body of fresh evidence to counteract the defendant's evidence and a case where a plaintiff merely wishes to give formal proof of a document.<sup>16</sup>
- (5) Where two suits are brought and both are sought to be withdrawn to be consolidated into one and there is an apprehension that the second of the two suits would be barred under O. 2 R. 2.<sup>17</sup>
- (6) Where the plaintiff had been misled by the absence of a specific denial in the written statement.<sup>18</sup>
- (7) Where a material document has been rejected as not properly stamped.<sup>19</sup>
- (8) Where the plaintiff finds that the defendant is absent and that even if a decree is passed it cannot be executed.<sup>20</sup>

For other instances, see the undermentioned cases.<sup>21</sup>

(<sup>'85</sup>) AIR 1935 Pat 251 (252).

(<sup>'88</sup>) AIR 1938 Lah 582 (583).

(<sup>'85</sup>) AIR 1935 Pat 438 (438).

(<sup>'88</sup>) AIR 1938 Lah 294 (294).

11. (<sup>'81</sup>) AIR 1931 Cal 268 (269). (Withdrawal may be allowed if evidence on which party depends is not available for no fault of the party.)

(<sup>'84</sup>) AIR 1934 All 214 (215). (Sufficient grounds mean any sufficient ground whether it is in the nature of formal defect or not.)

(<sup>'85</sup>) AIR 1935 Bom 28 (29) : 59 Bom 114. (Approving AIR 1921 Bom 267 and dissenting from A I R 1926 Bom 315.)

(<sup>'19</sup>) AIR 1919 Mad 1071 (1073, 1074) : 41 Mad 701 (Per Sadasiva Aiyar, J.)

(<sup>'88</sup>) AIR 1938 Rang 389 (390) : 1938 Rang L R 270. (The two sub-clauses are intended to cover different circumstances.)

12. (<sup>'88</sup>) AIR 1938 Rang 389 (391) : 1938 Rang L R 270. (Suit not including a certain claim—Plaintiff fearing that by persevering in suit he might lose altogether the right to sue in respect of such claim—Leave may be granted with liberty to sue again.)

13. (<sup>'26</sup>) AIR 1926 All 294 (294, 295).

14. (<sup>'81</sup>) AIR 1931 Cal 268 (269).

(<sup>'71</sup>) 16 Suth W R 100 (100).

15. [See (<sup>'26</sup>) AIR 1926 Mad 594 (595). (Only course where plaintiff brings his suit before cause of action arises is to dismiss the suit with liberty to bring fresh suit upon a proper cause of action.)]

16. (<sup>'29</sup>) AIR 1929 All 183 (184) : 50 All 835.

17. (<sup>'24</sup>) AIR 1924 Rang 249 (255) : 2 Rang 66.

(<sup>'75</sup>) 1875 Pun Re No. 65. (Objection to a suit on the ground of O. 2 R. 2 is a good ground.)

18. (<sup>'14</sup>) AIR 1914 Cal 842 (849). (Plaintiff was allowed to abandon portion of claim with liberty to sue afresh.)

19. (<sup>'69</sup>) 18 Moo Ind App 160 (170) (PC).

20. (<sup>'91</sup>) 15 Bom 160 (164).

[But see (<sup>'92-96</sup>) 1892-1896 Upp Bur Rul 261 (Court should not ask the plaintiff to withdraw his suit, if he does not know the address of the defendant.)]

21. (<sup>'10</sup>) 8 Ind Cas 962 (962) : 5 Low Bur Rul 191. (Promissory note invalid — Withdrawal with liberty of suing for money lent allowable.)

(<sup>'88</sup>) AIR 1938 Oudh 273 (273, 274). (Suit on behalf of a minor by his natural father — Court of Wards taking charge of minor's property—As suit would be incompetent without the Court of Wards, permission granted to guardian to withdraw.)

(<sup>'73</sup>) 20 Suth W R 168 (168, 164). (Where plaintiff had a good claim for contribution and the best evidence to determine the proportion payable by the various defendants had not been given.)

(<sup>'72</sup>) 17 Suth W R 164 (165). (Plaint containing prayer for separate possession instead of for joint possession.)

(<sup>'12</sup>) 17 Ind Cas 395 (396) (Mad). (Facts set out with no clear conception of the exact nature of right.)

(<sup>'29</sup>) AIR 1929 Mad 36 (37). (Plaintiff urging new point of law at late stage — Case raising questions of great importance affecting the rights of a large body of persons.)

(<sup>'21</sup>) AIR 1921 Cal 611 (612). (Claim for enhancement of rent on the ground of excess area under S. 52, Bengal Tenancy Act — Case sought to be

In the following cases it has been held that there are no sufficient grounds for allowing the plaintiff to withdraw his suit with liberty to institute a fresh suit —

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- (1) Where the parties are ready for trial, and a withdrawal will prejudice the defendant.<sup>22</sup>
- (2) Where the plaintiffs are not ready to go on with the case.<sup>23</sup>
- (3) Where notices on the heirs of a deceased defendant could not be served.<sup>24</sup>
- (4) Where owing to the mistake of the writer who drew up the plaint, some important items were left out.<sup>25</sup>
- (5) Where the plaintiff deliberately and grossly undervalues his suit and pays insufficient court-fee.<sup>26</sup>

For other instances, see the undermentioned cases.<sup>27</sup>

In the undermentioned case<sup>28</sup> it was held by the Allahabad High Court that where on an application by the plaintiff for permission to withdraw his suit, the Court refers the matter to the other side and on the other side stating that it has no objection provided that its costs are paid, permits the suit to be withdrawn with liberty to bring a fresh suit, the Court does not act without jurisdiction. The decision proceeds on the ground that the Court would be called upon to go into the question whether a formal defect or other sufficient ground existed only if the opposite party denied its existence. But where the opposite party did not deny it, there would really be nothing for the Court to examine.

**27. "May grant permission."**—The Court can pass an order under the rule *suo motu*. An application by the plaintiff is not necessary.<sup>1</sup> Although the rule does not specifically mention anything about notice, still "it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard." Hence, if the Court allows a plaintiff to withdraw his suit with liberty of bringing a fresh suit on the same cause of action, without giving notice to the defendant, the High Court will interfere in revision.<sup>2</sup> The permission under the rule extends only to *one* suit. A plaintiff was allowed to withdraw his suit with permission to bring a fresh suit, on condition of his paying defendant's

proved on the basis of contract—Case not framed as on contract—Withdrawal allowed.)

('88) AIR 1938 Rang 389 (391) : 1938 Rang L R 270. (Plaint not including certain claim—Plaintiff fearing that by persevering in suit he might lose altogether the right to sue in respect of such claim — Leave may be granted with liberty to sue again.)

22. ('25) AIR 1925 Mad 617 (618).

('22) AIR 1922 Nag 84 (85) : 18 Nag L R 30.

('18) AIR 1918 All 356 (357).

('09) 4 Ind Cas 252 (258) : 33 Bom 722.

23. ('25) AIR 1925 Mad 1268 (1269).

24. ('22) AIR 1922 Bom 449 (449) : 47 Bom 92.

25. ('17) AIR 1917 Cal 36 (37).

26. ('18) AIR 1918 Mad 499 (500).

('19) AIR 1919 Mad 1071 (1074) : 41 Mad 701.

27. ('03) 5 Oudh Cas 367 (368). (Suit as filed not maintainable.)

('84) AIR 1934 All 187 (188, 189). (Plaintiff not prepared to meet defendant's case, is no ground for withdrawal.)

'18) AIR 1918 Nag 93 (94). (Plaintiff who has misunderstood his case is not entitled to the

indulgence.)

('18) AIR 1918 Cal 797 (797). (Reliefs not properly asked for.)

('25) AIR 1925 Oudh 718 (718). (Amendment of plaint at late stage refused as necessitating new trial — Withdrawal with liberty also not allowed.)

('08) 10 Bom L R 625 (627). (Alteration in substantive law pending suit—Withdrawal so as to get benefit of—Not allowable.)

('35) AIR 1935 Pat 251 (252). (Lack of evidence is no ground for allowing withdrawal.)

28. ('38) AIR 1938 All 450 (451). (Order not open to revision.)

#### Note 27

1. ('27) AIR 1927 Nag 302 (303) : 10 Nag L R 142. ('33) AIR 1938 Mad 865 (876).

[See however ('37) 1937 Oudh W N 1146 (1149).]

2. ('17) AIR 1917 Cal 633 (633) : 44 Cal 454.

('30) AIR 1930 Nag 151 (151, 152).

('78) 5 N W P H O R 116 (117).

('84) 6 All 211 (213).

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costs. He filed the second suit without paying the costs, but paid them afterwards. The second suit was dismissed on the ground of the plaintiff's failure to comply with the condition as to costs. Thereupon the plaintiff tried to bring a third suit. It was held that he was not entitled to do so.<sup>3</sup>

In the undermentioned case<sup>4</sup> it was held that a specific order allowing the withdrawal of the suit and permitting a fresh suit to be brought is not necessary and that a direction in the decree permitting the plaintiff to bring a separate suit in regard to a portion of the claim is enough.

**28. Form of permission.** — The permission to file a fresh suit need not be express but may be implied from the circumstances under which the order was passed.<sup>1</sup> Where the Court does not wish to grant the application for permission, it can dismiss the application and direct the plaintiff to proceed with the suit and if he fails to do so, it can dismiss the suit for default of prosecution.<sup>2</sup> But the Court cannot refuse liberty to file a fresh suit and *at the same time* dismiss the suit.<sup>3</sup> Nor can it merely allow the suit to be withdrawn and at the same time refuse liberty to bring a fresh suit.<sup>4</sup> Similarly, an order on such an application granting permission to sue in respect of a portion of the claim only is bad.<sup>5</sup> Directing a new plaint to be filed is also not a legal order to be passed on an application under Rule 1 sub-rule (2).<sup>6</sup> Similarly an order substituting the plaintiff's assignee on the record and permitting him to withdraw the suit with liberty to bring a fresh suit is not valid.<sup>7</sup> The dismissal of a suit in the form "in which it is brought" does not amount to a permission to sue again.<sup>8</sup>

An application for withdrawal of a suit under Rule 1 is a petition chargeable

[See also ('98) 1 Oudh Cas 97 (99). (Order of withdrawal without notice though erroneous cannot be questioned in second suit.)]

3. ('25) AIR 1925 Bom 272 (272).

4. ('38) AIR 1938 Mad 865 (876).

[See however ('37) 1937 Oudh WN 1146 (1149). (Rule clearly contemplates an application by plaintiff and the decision in the presence of the parties — A mere remark in the judgment cannot be construed to be a permission of the Court.)]

**Note 28**

1. ('24) AIR 1924 Nag 285 (286).

('34) AIR 1934 All 292 (293). (Application to withdraw with permission to bring fresh suit—Application granted—No specific mention of liberty to bring fresh suit—Permission is presumed to have been granted.)

('26) AIR 1926 Pat 269 (260) : 5 Pat 23.

('27) AIR 1927 Oudh 860 (360).

('27) AIR 1927 Rang 237 (238).

('18) AIR 1918 Mad 126 (127).

('96) 9 C P L R 3 (4).

('20) AIR 1920 Lah 494 (496). (Application for probate withdrawn and suit filed.)

[But see ('17) AIR 1917 Lah 83 (84) : 1916 Pun Re No. 97.]

2. [See ('68) 1 Bong L R O O 45 (46).]

3. ('26) 95 Ind Cas 199 (200) (Cal).

('88) 1888 All W N 132 (132).

('82) 185 Ind Cas 160 (160) (All).

4. ('25) AIR 1925 All 272 (272). (If the order of withdrawal without liberty to bring fresh suit is not appealable, the High Court can interfere in revision.)

('26) AIR 1926 Cal 233 (233). (Court not allowing withdrawal with liberty to sue afresh—Court should simply dismiss the application.)

('28) AIR 1928 Cal 273 (273). (Where the Court considers that the application for withdrawal with liberty to bring a fresh suit should not be granted a proper course is to dismiss the application and go on with the case.)

('21) AIR 1921 Pat 360 (360).

('11) 10 Ind Cas 346 (346) (Cal). (Court allowing to withdraw without leave to sue afresh—If the order of the Court is not appealable, High Court can interfere in revision.)

('17) AIR 1917 Cal 197 (198).

('08) 82 Bom 845 (848). (Plaintiff not desiring to withdraw, unless with liberty to sue afresh—Court considering that liberty ought not to be granted—The proper course is simply to dismiss the application.)

('09) 8 Ind Cas 206 (206) (Mad). (Court cannot allow the withdrawal and refuse the applicant leave to bring a fresh suit, unless the petitioner is informed of such proposed order and he consents to it.)

('20) AIR 1920 Pat 587 (587, 588).

('21) AIR 1921 Pat 360 (360).

('82) 1882 All W N 69 (69).

('82) AIR 1982 Mad 155 (155). (Application indivisible.)

5. ('08) 5 Bom L R 223 (224).

6. ('87) 9 All 191 (200) : 13 Ind App 184 (PC).

7. ('88) 9 Suth W R 309 (311).

8. ('87) 9 All 155 (157).

('83) 5 All 595 (596).

('86) 8 All 282 (290).

with court-fee under the Court-fees Act.<sup>9</sup>

**29. Dismissal of suit with liberty to bring a fresh suit.** — A Court cannot dismiss a suit with liberty to the plaintiff to bring a fresh suit on the same cause of action.<sup>1</sup> See Note 28.

**30. Liberty to withdraw two suits in order to bring a consolidated suit.** — Where a plaintiff files two suits and then prays for permission to withdraw both the suits with leave to bring a fresh suit in respect of the subject-matter of both the suits so as to obviate any danger of the claim comprised in the second suit being barred by O. 2 R. 2, the application may be granted although, in fact, O. 2 R. 2 may not be applicable to the case.<sup>1</sup> See also Note 26.

**31. "On such terms as it thinks fit."** — A defendant should ordinarily be granted his costs where the plaintiff is granted permission to withdraw the suit with liberty to bring a fresh suit.<sup>1</sup> Where the payment of costs is made a condition of withdrawal with liberty, the order should limit the time for such payment and should further direct that on default of such payment the suit should stand dismissed with costs.<sup>2</sup> Where such direction has not been given and the plaintiff fails to pay the costs within the time fixed, there is a conflict of opinion as to whether the second suit is barred. According to the High Courts of Calcutta,<sup>3</sup> Lahore<sup>4</sup> and Patna,<sup>5</sup> the second

9. (1884) 8 Mad 15 (17). (Reference under Stamp Act.)

#### Note 29

1. ('25) AIR 1925 PC 55 (58); 52 Ind App 100; 27 Oudh Cas 394; 47 All 158 (PC).
- ('69) 13 Moo Ind App 160 (170) (PC).
- ('12) 14 Ind Cas 33 (33) (Cal).
- ('87) 9 All 690 (697).
- ('89) 11 All 187 (189).
- ('23) AIR 1923 Oudh 242 (245).
- ('97) AIR 1937 Rang 508 (510); 1937 Rang L R 492.
- [See (1864) 1 Suth W R 322 (322). (When suit by permission is withdrawn under this rule, proper order to be recorded is not of dismissal but a simple order in terms of the rule.)]

#### Note 30

1. ('24) AIR 1924 Rang 249 (255); 2 Rang 66.
- [See ('20) AIR 1920 Mad 1026 (1082). (Permission to consolidate withdrawn suit with a pending suit — Consolidation alone to be made — Fresh suit barred.)]

#### Note 31

1. ('28) AIR 1928 Bom 206 (206); 47 Bom 559.
- ('32) AIR 1932 Mad 714 (715).
- [See also (1864) 1 Suth W R 322 (322).
- ('26) AIR 1926 All 733 (739); 48 All 696. (Contested suit—Defendant ready—Full costs to be allowed.)]
2. ('18) AIR 1918 Pat 171 (171, 172); 8 Pat L Jour 68.
- ('85) AIR 1935 Nag 56 (56, 57); 31 Nag L R 266.
- ('29) AIR 1929 All 692 (695).
- ('14) AIR 1914 Cal 207 (208). (Time for payment not fixed—Fresh suit may be instituted and costs may be paid subsequently.)
3. ('14) AIR 1914 Cal 207 (208).
- ('11) 10 Ind Cas 6 (6) (Cal). (Notwithstanding the provision that otherwise suit should stand dismissed.)
- ('04) 81 Cal 965 (968).

2 Hyde 212 (213, 214).

('12) 15 Ind Cas 159 (160) (Cal). (Suit must be taken to be instituted on the day the costs were paid.)

('20) AIR 1920 Cal 897 (897). (Withdrawal allowed on condition of payment — Dismissal on default not directed—Fresh suit should only be stayed until payment.)

('88) AIR 1938 Cal 13 (15); ILR (1938) 1 Cal 273. (Letters Patent appeal affirming 164 Ind Cas 603.)

('88) 68 Cal L Jour 75 (81).

[See ('31) AIR 1931 Cal 791 (792). (Where the High Court has no jurisdiction and the case is withdrawn on that ground, unless there are other special reasons for applying R. 26 of the Original Side Rules, the payment of costs should not be made a condition precedent to the filing of a fresh suit.)]

[But see ('05) 2 Cal L Jour 480 (484). (Order was that the suit should stand dismissed on default.)]

('18) AIR 1918 Cal 749 (750). (Payment of costs made condition precedent to the institution of suit—Order held to be strictly complied with.)

('84) AIR 1934 Cal 438 (435). (Where costs are not paid within the time fixed, the order granting permission stands cancelled.)]

4. ('27) AIR 1927 Lah 159 (160). (Order of the Court not directing definite time for payment — Fresh suit not bad *ab initio* for default, but can be entertained if costs are paid before suit comes on for trial.)

[See however ('39) AIR 1939 Lah 148 (148). (Permission to institute fresh suit after payment of costs — Fresh suit is barred unless costs are paid.)]

5. ('26) AIR 1926 Pat 409 (410); 5 Pat 306.

('26) AIR 1926 Pat 472 (473).



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**Notes 31-32**

suit is not barred, whether a date has been fixed for the payment or not, or whether or not such payment has been made a condition precedent to the institution of a fresh suit. These decisions proceed on the view that until the costs are paid the original suit itself cannot be deemed to have been withdrawn but must be taken to be pending till such costs are paid, that inasmuch, therefore, as the second suit must be taken to have been filed at the time when the first suit was pending, it should be stayed under Section 10 of the Code, and that, when the costs are actually paid the first suit will be deemed to be withdrawn on the date of such payment and the second suit can be proceeded with. The High Court of Allahabad<sup>6</sup> has held that where the order of the Court is that the amount should be deposited by a certain date and that date expires, a subsequent deposit would in no way comply with the order granting leave to withdraw. But in regard to cases where no date is fixed, it follows the Calcutta view mentioned above.<sup>7</sup> The Judicial Commissioner's Court of Nagpur<sup>8</sup> has held that where a suit is allowed to be withdrawn with liberty, on payment of costs before the institution of the fresh suit, the failure to pay such costs is only an irregularity which does not entail *ipso facto* a dismissal of the suit, and that, if the costs are paid before the hearing, the irregularity is cured. The Calcutta view as to the original suit being pending till the costs are paid was not accepted by this Court. But the second suit must be treated as having been instituted on the day the costs are paid and if the costs are paid after the period of limitation for the suit expires, the suit must be dismissed.<sup>9</sup> According to the High Courts of Bombay,<sup>10</sup> Madras<sup>11</sup> and Rangoon,<sup>12</sup> the costs must, where the time for payment is *specified*, be paid before the specified date, and, where no time is specified, before the *institution of the suit*; otherwise, the second suit will be barred. According to this view, the permission means a permission *to bring a fresh suit* and not a permission to *withdraw* from the first suit, and that the first suit does not continue pending till the costs are paid, but is withdrawn immediately *on the order for withdrawal*.

Where it is impossible for the plaintiff to pay the costs within the time fixed, it has been held that the Court can extend the time for such payment.<sup>13</sup>

Where a plaintiff suing for redemption is allowed to withdraw his suit with liberty to sue again within two years from the date of the withdrawal but sues after the expiry of the two years, his suit is not barred, provided it is within limitation. It is not open to the Court in which the first suit is instituted, to curtail the period of limitation which the law allows to the plaintiff within which to bring his second suit for redemption.<sup>14</sup>

**32. Fresh suit must be between the same parties.** — The bar under this rule applies only if the second suit is between the *same parties* as the first suit.<sup>1</sup>

(18) AIR 1918 Pat 171 (171, 172) : 3 Pat L Jour 63. (It is sufficient if the costs are paid before the suit comes on for trial.)

[But see (25) AIR 1925 Pat 303 (310).]

6. (33) AIR 1933 All 810 (812) : 56 All 10.

7. (38) AIR 1933 All 810 (812) : 56 All 10. (AIR 1929 All 692, Not followed.)

[But see (29) AIR 1929 All 692 (695).]

8. (29) AIR 1929 Nag 135(136):25NagLR 171.

(35) AIR 1935 Nag 56 (56) : 31 Nag LR 266.

9. (35) AIR 1935 Nag 56 (57) : 31 Nag L R 266. (This does not mean that Court is bound to keep the second suit pending until period of limitation expires.)

10. (81) AIR 1931 Bom 257 (258,259):55 Bom 206.

11. (24) AIR 1924 Mad 877 (878, 879).

(10) 6 Ind Cas 288 (288) : 33 Mad 258.

[But see (18) AIR 1918 Mad 78 (80). (Payment of costs not condition precedent.)]

12. (39) AIR 1939 Rang 878 (880, 881) : 1939 Rang L R 749.

13. (06) 29 Mad 870 (871).

(26) AIR 1926 Pat 409 (411) : 5 Pat 806.

(19) 15 Ind Cas 159 (160) (Cal).

14. (20) AIR 1920 Bom 29 (29) : 44 Bom 939.

**Note 32**

1. (28) AIR 1928 All 689 (694, 695). (Suits by shebait representing idol — The idol need not be



Thus, where the second suit is against a different defendant it is not barred under this rule.<sup>3</sup> Similarly, the withdrawal without the leave of the Court, of a suit by a Hindu reversioner, challenging an improper alienation by a Hindu widow, is no bar to another suit by another presumptive reversioner for the same purpose as the reversioners do not claim through each other.<sup>3</sup>

**O. 23 R. 1**  
**Notes 32-33**

**33. Same subject-matter.** — Sub-rule (3) provides that where a plaintiff withdraws his suit without the permission of the Court under sub-rule (2), he shall be debarred from bringing a fresh suit in respect of the same subject-matter. The term "subject-matter" means the plaintiff's *cause of action* for his suit<sup>1</sup> and a suit on a different cause of action is therefore not barred under this rule<sup>2</sup> even though the suit may relate to the *same property*.<sup>3</sup> Conversely, a suit based on the same cause of action as the first one is barred.<sup>4</sup>

#### Illustrations

(1) A suit for *declaration of title* to a war bond is a bar to a suit for the recovery of the bond.<sup>5</sup>

(2) A suit for recovery of plots A and B and which is withdrawn with reference to plot B will bar a second suit for recovery of plot B as the cause of action with reference to both the plots is the same.<sup>6</sup>

(3) A suit for the ejectment of the defendant as a *trespasser* will not bar a second suit for the ejectment of the same defendant as a *tenant*, after notice to quit.<sup>7</sup>

(4) A suit claiming *ownership* of land is no bar to the institution of a suit claiming an *easement* over the same land.<sup>8</sup>

(5) Where, during the lifetime of a Hindu widow, a reversioner sues for a *declaration* that an alienation made by the widow is not binding on him and he then withdraws the suit without the permission of the Court to sue again, a subsequent suit by him after the widow's death, for *possession* of the property is *not* barred.<sup>9</sup>

represented by the same shebait.)

('17) AIR 1917 Pat 543 (544). (Principle of bar does not apply to a stranger.)

('27) AIR 1927 Bom 87 (88). (Same person claiming but in a different capacity—Principle of bar does not apply.)

2. ('82) 8 Cal 871 (874).

3. ('18) AIR 1918 Mad 495 (496).

#### Note 33

1. ('30) AIR 1930 Lah 937 (939).

('84) AIR 1934 Cal 433 (435, 436).

('17) AIR 1917 Bom 10 (10) : 42 Bom 155.

('05) 15 Mad L Jour 462 (465, 466) (FB).

('83) AIR 1933 Mad 3 (4) : 56 Mad 163.

('32) AIR 1932 Lah 138 (139, 140). (Suit under S. 77 of the Registration Act before refusal by Registrar — Withdrawal without permission—Subsequent suit after such refusal—Not barred.)

('24) AIR 1924 Oudh 180 (181).

('39) AIR 1939 All 584 (586). ('Subject-matter' means series of acts or transactions alleged to exist giving rise to the relief claimed.)

2. ('17) AIR 1917 Mad 512 (517) : 39 Mad 987 (FB). (Overruling 21 Mad 85.)

('83) AIR 1933 Lah 943 (944) : 15 Lah 1.

('13) 18 Ind Cas 49 (55) : 86 Mad 325.

('29) AIR 1929 Mad 798 (800, 801).

('84) AIR 1934 Lah 721 (723) : 16 Lah 27.

3. ('24) AIR 1924 Oudh 180 (181).

('84) AIR 1934 Cal 433 (436). (Suit for possession against tenants-at-will — Suit withdrawn for want of proper notice without permission for

fresh suit — Subsequent suit after proper notice is not barred.)

('33) AIR 1933 Lah 943 (944) : 15 Lah 1. (The word 'subject-matter' does not mean property but refers to right in property which a person seeks to enforce.)

(1900) 4 Cal W N 110 (112).

('94) 21 Cal 265 (268).

4. ('30) AIR 1930 Lah 755 (756).

('39) AIR 1939 All 584 (586).

5. ('24) AIR 1924 Rang 127 (131). 1 Rang 618.

6. ('18) AIR 1918 Cal 23 (26).

7. ('17) AIR 1917 Bom 10 (10) : 42 Bom 155.

('20) AIR 1920 Cal 666 (667).

('33) AIR 1933 Mad 3 (4) : 56 Mad 163.

[See also ('34) AIR 1934 Cal 433 (436). (Suit for possession against tenants-at-will — Suit withdrawn for want of proper notice to quit without permission to file a fresh suit—Subsequent suit after proper notice is not barred under this rule.)]

8. ('06) 2 All L Jour 59 (61).

9. ('17) AIR 1917 Mad 512 (517) : 39 Mad 987 (FB).

('33) AIR 1933 Lah 943 (944) : 15 Lah 1. (Even if plaintiff in the subsequent suit adds prayer in regard to the alienation, it may be treated as a surplusage.)

'06) 9 Oudh Cas 164 (166).

[But see (10) 8 Ind Cas 1066 (1067) (Mad).

('15) AIR 1915 Mad 1190 (1190).]

**O. 23 R. 1**  
**Notes 33-34**

(6) Where a suit is withdrawn in view of a compromise between the parties, a subsequent suit to enforce the terms of the compromise is not barred.<sup>10</sup>

(7) On the attachment of a house in execution of a decree, the plaintiff sued to establish her title. Meanwhile the executing Court refused to confirm the sale. Thereupon the plaintiff withdrew her suit. But the sale was afterwards confirmed in appeal. It was held that a fresh suit by the plaintiff was not barred as there was a fresh cause of action.<sup>11</sup>

(8) The withdrawal of a suit for *possession* is no bar to the institution of a suit for *rent*.<sup>12</sup>

(9) The withdrawal of a suit for partition is no bar to a fresh suit for partition by the same plaintiff and of the same property, as the cause of action for a suit for partition is a *recurring* one.<sup>13</sup>

For other instances, see the undermentioned cases.<sup>14</sup>

It has been held by the Madras High Court<sup>15</sup> that the withdrawal of a suit instituted by partners who have not been registered as a firm under the Partnership Act is no bar to a fresh suit filed by them on the same cause of action after they get themselves registered as a firm, because the later suit would be technically by a different plaintiff.

**34. Additional relief in fresh suit.** — The withdrawal of a suit *without* the permission of the Court to institute a fresh suit operates as a dismissal thereof. Hence, O. 2 R. 2 will be a bar to the institution of any suit in respect of any portion of the claim which the plaintiff may have omitted in the previous suit in such a case.<sup>1</sup> But where the withdrawal is with the Court's permission to bring a fresh suit, O. 2 R. 2 is no bar to the inclusion in the second suit of any portion of the plaintiff's claim or of any relief which the plaintiff might have included but did not include in his first suit.<sup>2</sup> When a suit is withdrawn with permission to bring a fresh suit on the same cause of action, it is not necessary to allege in the subsequent suit the same title as in the first.<sup>3</sup>

10. ('05) 1905 Pun Re No. 3.

('67) 2 Agra 158 (159).

('68) 3 Agra 135 (136).

11. ('81) 1881 Pun Re No. 119, page 287.

12. (1864) 1864 Suth W R Act X, 67 (67).

13. ('25) AIR 1925 Mad 112 (114).

('24) AIR 1924 All 905 (906) : 46 All 820.

('85) AIR 1935 Mad 909 (912).

14. ('26) AIR 1926 Cal 178 (178). (Redemption suit—Claim for mesne profits withdrawn—Suit for mesne profits from payment under decree to delivery of possession is not barred.)

('27) AIR 1927 Cal 865 (871). (Different portion of same plot from that involved in prior suit—Subsequent suit not barred.)

('15) 29 Ind Cas 24(24)(U. P. B. R.). (A fresh cause of action arises each year as regards ejectment.)

('26) AIR 1926 All 84 (84). (Right to sue for ejectment under the Agra Tenancy Act is a recurring one from year to year.)

('29) AIR 1929 All 67 (67, 68). (Withdrawal of suit to eject year to year tenant is no bar to suit for ejectment with effect from a subsequent year.)

('17) AIR 1917 Cal 112 (118). (Withdrawal of suit for declaration that defendant's name was wrongly entered as owner of certain share is no bar to suit for declaration of title and recovery of possession.)

('89) AIR 1989 All 584 (585). (Suit against co-sharers for recovery of joint possession of certain plots — Some plots being in possession of co-sharers as mortgagees, suit in respect of these plots dismissed—Subsequent suit for redemption

is not barred.)

('38) AIR 1988 Rang 210 (212). (Previous suit for ejectment on ground that defendant was plaintiff's tenant holding over after expiry of his tenancy — Second suit on basis of defendant being in wrongful possession in his own right—Second suit not barred.)

('89) AIR 1989 Lah 148 (149). (Previous suit for declaration that certain share in property was plaintiff's and not liable to execution withdrawn — Fresh suit for partition is not barred.)

('35) AIR 1935 Oudh 434 (437) : 11 Luck 860. (Suit on promissory note dismissed on plaintiff's withdrawal and no permission to bring fresh suit granted — Subsequent suit on another promissory note executed for same consideration as original note and in respect of same subject matter is barred.)

15. ('36) AIR 1936 Mad 697 (698). (Suit by partners of firm not registered under Partnership Act — Withdrawal—Fresh suit after registration not barred.)

**Note 34**

1. ('05) 2 Cal L Jour 480 (484).

2. ('17) AIR 1917 Lah 414 (416, 417) : 1917 Pun Re No. 65.

('11) 9 Ind Cas 956 (956, 957) (Lah).

('25) AIR 1925 Rang 118 (119).

('76) 1 All 824 (825).

('95) 17 All 58 (55).

('85) 7 All 624 (626).

('97) 10 Mad 160 (164).

3. ('85) 9 Bom 846 (852).

**35. Effect of withdrawal without permission.**—The effect of the withdrawal of a suit without the Court's permission to bring a fresh suit is to debar the plaintiff from filing such a suit.<sup>1</sup> Thus, where a plaintiff unconditionally withdraws his suit in view of the matter in dispute being referred to arbitration, he cannot subsequently sue again in respect of such matter, although the arbitration may have become infructuous.<sup>2</sup> The fact that the plaintiff states at the time of withdrawal that he reserves to himself the liberty of bringing a fresh suit does not remove the bar under the rule.<sup>3</sup> Even the defendant's consent to the withdrawal of the suit at the time of such withdrawal will not remove the bar under the rule.<sup>4</sup> But an illegal order for withdrawal without liberty being reserved to the plaintiff to bring a fresh suit does not bar a fresh suit.<sup>5</sup> Similarly, where the second suit has been *already filed* at the time of the withdrawal of the first suit, the withdrawal does not bar the trial of the second suit.<sup>6</sup> The rule merely bars a remedy but does not extinguish the right.<sup>7</sup> Where a creditor sues both the principal debtor and the surety in the same suit and later on withdraws the suit as against the former, though he cannot file a fresh suit against the principal debtor, he can continue the suit as against the surety.<sup>8</sup> The bar of a fresh suit in respect of the same subject-matter where a former suit has been withdrawn without the permission of the Court is not based on the principle of *res judicata* (because there is no *decision* of the Court in such a case) but is due to the express provision contained in sub-rule (3).<sup>9</sup>

Where the suit property is partly within the Court's jurisdiction and partly without, the withdrawal of the suit with reference to the former portion is no bar to the continuance of the suit with reference to the latter.<sup>10</sup>

In the undermentioned case<sup>11</sup> the Madras High Court held that it was "very doubtful" whether the prohibition of a fresh suit under this rule where the previous suit was withdrawn without the permission of the Court can apply to cases where the summons had not been served on the defendant at all.

#### Note 35

1. ('08) 30 All 279 (281).
- (83) AIR 1933 Nag 66 (67). (Plaintiff having the name of a defendant struck off without obtaining leave under this rule—In appeal against the decree in the suit he cannot claim against him or make him a respondent.)
- (18) AIR 1918 Cal 23 (26). (Though plaintiff may falsely allege a different cause of action.)
- (07) 4 All L Jour 201 (203, 204).
- (19) AIR 1919 Lah 206 (207) : 1919 Pun Re No. 136. (Subsequent suit, though on different allegation, is barred.)
- (17) AIR 1917 Mad 495 (497, 498).
- (17) AIR 1917 Cal 112 (118).
- (27) AIR 1927 All 628 (629).
- (73) 20 Suth W R 415 (415).
- (28) AIR 1928 All 689 (692). (Rule as to bar of suit is mandatory.)
- (38) AIR 1938 Rang 210 (211).
- [See ('85) AIR 1935 Cal 744 (746). (Where the defendants have failed to prove that the withdrawal of previous suit was without permission to bring a fresh suit, the suit is not barred by reason of O. 23 R. 1.)]
2. ('15) AIR 1915 All 32 (33).
- ('97-01) 2 Upp Bur Rul 286.
- [See also ('66) 1866 Agra 1 (6) (FB). (Suit withdrawn as compromised—Compromise not acted upon—If former position is restorable, then original cause of action revives—Otherwise not).]

[But see ('97-01) 2 Upp Bur Rul 284.]

3. ('28) AIR 1928 Rang 273 (274) : 6 Rang 494.
4. ('15) AIR 1915 All 32 (33).
- (85) AIR 1935 Cal 157 (158).
- (1900) 4 Cal W N 110 (112). ((1865) Bourke's Rep Part 7, page 162, Doubtful.)
- (88) AIR 1938 Rang 210 (211).
5. ('88) 1888 Pun Re No. 147.
6. ('30) AIR 1930 Lah 599 (600).
- (26) AIR 1926 Mad 490 (491). (Withdrawal without permission does not prevent the trial of a subject-matter so long as such trial is not affected by the principle of *res judicata*.)
- (28) AIR 1928 Lah 710 (712).
7. ('20) AIR 1920 Mad 545 (546).
- (39) AIR 1939 P C 110 (112) : 1939 Rang L R 358 : 66 Ind App 198 (P C).
8. ('39) AIR 1939 P C 110 (114) : 1939 Rang L R 358 : 66 Ind App 198 (PC). (Reversing AIR 1937 Rang 302.)
9. ('37) AIR 1937 Mad 718 (719). (Explanation 5 to Section 11 can be invoked only in respect of any adjudication made by the Court.)
- (39) AIR 1939 All 584 (585).
- [See ('37) AIR 1937 Mad 438 (443). (Dismissal under Order 23 does not amount to adjudication—It precludes only second suit on same cause of action.)]
10. ('89) 12 Mad 880 (886).
11. ('35) AIR 1935 Mad 909 (912).

**O. 23 R. 1**  
**Notes 35-39**

The prohibition enacted by sub-rule (3) applies to *suits* and not to *defences*. Thus, where a defendant raises a plea of set-off but withdraws it without the permission of the Court, he will not be precluded from raising the same plea again by way of a defence to a subsequent suit against him.<sup>12</sup>

**36. Erroneous order granting permission.** — An order for withdrawal of a suit with liberty to institute a fresh suit, contrary to the provisions of this rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void, and a fresh suit instituted upon leave so granted is not incompetent. Further, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw his first suit had *properly made such order*.<sup>1</sup> The undermentioned cases<sup>2</sup> in which a contrary view was held are not good law. But where there are a number of plaintiffs and the Court allows *some* of them alone to withdraw the suit without the consent of the others, the Court acts without jurisdiction and there should be deemed to be no withdrawal at all within the meaning of Order 23 Rule 1.<sup>3</sup>

**37. Effect of reversal of order granting permission.** — Where after a fresh suit is filed, the order permitting the withdrawal of the previous suit with leave to institute a fresh suit is reversed by the High Court in revision, the proper procedure is to declare the fresh suit null and void and to direct the lower Court to go on with the first suit from the stage at which the order set aside was passed.<sup>1</sup>

**38. Power of Court of Small Causes to allow withdrawal.** — A Presidency Small Cause Court which, after dismissing a suit, has granted a new trial, is seized of the case, not as a Court of revision but as an *original* Court and can allow the suit to be withdrawn under this rule.<sup>1</sup> But where a decree has been passed in favour of the plaintiff contingent on the opinion of the High Court on a certain question which is referred to it and the High Court decides against the plaintiff, the suit cannot be permitted to be withdrawn with liberty to sue again. The Small Cause Court must, in such a case, pronounce judgment in favour of the defendant.<sup>2</sup>

**39. Appeal.** — No appeal lies from an order allowing withdrawal of a suit with liberty to bring a fresh suit. Such an order is neither a decree nor an appealable order under Section 104 or O. 43 R. 1.<sup>1</sup> Nor does an appeal lie from an order as to

12. ('37) AIR 1937 Oudh 394 (395): 13 Luck 323.

**Note 36**

1. ('23) AIR 1923 Cal 269 (269).
  - ('21) AIR 1921 Cal 34 (38): 48 Cal 133 (F B).
  - ('12) 14 Ind Cas 175 (175) (All).
  - ('18) AIR 1918 Mad 1093 (1095).
  - ('71) 16 Suth W R 276 (276).
  - ('75) 23 Suth W R 345 (346).
  - ('22) AIR 1922 Pat 44 (46): 1 Pat 90 (F B).
  - ('81) 8 All 528 (529). (Plea as to order allowing withdrawal being had cannot be raised for first time at the hearing of second appeal in the subsequent suit.)
  - ('20) AIR 1920 Mad 1026 (1082).
  - ('20) AIR 1920 Lah 494 (496). (Application for probate and subsequent suit).
  - ('85) AIR 1935 Cal 739 (740). (Objection that previous suit had abated before leave to withdraw was granted to plaintiff.)
- [See also ('85) 1885 All W N 151 (151).

2. ('18) AIR 1918 Pat 575 (577): 3 Pat L Jour 404. ('20) AIR 1920 Pat 63 (64).

('16) AIR 1916 Cal 255 (256): 44 Cal 867. (Overruled by AIR 1921 Cal 34 (F B).)

3. ('22) AIR 1922 Pat 489 (490, 491): 1 Pat 228.

**Note 37**

1. ('18) AIR 1918 Pat 452 (454): 3 Pat L Jour 460.

**Note 38**

1. ('02) 29 Cal 239 (241). ('66) 3 Mad H C R 27 (28). (Can, but not bound to allow withdrawal.)

2. ('96) 24 Cal 129 (182, 183).

**Note 39**

1. ('84) 6 All 211 (213).
- ('11) 11 Ind Cas 880 (881) (Lah).
- ('80) AIR 1930 All 868 (864). (Order allowing the plaintiffs to withdraw as against certain defendants, not appealable.)
- ('26) AIR 1926 Oudh 185 (185).
- ('23) AIR 1923 Lah 267 (268).
- ('98) 1898 All W N 204 (204).

costs under this rule.<sup>3</sup> Where the Court refuses to permit a suit to be withdrawn with liberty to sue again, its order is not one affecting the decision of the case within the meaning of Section 105 and is therefore not open to attack in the appeal from the decree in the suit.<sup>3</sup> But where a Court, while dismissing a suit, reserves a right to institute a fresh suit, an appeal lies from the former part of the decree because the appeal in such a case is not from an "order" but from a decree.<sup>4</sup> So also, where the trial Court allows a suit to be withdrawn and, on the defendant appealing, the lower Appellate Court sets aside the order and dismisses the plaintiff's suit, the order of the lower Appellate Court amounts to a decree and is appealable to the High Court.<sup>5</sup>

**O. 23 R. 1**  
**Notes 39-42**

**40. Letters Patent Appeal.** — An order of a single Judge of a High Court refusing to set aside in revision an order of the lower Court allowing a plaintiff to withdraw his suit with liberty of bringing a fresh suit is a "judgment" within the meaning of Clause 15 of the Letters Patent and hence is appealable.<sup>1</sup> So also, an order of a single Judge of a High Court allowing the withdrawal of a suit with leave to sue afresh is a judgment and is appealable as such.<sup>2</sup>

**41. Revision.** — An order allowing the withdrawal of a suit with liberty to sue afresh is a decision of a case within the meaning of Section 115,<sup>1</sup> and is therefore open to revision if it is made on grounds not covered by O. 23 R. 1.<sup>2</sup> So also, an order permitting a partition suit to be withdrawn after the preliminary decree in the suit has been passed is open to revision.<sup>3</sup> Similarly, if the lower Court has not exercised a judicial discretion or has not applied its mind at all to the question, in ordering a

('28) AIR 1928 Mad 416 (418,419) : 51 Mad 664.

(Allowing withdrawal, not a decree.)

('19) AIR 1919 Oudh 116 (116).

('19) AIR 1919 Lah 313 (314).

('94) 16 All 19 (21).

('95) 17 All 97 (99).

('96) 1896 All W N 21 (21).

('93) 15 All 169 (170).

('91) 18 Cal 322 (323).

(1900) 27 Cal 362 (363).

('72) 17 Suth W R 229 (229, 230).

('89) AIR 1939 Lah 472 (472). (No distinction can be drawn between the cases where a suit is simply allowed to be withdrawn and the cases where the Courts though allowing the suit to be withdrawn add that the suit is dismissed.)

[But see ('86) 8 All 82 (84).

('04) 29 Bom 13 (18).]

2. ('27) AIR 1927 Nag 399 (400).

('98) 21 Mad 421 (422).

('39) AIR 1939 Lah 472 (472). (Such order is merely incidental to the order permitting withdrawal.)

3. ('25) AIR 1925 Cal 711 (713).

4. ('17) AIR 1917 All 134 (135, 136).

[See also ('04) 29 Bom 13 (18).]

5. (1900) 27 Cal 362 (363).

[See however ('85) AIR 1935 Oudh 486 (488). (No appeal lies against an order passed under O. 23 R. 1 (1) dismissing a suit as withdrawn by the plaintiff—*Obiter*.)]

#### Notes 40

1. ('07) 80 Mad 311 (312).

2. ('21) AIR 1921 Bom 267 (268) : 45 Bom 377.

#### Note 41

1. ('22) AIR 1922 Cal 58 (59).

('18) AIR 1918 Pat 372 (373) : 2 Pat L Jour 682. (Question left open.)

[But see ('15) AIR 1915 Cal 100 (100) : 41, Cal 632.]

2. ('25) AIR 1925 Oudh 596 (597).

('88) 11 Mad 322 (323).

('98) 15 All 169 (170).

('84) 6 All 211 (213).

('22) AIR 1922 Cal 58 (59).

('18) AIR 1918 Pat 485 (486) : 3 Pat L Jour 630.

('18) AIR 1918 Pat 372 (373) : 2 Pat L Jour 682.

('18) AIR 1918 Mad 699 (699).

('18) AIR 1918 Lah 329 (330).

('10) 5 Ind Ind Cas 187 (189) (Cal).

('15) AIR 1915 Mad 480 (481).

('17) AIR 1917 Cal 409 (410).

('17) AIR 1917 Cal 172 (172).

('17) AIR 1917 Cal 830 (830).

('12) 14 Ind Cas 33 (34) (Cal).

('21) AIR 1921 Pat 42 (43) : 6 Pat L Jour 112.

('23) AIR 1923 Lah 97 (98).

('25) AIR 1925 Lah 497 (498).

('26) AIR 1926 All 294 (295).

('30) AIR 1930 Lah 175 (176).

('25) AIR 1925 Oudh 61 (62).

('24) AIR 1924 Cal 751 (752).

('17) AIR 1917 Cal 86 (87).

('13) 21 Ind Cas 23 (24) : 37 Bom 682.

('25) AIR 1925 Oudh 291 (292, 293) : 27 Oudh

Cas 231.

('85) AIR 1935 Oudh 495 (495).

('85) AIR 1935 Pat 251 (252).

3. ('35) AIR 1935 Mad 445 (446).

**O. 23 R. 1**  
**Note 41**

suit to be withdrawn with liberty, the High Court can interfere in revision on the ground that the lower Court's order is vitiated by material irregularity in the exercise of its jurisdiction.<sup>4</sup> Thus, it has been held that if the lower Court orders a suit to be withdrawn with leave to sue afresh, *without giving any reasons*, it acts with material irregularity and its order is liable to be set aside in revision.<sup>5</sup> But where the lower Court has exercised a judicial discretion and allowed a suit to be withdrawn and the reasons assigned by it are within the scope of the rule, the High Court will not interfere with its discretion merely because the High Court itself might have taken a different view of the matter.<sup>6</sup> An order for withdrawal made *ex parte*<sup>7</sup> or made without any enquiry as to the circumstances justifying such withdrawal<sup>8</sup> is liable to be set aside in revision. But, where the Court, upon an application being made to it for permission to withdraw the suit, referred the matter to the other side and the other side stated that it had no objection provided that it got its costs and the Court thereupon allowed the application of the plaintiff, it was held that it could not be said that the Court had not applied its mind to the question and that, hence no revision lay.<sup>9</sup> An order refusing permission to withdraw a suit with liberty to bring another suit is *interlocutory* in nature and is not open to revision.<sup>10</sup>

4. ('12) 14 Ind Cas 97 (98) (All).
- ('35) AIR 1935 All 881 (882).
- ('34) AIR 1934 All 187 (189).
- ('34) AIR 1934 Cal 59 (60).
- ('25) AIR 1925 Oudh 140 (141).
- ('31) AIR 1931 Cal 396 (396).
- ('26) 95 Ind Cas 556 (556) (All).
- ('26) 92 Ind Cas 1030 (1031) (All).
- ('22) AIR 1922 All 185 (185).
- ('25) AIR 1925 All 466 (466) : 47 All 319.
- ('31) AIR 1931 All 19 (19, 20).
- ('27) AIR 1927 All 704 (705). (Discretion exercised without material—Revision lies.)
- ('35) AIR 1935 Pat 488 (488). (Failure of the lower Court to see whether the necessary conditions are existing, entitles the High Court to interfere in revision.)
- ('35) AIR 1935 All 740 (742) : 58 All 245.
5. ('88) 11 Mad 322 (323).
- ('31) AIR 1931 All 19 (19). (Order of lower Court should be in such terms as to make it possible for the High Court to be satisfied that there was *prima facie*, at any rate, proper ground for the Court's order.)
- ('22) AIR 1922 All 185 (185).
- ('31) AIR 1931 Cal 396 (396).
- ('18) AIR 1918 Nag 98 (94).
- ('28) 117 Ind Cas 864 (864) (Cal).
- ('18) AIR 1918 Pat 872 (878) : 2 Pat L Jour 682.
- ('16) AIR 1916 Mad 674 (674).
- ('17) AIR 1917 Cal 744 (744).
- ('12) 17 Ind Cas 647 (648) (All).
- ('29) AIR 1929 All 683 (684).
- ('31) AIR 1931 Cal 107 (108).
- ('22) 64 Ind Cas 82 (82) (Cal). (Plaintiff's allegation of misjoinder—Found against—No other reasons.)
- ('22) 64 Ind Cas 556 (558) (Cal). (Mere and vague allegation of "formal defect"—Not specific—No other reasons.)
- ('24) AIR 1924 Cal 751 (752).
- ('27) AIR 1927 All 522 (522) : 49 All 459.
- ('28) AIR 1928 All 98 (98) 50 All 199.

[But see ('02) 29 Cal 239 (241). (Order not containing ground specified in S. 373—It does not follow that Court was not satisfied as to the existence of such ground.)]

6. ('18) AIR 1918 All 418 (419) : 40 All 612.
- ('35) AIR 1935 All 284 (284).
- ('34) AIR 1934 All 214 (214).
- ('35) AIR 1935 Bom 28 (30) : 59 Bom 114.
- ('33) AIR 1933 Oudh 255 (256).
- ('08) 1903 All W N 12 (12).
- ('18) AIR 1918 Cal 534 (534).
- ('30) 125 Ind Cas 580 (580, 581) (All).
- ('21) AIR 1921 All 65 (66).
- ('24) AIR 1924 All 121 (122).
- ('20) AIR 1920 All 235 (235).
- ('26) AIR 1926 All 548 (548).
- ('27) AIR 1927 All 750 (750) : 50 All 143.
- ('32) AIR 1932 Lah 360 (361) : 13 Lah 537.
- ('32) 137 Ind Cas 804 (804) (Lah).
- ('38) AIR 1938 Bom 442 (443) : I L R (1939) Bom 66. (Not open to High Court in revision to consider whether lower Court exercised its discretion rightly.)
- [See ('12) 14 Ind Cas 414 (415) (All). (Where the order was held to be not open to objection as it promoted the ends of justice.)
- ('09) 32 All 148 (151). (The Privy Council refused to interfere with the exercise of discretion by the High Court.)]
- [See also ('36) AIR 1936 Mad 697 (698). (Opposite party sufficiently compensated by costs—High Court will not set aside order granting permission for fresh suit.)]
7. ('17) AIR 1917 Cal 633 (633, 634) : 44 Cal 454.
8. ('18) AIR 1918 Pat 452 (454) : 3 Pat L Jour 460.
- ('18) AIR 1918 Pat 261 (262) : 3 Pat L Jour 551.
9. ('38) AIR 1938 All 450 (451). (If the other party did not deny the existence of formal defect or other sufficient cause, there was nothing for the Court to examine.)
10. ('80) AIR 1980 Lah 599 (599).

See also the undermentioned case.<sup>11</sup>

As to powers of a special Judge appointed under Section 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), see the undermentioned case.<sup>12</sup>

See also Section 115 for a general discussion of the powers of the High Court in revision and Note 25 above.

**O. 23 R. 1  
Note 41**

**R. 2.** [S. 374.] In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

**O. 23 R. 2**

[1877, S. 374; 1859, S. 97.]

**1. Limitation.** — Under the present rule, a plaintiff withdrawing a suit under O. 23 R. 1 with liberty to sue again and instituting a fresh suit is not entitled to deduct from the period of limitation applicable to his second suit the time taken up by the withdrawn suit.<sup>1</sup> Section 14 of the Limitation Act does not apply where a suit is *withdrawn* by a plaintiff.<sup>2</sup> The rule provides that the law of limitation shall apply in the *same manner* as if the prior suit had not been brought. Hence a plaintiff is not deprived of the benefit of Section 31 of the Limitation Act merely because he has withdrawn a prior suit relating to the same subject-matter under O. 23 R. 1.<sup>3</sup> This rule applies only to a suit withdrawn under Rule 1 but that rule also does not apply except to cases *properly pending* in a Court in which the leave is granted. Therefore, where a Court has *no jurisdiction* to try the suit, its order granting leave to withdraw the suit with liberty to file a fresh suit does not fall within Rule 1. Hence this rule does not apply to such a case and Section 14 of the Limitation Act is applicable.<sup>4</sup>

Further, the present rule applies only where a period is fixed by the *law of limitation*. Hence, where a plaintiff who is required by the order of a Revenue Court to institute a suit within three months, does so within the three months but withdraws the suit with liberty to sue again, his subsequent suit brought on the basis of such liberty is not barred, though it may be instituted after the expiry of three months from the Revenue Court's order.<sup>5</sup>

See also Notes to S. 14 in the Authors' Commentaries on the Limitation Act.

11. ('88) AIR 1938 Cal 615 (618). (Decree-holder's application to withdraw from execution proceeding rejected on ground that third party had acquired interest in property — No revision lies especially at the instance of judgment-debtor.)

12. ('88) 12 Bom 684 (685). (Such Judge cannot in exercise of his revisional powers allow a plaintiff to withdraw suit with liberty to sue again.)

**Order 23 Rule 2 — Note 1**

1. ('18) 20 Ind Cas 205 (206) (Cal).

('84) AIR 1984 All 688 (691).

('88) 12 Bom 625 (633).

('87) AIR 1987 All 124 (126).

('88) AIR 1988 Bom 281 (282) : I L R (1988) Bom 327.

2. ('28) AIR 1928 All 402 (408).

('84) AIR 1984 All 688 (692).

('82) AIR 1982 All 877 (878). (*Obiter*.)

('05) 29 Bom 219 (225).

('16) AIR 1916 Mad 944 (945) : 89 Mad 936.

('87) AIR 1987 All 124 (126) : 1986 All W R 1014

(1015).

('35) AIR 1935 Bom 259 (260).

('88) AIR 1938 Bom 281 (282) : I L R (1938) Bom 327.

('39) AIR 1939 Cal 625 (625, 626). (Order 23, Rule 2, is apparently an exception engrafted on the provisions of S. 14, Limitation Act.)

3. ('12) 14 Ind Cas 175 (176) (All).

4. ('08) 35 Cal 924 (928). (Suit filed with leave of Registrar under Cl. 12 of the Charter—Leave bad—Withdrawal of suit—*Ultra vires*.)

[See also ('90) 18 Mad 451 (453). (Suits by some of obligees in one Court and others in another—One suit dismissed — Another withdrawn with permission to file fresh suit — Time saved by S. 14, Limitation Act.)]

5. ('14) AIR 1914 All 400 (401).

[See ('27) AIR 1927 All 98 (99). (The subsequent suit is a continuation of the prior suit.)]



O. 23 R. 3

**R. 3.** [S. 375.] Where it is proved to the satisfaction of the<sup>6</sup> Court that a suit has been adjusted<sup>7</sup> wholly or in part by any lawful agreement or compromise,<sup>8</sup> or where the defendant satisfies the plaintiff<sup>16</sup> in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded,<sup>17</sup> and shall pass a decree in accordance therewith so far as it relates to the suit.<sup>18</sup>

[1877, S. 375; 1859, S. 98. See S. 96 (3) and O. 20.]

### Local Amendments

#### OUDH

*Add the following proviso :*

"Provided that no agreement, compromise or satisfaction shall be recorded in a suit instituted under Section 92, Code of Civil Procedure, unless previous notice of the same has been given to the Legal Remembrancer to Government, and the Court, after hearing him, if he desires to be heard, decides to accept it."

#### RANGOON

*For Rule 3 the following shall be substituted, namely :*

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall either pass a decree in accordance therewith or shall decree that all further proceedings in the suit shall be stayed upon the terms of the said agreement, compromise or satisfaction with liberty to the parties to apply for the purpose of carrying the same into effect.

Provided that before recording an agreement, compromise or satisfaction in a suit instituted under the provisions of Section 92, Civil Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Advocate-General, Burma, or the officer with whose consent the suit was instituted, of the agreement, compromise or satisfaction proposed to be recorded. The Advocate-General or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction."

### Synopsis

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|--|---|
| 1. Legislative changes.  | 13a. Compromise of proceedings for setting aside award. See Sch. II Para. 15, Note 4. |
| 2. Scope of the Rule.  | 14. Compromise of guardianship proceedings.   |
| 3. Applicability to Revenue Courts.                                  | 15. Pre-decree agreements in bar of execution.  |
| 4. Applicability to mortgage suits.                                  | 16. "Where the defendant satisfies the plaintiff."                                    |
| 5. Applicability to divorce suits.                                   | 17. "Shall order such agreement, compromise or satisfaction to be recorded."          |
| 6. "Where it is proved to the satisfaction of the Court."            | 18. "Shall pass a decree in accordance therewith so far as it relates to the suit."   |
| 7. "Has been adjusted."  | 19. Where compromise includes matters not relating to the suit.                       |
| 8. "By any lawful agreement or compromise."                          | 20. Parties to the compromise.  |
| 9. Submission to award, if a valid adjustment.                       | 21. Compromise by minor's guardian. See Notes to Order 82 Rule 7.                     |
| 10. Agreement to take oath.  | 22. Compromise by Hindu widow.  |
| 11. Compromise of probate proceedings.                               |   |
| 12. Compromise of suit under the Dekkhan Agriculturists' Relief Act. |   |
| 13. Compromise pending arbitration.                                  |   |



**23. Compromise by pleader.****24. Effect of consent decree and admissibility in evidence.****25. Registration, if necessary.****26. Stamp.****27. Execution of consent decree.****28. Mode and effect of setting aside compromise decrees.****29. Compromise of appeal.****30. Compromise of execution proceedings. See Rule 4.****31. Appeal.****32. Revision.****33. Construction of compromise decrees.****O. 23 R. 3  
Notes 1-3***Other Topics (miscellaneous)*

Compromise not binding on non-parties thereto.

See Note 20.

Compromise to party's disadvantage not invalid.

See Note 8.

Jurisdiction of Court under the rule. See Note 18.

Partial award not invalid. See Note 3.

Procedure in case of denial of compromise. See Notes 2 and 6.

Procedure under this rule not formal. See Note 17.

**1. Legislative changes. —**

1. The words "where it is proved to the satisfaction of the Court that" are new. See Notes 2 and 6 below.

2. The words "the Court shall *order* such agreement, compromise or satisfaction to be recorded" have been substituted for the words "such agreement, compromise or satisfaction shall be recorded." This makes it clear that in every case of a compromise decree, there should be an *order* recording the compromise from which an appeal is provided by Order 43 Rule 1 (m).

3. The words at the end of Section 375 "such decree shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction" have been omitted and a new sub-section has been added to Section 96, providing that no appeal lies from a consent decree.

**2. Scope of the Rule. —** After the institution of a suit it may be adjusted by the parties either *wholly* or *in part* by any lawful agreement or compromise. The defendant may also *satisfy* the plaintiff in respect of the *whole* or *any part* of the subject-matter of the suit. In such cases, on the application of the parties the Court *shall order* such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith *so far as it relates to the suit*. Where the agreement or compromise relates to matters *entirely extraneous* to the suit, no decree can be passed in terms of such agreement or compromise under this rule.

The Court must be *satisfied* that there has been a lawful agreement or compromise; and when one of the parties disputes the legality of the compromise or agreement, the Court should investigate the matter, and, if it finds that there has been a lawful compromise, should pass a decree in terms thereof so far as such compromise relates to the suit.<sup>1</sup>

The word "compromise" is more comprehensive than the word "agreement." It means an adjustment of claims in dispute by mutual concessions, and also a mutual promise of two or more parties at difference, to refer the ending of their controversy to arbitrators.<sup>2</sup>

**3. Applicability to Revenue Courts. —** The rule applies to revenue as well**Order 23 Rule 3 — Note 2**

1. ('85) AIR 1935 All 187 (188) : 57 All 426.  
(Rule is mandatory.)

('84) AIR 1984 Mad 887 (840) : 57 Mad 892.  
(Provisions of this rule are imperative.)

('84) AIR 1984 Pat 582 (582, 583).

('87) AIR 1987 Pat 11 (12) : 15 Pat 879.

[See ('34) AIR 1934 Pat 880 (381).]

2. See Wharton's Law Lexicon, 13th Edn., p. 198.

('27) AIR 1927 Bom 565 (567, 578) : 51 Bom 908.

('81) AIR 1981 Oudh 127 (129) : 6 Luck 591.

('89) AIR 1989 Nag 186 (187) : 1 L R (1989) Nag 250 (F B).

**O. 23 R. 3  
Notes 3-6**

as civil proceedings.<sup>1</sup> It does not, however, apply to proceedings for the appointment of common manager under Section 93 of the Bengal Tenancy Act.<sup>2</sup> Nor does it apply to a rent suit under that Act, though a compromise in such suits can be recorded by the Court under Section 147A of that Act which is identical in terms with this rule.<sup>3</sup> The rule does not, likewise, apply to proceedings under some other special Acts.<sup>4</sup>

**4. Applicability to mortgage suits.** — The rule applies also to suits on mortgages, so that it is open to the Courts to decree such suits on terms settled between the parties, instead of in the form directed by Order 34.<sup>1</sup> Similarly, the proceedings for a final decree, after the preliminary decree has been passed, are proceedings in *suit* and can be compromised.<sup>2</sup> See Note 14 to O. 34 R. 5 for a full discussion. So also, the rule applies to the adjustment of the claim of a mortgagee for a personal decree against the mortgagor under O. 34 R. 6.<sup>3</sup> But a mere agreement to *extend the time* given by the preliminary decree for the payment of the mortgage money does not amount to an adjustment of the suit.<sup>4</sup> This rule cannot be extended by analogy to proceedings under Section 83 of the Transfer of Property Act.<sup>5</sup>

**5. Applicability to divorce suits.** — Where a decree *nisi* has been passed in a suit for dissolution of marriage it is competent to the Court, where the parties consent, not to make the decree absolute.<sup>1</sup>

**6. "Where it is proved to the satisfaction of the Court."** — These words are new. Under the old Code there was a conflict of decisions as to whether, where a compromise was alleged by one party and denied by the other, or where one of the parties to the compromise was not willing to abide by the compromise, the Court had the power to record the compromise and pass a decree thereon. On the one hand, it

**Note 3**

1. ('18) AIR 1918 Oudh 412 (417) : 21 Oudh Cas 846.
2. ('06) 4 Cal L Jour 564 (565).
3. ('20) AIR 1920 Pat 602 (604) : 4 Pat L Jour 667.
4. See S. 196 of the Orissa Tenancy Act (II of 1918) and S. 199 of the Madras Estates Land Act (I of 1908).

**Note 4**

1. ('21) AIR 1921 Pat 320 (321).
2. ('37) AIR 1937 All 108 (112). (Final decree for foreclosure based on a preliminary decree which had been passed as a result of a compromise.) [See ('84) AIR 1934 Oudh 44 (45) : 9 Luck 387.]
3. ('17) AIR 1917 Nag 79 (80). (Applies to proceedings after conditional decree.)
4. ('19) AIR 1919 Sind 64 (65) : 18 Sind L R 185.
5. ('27) AIR 1927 Oudh 275 (276).
6. ('17) AIR 1917 Pat 577 (577) : 2 Pat L Jour 538. (Payment out of Court after preliminary decree is adjustment under this rule.)
7. ('85) AIR 1935 Pat 885 (895) : 14 Pat 488.
8. ('36) AIR 1936 Oudh 152 (153) : 11 Luck 500. (Payment out of Court can be treated as adjustment of suit under this rule.)
9. ('85) AIR 1935 Oudh 818 (815) : 11 Luck 116. (In this case it is held that there is inconsistency between O. 34 R. 5 which requires payment under preliminary mortgage decree to be made into Court and this rule which recognizes payment

made out of Court and in order to get over the inconsistency it is held that if payment out of Court is admitted, it may be recorded as an adjustment under this rule but if it is disputed it being clearly in disregard of O. 34 R. 5 cannot be recorded. It is submitted that the distinction drawn does not seem to be correct. This rule, if it applies at all, will apply whether the payment is admitted or not and the Court has power under this rule to investigate the dispute and determine whether the alleged payment has been made or not.)

10. ('36) AIR 1936 All 9 (10, 11) : 58 All 565.
11. ('39) AIR 1939 All 28 (29). (Application by judgment-debtor before preparation of final decree for recording part satisfaction of the decree — *Held*, application fall under O. 23 R. 3.)
12. ('39) AIR 1939 All 174 (175).
13. [But see ('32) AIR 1932 Lah 281 (282). (Such payment is not an adjustment under this rule.)
14. ('35) AIR 1935 Lah 168 (169).
15. ('39) AIR 1939 Lah 79 (81) : I L R (1939) Lah 818. (Payment out of Court under preliminary decree for sale is contrary to O. 34 R. 4 and cannot be recognized.)]
16. 3. ('36) AIR 1936 Mad 84 (89) : 59 Mad 188 (FB). (Proceedings for personal decree are not proceedings in execution.)
17. 4. ('28) AIR 1928 Rang 194 (195) : 6 Rang 285.
18. 5. ('90) 18 Mad 316 (318).

**Note 5**

1. ('88) 10 All 559 (562, 563).

was held by the High Courts of Madras,<sup>1</sup> Calcutta<sup>2</sup> and Bombay,<sup>3</sup> the Chief Court of the Punjab<sup>4</sup> and the Judicial Commissioner's Courts of Nagpur<sup>5</sup> and Oudh<sup>6</sup> that the Court had the power to enquire into the matter, to record it if proved, and to pass a decree thereon; on the other hand, it was held by the High Court of Allahabad<sup>7</sup> that under Section 375, the Court could record a compromise and pass a decree thereon only when *at the time of moving the Court* the parties were agreed as to the compromise and the decree to be passed on it. The present rule makes it clear that the Legislature has adopted the former view, *viz.*, that the Court has jurisdiction, in the case of a dispute between the parties as to the compromise, to enquire into, and decide whether there has been a lawful compromise in terms of which the suit should be decreed.<sup>8</sup> The provision in this rule for an inquiry about the fact and lawfulness of a compromise of a suit in the suit itself is a speedier alternative to a separate suit for specific performance of the contract to compromise the suit on certain terms.<sup>9</sup> As to whether and when *appeal* lies from a decree passed under such circumstances, see Note 15 to Section 96 *ante*.

The onus of establishing that a suit has been adjusted in a lawful manner is on the person who alleges the same.<sup>10</sup> It is open to the Court to decide the matter by taking evidence in the usual way or upon affidavits.<sup>11</sup> The agreement compromising the suit may be written or oral,<sup>12</sup> and may be proved by oral<sup>13</sup> or documentary evidence. The compromise need not be presented by the parties themselves.<sup>14</sup> A compromise otherwise unobjectionable is not vitiated by the want of signature of a party.<sup>15</sup> A compromise disallowed by the Court cannot be again set up in execution of the decree in the suit.<sup>16</sup>

#### Note 6

1. ('96) 19 Mad 419 (421, 422).  
(1900) 23 Mad 101 (104, 105).  
(86) 9 Mad 103 (106, 107).  
(85) 8 Mad 482 (488).
2. ('97) 24 Cal 908 (915). (Overruling 11 Cal 250.)
3. ('96) 20 Bom 304 (308).  
(92) 16 Bom 202 (208, 209).  
(83) 7 Bom 304 (308).
4. ('96) 1896 Pun Re No. 8, page 21.  
(88) 1888 Pun Re No. 182, page 477.
5. ('99) 12 C P L R 56 (58).
6. ('99) 2 Oudh Cas 67 (72).  
(02) 5 Oudh Cas 49 (58).
7. ('92) 14 All 350 (352).
8. ('15) AIR 1915 All 332 (338) : 38 All 75.  
(18) 19 Ind Cas 786 (787) (Bom).  
(88) AIR 1938 Pat 306 (427) : 12 Pat 359.  
(16) AIR 1916 Cal 479 (481).  
(09) 4 Ind Cas 5 (6) (Cal).  
(10) 6 Ind Cas 857 (859) (All).  
(12) 15 Ind Cas 478 (479) (Lah).  
(13) 21 Ind Cas 689 (640) (Mad).  
(27) AIR 1927 P C 204 (205) (P C).  
(24) AIR 1924 Cal 991 (992).  
(28) AIR 1928 Lah 204 (205).  
(30) AIR 1930 Lah 293 (294). (Binding nature of compromise.)  
(29) AIR 1929 Pat 102 (102).  
(88) AIR 1938 Bom 85 (86).  
(87) AIR 1987 Pat 89 (40).  
[See also ('85) AIR 1935 Cal 239 (240) : 62 Cal 229.]  
[But see ('84) AIR 1984 Cal 648 (644).]

9. ('33) AIR 1933 Pat 306 (403) : 12 Pat 359.
10. ('37) AIR 1937 Pat 11 (12) : 15 Pat 379.
11. ('83) 7 Bom 304 (309).  
(02) 5 Oudh Cas 49 (53).  
(99) 2 Oudh Cas 67 (72).  
(96) 20 Bom 304 (308).  
(36) AIR 1936 Mad 347 (350).  
[See ('36) AIR 1936 Sind 59 (61) : 29 Sind L R 437. (The general rule, that evidence should be recorded before a decision is made and not after should also be followed in cases in which the Court records compromise arrived at between the parties.)  
[See also ('38) AIR 1938 Bom 85 (86). (Recording of compromise—Notice of motion by party may be taken out.)]
12. ('09) 4 Ind Cas 5 (6) (Cal).  
(05) 3 Low Bur Rul 243 (243).  
[See also ('39) AIR 1939 Rang 149 (150). (In case of complicated compromise it is more desirable that its terms should be drawn up into writing before they can be strictly proved.)]
13. ('16) AIR 1916 Mad 849 (850).  
[See also ('39) AIR 1939 Rang 149 (150). (Court must look with suspicion on cases of elaborate compromises sought to be proved by oral evidence when one party denies the compromise.)]
14. ('17) AIR 1917 Lah 282 (283) : 1917 Pun Re No. 78.
15. ('14) AIR 1914 Lah 130 (131). (In this case the person, who later on objected to the compromise, was a party to the suit and was also represented by another person, who had a power of attorney in his favour.)
16. ('71) 3 N W P H C R 81 (81).

**O. 23 R. 3**  
**Note 7**

**7. "Has been adjusted."** — In order that the rule may apply, there must be a *completed agreement* between the parties<sup>1</sup> and the agreement *must amount to an adjustment*, in whole or in part, of the suit.<sup>2</sup> The following cases will show when a suit can be said to be adjusted and when not —

- (1) Where a case is adjourned on the ground that the parties contemplated compromising the matter out of Court, there is no adjustment of the suit within this rule.<sup>3</sup>
- (2) Where parties agree that the suit should be disposed of in one way if a certain simple fact was found to exist and in another way if it was found not to exist, it has been held by the High Court of Calcutta that it amounts to an adjustment of the suit.<sup>4</sup> The High Court of Allahabad has taken a contrary view.<sup>5</sup> See also the undermentioned decision.<sup>6</sup>
- (3) An agreement between the parties to a suit to abide by the final decision which may be made in another proceeding amounts to an adjustment when that decision is actually passed.<sup>7</sup>
- (4) (a) An agreement *between the parties* that a dispute is to be settled in one way or the other in accordance with the statement of a third person is an adjustment.<sup>8</sup>  
(b) But an agreement between the parties to *refer their disputes* to a third party's decision and abide by his terms is not an adjustment, till the terms are stated and *accepted*.<sup>9</sup>

**Note 7**

1. ('16) AIR 1916 Pat 159 (160). (Parties making mutual concession with a view to terminate the litigation—Agreement.)
- ('11) 9 Ind Cas 426 (427) (Oudh). (Mere offer of certain terms by plaintiff which are rejected by defendant not enough.)
- ('20) AIR 1920 Mad 13 (18). (Mere agreement to draw up a formal document does not prevent the terms settled being a binding agreement unless it is also agreed that till the formal document is perfected, there should be no agreement.)
- ('25) AIR 1925 Cal 866 (870). (If the terms of an agreement are intelligible, and the agreement is binding between the parties, it cannot be avoided by one of the parties on the ground, that he does not understand whether a particular matter is included in those terms or not.)
- ('80) AIR 1930 Sind 217 (218). (Inchoate agreement — Evidence of completion is necessary — Agreement is ineffective without it.)
- ('24) AIR 1924 P C 200 (201) (P C). (Parties not *ad idem*—No agreement of compromise.)
- ('84) AIR 1984 Cal 846 (847) : 61 Cal 910.
2. (1900) 2 Bom L R 118 (119). (Agreement that should plaintiff succeed in his suit with regard to certain land, he should purchase the land from the defendant for a certain price does not amount to an adjustment of the suit.)
- ('80) AIR 1930 Sind 217 (217). (Rule applies to adjustment of whole or part of suit.)
- ('28) AIR 1928 Pat 293 (294). (Partial adjustment — Suit must proceed in usual way in respect of portion not compromised.)
- ('89) AIR 1939 Rang 300 (303) : 1939 Rang L R 280 (F B). (Adjustment means settlement and harmonizing of disputes—Where there exists no settlement and no harmony dispute cannot be

said to have been adjusted by lawful agreement or compromise)

3. ('31) AIR 1931 Cal 205 (206).
- ('29) AIR 1929 Mad 416 (417).
4. ('17) AIR 1917 Cal 827 (828).
5. ('92) 14 All 141 (144). (Agreement to make disposal of suit depends upon a certain fact being found upon a certain document or not — Agreement is not "adjustment" as it leaves something to be done by the Court.)
6. ('36) AIR 1936 Mad 856 (857). (Defendant agreeing that if the key which he produced should not fit the lock of the suit house, suit should be decreed—Defendant will be estopped from resiling from agreement apart from question of adjustment.)
7. ('19) AIR 1919 Mad 546 (547). (Distinguishing 15 Ind Cas 378 on ground that terms of agreement in that case were not clear.)
- [But see ('35) AIR 1935 Rang 482 (482). (Agreement between parties that damages claimed by landlord in suit should follow decision in tenant's title suit—Tenant's title suit dismissed — Such agreements *held* had nothing to do with adjustments of suits under O. 23 R. 3—A I R 1925 All 271, Followed.)]
8. ('24) AIR 1924 All 570 (570) : 46 All 710.
- ('38) AIR 1938 All 861 (880, 889) : 56 All 89 (SB).
- ('32) AIR 1932 All 166 (167, 168).
- ('27) AIR 1927 Lah 99 (100).
- ('87) AIR 1937 All 701 (702, 704).
- [See also ('38) AIR 1938 All 853 (854). (In this case the same principle was held applicable to an agreement of the defendant to be bound by a statement of the plaintiff and A I R 1938 All 861 (F B) was relied on.)]
9. ('30) AIR 1930 All 162 (168) : 52 All 235.
- ('27) AIR 1927 All 614 (615) : 50 All 51.

- (c) When a dispute is referred by the parties to a third party's decision, there is a *locus penitentiae* to withdraw from such agreement till the third party functions.<sup>10</sup>
- (5) A compromise which either party has the option of repudiating afterwards is not an adjustment of the suit.<sup>11</sup>
- (6) An agreement to abide by the decision of the Court whether right or wrong amounts to a compromise within this rule.<sup>12</sup>
- (7) An agreement for making the decision of Court depend on contingencies *beyond* the control of parties is not an adjustment,<sup>13</sup> while it will be an adjustment if the contingency is within the power of the parties themselves.<sup>14</sup>
- (8) The abandonment of an issue does not amount to a compromise.<sup>15</sup>
- (9) It has been held by the Allahabad High Court<sup>16</sup> that an agreement that the suit should be decreed if a certain witness eats food served by the plaintiff is binding on the parties and if the witness eats the food the suit should be decreed as per the agreement. In the above case it was held that the present rule did not apply to it. In an earlier case of the same High Court it was held that such an agreement concluded the matter only with reference to one of the issues in the case, *viz.*, that of legitimacy and that the other issues should be tried on the merits.<sup>17</sup> According to the Oudh Judicial Commissioner's Court<sup>18</sup> such an agreement does not constitute an adjustment within this rule but the agreement and its performance would be evidence on the issue of legitimacy. In the undermentioned case<sup>19</sup> it was held by the Madras High Court that an agreement by a party that the suit should be decided in a particular way if a certain event should happen will *estop* him from resiling from the agreement afterwards apart from the question of adjustment. The Rangoon High Court in the undermentioned case<sup>20</sup> held that an agreement that the suit should be decided according to the decision in another suit then pending is not an "adjustment" but is binding on the parties.

It has been held that a suit may be compromised even after a preliminary decree provided that the final decree has not been passed.<sup>21</sup> Similarly, it has been held that there can be a 'satisfaction' (under this rule) of the plaintiff's claim between the preliminary and final decrees in a suit.<sup>22</sup> For full discussion, see Note 14 to O. 34 R. 5.

(13) 19 Ind Cas 450 (450) : 6 Sind L R 166.

(14) AIR 1914 Sind 189 (189) : 8 Sind L R 91.

10. ('30) AIR 1930 All 162 (163) : 52 All 235.

(33) AIR 1933 All 184 (185).

(31) AIR 1931 All 557 (559) : 53 All 673.

(39) AIR 1939 All 92 (94) : I L R (1939) All 50.

11. ('14) AIR 1914 Lah 906 (907) : 1914 Pun Re No. 24.

12. ('25) AIR 1925 All 558 (558) : 47 All 921.

(21) AIR 1921 All 810 (810) : 43 All 266.

(29) AIR 1929 Oudh 451 (452) : 5 Luck 391.

(28) AIR 1928 All 497 (498). (Judge deviating from ordinary procedure on the strength of agreement between parties and deciding on question of fact—Findings of fact are binding on the parties.)

13. ('27) AIR 1927 Oudh 222 (223).

(24) AIR 1924 Oudh 367 (368) : 27 Oudh Cas 157.

(28) AIR 1928 Cal 108 (110). (Parties agreeing to withdraw their respective pleas on certain contingency — Contingency not occurring — There

is no compromise within O. 23 R. 3.)

14. ('05) 17 Mad L Jour 37 (38) (Agreement that suit should be dismissed if within a given time the plaintiff failed to convey the suit lands to the defendant.)

15. ('99) 22 Mad 538 (546).

16. ('25) AIR 1925 All 271 (272) : 47 All 456.

17. ('24) AIR 1924 All 911 (912).

18. ('24) AIR 1924 Oudh 367 (368) : 27 Oudh Cas 157.

19. ('36) AIR 1936 Mad 856 (857).

20. ('35) AIR 1935 Rang 482 (482).

21. ('86) AIR 1936 Oudh 320 (320, 321) : 12 Luck 260. (Appeal against preliminary decree pending — Trial Court can entertain application to record compromise unless Appellate Court has stayed proceedings.)

22. ('35) AIR 1935 Pat 385 (395) : 14 Pat 488. (There is nothing in the rule which makes it inapplicable to a suit after the preliminary decrees and before the final decree.)

**O. 28 R. 3**  
**Note 8**

8. "By any lawful agreement or compromise." — The rule restricts the power of the Court to record agreements or compromises, to such agreements as are *lawful* and the Court is therefore bound to enquire into the question whether the compromise it is asked to record is a lawful one or not.<sup>1</sup> If a *part* of the compromise is unlawful and it can be separated from the rest, the Court can record that portion of the compromise which is lawful.<sup>2</sup> Ordinarily, when investigating the fact and lawfulness of a compromise under this rule, it is irrelevant to examine the strength or weakness of the suit itself.<sup>3</sup>

The expression "lawful" refers to the *legality* of the terms of the agreement and not to its *binding character*. Therefore, an agreement or compromise may be lawful within this rule although it may not be *binding* on one of the parties on the ground of its having been brought about by coercion, undue influence or fraud.<sup>4</sup> The word "lawful" means lawful within the meaning of the Contract Act, that is to say, the rule requires an agreement which is legally enforceable; but it is not necessary that in order to enable a Court to record a compromise the terms, which are to be complied with after decree, should be specifically enforceable under the Specific Relief Act.<sup>5</sup>

The following have been held to be agreements which are *unlawful* within the meaning of this rule —

- (1) Agreements *prohibited* by law such as an agreement to transfer a property which is inalienable in law.<sup>6</sup>
- (2) Agreements which are *opposed to public policy*, such as an agreement for the alienation of a religious office,<sup>7</sup> or an agreement relating to a public trust

**Note 8**

1. ('26) AIR 1926 Nag 194 (195).
- ('34) AIR 1934 Pat 582 (582, 583).
- ('11) 11 Ind Cas 280 (284) (Cal).
- ('24) AIR 1924 Cal 159 (159).
- ('11) 9 Ind Cas 875 (880) : 35 Mad 75.
- ('19) AIR 1919 Pat 146 (155) : 4 Pat L Jour 580.
- ('10) 7 Ind Cas 481 (482, 483) (Cal).
- ('10) 8 Ind Cas 651 (652) : 35 Bom 190.
- ('35) AIR 1935 Bom 54 (64).

[See ('33) AIR 1933 Pat 306 (399) : 12 Pat 359. (Grossly unfair compromise will raise presumption of unconscionableness and fraud and may be relieved against.)]

2. ('10) 6 Ind Cas 857 (859) (All).
- ('28) AIR 1928 Pat 495 (496). (Compromise was held not illegal, inasmuch as the substantial portion of it was not against the law of the locality.)
- [See also ('19) AIR 1919 Cal 458 (458). (Separate petitions by both parties to a suit for a decree — Held, not a compromise under this rule.)]

3. ('38) AIR 1938 Pat 306 (389) : 12 Pat 359.
4. ('28) AIR 1928 All 494 (496) : 50 All 748.
- ('35) AIR 1935 All 137 (138, 139) : 57 All 426. (Party executing compromise cannot avoid it under O. 28 R. 8 on ground of fraud.)
- ('32) AIR 1932 All 478 (479). (The fact that the compromise infringes rights of third party will not make it unlawful.)
- ('92) 1892 Pun Re No. 114, page 390.
- ('90) 1890 Pun Re No. 81, page 251.

('25) AIR 1925 All 266 (267).

('36) AIR 1936 Mad 347 (350). (Mere fact that the compromise is voidable is no reason for Court refusing to record it.)

[See ('40) AIR 1940 Bom 60 (61) : 41 Bom L R 1290 (1292). (The term "lawful agreement" in the rule excludes not only unlawful agreements the object or consideration for which is unlawful as defined in the Contract Act, but also all agreements which on the face of them are void.)]

[But see ('27) AIR 1927 Lah 546 (549). (In the peculiar circumstances in the case it was held that the compromise which had been brought about by undue influence was unlawful and could not be recorded.)]

5. ('33) AIR 1933 Pat 306 (405) : 12 Pat 359.
6. ('19) AIR 1919 Mad 429 (431). (Mortgage invalid under Section 4 of the Madras Impartible Estates Act.)
- ('20) AIR 1920 Nag 85 (87). (Compromise involving sale of *thekadari* interest the transfer of which is prohibited by law.)
- ('20) AIR 1920 Pat 159 (160). (Compromise amounting to a clear violation of statutory rules is not "lawful.")
- ('10) 5 Ind Cas 236 (238) (Cal). (Compromise in excess of powers conferred by S. 90 of the Probate and Administration Act is unlawful.)
7. ('15) AIR 1915 Mad 561 (568) : 38 Mad 860.
- ('02) 26 Mad 81 (83).

which is detrimental to its interest,<sup>8</sup> or an agreement which amounts to a breach of trust.<sup>9</sup>

(8) Agreements which involve injury to a third party.<sup>10</sup>

(4) According to the High Courts of Allahabad<sup>11</sup> and Madras<sup>12</sup> an agreement amounting to the transfer of a *spes successionis* which is prohibited by Section 6 of the Transfer of Property Act, is not lawful. According to the High Court of Calcutta<sup>13</sup> an agreement between expectants to divide a particular property in a certain way on the happening of a particular contingency is lawful. Where certain reversioners executed a sale deed of a *spes successionis* before the death of the limited owners but entered into a compromise as to it *after the limited owner's death*, it was held by the Chief Court of Oudh that the compromise was not unlawful.<sup>14</sup>

For other instances, see the undermentioned cases.<sup>15</sup>

A compromise containing an agreement for the withdrawal of a prosecution for a *compoundable offence*,<sup>16</sup> or for allowing a relief which is barred by limitation,<sup>17</sup> is not unlawful. Nor is a compromise unlawful merely because the parties do not get the shares to which they would be legally entitled<sup>18</sup> or because it contains a penal provision.<sup>19</sup> A compromise in which one party transfers his right to another is not bad on the ground of *lis pendens*.<sup>20</sup>

A *promise* to do a thing can be a good consideration for the adjustment of a suit; it is not necessary that the promise should have been carried out before the adjustment can be recorded under this rule.<sup>21</sup> The rule contemplates an adjustment by *act of parties* and not an adjustment which has a statutory operation. Hence, a scheme of arrangement which when sanctioned by the Court acquires a statutory

8. ('30) AIR 1930 Mad 629 (630) : 53 Mad 398.

('22) AIR 1922 Mad 429 (432). (Compromise relating to public trust is not necessarily unlawful. But Court must scrutinize compromise to see if it is not detrimental to trust.)

('15) AIR 1915 Mad 915 (919). (Compromise by *matadhipathi* under influence of indirect motive, viz., to avoid appearing in Court as a witness, is breach of duty and not lawful.)

('27) 106 Ind Cas 645 (646) (Pat). (Agreement by mahant to transfer *mutt* property for no necessary purpose is unlawful.)

('01) 8 Cal W N 404 (405, 406). (Decree for removal of mahant — Appeal pending — Parties compromising suit not lawful.)

[See ('07) 34 Cal 249 (255, 256). (Compromise by shebait for benefit of endowment is valid and binding.)]

[See also ('15) AIR 1915 Cal 193 (194). (Suit relating to public trust under S. 92, C. P. C., cannot be compromised.)]

[But see ('20) AIR 1920 Mad 508 (509). (*Bona fide* compromise by trustee of public trust is lawful — It is not for Court to enquire whether it is in fact beneficial to trust or not.)]

9. ('08) 81 Mad 286 (250) : 35 Ind App 176 (PC). (Compromise by trustee allowing certain castes to worship in a temple against the settled custom.)

10. ('19) AIR 1919 Pat 146 (155) : 4 Pat L Jour 580.

('19) AIR 1919 Pat 825 (828).

('05) 82 Cal 561 (566). (Compromise between the plaintiffs and the executors in administration suit

ignoring the rights of the other defendants.)

('23) AIR 1923 Oudh 252 (253). (Compromise between plaintiff and one defendant prejudicial to other defendants.)

('24) AIR 1924 Cal 159 (160). (*A* suing *B*, the mortgagor and *C* the puisne mortgagee—*A* and *B* compromising whereby *A* agrees to pay *B* more than what was due.)

11. ('09) 2 Ind Cas 865 (879) (All).

12. ('07) 30 Mad 255 (263).

13. ('82) 8 Cal 138 (145).

14. ('29) AIR 1929 Oudh 63 (64) : 4 Luck 181.

15. ('35) 61 Cal L Jour 88 (90). (Agreement which purports to deal with the rights of certain minors who are not parties to the suit is not a lawful agreement as it involves and implies injury to the property of minors.)

('36) 38 Pun L R 283 (283, 284). (Compromise affecting the rights of a person who is not a party to it cannot be considered to be lawful.)

16. ('30) AIR 1930 Lah 860 (861).

[But see ('88) 1883 All W N 145 (145). (Compromising with the object of escaping from criminal prosecution held to be unlawful.)]

17. ('20) AIR 1926 Oudh 311 (313). (Compromise preventing consideration of legal bar to claim is not unlawful.)

18. ('20) AIR 1920 Cal 269 (269).

19. ('26) AIR 1926 All 278 (280).

20. ('85) AIR 1935 Bom 54 (64).

21. ('37) AIR 1937 Pat 39 (39). (Defendant agreeing to execute sale deed in consideration of plaintiff agreeing to have suit decided in parti-



**O. 23 R. 3**  
**Notes 8-9**

operation under Section 153, sub-section (2) of the Companies Act cannot be said to be a lawful agreement or compromise within the meaning of this rule.<sup>22</sup>

**9. Submission to award, if a valid adjustment.** — Under the old Code it was held that where the parties to a pending suit referred the matter to arbitration the award could be filed as an adjustment under this rule.<sup>1</sup> The present Code, however, contains a new Section, namely Section 89, which provides as follows :

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by *any other law* for the time being in force all *references* to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder *shall be governed by the provisions contained in the Second Schedule.*"

The question has arisen whether, in view of this Section a submission to arbitration by parties without the intervention of the Court and the award passed by the arbitrators on such submission can be filed as an adjustment by way of compromise under this rule. On this question there is a conflict of opinion. According to the High Courts of Calcutta,<sup>2</sup> Lahore,<sup>3</sup> Nagpur<sup>4</sup> and Rangoon,<sup>5</sup> the words "any other law in force" cannot include the *provisions of the Code itself*, and therefore cannot include the provisions of this rule. Hence, in view of Section 89 such a matter must be governed only by the provisions of the Second Schedule, and the submission and the award cannot be filed as an adjustment under this rule. On the other hand, the High Courts of Allahabad,<sup>6</sup> Madras<sup>7</sup> and Patna,<sup>8</sup> the Chief Court of Oudh<sup>9</sup> and the Judicial Commissioner's Court of Sind<sup>10</sup> are of the opinion that the words "any other law in force" include the provisions of this rule and that therefore such submission and award can be filed as an adjustment by way of a compromise within the meaning of this rule. The High Court of Bombay has reached the same conclusion but on a

cular way—Sale deed need not have been executed before defendant can apply under this rule.)

22. ('97) AIR 1937 Cal 881 (882).

**Note 9**

1. ('97) 21 Bom 335 (341).

('96) 20 Bom 304 (308).

('01) 24 Mad 326 (330).

('02) 26 Bom 76 (78, 80, 81).

2. ('22) AIR 1922 Cal 404 (406) : 49 Cal 608.

('35) AIR 1935 Cal 239 (241) : 62 Cal 229.

('84) AIR 1934 Cal 643 (644). (But otherwise if consented to by parties.)

('21) AIR 1921 Cal 238 (239).

('27) AIR 1927 Cal 887 (888) : 55 Cal 533. (But otherwise if consented to by parties.)

[But see ('20) AIR 1920 Cal 269 (269).]

3. ('21) AIR 1921 Lah 282 (233). (But otherwise if consented to by parties.)

('30) AIR 1930 Lah 860 (861). (Do.)

('86) AIR 1936 Lah 374 (375).

[See also ('81) AIR 1981 Lah 594 (595).]

4. ('18) AIR 1918 Nag 237 (239).

('39) AIR 1939 Nag 186 (189, 190) : ILR (1939) Nag 250 (F B). (Overruling AIR 1926 Nag 405

and AIR 1928 Nag 173 — The following decisions must also be deemed as impliedly overruled : AIR 1938 Nag 492, AIR 1936 Nag 8, AIR 1931 Nag 66 and AIR 1918 Nag 80.)

5. ('39) AIR 1939 Rang 300 (303, 304) : 1939 Rang L R 380 (F B). (Overruling AIR 1931 Rang 58.)

6. ('25) AIR 1925 All 503 (506, 508) : 47 All 637 (F B).

7. ('28) AIR 1928 Mad 1025 (1028) : 51 Mad 800 (F B).

(25) AIR 1925 Mad 50 (51).

('27) AIR 1927 Mad 1126 (1127).

('23) AIR 1923 Mad 576 (576, 577). (Partial award not invalid.)

('12) 16 Ind Cas 478 (481, 482) (Mad).

[See ('20) AIR 1920 Mad 800 (801) : 42 Mad 625.

(Decree obtained upon an award on a reference to presiding Judge and another individual must be regarded as consent decree.)]

8. ('32) AIR 1932 Pat 205 (205) : 11 Pat 237.

[But see ('35) AIR 1935 Pat 243 (245, 247).]

9. ('31) AIR 1931 Oudh 127 (129, 131) : 6 Luck 591.

('22) AIR 1922 Oudh 189 (190) : 25 Oudh Cas 213.

10. ('13) 19 Ind Cas 450 (450) : 6 Sind L R 166.

('29) AIR 1929 Sind 107 (109) : 23 Sind L R 349. (Obiter.)

('25) AIR 1925 Sind 266 (268) : 18 Sind L R 111.

('21) AIR 1921 Sind 65 (67, 70) : 16 Sind L R 174 (F B).

('85) AIR 1935 Sind 184 (185). (But if the plaintiff wants a decree for certain reliefs granted to him under the award which, according to the tenor of the award, are enforceable under the provisions of the Arbitration Act, and not by virtue of any decree which might be passed in the suit, the application of the plaintiff for the reference and award being recorded as an adjustment of the suit under O. 23 R. 3 should be disallowed.)



somewhat different reasoning. According to it, the words "any other law in force" mean only any other law of *arbitration* for the time being in force, such as Section 152 of the Companies Act or Sections 43 to 45 of the Dekkhan Agriculturists' Relief Act or the Co-operative Societies Act or the general law of contracts whereby parties may agree to refer their disputes to arbitration, and that they do not include this rule. It is, however, of opinion that the words in Section 89 of the Code "shall be governed by the provisions of the Second Schedule" are totally inapt to convey a *prohibition* and that they mean no more than that in those arbitrations which are dealt with by the Second Schedule the procedure of that Schedule shall be followed. Where, therefore, a submission and award are not covered by the provisions of the Second Schedule, as where the reference is made in a *pending suit* without the intervention of the Court, Section 89 has no application at all and the award can therefore be recognized as an adjustment of the suit by way of compromise under this rule.<sup>11</sup> In the undermentioned case of the Bombay High Court,<sup>12</sup> Rangnekar, J., sitting as a single Judge, was inclined to agree with the Calcutta view. The observations were, however, *obiter*. Where both the parties *accept* the award of the arbitrators, the award becomes a compromise and can be recorded under this rule.<sup>13</sup>

The Court acting under this rule (in cases where it has been held that an award can be pleaded in a compromise) can enquire into any alleged misconduct of the arbitrator.<sup>14</sup> Further, if a party does not raise any objection to the recording of a submission and award as a compromise under this rule, he is estopped from questioning the Court's power to do so.<sup>15</sup> But a *mere agreement* to refer to arbitration has been held not to be a compromise within this rule.<sup>16</sup> Nor can an award under an invalid reference be accepted as a compromise or adjustment under this rule.<sup>17</sup>

**10. Agreement to take oath.** — The Oaths Act does not provide for the *adjustment* of a suit in an arbitrary way by the oath of a party. Hence, an agreement to be bound by the oath of the opposite party does not amount to an adjustment of the suit but the oath amounts only to a *conclusive proof*, as against the party agreeing to be bound, of the matter stated.<sup>1</sup> Similarly, if a party has agreed that if he fails to take a certain oath the suit should be decreed or dismissed, his failure to take the oath does not justify the disposal of the suit under the present rule. Under Section 12 of

11. ('27) AIR 1927 Bom 565 (574, 577) : 51 Bom 908 (F B). (Overruling by necessary implication A I R 1916 Bom 125.)

('21) AIR 1921 Bom 310 (314, 316) : 45 Bom 245.

('30) AIR 1930 Bom 431 (435) : 54 Bom 696.

('13) 19 Ind Cas 786 (787) : 37 Bom 639.

12. ('30) AIR 1930 Bom 98 (105) : 54 Bom 197.

13. ('30) AIR 1930 Lah 860 (861).

('26) AIR 1926 Mad 1211 (1211, 1212).

('12) 15 Ind Cas 959 (960) : 6 Low Bur Rul 55.

('37) AIR 1937 Rang 287 (290) : 14 Rang 766.

('8) AIR 1939 Rang 300 (301) : 1939 Rang L R 280 (FB).

14. ('28) AIR 1928 Bom 401 (401).

15. ('29) AIR 1929 Bom 1 (6) : 53 Bom 75.

16. ('08) 30 Cal 218 (228, 229).

('82) 1882 Pun Re No. 180, page 387.

('22) AIR 1922 Bom 436 (437) : 46 Bom 854.

('25) AIR 1925 P C 70 (73) (PC).

('11) 12 Ind Cas 373 (375) : 36 Mad 853.

('12) 16 Ind Cas 478 (482) (Mad).

('14) AIR 1914 Sind 95 (96) : 8 Sind L R 187.

('14) AIR 1914 Bom 184 (186) : 38 Bom 687.

('17) AIR 1917 Cal 327 (328).

17. ('08) 33 Bom 69 (76).

('21) AIR 1921 Mad 709 (709).

('31) AIR 1931 Bom 343 (346) : 55 Bom 508.

[Compare ('26) AIR 1926 Mad 366 (366).]

#### Note 10

1. ('99) 22 Mad 234 (237).

('79) 2 Mad 356 (360).

('22) AIR 1922 All 160 (161) : 44 All 117.

('92) 14 All 141 (145).

('18) AIR 1918 Lah 126 (126) : 1918 Pun Re No. 88.

[See ('33) AIR 1933 All 956 (957). (Reference of dispute to arbitration—Defendant's subsequent statement on oath—Decree might be passed as prayed for in plaint—Plaintiff making required statement on oath—There is no compromise as defined in O. 23 R. 3 and arbitrator was not deprived of his powers to give whatever award he thought proper.)]

[See also ('33) AIR 1933 All 463 (464) : 55 All 298.]

**O. 23 R. 3**  
**Notes 10-13**

the Oaths Act, the Court can only record the failure to take the oath and the reasons given for such failure and proceed with the suit.<sup>3</sup> A party who has agreed to be bound by the statement on oath of the opposite party is entitled, at any time before the oath is actually taken, to resile from the agreement.<sup>3</sup>

**11. Compromise of probate proceedings.** — A compromise between an applicant for probate of a will and a caveator which aims at *excluding proof of the genuineness of the will* is opposed to public policy which requires that the question of the genuineness of a will should be decided only by the Court. Hence, such a compromise is *unlawful* and probate cannot be granted merely on the basis of such a compromise and without proof of the will in some form or other.<sup>1</sup> It is open to a caveator who has entered into such a compromise to resile from it and to require due proof of the will.<sup>2</sup> In the same way an executor who withdraws his application for probate in pursuance of a compromise is not debarred from filing another application for probate.<sup>3</sup>

**12. Compromise of suit under the Dekkhan Agriculturists' Relief Act.** — Parties to a suit under the Dekkhan Agriculturists' Relief Act can enter into a compromise under this rule.<sup>1</sup> A compromise decree in such a suit is not unlawful merely because it is not in accordance with Section 15B of the Act.<sup>2</sup> But even where a defendant admits the whole of the plaintiff's claim, this rule does not oust the jurisdiction of the Court under Section 12 of the Dekkhan Agriculturists' Relief Act to go behind the transaction and examine whether the admission is true and made by the debtor with a full knowledge of his legal rights against the creditor.<sup>3</sup>

**13. Compromise pending arbitration.** — A compromise entered into pending arbitration proceedings without the intervention of the Court is valid.<sup>1</sup> Proceedings under Sch. II, Para. 17<sup>2</sup> or under Para. 20<sup>3</sup> can be validly compromised. But where an arbitration is held on an order of reference by the Court, then, unless the arbitration is superseded, the parties cannot validly enter into any compromise.<sup>4</sup> The mere fact that the time fixed for making the award has expired does not amount to supersession of the arbitration.<sup>5</sup> But it has been held by the Lahore High Court that even after a reference to arbitration through the Court, the parties can validly compromise the

[See however ('38) AIR 1938 All 353 (354). (Statement by one defendant that suit may be decreed against him if plaintiff makes certain statement—Plaintiff making required statement — Court can accept it as adjustment : A I R 1938 All 861 (F B), Followed.)]

2. ('88) 1888 Pun Re No. 31, page 84.

('08) 31 Mad 1 (3).

('69) 4 Mad H C R 422 (424).

[See however ('07) 17 Mad L Jour 99 (100). (Party agreeing to be bound by oath preventing the oath being taken—Other party held entitled to a decree.)]

3. ('35) AIR 1935 All 276 (277).

**Note 11**

1. ('16) AIR 1916 Pat 82 (88) : 1 Pat L Jour 377. ('97) 21 Bom 335 (344, 347). (Caveat entered against executor's application for probate — Submission to arbitration and an award made on such submission — Court of probate not excluded from considering the application.)

('04) 81 Cal 857 (862, 868).

('10) 6 Ind Cas 912 (915) (Cal).

('17) AIR 1917 Pat 41 (42) : 2 Pat L Jour 535.

2. ('16) AIR 1916 Pat 82 (88) : 1 Pat L Jour 377.

3. ('17) AIR 1917 Pat 41 (42) : 2 Pat L Jour 535.

**Note 12**

1. ('10) 6 Ind Cas 527 (528) : 34 Bom 502.

('22) AIR 1922 Bom 331 (338) : 46 Bom 560.

2. ('21) AIR 1921 Bom 398 (399) : 45 Bom 1123.

('18) 20 Ind Cas 969 (971) : 37 Bom 614 (F B).

(Impliedly overruling 8 Ind Cas 651.)

3. ('22) AIR 1922 Bom 331 (338, 334) : 46 Bom 560.

**Note 13**

1. ('10) 5 Ind Cas 994 (995) (Lah).

2. ('14) AIR 1914 Lah 813 (818).

3. ('22) AIR 1922 Oudh 189 (190, 191, 196) : 26 Oudh Cas 213.

('21) AIR 1921 Lah 84 (88) : 2 Lah 114.

('10) 5 Ind Cas 994 (995) (Lah).

[See however ('87) AIR 1987 Cal 201 (208).]

4. ('24) AIR 1924 Cal 722 (724) : 51 Cal 432.

('04) 1 All L Jour 29 (32).

5. ('24) AIR 1924 Cal 722 (724) : 51 Cal 432.

disputes under the present rule.<sup>6</sup> In a Madras case, where the Court recorded a compromise under the present rule after the expiry of the time fixed for the making of the award by the arbitrator, it was held that the Court should be deemed to have superseded the arbitration.<sup>7</sup> An agreement not to dispute an award may be said to be a lawful adjustment of the suit within this rule.<sup>8</sup>

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**Notes 13-17**

As to adjustment of an award, see the undermentioned decision.<sup>9</sup>

**13a. Compromise of proceeding for setting aside award.** — See Note 4 to Schedule II, Paragraph 15.

**14. Compromise of guardianship proceedings.** — A guardian appointed by the Court cannot be removed by a compromise as it would have the effect of withdrawing from the jurisdiction of the Court the question of the welfare of the minor and would defeat the provisions of Sections 40 and 42 of the Guardians and Wards Act.<sup>1</sup>

**15. Pre-decree agreements in bar of execution.** — An agreement between the parties to a suit entered into before the decree is passed to treat the decree as not executable wholly or partly cannot be given effect to by the executing Court.<sup>1</sup> But an agreement not to execute the decree in whole or in part, entered into after the decree is passed, is valid and binding.<sup>2</sup>

**16. "Where the defendant satisfies the plaintiff."** — In an old case of the Punjab Chief Court it was held that a Court cannot dispose of a suit according to a compromise if the plaintiff professes himself merely satisfied *aliunde* and that the defendant must have satisfied the plaintiff.<sup>1</sup> It is submitted that this view will hold good even now but that the "defendant" would include his agents also.

**17. "Shall order such agreement, compromise or satisfaction to be recorded."** — The provision requiring the Court to order that the compromise be recorded is not a mere matter of form but is one of *substance* as the aggrieved person has a right of appeal against such an order under O. 43 R. 1 (m) of the Code.<sup>1</sup> The omission to comply with the requirements of this rule goes to the root of the jurisdiction of the Court to pass a decree in accordance with the compromise,<sup>2</sup> as the rule makes it obligatory on the Court to record a compromise duly entered into by the

6. ('27) AIR 1927 Lah 156 (157).

7. ('23) AIR 1923 Mad 576 (577).

8. ('15) AIR 1915 Cal 101 (102).

9. ('36) AIR 1936 Lah 319 (320). (Compromise *pendente lite* differs from adjustment of award — Decree on award is decree of domestic Court re-affirmed by Court of law—Award if completely adjusted, bars execution of decree based on it.)

**Note 14**

1. ('18) AIR 1918 Sind 32 (33) : 12 Sind L R 14.

**Note 15**

1. ('20) AIR 1920 Mad 124 (124) : 43 Mad 725.

('28) AIR 1928 Cal 527 (530). (Remedy of aggrieved party is by suit.)

2. ('15) AIR 1915 Nag 128 (129) : 11 Nag L R 110.

**Note 16**

1. ('67) 1867 Pun Re No. 12.

**Note 17**

1. ('27) AIR 1927 Pat 354 (357, 360) : 6 Pat 108.

('14) AIR 1914 Lah 112 (113) : 1914 Pun Re No. 96.

('17) AIR 1917 Cal 607 (607) : 43 Cal 85.

('29) AIR 1929 Sind 32 (36).

('06) 29 Mad 104 (105, 106). (Compromise petition not accepted—Court cannot subsequently pass a decree on the same compromise.)

('23) AIR 1923 P C 178 (183) (P C). (Failure to record satisfaction makes adjustment not in accordance with the rule.)

('18) AIR 1918 Nag 129 (131). (Compromise not recorded is no compromise under rule.)

('14) AIR 1914 All 419 (420). (The mere fact of an oral compromise having been come to cannot supersede the mortgage unless the Court accepts it and passes a decree in accordance with it.)

('35) AIR 1935 Pat 439 (444) : 14 Pat 356.

[But see ('29) AIR 1929 Sind 12 (12). (Omission to record is not fatal to validity of decree—Defect is curable under Section 99.)]

2. ('27) AIR 1927 Pat 354 (360) : 6 Pat 108.

[But see ('35) AIR 1935 All 738 (739). (Omission to record compromise does not affect validity of decree—Defect can be cured by Section 99.)]

**O. 23 R. 3  
Note 17**

parties to a suit.<sup>3</sup> The Court cannot refuse to record the compromise merely because the Court considers it too favourable to one side<sup>4</sup> or that the working of it would give trouble.<sup>5</sup>

It has been held by the Madras High Court<sup>6</sup> and the Chief Court of the Punjab<sup>7</sup> that till judgment is delivered in open Court, the Court has jurisdiction to record a compromise. In a Calcutta case<sup>8</sup> where an appeal had been dismissed for default, both parties being absent and they then presented a petition asking that the case should be decreed in terms thereof, it was held that the Court ought to restore the case giving effect to the petition of compromise. Where an *ex parte* decree is set aside by suit on the ground of fraud, the original suit is restored as on the date of the *ex parte* decree and any compromise entered into before the decree should be recorded.<sup>9</sup> But there can be no consent decree unless the case has come on the cause list of the Court.<sup>10</sup>

Where a plaintiff, in pursuance of a compromise, merely asks for a withdrawal of suit, the Court is not bound to record the compromise.<sup>11</sup> Where the parties enter into a compromise outside Court, but a compromise decree is not duly passed under this rule, and a decree is passed in the usual way, the terms of the agreement between the parties cannot be enforced.<sup>12</sup> If the Court's order does not embody the whole compromise but embodies only a portion of it, the compromise is not enforceable.<sup>13</sup> But the rule does not require that the order should set out the compromise *verbatim*. It is enough if the terms of the compromise are indicated with sufficient clearness.<sup>14</sup> An order of adjournment incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment is not a record of the compromise.<sup>15</sup> Where the claim is beyond the jurisdiction of the Court it cannot pass a compromise decree. It can only return the plaint under O. 7 R. 10.<sup>16</sup>

3. ('23) AIR 1923 P C 98 (101) (P C).

('33) AIR 1933 Pat 306 (406): 12 Pat 359.

('30) AIR 1930 P C 158 (162): 57 Ind App 133: 57 Cal 1311 (P C).

('28) AIR 1928 Oudh 48 (48).

('35) AIR 1935 P C 119 (120): 14 Pat 545: 62 Ind App 196 (P C). (If there is no separate record of the compromise the decree ought to recite the fact of a compromise and its terms and then proceed to set out the orders made by the Court to enforce the decree.)

('89) AIR 1939 Nag 233 (238): I L R (1939) Nag 607 (F B).

('36) AIR 1936 Mad 347 (350).

('36) AIR 1936 All 433 (433).

('36) AIR 1936 Pat 401 (401): 15 Pat 456. (Passing of decree based on compromise may be postponed but not actual recording of compromise.)

('36) AIR 1936 All 9 (10): 58 All 565.

[See also ('32) AIR 1932 Bom 466 (467).]

4. ('98) 22 Bom 288 (240).

('80) AIR 1930 Mad 629 (630): 53 Mad 898.

('36) AIR 1936 Mad 347 (350). (Court has no jurisdiction, except in the case of minors etc., to investigate the fairness or unfairness of a compromise which has been accepted by the parties.)

5. ('10) 6 Ind Cas 857 (858) (All).

('33) AIR 1933 Pat 306 (405): 12 Pat 359. (It is not the business of the Court to speculate on the difficulties that may arise at the time of execution.)

6. ('21) AIR 1921 Mad 690 (690, 691). (Though result of suit announced on notice board.)

7. ('08) 1908 Pun W R 67. (Though judgment already written.)

8. ('23) AIR 1923 Cal 819 (819).

9. ('19) AIR 1919 Cal 993 (994).

10. ('79) 5 Cal L Rep 464 (464).

11. ('16) AIR 1916 Cal 80 (81).

('17) AIR 1917 Nag 1 (4). (Dismissal at party's request amounts to withdrawal of suit without leave to sue afresh.)

12. ('21) AIR 1921 Lah 248 (249): 1 Lah 445.

('24) AIR 1924 Nag 325 (327).

[But see ('74) 8 Mad H O R 1 (5). (Suit lies on the agreement against the party violating its terms.)]

13. ('29) AIR 1929 Lah 291 (292): 10 Lah 655.

14. ('28) AIR 1928 Nag 51 (51): 23 Nag L R 124. ('32) AIR 1932 Lah 24 (24, 25). (A reference to the agreement in the order held sufficient record of its terms.)

15. ('16) AIR 1916 Mad 849 (849).

16. ('21) AIR 1921 Mad 696

**18. "Shall pass a decree in accordance therewith so far as it relates to the suit."** — A decree on a compromise under this rule can be passed only so far as it relates to the suit.<sup>1</sup> The question whether a particular term of a petition of compromise relates to the suit must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down and each case must be governed by its own facts.<sup>2</sup> Where the suit is merely for the recovery of specific properties, the compromise must relate to such properties only. But where the suit is not merely for the recovery of the property, but to establish particular rights, the facts have to be looked at as a whole to decide whether matters that do not relate to the suit have been introduced. In such cases, all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit, and can be embodied in the decree.<sup>3</sup>

**O. 23 R. 3  
Note 18**

The following are instances in which the compromise was held to "relate to the suit" within the meaning of this rule —

- (1) The compromise of a suit for a money decree may provide for a charge being created on the defendant's immovable property for the payment of the amount agreed on.<sup>4</sup>

**Note 18**

1. ('95) 18 Mad 410 (414).  
( '86) 13 Cal 170 (171).  
( '20) AIR 1920 Pat 159 (160).  
( '99) 2 Oudh Cas 330 (334).  
( '22) AIR 1922 Cal 358 (361, 362): 49 Cal 220.  
( '86) AIR 1936 Pat 401 (401): 15 Pat 456.  
( '85) AIR 1935 All 127 (129).  
( '89) AIR 1939 All 454 (456): I L R (1939) All 435. (Where the compromise does not relate to the suit the presumption is that the rule implies that the Court should not pass a decree in regard to it.)  
( '35) AIR 1935 P C 119 (122): 14 Pat 545: 62 Ind App 196 (P C). (Matter compromised collateral to suit—Court not to pass decree in respect of such matter under this rule.)  
2. ('08) 35 Cal 837 (841).  
( '15) AIR 1915 Mad 210 (215): 38 Mad 959.  
( '32) AIR 1932 Bom 47 (48 to 51).  
( '40) AIR 1940 Oudh 27 (29).  
( '37) AIR 1937 Pat 232 (233). (Whether a particular matter is the subject-matter of or relates to suit is primarily a question of fact.)  
( '37) AIR 1937 Sind 190 (192): 31 Sind L R 153. (Whether compromise does or does not relate to suit is question of fact depending upon particular facts of each case.)  
3. ('21) AIR 1921 Cal 302 (307): 48 Cal 1059.  
( '34) AIR 1934 Lah 623 (625). (Demolition of wall not in suit consideration for abandoning claim of wall in suit—Compromise as to former wall is deemed as relating to suit.)  
( '33) AIR 1933 Pat 176 (178). ("Matter relating to the suit" means "either relating to the suit or not collateral to the suit.")  
( '18) AIR 1918 Pat 507 (512): 3 Pat L Jour 255 (S B).  
( '32) AIR 1932 Bom 466 (467).  
( '15) AIR 1915 Mad 210 (215): 38 Mad 959.  
( '15) AIR 1915 Mad 322 (323).  
( '15) AIR 1915 Mad 683 (684).  
( '18) AIR 1918 Pat 139 (142): 3 Pat L Jour 43.  
( '32) AIR 1932 Bom 47 (51).  
( '31) AIR 1931 Bom 295 (296).  
( '25) AIR 1925 Mad 1101 (1104).  
( '20) AIR 1920 Pat 602 (604): 4 Pat L Jour 667.  
( '09) 33 Mad 102 (105). (Relief granted under O. 23 R. 3 (S. 375) can extend to what is not prayed for in the plaint.)  
( '22) AIR 1922 Low Bur 22 (24): 10 Low Bur Rul 349. (The words "so far as it relates to the suit" mean "so far as it relates to the adjustment or settlement of the matters litigated in the suit" and there is nothing to prevent that settlement taking any form which is lawful and fair and which satisfies the parties.)  
( '88) AIR 1938 Oudh 103 (105).  
( '37) AIR 1937 Pat 232 (233).  
[But see ('95) 5 Mad L Jour 145 (147). (The compromise should be confined to the relief that could be given in the same suit if decided in the regular course.)  
( '40) AIR 1940 Oudh 27 (29). (Mere fact that certain matters of compromise formed consideration of it does not mean that those matters became related to suit. The test to apply is what is the relief which would have been granted by the Court in the suit if the compromise had not intervened.)]  
4. ('30) AIR 1930 Nag 17 (18).  
( '29) AIR 1929 Nag 164 (167, 168): 25 Nag L R 110.  
( '25) AIR 1925 Mad 1101 (1103, 1104).  
( '18) AIR 1918 Mad 1307 (1308).  
( '07) 30 Mad 478 (480, 481).

**O. 23 R. 3**  
**Note 18**

- (2) The compromise of a suit for a declaration may include a term as to the payment of a sum of money by one of the parties to the others.<sup>5</sup>
- (3) Where one co-tenant who has paid the entire rent of the land sues the other co-tenant for contribution, the suit may be compromised by providing that the defendant should give up his share of the land in favour of the plaintiff.<sup>6</sup>
- (4) Where a suit is for the recovery of certain property, a compromise providing that the defendant should redeem a certain house under mortgage and deliver it to the plaintiff is one relating to the suit.<sup>7</sup>
- (5) *A* and *B*, a lessee from *A*, sued *C* asserting *A*'s title to certain land. The suit was compromised by providing that *C*, the defendant, should recognize the lease granted by *A* to *B* and that, in consideration for this, was to be entitled to a half-share of the rent paid by *B*. The compromise was held to be one relating to the suit.<sup>8</sup>

See also the undermentioned cases.<sup>9</sup>

The following are instances in which the compromise was held *not* to "relate to the suit"—

- (1) A consent decree in a partition suit between brothers cannot deal with the rights in their mother's share after her death.<sup>10</sup>
- (2) Plaintiff claimed a certain sum with interest at nine and a half per cent. per annum. The suit was compromised by the defendant agreeing that he would pay a smaller sum within a fixed time and that on default he would pay the amount with interest at a very much higher rate. It was held that the stipulation as to the higher rate of interest did not relate to the suit.<sup>11</sup>
- (3) A suit for damages for crops misappropriated was compromised by the amount of damages being settled and also by a provision being made that the defendant should hold the land under the plaintiff at a certain rent. It was held that the agreement as to tenancy was outside the scope of the suit.<sup>12</sup>
- (4) Plaintiff sued to restrain the defendant from building a house in such a way as to interfere with the plaintiff's enjoyment of light and air. The suit was compromised by providing that the defendant should not build his house higher than it originally was and also that the defendant should not let water into the passage between the houses. The agreement as to the passage was held to be beyond the scope of the suit.<sup>13</sup>

('08) 35 Cal 887 (848).

('07) 17 Mad L Jour 200 (201). (Suit on mortgage bond and for accounts compromised—Mortgage decree for the whole amount including the sum not forming part of the mortgage amount may be passed.)

('25) AIR 1925 Bom 509 (510). (Mortgage suit—Compromise decree making the decretal amount charge on certain properties in addition to the mortgaged property legal.)

5. ('28) AIR 1928 Nag 178 (174, 175): 24 Nag L R 55.

('88) AIR 1988 Pat 176 (178).

6. ('20) AIR 1920 Cal 194 (195).

7. ('09) 2 Ind Cas 480 (480) (Mad).

8. ('09) 88 Mad 102 (105, 106).

9. ('09) 1 Ind Cas 572 (572) (Cal). (Suit by *A* against his landlord for possession of leased land—*B* impleaded as party—Real contest being between *B* and landlord—Compromise of suit—

*A* abandoning suit and *B* agreeing to pay rent to landlord—Compromise is one relating to suit.)

('87) AIR 1987 Pat 282 (284). (Suit for account—Agreement by plaintiff to take only her share of income of certain villages in consideration of her giving up her rights to an account is one relating to suit.)

10. ('21) AIR 1921 Cal 202 (207): 48 Cal 1059.

11. ('18) AIR 1918 Pat 685 (686): 2 Pat L Jour 678.

12. (07) 5 Cal L Jour 15 (17).

13. ('88) 7 Bom 804 (809).

[See also ('87) AIR 1987 Sind 190 (191, 192): 81 Sind L R 158. (Suit for injunction against defendant restraining him from building his house in such a manner as to block certain apertures of plaintiff's house and thus keep out light and air—Compromise between parties preventing defendant from raising certain structure—Compromise giving plaintiff only

Although it is obligatory upon a Court, under this rule, to pass a decree in terms of a compromise, after it has been recorded, it is not necessary that the decree should be passed *simultaneously* with the order recording the compromise. There is nothing to prevent the Court from postponing the passing of a decree in a proper case.<sup>14</sup> Also, the Court is not bound to pass a decree in the exact form which the parties propose.<sup>15</sup> Further, the decree is not vitiated merely because it does not recite *verbatim* the compromise.<sup>16</sup> A Court acting under this rule cannot make a *declaratory* decree inasmuch as, not having heard the case on the merits, the Court is not in a position to form its own opinion as to the merits of the case.<sup>17</sup> As the decree should be in accordance with the compromise, where the latter does not provide for a personal remedy, the decree also cannot grant it.<sup>18</sup> If a suit has been compromised by the original parties thereto, a third party cannot be allowed to intervene and oppose the passing of a decree on the compromise.<sup>19</sup>

**O. 23 R. 8**  
**Notes 18-19**

**19. Where compromise includes matters not relating to the suit.**— It has been seen that a decree can be passed under this rule only so far as the compromise relates to the suit. But a compromise which includes matters extraneous to the suit is not unlawful<sup>1</sup> and cannot be rejected in its entirety by the Court.<sup>2</sup> Where a compromise comprises matters unconnected with the suit, the proper course for the Court is to recite the compromise as a whole in its decree or in the form of a schedule to the decree for purposes of reference but to restrict the operative part of the decree to those terms of the compromise which relate to the suit. In such a case the decree would be executable only in respect of the matters that relate to the suit.<sup>3</sup> The remaining terms of the compromise, *i.e.*, those which are not incorporated in the operative part of the decree, may be enforced by means of a separate suit.<sup>4</sup>

Where a compromise which includes matters extraneous to the suit has been entered into on condition that it should be given effect to as a whole, the Court should not dismiss the suit,<sup>5</sup> but should permit the parties to suitably enlarge the scope of the suit by means of amendment of pleadings, so as to enable the compromise to be passed into a decree.<sup>6</sup>

adequate relief and not full relief—Decree based on compromise—Compromise falls within scope of suit—Decree on such compromise can be executed under O. 23 R. 3.)

14. ('30) AIR 1930 Pat 395 (399, 400); 9 Pat 314.

('36) AIR 1936 Pat 401 (401); 15 Pat 456.

15. ('29) AIR 1929 Bom 350 (352).

[See also ('97-01) 1897-1901 Upp Bur Rul 256.

(Court to ascertain terms of compromise and decree accordingly.)]

16. ('29) AIR 1929 Lah 527 (528).

17. ('29) AIR 1929 Bom 350 (352).

18. ('26) AIR 1926 Nag 20 (21).

19. ('26) AIR 1926 Mad 341 (341, 342).

('32) AIR 1932 All 478 (479, 480).

#### NOTE 19

1. ('17) AIR 1917 Lah 282 (284); 1917 Pun Re No. 78.

2. ('17) AIR 1917 Lah 282 (284); 1917 Pun Re No. 78.

3. ('19) AIR 1919 P C 79 (81); 46 Ind App 240; 47 Cal 485 (PC).

('38) AIR 1938 All 649 (651); 55 All 775 (FB).

('01) 5 Cal W N 485 (487).

('18) AIR 1918 Pat 507 (512); 3 Pat L Jour 255 (SB).

('32) AIR 1932 Bom 466 (467).

('21) AIR 1921 Cal 500 (500).

('28) AIR 1928 Rang 43 (43, 44); 5 Rang 662.

('39) AIR 1939 All 454 (456); I L R (1939) All 435.

('36) AIR 1936 Cal 446 (448).

('40) AIR 1940 Oudh 27 (32). (Merely saying that compromise is made part of decree is not embodying it in operative part of it.)

[See ('20) AIR 1920 Bom 358 (359).]

[See also ('36) AIR 1936 Pat 300 (301, 302).

(Compromise decree—Reference to property not subject of dispute in compromise—Operative part of decree not dealing with such property but dealing with subject-matter of dispute only—Compromise operates as bare agreement—It does not create title.)

4. ('19) AIR 1919 Mad 305 (310).

('98) 2 Cal W N 668 (664).

('09) 2 Ind Cas 430 (430) (Mad).

('05) 2 All L Jour 680 (681).

('32) AIR 1932 Bom 466 (467).

('39) AIR 1939 All 454 (456); I L R 1939 All 435.

5. ('99) 22 Mad 214 (216).

('08) 1908 Pun Re No. 77, page 359.

6. ('87) 9 All 229 (230).



**O. 23 R. 3**  
**Notes 19-20**

As to whether, where a decree erroneously includes in the operative part of it, terms extraneous to the suit, the executing Court can refuse to execute the decree with respect to those terms and whether a separate suit lies in respect of them, see Note 27.

**20. Parties to the compromise.** — A compromise to which some of the parties to a suit alone are parties is not necessarily invalid<sup>1</sup> though on good cause being shown by any of the other parties, the Court has a discretion to reject such a compromise.<sup>2</sup> Thus, where a partial compromise would be prejudicial to the interests of the parties not joining it, it cannot be recognized.<sup>3</sup> Similarly, where the interests of the several parties to a suit are *inseparable*, it is not open to some of them alone to compromise the matter.<sup>4</sup> Thus, a suit for partition cannot be compromised by some only of the parties to it.<sup>5</sup>

A compromise between some parties alone cannot affect the position of the other parties to the suit. They are neither bound by it nor are entitled to enforce it.<sup>6</sup> In the undermentioned case,<sup>7</sup> however, it was held by the Oudh Chief Court that where certain defendants were *ex parte* and the Court passed an *ex parte* decree against them in the terms of the compromise that had been entered into between the other defendants and the plaintiff, the decree was not a nullity as against the *ex parte* defendants. A party is not bound by an unauthorized compromise entered into by his agent.<sup>8</sup> But a person who is suing or is being sued in a representative capacity can enter into a *bona fide* compromise and thereby bind the persons represented.<sup>9</sup> See also Note 23 to Order 1 Rule 8.

Where a compromise includes, as parties thereto, some persons who are not parties to the suit and the terms affecting the parties to the suit are not separable from

**Note 20**

1. ('27) AIR 1927 PC 57 (59): 51 Bom 442: 54 Ind App 111 (PC).
- ('34) AIR 1934 Lah 34 (35). (Party having no interest — His consent to compromise is not necessary.)
- ('38) AIR 1938 Pat 306 (415): 12 Pat 359.
- ('17) AIR 1917 Mad 771 (772).
- ('28) AIR 1928 Lah 792 (794). (Compromise invalid against minors but valid against the plaintiff.)
- [See also ('36) AIR 1936 Lah 971 (971). (Some defendants contested claim—Others confessing judgment—Plaintiff should be given advantage of confession as against latter.)]
2. ('26) AIR 1926 Cal 198 (198).
3. ('28) AIR 1928 Oudh 252 (253, 254).
- ('05) 82 Cal 561 (566).
4. ('19) AIR 1919 Cal 727 (728).
- ('25) AIR 1925 Lah 280 (280).
- ('27) AIR 1927 Oudh 222 (228).
5. ('28) AIR 1928 Mad 594 (596). (One member accepting certain sum and going out of family—All parties to suit not joining—Compromise was still held good.)
- ('15) AIR 1915 Cal 478 (474).
- [See also ('20) AIR 1920 Sind 101 (104): 14 Sind L R 245. (Some only of the partners in a partnership suit.)]
6. ('15) AIR 1915 Cal 478 (474). (Consent decree not binding on some defendants—Suit to declare this not necessary.)
- ('95) 1895 Pun Re No. 48, page 203.
- ('19) AIR 1919 Cal 1043 (1043, 1044).
- ('26) AIR 1926 Cal 188 (188). (Suit for rent by all co-sharers—One plaintiff subsequently entering into compromise—Suit can proceed.)
- ('36) AIR 1936 All 1 (2).
- [But see ('01) 5 Cal W N 386 (390, 391).
- ('18) 19 Ind Cas 915 (916) (Cal). (Person beneficially entitled may sue to enforce compromise though not party.)
- ('24) AIR 1924 Cal 814 (815). (Points arising out of a new state due to the compromise between the other parties may be raised.)]
7. ('85) AIR 1935 Oudh 358 (361, 362): 11 Luck 187 (FB).
8. ('04) 31 Cal 357 (362).
- ('14) AIR 1914 Lah 112 (113): 1914 Pun Re No. 96.
- ('16) AIR 1916 Cal 479 (482). (Though agent entrusted with the general conduct of the litigation.)
9. ('18) 18 Ind Cas 369 (371, 372) (Mad). (Person suing under O. 1 R. 8.)
- (1900) 28 Mad 239 (249, 250). (Trustee can compromise on behalf of the beneficiary.)
- ('07) 1907 Pun Re No. 87, page 162. (Compromise by reverserloner binding on successor-in-title.)
- ('94) 21 Cal 388 (386). (Auction-purchaser bound by compromise entered into by judgment-debtor.)
- ('10) 8 Ind Cas 91 (95) (Cal). (Compromise by purchaser with regard to title to property binds vendor.)



those affecting the non-parties, the Court cannot pass a decree under this rule.<sup>10</sup> Where a consent decree between some of the parties alone is sought to be enforced in execution against the other parties to the suit who, however, are not parties to the compromise and such persons object to the execution of the decree against them on the ground that the consent decree is not binding on them, the dispute falls within Section 47 of the Code.<sup>11</sup>

**O. 23 R. 3**  
**Notes 20-24**

A purchaser *pendente lite* is bound by a compromise decree.<sup>12</sup>

Where a party has no further interest in the property which is the subject-matter of the suit and the compromise (he having parted with his interest in favour of another party to the suit), his consent is not necessary for a compromise of the suit.<sup>13</sup>

**21. Compromise by minor's guardian.** — See Notes to Order 32 Rule 7.

**22. Compromise by Hindu widow.** — A *bona fide* compromise by a Hindu widow as representing her husband's estate binds the reversioners.<sup>1</sup>

**23. Compromise by pleader.** — See Note 7 to O. 3 R. 4 *ante*, and also the undermentioned cases.<sup>1</sup>

**24. Effect of consent decree and admissibility in evidence.** — As has been seen in Note 114 to Section 11, a compromise decree does not operate as *res judicata* though it will create an estoppel between the parties and is as much binding upon them as a decree *in invitum*.<sup>1</sup> Hence, a compromise decree is admissible in evidence in a later suit between the same parties, for the same purposes for which an ordinary

('15) AIR 1915 PC 83 (85, 87) : 39 Mad 115 (PC).

(Trustee compromising—Act not reasonable and proper in the circumstances—Act not binding.)

('12) 16 Ind Cas 611 (612) (Cal). (Compromise by pardanashin lady — Court should satisfy itself that terms were understood by her and that she acted on independent advice.)

('37) AIR 1937 Mad 438 (443). (Compromise on behalf of Malabar tarwad—Compromise in the particular case was *held* not *bona fide*.)

('85) AIR 1935 All 862 (867) : 59 All 230. (Compromise decree passed on family disputes is binding on successors of persons making compromise.)

[See ('36) AIR 1936 All 1 (3). (Suit on behalf of Mahomedan community by seven persons against 24 Hindus as representing the Hindu community—Compromise entered into between some of the plaintiffs and some of the defendants alone will not bind the rest.)]

10. ('24) AIR 1924 Cal 722 (723, 724) : 51 Cal 432.

[See ('34) AIR 1934 Mad 887 (842) : 57 Mad 892. (Compromise between parties and strangers — Stranger applying to be made a party and for recording compromise — Plaintiff realising and applying for withdrawal of suit — Court must not allow withdrawal but must inquire into compromise.)]

11. ('85) 8 Mad 478 (475).

12. ('10) 6 Ind Cas 750 (751) : 13 Oudh Cas 98.

('10) 6 Ind Cas 168 (169) (All).

[See *however* ('91) 18 Cal 188 (195, 196). (Affirmed by Privy Council in 22 Cal 909.)]

13. ('84) AIR 1984 Lah 84 (85).

#### Note 22

1. ('09) 4 Ind Cas 513 (516, 517) (Cal).

('16) AIR 1916 Cal 938 (943).

('24) AIR 1924 Mad 301 (304).

*But see the following cases :*

('82) 10 Cal L Rep 337 (344).

('80) 6 Cal L Rep 76 (81) (PO).

('07) 29 All 487 (494).

('08) 30 All 75 (76).

('09) 2 Ind Cas 549 (550) (Cal).

#### Note 23

1. ('32) AIR 1932 Cal 231 (233) : 59 Cal 31.

('34) AIR 1934 Oudh 417 (417).

('35) AIR 1935 Rang 150 (150) : 18 Rang 319.

(Court will refuse to give effect to compromise when it finds that there has been some misunderstanding between party and counsel as to the terms of the compromise.)

#### Note 24

1. ('26) AIR 1926 Cal 672 (675).

('38) AIR 1933 Sind 53 (55).

('08) 31 Mad 474 (477).

('95) 21 Ind App 128 (130, 131) : 18 Mad 1 (PC).

('66) 1 Agra 1 (6) (FB).

('97) 24 Cal 216 (237).

(1900) 24 Bom 77 (85).

('24) AIR 1924 Oudh 84 (88).

('22) AIR 1922 Oudh 236 (248) : 25 Oudh Cas 189. (Not rendered invalid because it proceeds on a wrong legal ground.)

('29) AIR 1929 All 243 (249) : 51 All 575.

('17) AIR 1917 Nag 37 (39) : 14 Nag L R 35. (Whatever is necessarily involved in the decree pronounced cannot be re-opened by either party.)

**O. 23 R. 3**  
**Notes 24-25**

decree would be admissible under the provisions of the Evidence Act.<sup>3</sup> Where a suit is terminated by a compromise decree, a breach of its terms does not restore the parties to the rights which they had prior to the decree.<sup>3</sup> But a compromise decree is a creature of the *agreement* on which it is based and is subject to *all the incidents of such agreement*.<sup>4</sup> A compromise decree is but a contract with the command of a Judge superadded to it.<sup>5</sup> Hence such a decree is of no greater validity than the contract on which it is based.<sup>6</sup> It can, therefore, be set aside on any of the grounds, such as fraud, mistake, misrepresentation, etc., on which a contract may be set aside.<sup>7</sup> (See Note 28, *infra*). For the same reason, where a compromise decree contains any term which is in the nature of a penalty under Section 74 of the Contract Act, or of a forfeiture, it is open to the Court to grant relief against the forfeiture incurred under such penal clause.<sup>8</sup> As a minor's contract is void, a decree on a compromise with a minor is a nullity.<sup>9</sup> See also the undermentioned cases.<sup>10</sup>

**25. Registration, if necessary.**—Under Section 17 (2) (vi) of the Registration Act, before the amendment thereof by Act XXI of 1929, a decree or order of a Court was exempt from registration, even though it may otherwise come within the scope of

('82) 8 Cal 188 (141).

('30) AIR 1980 Bom 481 (486) : 54 Bom 696.

('14) AIR 1914 Mad 70 (77).

('18) 21 Ind Cas 538 (539) (Cal).

('11) 9 Ind Cas 875 (881) : 85 Mad 75. (Consent decree operates as a waiver of prior errors of procedure not going to root of Court's jurisdiction.)

('19) AIR 1919 Mad 305 (309).

('20) AIR 1920 Oudh 258 (264) : 23 Oudh Cas 303.

('19) AIR 1919 Mad 177 (179).

('18) AIR 1918 Mad 1381 (1382).

('17) AIR 1917 Mad 578 (580) : 40 Mad 177.

('15) AIR 1915 Cal 464 (467).

('24) AIR 1924 Nag 180 (188). (Terms attacked as contrary to Hindu law—Compromise still binding on consenting party.)

('99) 2 Oudh Cas 112 (115).

('05) 8 Oudh Cas 143 (144) (PC).

('36) AIR 1936 Cal 446 (448) : 68 Cal 750. (Compromise decrees between landlord and tenant settling rate of rent.)

('36) AIR 1936 Sind 99 (104) : 29 Sind L R 455.

('36) AIR 1936 Bom 301 (303, 304). (Even if the decree is based on an agreement which is bad in law, in the sense that it gives effect to and sanctions what is illegal or prohibited by statute, it is binding until set aside in proper proceedings.) [See ('23) AIR 1923 PC 184 (185) (PC).]

('38) AIR 1938 Cal 66 (67, 69). (Compromise decree passed in contravention of S. 29 of the Bengal Tenancy Act is binding in subsequent suit until vacated.)

('84) AIR 1984 Cal 799 (801). (Party to decree including collusive compromise decree is bound by it—But third party affected by such decree is not bound.)

('85) AIR 1985 All 771 (778). (Compromise given effect to in decree—It is not collusive unless it is fraud on rights of third parties.)

[See also ('06) 4 Cal L Jour 323 (327). (Compromise will not be set aside on the ground that it gave to one party more than he would have got if he had obtained judgment.)]

('84) AIR 1984 Lah 318 (319). (Compromise not

recorded under R. 8 is still agreement—Party taking advantage of such agreement is estopped from challenging its binding nature.)]

2. ('09) 1 Ind Cas 572 (573) (Cal).

('98) 2 Cal W N 174 (176).

3. (1865) 2 Suth W R 209 (210).

('11) 12 Ind Cas 15 (17) : 38 All 743 : 38 Ind App 151 : 14 Oudh Cas 289 (PC).

(1864) 1 Suth W R 265 (266).

('66) 1 Agra 1 (8) (FB).

[See also ('09) 31 All 429 (436). (Where the compromise expressly provided for suit being proceeded with on breach of conditions in compromise decree.)]

[But see ('04) 1904 Pun Re No. 1 p. 1. (Where a second suit for the same claim was held not barred.)]

4. ('30) AIR 1930 Lah 987 (941).

('15) AIR 1915 Cal 464 (467).

('01) 24 Mad 265 (270).

5. ('24) AIR 1924 Pat 231 (232) : 2 Pat 749.

('33) AIR 1933 Pat 306 (402) : 12 Pat 859.

('35) AIR 1935 Pat 123 (125).

6. ('17) AIR 1917 Mad 578 (580) : 40 Mad 177.

('37) AIR 1937 Nag 418 (414).

7. ('39) AIR 1939 Lah 439 (451) : I L R (1939) Lah 433.

('37) AIR 1937 Nag 418 (414).

8. ('07) 31 Bom 15 (22) (FB). (Overruling 10 Bom 435.)

('60) 8 Moo Ind App 289 (361) (PC).

('37) AIR 1937 Nag 418 (414).

[See also ('84) 10 Cal 805 (814) : 10 Ind App 162 (PC).]

9. ('27) AIR 1927 Pat 271 (279, 280) : 6 Pat 888.

10. ('68) 3 Agra 82 (86, 87). (Compromise between members of family for settlement of their disputes—Effect—New rights are not created—Only previously asserted rights are recognised.)

('78) 1 Ind App 157 (166) (P O). (Compromise based on the assumption that there was an antecedent title of some kind in the parties—Suit on compromise did not rest on contract only but also on title.)

sub-section (1) of Section 17 which made the registration of certain types of documents obligatory. Hence, a compromise decree was held exempt from registration,<sup>1</sup> even in cases where the compromise which it embodied affected matters extraneous to the suit.<sup>2</sup> Under the Section as amended, a compromise decree comprising properties *extraneous* to the suit is not exempted from registration under Section 17, sub-section (2). As to whether a compromise decree requires registration in cases falling under clauses (a) and (d) of Section 17 of the Registration Act, there is a conflict of opinions, for which see the undermentioned cases.<sup>3</sup> A compromise in so far as it is not incorporated in a decree, is not exempt from registration if it is otherwise compulsorily registrable.<sup>4</sup>

A petition to the Court, which merely recites the compromise arrived at between the parties and prays for an order recording the compromise, does not come within the provisions of the Registration Act regarding compulsory registration of documents,<sup>5</sup> even though the compromise may include terms affecting matters extraneous to the suit.<sup>6</sup> Where the compromise does not transfer or declare any rights in immovable property but merely provides for the temporary management of the property, registration is not necessary.<sup>7</sup> Even where a compromise is compulsorily registrable the doctrine of part performance applies to such a compromise and where it has been acted upon, parties cannot resile from it.<sup>8</sup> (See Section 53A of the Transfer of Property Act as amended in 1930.)

When both the parties are agreed in stating that the suit has been adjusted, the Court has no option but to record the compromise. In such a case, it does not

#### Note 25

1. ('99) 9 Cal W N 485 (489) : 22 Mad 508 : 26 Ind App 101 (PC).

('35) AIR 1985 Mad 232 (234). (Suit for money compromised — Charge created over attached properties—Property relates to subject-matter of proceedings within S. 17 (2) (vi) of Registration Act and decree is exempt from registration.)

('88) 2 Cal W N 663 (664).

('98) 20 All 171 (180) : 25 Ind App 9 (PC).

('20) AIR 1920 Mad 242 (244) : 43 Mad 688 (FB).

('19) AIR 1919 Mad 177 (178).

('13) 19 Ind Cas 551 (552) (Cal).

('27) AIR 1927 Lah 156 (157). (Compromise embodied in decree of Revenue Court—Registration not necessary.)

('30) AIR 1930 Lah 937 (940).

('82) AIR 1932 Lah 24 (24).

('08) 35 Cal 837 (840).

('08) 85 Cal 1010 (1012). (*Obiter.*)

[See ('20) AIR 1920 Cal 881 (883).

('26) AIR 1926 Cal 666 (667).]

2. ('19) AIR 1919 P O 79 (81) : 47 Cal 485 : 46 Ind App 240 (PC).

('06) 28 All 78 (81).

('21) AIR 1921 Pat 320 (321).

('18) AIR 1918 Pat 139 (140) : 3 Pat L Jour 43.

('36) 40 Cal W N 1176 (1178).

('35) AIR 1935 All 862 (868) : 58 All 230.

[See ('07) 84 Cal 456 (462, 463).]

[But see ('19) AIR 1919 Lah 400 (402) : 1919 Pun Re No. 81.

('15) AIR 1915 Cal 170 (172).]

3. ('32) AIR 1932 Pat 97 (100) : 11 Pat 98. (Requires registration.)

('10) 3 Ind Cas 701 (706) : 33 Mad 102. (Registration is not necessary.)

('33) AIR 1933 Pat 457 (460). (Where the party is already a lessee and the compromise merely varies the terms of the tenancy compromise decree does not require registration—A. I. R. 1932 Pat. 97, Distinguished.)

4. ('28) AIR 1928 All 584 (586).

('10) 5 Ind Cas 234 (235) : 32 All 206.

('09) 1 Ind Cas 558 (559) : 31 All 13.

('11) 12 Ind Cas 317 (320) : 36 Mad 46.

('23) AIR 1923 Lah 581 (582, 583) : 4 Lah 263.

('06) 29 Mad 365 (366).

('99) 22 Mad 508 (514) : 26 Ind App 101 (P O).

('36) AIR 1936 Lah 605 (606). (Even though a suit is dismissed in accordance with the terms of a deed of compromise, if that compromise has not been recorded under the provisions of O. 23, R. 3, the deed is not exempt from registration under S. 17 (2) (vi), Registration Act.)

[See also ('37) AIR 1937 Lah 353 (359, 360).]

5. ('05) 1 Cal L Jour 888 (406). (Per Mookerjee, J.)

('38) AIR 1938 Pat 306 (421, 422) : 12 Pat 359.

('15) AIR 1915 All 392 (393) : 38 All 75.

('15) AIR 1915 Lah 240 (240).

('17) AIR 1917 Lah 282 (284) : 1917 Pun Re No. 78.

('18) AIR 1918 Oudh 412 (417) : 21 Oudh Cas 346.

('17) AIR 1917 Nag 1 (4).

('08) 12 Cal W N 59 (60).

('20) AIR 1920 Sind 101 (108) : 14 Sind L R 245.

6. ('18) AIR 1918 Pat 507 (517, 519, 520) : 3 Pat L Jour 255.

('17) AIR 1917 Pat 9 (10) : 1 Pat L Jour 208.

[But see ('03) 30 Cal 783 (787).

('02) 25 Mad 553 (555).]

7. ('26) AIR 1926 Bom 24 (25).

8. ('14) AIR 1914 P C 27 (29) : 42 Cal 801 : 42 Ind App 1 (P C).

**O. 23 R. 3**  
**Notes 26-27**

matter whether the compromise, though requiring registration under the law, was embodied in an unregistered document, because the admissions of the parties constitute in themselves the "proof" required by this rule. It is only when the matter is in dispute that the *writing* has to be used as evidence and the question of registration becomes material.<sup>9</sup>

**26. Stamp.** — A *solanamah* on stamped paper is not necessary for a compromise decree to be passed under this rule.<sup>1</sup>

See also the undermentioned cases.<sup>2</sup>

**27. Execution of consent decree.** — A consent decree is executable in the same manner as an ordinary decree.<sup>1</sup> Thus, a consent decree providing for the execution of a document by one of the parties may be enforced under O. 21 R. 34.<sup>2</sup> But where the decree is *incapable of execution*, as for instance, where it merely creates a charge on property and does not confer the power of sale, a separate suit is necessary to enforce the right created by the decree.<sup>3</sup> Similarly, a decree can be executed only in respect of the terms included in the *operative part* thereof. Hence, where certain terms of a compromise are not included in the operative part of a decree as being concerned with matters extraneous to the suit, such terms cannot be enforced in execution.<sup>4</sup>

With regard to the power of an executing Court to go behind a consent decree, the question has arisen with reference to three matters as noted below —

(1) *Where the decree gives effect to an unlawful compromise.* — In such a case, the executing Court is entitled and bound to refuse to execute the decree.<sup>5</sup>

(2) *Where the operative part of the decree gives effect to terms of a compromise which do not relate to the suit.* — On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras,<sup>6</sup> Allahabad,<sup>7</sup> Lahore<sup>8</sup> and Patna<sup>9</sup> and by the Chief Court of Oudh<sup>10</sup> that the executing Court cannot refuse to execute the decree in such a case. The reason, according to the Madras High Court, is that an objection to the decree cannot be allowed to be raised in the executing Court

9. ('39) AIR 1939 Nag 293 (238): I L R (1939) Nag 607 (F B).

**Note 26**

1. ('15) 29 Ind Cas 511 (512) (U P B R).  
 ('08) 12 Cal W N 59 (60).

2. ('69) 12 Suth W R 376 (376).  
 (1862) 1 Hyde 149 (149).  
 2 Hay 218.

**Note 27**

1. ('22) AIR 1922 Oudh 150 (152): 25 Oudh Cas 58.  
 ('21) AIR 1921 Cal 227 (229).  
 ('70) 13 Suth W R 151 (154).  
 ('84) AIR 1984 Cal 735 (736).

[See also ('38) AIR 1938 Mad 516 (517). (Partition suit—Consent decree—Preliminary decree is not obligatory and where parties treated it as an executable decree they cannot resile from that position.)]

2. ('21) AIR 1921 Cal 227 (228, 229).  
 ('26) AIR 1926 Cal 975 (976).  
 3. ('95) 22 Cal 818 (816).  
 ('95) 22 Cal 859 (863, 864).  
 4. ('18) AIR 1918 Mad 1381 (1382).  
 ('16) AIR 1916 Mad 550 (550).  
 ('24) AIR 1924 Cal 49 (51).  
 5. ('10) 5 Ind Cas 236 (238, 239) (Cal).  
 ('24) AIR 1924 Nag 84 (85): 20 Nag L R 1.

('30) AIR 1930 Mad 305 (314): 53 Mad 805.

('08) 26 Mad 81 (83).

[But see ('38) AIR 1938 Bom 298 (301). (Objection in execution on the ground of want of registration of compromise and decree—Objection should have been taken before decree and cannot be taken in execution.)]

6. ('15) AIR 1915 Mad 683 (684).

('07) 30 Mad 421 (423).

('32) AIR 1932 Mad 557 (558).

7. ('87) 9 All 229 (231).

('33) AIR 1933 All 649 (652): 55 All 775 (FB).

8. ('34) AIR 1934 Lah 623 (625).

[But see ('19) AIR 1919 Lah 400 (402): 1919 Pun Re No. 81.]

9. ('34) AIR 1934 Pat 203 (203): 13 Pat 17.

10. ('27) AIR 1927 Oudh 83 (83): 29 Oudh Cas 276.

('24) AIR 1924 Oudh 230 (231). (A decision of the Judicial Commissioner's Court of Oudh.)

[See also ('40) AIR 1940 Oudh 27 (30). (Court recording compromise under O. 23 R. 3—Certain terms of compromise not relating to suit but Court having jurisdiction over subject-matter of entire compromise—Recording of compromise though erroneous is not without jurisdiction and would be binding on the parties unless set aside in appeal.)]

but must be taken by way of appeal.<sup>11</sup> The High Court of Calcutta,<sup>12</sup> on the other hand, has held that such a decree is inoperative and invalid and cannot be executed in so far as it gives effect to the terms of a compromise not relating to the suit. The High Court of Bombay seems to take the latter view.<sup>13</sup>

(3) *Where the decree contains any provision in the nature of a penalty.* — A compromise decree being of no greater validity than the contract on which it is based, an executing Court can, in the exercise of its equitable jurisdiction, relieve against any forfeiture incurred under any penal clause in a consent decree.<sup>14</sup>

It follows from the differences in views noted above that in respect of the terms of a consent decree which do not relate to the suit, a separate suit, according to the Calcutta High Court, can be brought on the *contract*;<sup>15</sup> while according to the Allahabad High Court, the question in such a case is one relating to execution and hence a fresh suit is barred under S. 47 of the Code.<sup>16</sup> Where, however, any terms of a compromise are *not embodied* in the operative part of a decree, the bar of S. 47 cannot apply to a suit to enforce such terms and such a suit will therefore lie.<sup>17</sup>

Where a consent decree orders the sale of any property, it can be executed and the property can be sold without the formality of an attachment.<sup>18</sup> Similarly, a consent decree in a mortgage suit can be executed without any final decree being passed (unlike the case of an ordinary preliminary decree on the mortgage).<sup>19</sup>

See also the undermentioned cases.<sup>20</sup>

11. ('15) AIR 1915 Mad 210 (215) : 38 Mad 959.
- (07) 30 Mad 421 (423).
12. ('09) 36 Cal 193 (223).
- ('12) 14 Ind Cas 701 (701) : 39 Cal 663.
- ('05) 1 Cal L Jour 388 (399).
- ('07) 34 Cal 456 (463).
- ('25) AIR 1925 Cal 286 (288).
- ('21) 62 Ind Cas 653 (654, 655) (Cal).
- [See also ('36) AIR 1936 Cal 446 (448) : 63 Cal 760. (A term in a compromise petition which goes beyond the scope of the suit has no force beyond that of an agreement, even though such term is made part of the consent decree which is passed on the compromise.)]
13. ('32) AIR 1932 Bom 466 (467). (Compromise including extraneous matters—Executable only as to subject-matter of suit — Extraneous matters to be enforced by separate suit.)
14. ('11) 12 Ind Cas 334 (335) (Mad).
- ('33) AIR 1933 All 252 (255) : 55 All 334 (FB).
- (Overruling A I R 1924 All 689.)
- ('26) AIR 1926 Bom 81 (81).
- ('21) AIR 1921 Cal 356 (359).
- ('21) AIR 1921 Cal 555 (566).
- ('01) 24 Mad 265 (270, 271).
- ('20) AIR 1920 Cal 716 (717).
- ('1900) 28 Cal 557 (567) : 28 Ind App 89 (P C).
- (Compromise decree in a mortgage suit and enforcement of its terms.)
- ('16) AIR 1916 Mad 1006 (1006).
- ('16) AIR 1916 Mad 774 (774).
- ('33) AIR 1933 Lah 23 (24). (Court has no unrestricted power to relieve defaulting party from consequence of default — It cannot interfere with effect of default if as a result thereof decree-holder merely seeks to take away concession allowed to judgment-debtor.)
- ('37) AIR 1937 Nag 413 (414).
- ('35) AIR 1935 All 862 (868) : 58 All 230.
- [See ('34) AIR 1934 Oudh 44 (45) : 9 Luck 387. (Provision in compromise decree in mortgage suit for payment by instalments — Failure to pay — Provision held to be final.)]
- [See also ('37) AIR 1937 Lah 828 (829). (Compromise decree — Relief against penalty — Court can relieve defaulting party only if decree-holder enforces penalty, but cannot do so where he merely withdraws concession given to judgment-debtor.)]
15. ('07) 34 Cal 456 (463).
- ('25) AIR 1925 Cal 286 (288).
16. ('87) 9 All 229 (231).
17. ('19) AIR 1919 Mad 305 (310).
- ('94) 16 All 423 (436). (Suit for specific performance lies.)
- ('80) 1880 Pun Re No. 95, page 230.
- ('39) AIR 1939 All 454 (456) : 1 LR (1939) All 435.
- ('38) AIR 1938 Rang 145 (147).
- [But see ('97) 10 C P L R 56 (57, 58).]
18. ('21) AIR 1921 Pat 320 (321).
19. ('26) AIR 1926 Oudh 385 (386) : 29 Oudh Cas 26.
- ('25) AIR 1925 Bom 509 (510).
- ('21) AIR 1921 Pat 320 (321).
- [But see ('11) 10 Ind Cas 481 (485, 486) (All). (Per Richards, J.)]
20. ('05) 3 Low Bur Rul 243 (243). (Suit under Sec. 9 of the Specific Relief Act compromised— Suit by the parties to establish their title not barred.)
- ('04) 26 All 299 (309) : 31 Ind App 116 (PC). (Suit based on compromise decree is not a suit for breach of contract.)
- ('27) AIR 1927 Bom 87 (88). (Earlier suit brought in a different right is as if it was brought by a different person.)

**O. 23 R. 3**  
**Note 28**

**28. Mode and effect of setting aside compromise decrees.** — No appeal lies from a consent decree: see Section 96 (3) and Note 31 below. But an appeal lies from an order recording a compromise [O. 43 R. 1 (m)] and when such an order is set aside, the decree based on it also falls to the ground: see Note 31 *infra*. Apart from this, the two usual methods of setting aside a consent decree are (a) by suit and (b) by review.<sup>1</sup> These two remedies are cumulative and not alternative, so that failure in an application for review is no bar to a suit to set aside the decree.<sup>2</sup>

A consent decree being only the contract between the parties with a command of a Judge superadded to it, a suit lies to set aside the consent decree on any of the grounds on which the contract can be set aside, such as fraud, mistake, etc.<sup>3</sup> In appropriate cases, a compromise decree may be set aside by means of an application under O. 9 R. 13. Thus, when such a decree is attacked on the ground that the compromise was not actually entered into by the defendants, that they were not duly served and that they were not present or represented at the trial, an application under O. 9 R. 13 is a proper remedy to set aside the compromise decree.<sup>4</sup>

**Note 28**

1. ('95) 1895 Pun Re No. 48, page 208.  
( '82) AIR 1982 Bom 615 (615, 616) : 56 Bom 231.  
( '92) 1892 Pun Re No. 114, page 390.  
( '90) 1890 Pun Re No. 81, page 254.  
( '84) 10 Cal 612 (614).  
( '91) 15 Bom 594 (598).  
( '99) 23 Bom 620 (623) : 1 Bom L R 82.  
( '01) 5 Cal W N 877 (878).  
( '71) 6 Beng L R 648 (651) (PC). (Review application lies.)  
[See ('38) 144 Ind Cas 82 (82) (Cal). (If fraud is relied on, suit is the remedy.)]  
( '36) AIR 1936 Rang 389 (390). (Review on ground of fraud or mistake is not permissible—Remedy is by way of suit.)]  
[See also ('38) AIR 1938 Sind 304 (304). (If fraud is alleged to have been practised in obtaining a consent decree the remedy is by way of suit and not by way of an application.)]  
( '16) 3 Cal L Jour 119 (128, 129, 130). (Remedy of minor seeking to set aside compromise decree on the ground of fraud is by suit and not by review.)]  
[But see ('66) 5 Suth W R 226 (226). (Review of consent decree not legal.)]  
( '33) AIR 1933 Sind 29 (31) : 26 Sind L R 395. (Consent decree cannot be vacated by review.)]  
2. ('09) 2 Ind Cas 129 (143) (Cal).  
[But see ('05) 2 Cal L Jour 508 (610).]  
3. ('81) 6 Cal 687 (704). (Consent decree can be set aside on the ground of mistake of material facts.)  
( '85) AIR 1935 All 137 (189) : 57 All 426. (Party alleging fraud cannot be allowed to avoid compromise in proceedings under this rule — Suit is the remedy.)]  
( '82) AIR 1982 Bom 615 (615) : 56 Bom 231.  
( '84) AIR 1984 Oudh 417 (417, 418). (Pleader not authorized to enter into compromise—Decree in terms of a compromise by him — Suit to set aside decree lies without appealing against order under O. 43 R. 1 (m).)  
( '35) AIR 1935 Pat 69 (61). (Money paid under such decree can be recovered when decree is rectified and execution proceedings can be set

aside.)

- ( '84) AIR 1934 Pat 229 (231) : 18 Pat 165. (Fraud on the party.)  
( '33) AIR 1933 Sind 53 (55).  
( '23) AIR 1923 Pat 483 (486) : 2 Pat 731.  
( '25) AIR 1925 All 266 (267). (Consent decree can be set aside on the ground of undue influence or coercion.)  
( '07) 34 Cal 83 (89).  
( '10) 5 Ind Cas 236 (238) (Cal).  
( '08) 8 Cal L Jour 266 (271).  
( '22) AIR 1922 Cal 493 (497).  
( '21) AIR 1921 Bom 414 (415).  
( '19) AIR 1919 Pat 232 (232) : 4 Pat L Jour 205.  
( '86) AIR 1936 Sind 99 (105) : 29 Sind L R 455. (But suit confined to ground on which agreement can be set aside.)  
( '37) AIR 1937 Nag 413 (414).  
( '35) 62 Cal 642 (649, 650).  
( '84) AIR 1934 Lah 393 (393) : 15 Lah 626. (But suit does not lie to set aside compromise decree on ground that plaintiff was not consenting party — Remedy is to impeach decree by appropriate proceeding taken in suit in which decree was passed.)  
( '39) AIR 1939 Bom 490 (491) : 41 Bom L R 994 (996).  
[See ('12) 16 Ind Cas 611 (612) (Cal).]  
[See also ('09) 3 Ind Cas 4 (5) (All).]  
( '32) AIR 1932 Pat 170 (177) : 11 Pat 618. (Fraud must be specifically proved — Mere proof of inequality of division under compromise is not enough.)]  
[But see ('11) 9 Ind Cas 875 (879, 880) : 35 Mad 75. (Consent decree cannot be set aside on some of the grounds on which a contract can be set aside, such as absence of consideration, mistake etc.)]  
4. ('06) 3 Cal L Jour 158 (159).  
( '20) AIR 1920 Lah 408 (409) : 1 Lah 844. (Or an application for review or an appeal to superior Court.)  
( '25) AIR 1925 Lah 431 (432). (Or appeal.)  
( '27) AIR 1927 Lah 602 (608, 604) : 9 Lah 248.  
( '09) 3 Ind Cas 116 (117) (Cal).  
( '18) AIR 1918 Cal 322 (323).

But a consent decree cannot be set aside by rule on motion,<sup>5</sup> or by an application under Section 151.<sup>6</sup>

**O. 23 R. 3**  
**Notes 28-31**

An interlocutory consent order can be set aside by application in the same suit.<sup>7</sup>

Parties cannot rescind a consent decree as an ordinary contract by mutual agreement.<sup>8</sup> So a consent decree cannot be varied by consent of parties.<sup>9</sup>

Where, by a mistake, the Court passes a decree which *purports* to be in accordance with the terms of the compromise between the parties, but is not *actually* in accordance with such terms, it has got power under Section 151 to correct its mistake and amend the decree so as to be in accordance with the agreement of the parties.<sup>10</sup>

When a compromise decree is set aside, both the parties are restored to their original rights in the former suit when the compromise was effected and the suit can be proceeded with from that stage.<sup>11</sup>

Ignorance of real facts, when it was within the party's power to know them,<sup>12</sup> or a mistake or ignorance of law<sup>13</sup> is no ground for setting aside a compromise decree. A compromise decree cannot be set aside on the ground of the defendant's absence at the time when the compromise was recorded by the Court.<sup>14</sup> See also the undermentioned case.<sup>15</sup>

**29. Compromise of appeal.** — The present rule applies also to appeals and an Appellate Court can pass a compromise decree if the appeal is compromised.<sup>1</sup>

**30. Compromise of execution proceedings.** — See Rule 4 *infra*.

**31. Appeal.** — See also Note 15 to Section 96 *ante*, for a full discussion.

An order recording or refusing to record a compromise is appealable under O. 43 R. 1 (m).<sup>1</sup> An order recording a compromise is appealable although a decree has

(‘66) 6 Suth W R Misc 36 (37).

5. (‘11) 11 Ind Cas 568 (568) : 36 Bom 77.

(‘32) AIR 1932 Bom 615 (616) : 56 Bom 231.

(‘11) 11 Ind Cas 356 (357) (Bom).

(‘98) 25 Cal 649 (652). (Charges of fraud cannot properly be tried on affidavits.)

6. (‘32) AIR 1922 Mad 446 (446).

(‘83) AIR 1933 Sind 29 (31, 32) : 26 Sind L R 395.

(‘89) AIR 1939 Bom 490 (491) : 41 Bom L R 994 (996).

[See (‘84) AIR 1934 Pat 229 (231) : 18 Pat 165. (If fraud is practised on Court remedy is by application—But if practised on party remedy is by way of suit.)]

[But see (‘26) AIR 1926 Oudh 315 (315) : 1 Luck 341. (May be set aside under the inherent powers of the Court if in excess of authority.)]

(‘35) AIR 1935 Cal 231 (238) : 62 Cal 223. (Intimidation from bench—Counsel consenting to a decree—*Held*, decree not binding and Court has inherent power to set it aside.)]

7. (‘80) AIR 1930 Bom 362 (364) : 55 Bom 372.

(‘32) AIR 1932 Bom 615 (616) : 56 Bom 231.

8. (‘11) 9 Ind Cas 875 (879) : 35 Mad 75.

9. (‘37) AIR 1937 Cal 222 (224).

[See however (‘88) AIR 1938 Oudh 103 (105). (Decree can be varied by consent of parties.)]

10. (‘84) AIR 1934 Rang 103 (109).

[See also (‘88) AIR 1938 Pat 135 (138). (Compromise petition—Court passing order “let suit

be dismissed in terms of compromise”—Defendant not paying within time—Plaintiff seeking execution—Order can be amended and execution allowed.]]

11. (‘81) 6 Cal 687 (704).

(‘76) 2 Cal 184 (196) : 3 Ind App 291 (PC).

(‘24) AIR 1924 Pat 758 (758).

[But see (‘85) 10 Bom 338 (340).]

12. (1837) 2 Moo Ind App 181 (247) (PC).

13. (‘82) 8 Cal 133 (141).

(‘36) AIR 1936 Sind 99 (105) : 29 Sind L R 455.

14. (‘86) AIR 1936 Mad 347 (350).

15. (‘28) AIR 1928 Mad 708 (710).

#### Notes 29

1. (‘02) 5 Oudh Cas 49 (53).

(‘25) AIR 1925 Lah 145 (146).

#### Notes 31

1. (‘29) AIR 1929 Nag 275 (276) : 26 Nag L R 101. (‘35) AIR 1935 Cal 239 (240) : 62 Cal 229. (No second appeal lies but revision is allowed.)

(‘33) AIR 1933 Pat 306 (427) : 12 Pat 359.

(‘28) AIR 1928 Lah 39 (39, 40).

(‘27) AIR 1927 Lah 546 (548).

(‘18) AIR 1918 Cal 431 (431).

(‘33) AIR 1933 Cal 94 (95). (Even though no appeal be filed against the decree.)

(‘25) AIR 1925 Mad 606 (607).

(‘86) AIR 1936 Sind 59 (60) : 29 Sind L R 437.

(‘36) AIR 1936 Nag 8 (10) : 31 Nag L R (Supp) 72.



**O. 23 R. 3**  
**Notes 31-33**

been passed on the compromise.<sup>2</sup> The High Court of Bombay<sup>3</sup> has held that where an order under this rule is made with the consent of the parties in the trial Court, there can be no appeal against the order under O. 43 R. 1. The reason is that there is no material before the Court on which a decision can be come to. The Madras High Court<sup>4</sup> has, however, dissented from this view and held that an appeal will lie against an order recording a compromise, whether such order has been passed after contest or not. It has been held by the High Court of Lahore<sup>5</sup> that that rule applies only where a compromise was actually made but the Court for some reason has refused to record it, and not where it has been found that there has been no compromise at all. The Allahabad High Court has taken a contrary view.<sup>6</sup>

**32. Revision.** — Although under this rule a Court has power only to record a "lawful" compromise, yet, where it requires evidence to be given of an illegal compromise, its order is not open to revision as such order is not likely to cause irreparable injury.<sup>1</sup> It has been held by the Allahabad High Court<sup>2</sup> that no revision will lie against a decree on a compromise on the ground that the Court omitted to order the recording of the compromise.

**33. Construction of compromise decrees.** — See the undermentioned cases.<sup>1</sup>

**O. 23 R. 4**

Proceedings in execution of decrees not affected.

**R. 4. [S. 375A.]** Nothing in this Order shall apply to any proceedings in execution of a decree or order.

*Synopsis***1. History of the Rule. | 2. Effect of the Rule.***Other Topics (miscellaneous)*

Adjustment of decrees. See Note 2.

Mesne profits—Compromise as to. See Note 2.

2. ('36) AIR 1936 Mad 385 (386).

('84) AIR 1934 Cal 846 (846) : 61 Cal 910.

('38) AIR 1938 Lah 766 (766).

3. ('33) AIR 1933 Bom 205 (207, 208) : 57 Bom 206.

4. ('36) AIR 1936 Mad 385 (386).

('36) AIR 1936 Mad 347 (349).

5. ('24) AIR 1924 Lah 248 (249).

6. ('36) AIR 1936 All 433 (433).

**Note 32**

1. ('12) 16 Ind Cas 3 (4) (Cal).

2. ('35) AIR 1935 All 788 (739). (Defect cured by S. 99 of the Code.)

**Note 33**

1. ('74) 1 Cal 153 (162) : 2 Ind App 263 (P C).

('84) AIR 1934 Cal 402 (404) : 61 Cal 148.

('32) AIR 1932 Mad 457 (457, 458) : 55 Mad 436.

('35) AIR 1935 Mad 41 (42). (Compromise decree against several defendants—Joint and several liability cannot be implied in the absence of words to that effect.)

('38) AIR 1933 P C 167 (168, 169) : 56 Mad 737 : 60 Ind App 266 (P C). (Compromise decree in mortgage suit—Mortgagor to pay certain amount in a certain time and on default mortgagee to take possession and keep it as a usufructuary mortgage—Mortgagor's remedy is not by execution only but he can sue to redeem.)

('97) 20 Mad 256 (268) : 24 Ind App 218 (P C).

Order 21 Rule 90 — Proceedings under. See Note 2.

('20) AIR 1920 Nag 32 (33, 34) : 16 Nag L R 212.

('26) AIR 1926 P C 110 (111) (P C).

('36) AIR 1926 Oudh 427 (427).

('07) 80 Mad 356 (360).

('86) AIR 1936 P C 309 (310, 311) : 68 Ind App 429 : 1 L R (1937) Mad 94 (P C). (Compromise decree—Condition precedent—Minor to obtain certain amount and mesne profits on attaining majority and after executing receipt of acquittance — Minor's execution of receipt of acquittance on attaining majority held not condition precedent nor was it personal right.)

('35) AIR 1935 All 748 (749). (Installments to be paid on specified dates—If three instalments fall into arrears, decree-holder would be entitled to recover entire amount—Held that three instalments falling due was not enough—There should be further condition that payment of any of them should not be made.)

('35) AIR 1935 Mad 107 (110, 111). (Statement in decree that defendant agreed to give plaintiff "as matter of grace and out of love" certain amount and that plaintiff should recover same from defendant after executing registered receipt etc.—Held plaintiff got vested right and not merely contingent one.)

('35) AIR 1935 Pat 123 (125). (Patent ambiguity in consent decree — Evidence should not be allowed to construe it.)



**1. History of the Rule.**—There was no provision in the old Code corresponding to the present rule. Hence, there was a conflict of decisions as to whether, by virtue of Section 647 (now Section 141) the provisions of this Order could be applied to proceedings in execution, some cases holding that they could be so applied<sup>1</sup> and others holding that they could not.<sup>2</sup> This conflict was set at rest by Act VI of 1892 which introduced Section 375A into the Code, by which the provisions of the Chapter were declared inapplicable to proceedings after the passing of the decree. In 1894 the Privy Council in I. L. R. 17 Allahabad 106<sup>3</sup> decided that irrespective of the changes made by Act VI of 1892, Section 647 (now Section 141) had not the effect of making the provisions of the Code relating to withdrawal and adjustment of suits applicable to execution proceedings. The present rule states in explicit terms that Order 23 does not apply to execution proceedings.<sup>4</sup> For fuller information, see Notes under Section 141.

**2. Effect of the Rule.** — Order 23 Rule 1 relating to withdrawal and abandonment of a suit does not apply to execution proceedings. But a decree-holder may apply to have his application for execution dismissed.<sup>1</sup> The Court has no power to allow an application for execution to be withdrawn with liberty of bringing a fresh application.<sup>2</sup> Similarly, the withdrawal of an application for execution without the Court's permission to bring a fresh application is no bar to a fresh application for execution.<sup>3</sup> Order 23 Rule 3 does not apply to execution proceedings and the Court has no power to pass a consent order in such proceedings.<sup>4</sup> Order 21 Rule 2 and Section 47 provide a complete procedure for the adjustment of decrees out of Court.<sup>5</sup> Where a decree leaves the amount of mesne profits to be ascertained in further proceedings, the suit being undisposed of, the parties can enter into a compromise pending the proceedings for the ascertainment of mesne profits.<sup>6</sup> But it has been held by the Rangoon High Court<sup>7</sup> that an agreement between a mortgagor and mortgagee after preliminary decree for sale and before the final decree for sale, whereby the mortgagor is to be given an extension of time for the payment of decretal amount, falls within O. 21 R. 2 and not under this rule. The High Courts of Patna<sup>8</sup> and Lahore<sup>9</sup> hold that an application to set aside an execution sale, under O. 21 R. 90, is not a proceeding in execution and hence O. 23 R. 3 applies to such application. According to the Bombay High Court,<sup>10</sup> where a preliminary decree is passed in a suit for partnership accounts and an enquiry is pending before the commissioner for taking the accounts, the parties can enter into a compromise, as the proceedings before the commissioner are not proceedings in execution.

**Order 23 Rule 4 — Note 1**

1. ('85) 7 All 359 (362).
- ('82) 6 Bom 681 (682).
- ('90) 12 All 892 (395) (F B).
- ('95) 19 Bom 546 (549).
- ('88) 11 All 228 (282).
2. ('86) 10 Bom 62 (64).
- ('91) 18 Cal 635 (639).
3. ('95) 17 All 106 (111) : 22 Ind App 44 (P C).
4. ('24) AIR 1924 Lah 342 (343).

**Note 2**

1. ('22) AIR 1922 Pat 525 (526) : 1 Pat 292.
- ('18) 19 Ind Cas 904 (905) (Cal). (A decree-holder has no absolute right to discontinue execution proceedings at any stage at his option.)
2. ('14) AIR 1914 All 134 (135) : 36 All 172.

3. ('14) AIR 1914 Mad 1 (1).
4. ('18) AIR 1918 Nag 110 (111).
- ('24) AIR 1924 Lah 342 (343).
- ('12) 17 Ind Cas 752 (752) (Mad).
- ('16) AIR 1916 Mad 604 (604).
- ('80) AIR 1930 Mad 105 (108).
- ('25) AIR 1925 Oudh 136 (137).
- ('22) AIR 1922 Cal 311 (313).
- [But see ('27) AIR 1927 Nag 31 (32). (This decision, it is submitted, is not correct.)]
5. ('21) AIR 1921 Pat 107 (108):6 Pat L Jour 253.
6. ('09) 4 Ind Cas 1040 (1041) : 33 Mad 78 (79).
7. ('28) AIR 1928 Rang 194 (195) : 6 Rang 285.
8. ('21) AIR 1921 Pat 107 (108):6 Pat L Jour 253.
9. ('29) AIR 1929 Lah 886 (887).
10. ('02) 26 Bom 76 (82).

**O. 23 R. 4**  
**Note 2**

Whatever its other effects may be, Rule 4 does not in any way affect the rule of estoppel.<sup>11</sup> Thus, where an application for execution is allowed to be dismissed on the basis of a compromise which provides for a fresh application if the compromise was not carried out and the compromise is broken, the defendant is estopped from contending that as O. 23 R. 3 does not apply to applications for execution, the decree-holder cannot file a fresh application for execution as on the basis of the compromise.<sup>12</sup>

A pre-decree arrangement concerning the execution of the decree cannot be set up in bar of execution in the executing Court. But it can be enforced by means of a separate suit.<sup>13</sup>

## ORDER XXIV.

### PAYMENT INTO COURT

**O. 24 R. 1**

**R. 1. [S. 376.]** The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

Deposit by defendant of amount in satisfaction of claim.

[1877, S. 376; R. S. C., O. 22 R. 1.].

### Synopsis

- |                                     |  |
|-------------------------------------|--|
| 1. Scope of the Rule.               | 5. Suits for accounts.                               |
| 2. Payment into Court.              | 6. "At any stage of the suit."                       |
| 3. Suit to recover debt or damages. | 7. Insolvency of defendant after payment into Court. |
| 4. Suit for injunction.             |  |

### Other Topics (miscellaneous)

Expression of willingness to pay. See Note 2.

May deposit in Court. See Notes 1 and 2.

**1. Scope of the Rule.** — This rule deals with payments into Court in satisfaction of a claim *after* the institution of a suit and *before* decree.<sup>1</sup> Payments made after decree are dealt with by O. 21 R. 1. This rule does not apply to payments made into Court under Section 83 of the Transfer of Property Act, *before the institution* of the suit,<sup>2</sup> nor to payments made in pursuance of the order of the Court under the provisions of O. 9 R. 13 setting aside an *ex parte* decree.<sup>3</sup>

The rule contemplates an unconditional deposit of a sum of money in Court by the defendant.<sup>4</sup> This is contrary to the corresponding English Rules of the Supreme Court (O. 22 Rules 1 and 6), whereunder a deposit may be made coupled with a denial of liability.

11. ('12) 18 Ind Cas 81 (82) (Mad).  
(80) AIR 1930 Pat 615 (617, 618) : 10 Pat 178.  
(80) 5 Cal 27 (80, 81).

12. ('12) 18 Ind Cas 81 (82) (Mad).

13. ('28) AIR 1928 Cal 527 (580).

#### Order 24 Rule 1 — Note 1

1. See Note 6 below.

2. [See ('11) 10 Ind Cas 893 (897) : 35 Mad 209.

(After the institution of the suit, payment into Court is regulated by this rule.)]

3. ('26) AIR 1926 Mad 1069 (1070, 1071).

4. ('27) AIR 1927 Cal 72 (78).

('87) AIR 1987 Lah 788 (786). (Deposit conditional on furnishing security — Interest does not cease to run.)

[See also (1859) 7 Moo Ind App 823 (858).

('84) 6 All 899 (402).]

**2. Payment into Court.** — A mere expression of willingness to pay made in a written statement is not equivalent to a payment into Court<sup>1</sup> nor, it is conceived, will a payment into a post office by a money order be a valid payment under this rule unless and until it reaches the Court's hands.<sup>2</sup> But a payment into Government treasury under rules framed by the High Court will be a payment into Court.<sup>3</sup> Where moneys in the hands of the defendant were sought to be attached before judgment, and the defendant deposited the same into Court and the attachment was subsequently found not to have been validly made, the money deposited was construed to be a payment under this rule.<sup>4</sup>

**O. 24 R. 1**  
**Notes 2-7**

**3. Suit to recover debt or damages.** — The rule applies to all suits to recover a debt or damages, though there may be other reliefs claimed in the suit.<sup>1</sup> It does not apply to a suit for a *return of goods* taken or their value.<sup>2</sup>

**4. Suit for injunction.** — A suit for injunction for obstruction to light and air is not a suit to recover a debt or damages within the meaning of this rule, even though the Court may, in a proper case, allow damages in lieu of injunction. According to the practice of the High Court of Bombay, however, where a defendant deposits money into a Court in a suit for injunction in satisfaction of the plaintiff's claim and the Court allows damages in lieu of injunction to the extent of the amount deposited, the Court should apply the provisions of Rule 4 in directing the payment of costs.<sup>1</sup>

**5. Suits for accounts.** — The rule does not apply to suits for accounts.<sup>1</sup> But the Court has, in such suits, the power to direct the payment into Court of admitted sums in the possession of parties liable to account, or of persons in a fiduciary capacity; such a power is not, in any way, controlled by this rule.<sup>2</sup>

**6. "At any stage of the suit."** — These words show that the payment must be made before decree.<sup>1</sup> Note also the words "in full of the *claim*."

**7. Insolvency of defendant after payment into Court.** — According to English law where the defendant pays money into Court admitting liability to the plaintiff and then becomes a bankrupt, the plaintiff is secured creditor in respect of such amount. When the liability is denied, he is a secured creditor to the extent to which the claim is admitted or proved.<sup>1</sup>

**R. 2. [S. 377.]** Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

**O. 24 R. 2**

[1877, S. 377; R. S. C, O. 22 R. 4.]

#### Note 2

1. ('92) 16 Bom 141 (150).
2. [See ('98) 22 Bom 415 (416). (Case relating to auction-purchaser sending balance of purchase-money due under O. 21 R. 85 by money order.)]
3. [See ('84) 7 Mad 211 (212). (Case relating to payment of purchase-money by auction-purchaser.)]
4. ('27) AIR 1927 Rang 278 (278) : 5 Rang 758.

#### Notes 3

1. (1890) 68 Law Tim 871, Moon v. Dickinson.
- ('85) AIR 1985 Oudh 98 (95) : 10 Luck 350. (The word "debt" applies to secured as well as unsecured debts—The rule applies to suits to enforce charge on mortgage.)
- (1899) 2 Ch D 95 (108, 105), Coots v. Ford.
2. (1857) 1 H & N 572, Allan v. Dunn.

#### Note 4

1. ('97) 21 Bom 502 (508, 509).  
[See also ('89) AIR 1989 Bom 198 (202). (Principles laid down in Order 24 apply to case of innocent infringement of designs where offender offers to pay profits made by the infringement.)]

#### Note 5

1. (1883) 22 Ch D 611 (613), Nichols v. Evans.
2. (1892) 3 Ch 226 (286), Hollis v. Burton.  
[See also (1878) 3 Ch D 84 (90), London Syndicate v. Lord.]

#### Note 6

1. ('26) AIR 1926 Mad 1069 (1070).

#### Note 7

1. (1897) 2 Q B 516 (519, 520), Re Gordon.

**O. 24 R. 2**  
**Notes 1-2**

*Synopsis*

**1. Form of the notice. | 2. "Unless the Court otherwise directs."**

**1. Form of the notice.** — The words "in writing" which occurred in the old Code have been omitted as unnecessary in view of Section 142 of the present Code under which all notices under the Code should be in writing.

Where the deposit made is on the challenge of the plaintiff and in the presence of the plaintiff, a separate notice is not necessary.<sup>1</sup>

For form of notice, see Appendix H, Form No. 3.

**2. "Unless the Court otherwise directs."** — The Court has a *discretion* under this rule to refuse to allow the plaintiff to withdraw the money deposited in Court, but such discretion must be exercised reasonably. "In a case where the money sued for is due on a promissory note, it would be unreasonable, in the absence of special circumstances, not to allow the plaintiff to take the money out."<sup>1</sup> But where the amount in deposit is *claimed by different parties*, no party can, without an order of the Court, withdraw the amount.<sup>2</sup> The money deposited to the credit of the plaintiff but not withdrawn by him should not be treated as the defendant's money and paid over to the person who attaches the same in execution of his decree against the defendant.<sup>3</sup>

It is the practice of the Court to appropriate payment upon a bond first to the interest due, and then to the principal.<sup>4</sup>

**O. 24 R. 3**

**R. 3. [S. 378.]** No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or

Interest on deposit not allowed to plaintiff after notice.

falls short thereof.

[1877, S. 378.]

*Synopsis*

- 1. Scope of the Rule.**
- 2. Tender without payment.**
- 3. Execution proceedings.**

*Other Topics (miscellaneous)*

Plaintiff, whether entitled to interest after notice of deposit. See Note 1.

Tender and payment, refusal to accept — Effect. See Note 2.

**1. Scope of the Rule.** — No interest can be claimed by the plaintiff after he receives notice of the payment into Court.<sup>1</sup>

**Order 24 Rule 2 — Note 1**

1. ('85) AIR 1935 Mad 342 (344). (Plaintiff is not entitled to interest in such a case between date of deposit and date when he gets formal notice.)

**Note 2**

1. ('99) 26 Cal 766 (769).
2. ('92) 16 Bom 141 (150).
3. ('91) 15 Bom 681 (684).
4. ('05) 28 All 25 (27).

**Order 24 Rule 3 — Note 1**

1. ('99) 26 Cal 766 (768, 769).
- ('35) AIR 1935 Oudh 98 (95); 10 Luck 350. (Payment between preliminary and final decree—Rule applies as suit is pending.)
- ('10) 5 Ind Cas 165 (170) (Cal).
- ('18) AIR 1918 Mad 1860 (1862); 40 Mad 804.
- [See also ('18) AIR 1918 Mad 68 (91). (Mortgagee wrongly refusing to withdraw deposit—Redemp-

Where the defendant deposits the amount in Court but stipulates that it should not be paid to the plaintiff until the termination of the trial, this rule does not apply and the plaintiff is entitled to interest even after the deposit.<sup>2</sup>

**O. 24 R. 3**  
**Notes 1-3**

**2. Tender without payment.** — The general rule is that a creditor is not bound to accept a sum tendered which is less than what is due to him.<sup>1</sup> This rule provides an exception to the general rule in that interest ceases to run on the deposit, whether such deposit is in *full* satisfaction of the claim or *falls short* thereof. But the plea of tender before action must, in order to stop interest, be accompanied by a payment into Court after the suit; otherwise the tender is ineffectual.<sup>2</sup> Where the defendant was restrained by an order of injunction not to pay the amount due by him on a bond to the plaintiff, but the Court ordered him to deposit the amount *in Court* and he did not do so, he was held bound to pay interest from the date of the order.<sup>3</sup> A deposit in Court before the due date, of money due upon a bond is not a valid tender of the debt;<sup>4</sup> nor is a mere offer to pay the amount a valid tender.<sup>5</sup> A valid tender, if improperly refused, stops interest.<sup>6</sup>

As to the effect of a tender made to one of two joint promisees, see the undermentioned cases.<sup>7</sup>

**3. Execution proceedings.** — This Order does not apply to proceedings in execution.<sup>1</sup> But the benefit of this rule has been extended by way of analogy to judgment-debtors and as a result, a decree-holder, who might have, but has not, drawn the amount immediately after its deposit will be disallowed interest, even though the amount deposited is not the full amount due under the decree.<sup>2</sup>

**R. 4. [S. 379.] (1)** Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

**O. 24 R. 4**

Procedure where plaintiff accepts deposit as satisfaction in part.

tion suit—Mortgagor is entitled to interest from service of summons on mortgagees.])

2. ('86) AIR 1936 Lah 76 (78).

**Note 2**

1. ('78) 8 Cal 6 (16).

('78) 8 Cal 468 (471).

[See ('78) 2 Cal L Rep 183 (184).]

2. ('92) 16 Bom 141 (149, 150).

('32) AIR 1932 Mad 109 (111) : 55 Mad 458.

('04) 8 Cal W N 153 (155).

('28) AIR 1928 Cal 874 (875).

2 O & M 683 (684), Chapman v. Hicks. (1848) 5 O B 865 (877), Dixon v. Clark.

3. ('71) 16 Suth W R 297 (298).

4. ('08) 31 Cal 188 (185).

5. ('98) 22 Bom 440 (446).

6. ('07) 34 Cal 805 (823).

('03) 7 Cal W N 720 (723). (No valid tender—Interest allowed.)

7. ('97) 20 Mad 461 (464, 465). (Amount due on mortgage paid to one of the joint mortgagees—Suit on mortgage by the other mortgagee—Held mortgage debt was discharged.)

('02) 25 Mad 26 (39). (As between co-heirs none of them can receive the whole amount of debt for the others, nor give a discharge to the debtor.)

**Note 3**

1. ('27) AIR 1927 Cal 72 (73).

2. ('18) AIR 1918 All 234 (235) : 40 All 125.

('35) AIR 1935 Oudh 93 (96) : 10 Luck 350.

('71) 16 Suth W R 304 (304).

('69) 12 Suth W R 50 (52).

[But see ('67) 7 Suth W R 20 (20).]

**O. 24 R. 4**  
**Notes 1-2**

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

**Procedure where he accepts it as satisfaction in full.**

*Illustrations*

(a) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suits, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs. 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

[1877, S. 379. Cf. R. S. C., O. 22 R. 6.]

*Synopsis*

1. "May prosecute his suit for the balance." | 2. Apportionment of costs.

1. "May prosecute his suit for the balance." — Where the plaintiff accepts the payment only in part satisfaction of his claim, he is entitled under this rule to prosecute the suit for the balance.

2. **Apportionment of costs.** — The Court has a discretion under this rule in awarding costs<sup>1</sup> and, in exercising such discretion, the Court ought to find which of the parties is most to blame for the litigation.<sup>2</sup> Where, at the settlement of issues, the defendant paid the amount into Court which plaintiff took out in part satisfaction and raised an issue as to damages and subsequently the plaintiff withdrew the suit accepting the same in full satisfaction of his claim, it was held that the plaintiff was entitled to his costs upto the settlement of the issues.<sup>3</sup> Where the suit is not one "to recover a debt or damages" within the meaning of this rule, the Court has full discretion to apportion costs under Section 35 of the Code.<sup>4</sup> In the undermentioned case<sup>5</sup> it was held that the principles of this rule applied to a suit for injunction and damages in respect of an infringement of a registered design.

**Order 24 Rule 4 — Note 2**

1. ('12) 18 Ind Cas 200 (201) (Mad).
2. ('12) 18 Ind Cas 188 (188) (Mad).
- ('94) 21 Cal 680 (688). (Defendant not blamable—He is entitled to his costs.)
3. (1868) 1 Bom H O R O O 70 (71).
4. ('97) 21 Bom 502 (509).

5. ('89) AIR 1939 Bom 198 (202). (Suit for injunction and damages for infringement of design — Offender at early stage of suit admitting infringement and offering to pay profits made by infringement — Proprietor electing to continue suit — Decree passed only in terms of offer — Proprietor is liable to pay offender's costs incurred after date of offer.)

# ORDER XXV.

## SECURITY FOR COSTS

**R. 1.** [Ss. 380, 382.] (1) Where, at any stage of a suit, it **O. 25 R. 1**

When security for costs  
may be required from  
plaintiff.

appears to the Court that a sole plaintiff<sup>11</sup> is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

Residence out of Bri-  
tish India.

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

### Local Amendments

#### ALLAHABAD

After the words "property in suit," add "or that the plaintiff is being financed by a person not a party to the suit."

#### MADRAS

The following shall be *inserted* as sub-rule (4) :

"(4) In all cases in which an element of champerty or maintenance is proved, the Court may, on the application of the defendant, demand security for the estimated amount of the defendant's costs, or such proportion thereof, as from time to time during the progress of the suit, the Court may think just."

#### NAGPUR

In Rule 1 (1) *insert* the words "or that any plaintiff is being financed by a person not a party to the suit" between the words "other than the property in suit" and "the Court may."

#### ODDH

Add the following as sub-rules (4) and (5) :

"(4) Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court

**O. 25 R. 1  
Note 1**

to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned, or may declare that he shall be debarred for claiming any right to, or interest in, the property in suit.

(5) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by the Court, to give security for the payment of all costs likely to be incurred by any other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or interest in, the property in suit."

**RANGOON**

*Substitute the following :*

*"Costs and security for costs in special cases :—*

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within British India other than the property in suit, the Court may either of its own motion or on the application of any defendant order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India."

*Synopsis*

- |  |  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Scope, object and applicability of the Rule.</li> <li>2. Residence outside British India.</li> <li>3. "British India." See Note 1 to Section 1.</li> <li>4. Trading corporations.</li> <li>5. Immovable property.</li> <li>6. "The Court may . . . order."</li> <li>7. Poverty of plaintiff.</li> <li>8. Where plaintiff is a minor.</li> <li>9. Where the plaintiff is a woman — Sub-rule (3).</li> <li>10. Where leave has been granted to sue as a pauper.</li> </ol> | <ol style="list-style-type: none"> <li>11. Inherent power to order security for costs.</li> <li>12. "Suit for the payment of money" — Sub-rule (3).</li> <li>13. Claim and cross-claim.</li> <li>14. Appeal.</li> <li>15. Revision.</li> <li>16. Other cases under the Code where security may be required.</li> <li>17. Liability of a person standing surety.</li> <li>18. Enforcement of security bonds given under this Rule.</li> </ol> |
|--|--|

*Other Topics (miscellaneous)*

Plaintiff. See Note 11.  
Principle on which the Court should act. See Note 6.  
Security in suit by a foreigner. See Notes 1 and 2.  
Security in suits by undischarged insolvent. See Note 7.

Security in suits for administration and partition of property. See Note 1.  
Security in suit to enforce a religious trust. See Note 1.  
When to apply for security. See Note 6.

**1. Scope, object and applicability of the Rule.** — This rule provides for the taking of security for the *costs of the suit* and O. 41 R. 10 provides for the taking of security for the *costs of the appeal*. Security for costs of the suit may, under this rule,



be ordered to be given in the following cases —

**O. 25 R. 1**  
**Notes 1-2**

- (1) Where the sole plaintiff is, or where there are more plaintiffs than one, *all* the plaintiffs are, residing outside British India and none of them has sufficient immovable property in British India other than the property in suit.
- (2) Where, in a *suit for money*, the plaintiff is a *woman* and she does not possess sufficient immovable property in British India.

In *Bidhatree Dasse v. Mutty Lall Ghose*,<sup>1</sup> Mr. Justice Sale observed as follows :

"The object of the Section clearly is to provide for the protection of defendants in certain cases, where, in the event of success, they may have difficulty in realising their costs . . . . But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of suit. In illustration I may refer to an administration suit by a creditor or legatee where the claim is admitted, or to a suit on a mortgage or promissory note where there is no defence. Is it to be supposed that it was intended that the defendant, in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly?"

And his Lordship held that no security should be demanded in such cases, even though the plaintiff is a woman having no sufficient immovable property within British India. See also the undermentioned cases.<sup>2</sup>

The provisions of the rule are wide enough to cover the case of *every* plaintiff, including a *minor* plaintiff<sup>3</sup> and will apply even though the defendant is himself a resident outside British India.<sup>4</sup> In the case of a pauper plaintiff, however, no security should be ordered to be furnished except in exceptional circumstances, inasmuch as it virtually deprives the plaintiff of the benefit of the order made in his favour under Order 33 of the Code.<sup>5</sup> As to when security for costs can be demanded from infants, see Note 8 below.

The rule does not apply to a reference under the Revenue Jurisdiction Act as there is no *suit* before the Court.<sup>6</sup> Irrespective of this rule, the High Court may, by Section 26 (3) of the Indian Patents and Designs Act, II of 1911, demand security for the costs to be incurred by the opposite party, from the person applying for the revocation of a patent, in proceedings under that Act.<sup>7</sup>

**2. Residence outside British India.** — "Residence" should be residence under such circumstances as will afford reasonable probability that the plaintiff will be forthcoming when the suit is decided.<sup>1</sup> A more temporary residence at the time of the suit is not "residence" within the meaning of this rule.<sup>2</sup> Thus, a resident of a Native State temporarily staying in British India for the purpose of legal proceedings to get his wife back from the person who had enticed her cannot be said to be "residing" in British India.<sup>3</sup> But where a subject of Bhopal, a Native State, was living for four years at Poona and there was nothing to show that he had come to Poona on a mere

#### Order 25 Rule 1 — Note 1

1. ('94) 21 Cal 832 (836).
2. (05) 7 Bom L R 495 (496, 497). ('73) 10 Beng L R App 25 (25). ('80) 6 Cal L Rep 58 (60); 5 Cal 700. (Representatives of a Hindu testator suing for the performance of religious and charitable trusts created by him and in which they are not personally interested should, it has been held, give security.) (1865) 1865 Bourke 40. (Do—Confirmed in Bourke O C 119.)
3. (98) 28 Bom 100 (101).

4. ('69) 12 Suth W R 465 (465).
5. ('28) AIR 1928 Lah 960 (960).
6. ('21) AIR 1921 Bom 463 (463).
7. See Section 26 (3), Indian Patents and Designs Act (II of 1911).

#### Note 2

1. ('78) 3 Bom 227 (229).  
[See also ('32) AIR 1932 Sind 33 (34) : 26 Sind L R 21.]
2. ('79) 3 Bom 227 (229). ('90) 14 Bom 541 (547, 553). (1900-02) 1 Low Bur Rul 222 (224, 225).
3. ('22) AIR 1922 Bom 299 (300) : 46 Bom 589.

**O. 25 R. 1**  
**Notes 2-6**

temporary purpose, it cannot be said that he resides outside British India.<sup>4</sup> Where there are several co-plaintiffs, *all* of them must reside outside British India; if one of them resides ordinarily within the jurisdiction no security will be ordered from any of them although the resident co-plaintiff may be a bankrupt.<sup>5</sup> Where a plaintiff *leaves* the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided.<sup>6</sup> But security will not be ordered on an affidavit that plaintiff is *about* to leave the country.<sup>7</sup>

**3. "British India."** — See Note 1 to Section 1.

**4. Trading corporations.** — Trading corporations comprise —

- (a) chartered companies,
- (b) companies incorporated by special Acts of Parliament, such as railway companies and the like including joint stock companies incorporated under special Acts, and
- (c) companies incorporated under the Companies Act.<sup>1</sup>

A trading corporation ought to have a place of foundation. It may have more than one residence. But it "dwells" at the place where it carries on its general administrative business and not where it carries on even a considerable part of its other businesses.<sup>2</sup> See Note 3 to Section 20.

**5. Immovable property.** — See Note 4 to Section 16, *ante*.

A beneficial interest in a part of the surplus *income* derived from immovable property cannot be said to be immovable property.<sup>1</sup> But a lease is a transfer of an interest in immovable property and a leasehold interest is therefore itself immovable property within the meaning of this rule.<sup>2</sup>

**6. "The Court may . . . order."** — The Court has a discretion under this rule to require or not, security for costs from the plaintiff.<sup>3</sup> There is no rigid rule for the exercise of such discretion, but the Court will not ordinarily make an order for security, unless it is shown that the exercise of power is necessary for the reasonable protection of the interests of the defendant.<sup>3</sup> The order should be in the Judge's own handwriting<sup>3</sup> and should contain reasons for ordering such security.<sup>4</sup> No specific sum need, however, be mentioned in the order, for which security should be granted.<sup>5</sup> A defendant asking that security may be taken from the plaintiff under this rule should

4. ('80) AIR 1930 Bom 220 (221).

5. (1755) 1 Dick 282 (282), *Winthorp v. Royal Exchange Co.*

(1801) 1 East 431 (432), *McConnell v. Johnston*.

(1882) 10 Q B D 18 (15), *D'Hormusjee v. Grey*.

6. ('67) 8 Suth W R 217 (217).

7. (1795) 2 Anst 552 (553): 1 R R 201*n*, *Adams v. Colethurst*.

**Note 4**

1. Halsbury: Laws of England, Vol. 8, page 304.

2. Halsbury: Laws of England, Vol. 8, page 312, paragraphs 702, 703.

**Note 5**

1. ('94) 21 Cal 882 (885).

2. ('71) 7 Beng L R App 60 (60).

**Note 6**

1. ('90) 17 Cal 610 (618).

('99) 8 Cal W N 753 (754).

('04) 6 Bom L R 1072 (1072). (The principle on which the Court acts is to see whether, at first sight, the suit appears *bona fide* and whether the defence is such as is likely to succeed.)

('05) 7 Bom L R 495 (497).

('89) AIR 1939 Cal 154 (154): ILR (1938) 1 Cal 688.

('86) 164 Ind Cas 560 (560) (Cal).

2. ('94) 21 Cal 882 (886).

('86) 164 Ind Cas 560 (560) (Cal). (Court is not bound to exercise discretion provided requirements of the rule as to nature of property are satisfied.)

('89) AIR 1939 Cal 154 (154): ILR (1938) 1 Cal 688.

3. ('88) 1888 All W N 241 (241). (Decision under O. 41 R. 10.)

4. ('08) 7 Cal L Jour 812 (814).

5. ('96) 18 All 101 (105) (FB). (Decision under O. 41 R. 10.)

not be guilty of delay in making the application.<sup>6</sup> He should supply full information on all necessary points.<sup>7</sup>

An order for security will not be made before the defence has been filed<sup>8</sup> or after the judgment has been passed.<sup>9</sup>

**7. Poverty of plaintiff.** — The mere poverty or insolvency of the plaintiff is not a sufficient ground for ordering him to give security for costs as a condition precedent to his going on with the suit.<sup>1</sup> "The general rule is," said Bowen, L. J., in *Cowell v. Taylor*,<sup>2</sup> "that poverty is no bar to a litigant; that, from time immemorial, has been the rule at common law, and also, I believe, in equity." There is, however, an exception to this rule introduced for the purpose of preventing abuse, that is, if an insolvent sues as *nominal* plaintiff for the benefit of somebody else, he must give security; in that case the nominal plaintiff is a mere shadow.<sup>3</sup> Thus, where *A*, an undischarged bankrupt, and his daughter *B* sued *C* for damages for breach of promise of marriage and it was contended by *C* that the suit was brought really for the purpose of benefiting *A* out of his daughter's engagement and that the daughter *B* had no property within British India, it was held that an order for security should be made against *A*.<sup>4</sup> But an insolvent plaintiff who is bound to hand over the fruits of his suit to the Official Assignee cannot be said to be a nominal plaintiff,<sup>5</sup> especially if the insolvent is also to benefit himself by the result of the suit as, for instance, where the suit is in respect of a sum earned by him subsequent to his adjudication and the amount claimed is in excess of the amount of his debt provable in insolvency.<sup>6</sup>

**8. Where plaintiff is a minor.** — As has been seen already in Note 1 *ante*, the rule applies to *all* plaintiffs including minors. But, save in exceptional circumstances, neither a minor nor his next friend should be called upon to give security for costs.<sup>1</sup> A suit on behalf of a minor plaintiff should not be stopped merely on the ground that the next friend is unable to give security for costs. The other parties are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for the benefit of the minor or if there is a just cause other than the poverty of the next friend to have him removed.<sup>2</sup>

**9. Where the plaintiff is a woman — Sub-rule (3).** — It has always been a principle of the law relating to security for costs that persons privileged from legal

6. ('84) 1884 All W N 99 (99).

('05) 7 Bom L R 495 (496). (About two years delay.)

7. ('86) 1886 All W N 64 (64). (Decision under O. 41 R. 10.)

8. ('18) 18 Ind Cas 217 (218) (Cal).

9. ('67) 8 Suth W R 217 (217). (Defendant must apply before judgment.)

#### Note 7

1. ('78) 8 Bom 241 (241).

('82) AIR 1932 Sind 33 (35) : 26 Sind L R 21.

('85) 7 All 542 (545, 546). (Decision under O. 41, Rule 10.)

('86) 8 All 208 (204). (Do.)

('84) 1884 All W N 99 (99). (Do.)

('88) 1888 All W N 46 (49). (Do.)

('87) 14 Cal 538 (536). (Though a portion of the interest in the subject-matter of the suit is parted with for carrying on the litigation.)

('18) 20 Ind Cas 708 (704) (Cal).

('15) AIR 1915 Cal 595 (595). (Decision under O. 41,

#### Rule 10.)

('19) AIR 1919 Cal 719 (720); 46 Cal 156.

[See also ('86) 1886 All W N 286 (286).]

2. (1885) 31 Ch D 34 (38).

3. (1885) 31 Ch D 34 (38), *Cowell v. Taylor*.

('77) 2 Cal 233 (259); 4 Ind App 23 (PC).

('81) 14 Cal 533 (536).

('72) 8 Beng L R App 65 (67).

[See also ('72) 18 Suth W R 102 (103).]

4. ('02) 27 Bom 100 (103).

5. ('32) AIR 1932 Sind 33 (35) : 26 Sind L R 21.

6. ('19) AIR 1919 Cal 719 (720) : 46 Cal 156.

#### Note 8

1. ('99) 23 Bom 100 (102).

('84) AIR 1934 All 458 (458) : 56 All 653.

(1886) 1 Keen 119 (120), *Fellows v. Barrett*. (Circumstance, that next friend is poor, is no ground for calling upon him to give security for costs.)

('08) 18 Mad L Jour 155 (156).

2. ('11) 11 Ind Cas 551 (552) : 35 Bom 389.

('34) AIR 1934 All 458 (458) : 56 All 653.

**O. 25 R. 1**  
**Notes 9-11**

process can be called upon to give security<sup>1</sup> and this sub-rule has been enacted in view of the provisions of Section 56 of the Code which provide that a woman is exempted from arrest in execution of a decree.<sup>2</sup> The Court has, however, a discretion in the matter and the principle to be adopted in the exercise of such discretion has been thus stated by Mr. Justice Davar in *Sonabai v. Tribhuvandas*<sup>3</sup>: "I have always been most averse to making orders against women for depositing security for the defendant's costs when I find that such an order would embarrass them and hamper them in the conduct of their cases. In the case of poor women, such an order amounts to a denial of justice to them. Unless the suit is on the face of it vexatious, or is one which I feel is filed merely for the harassment of the defendant, I do not make an order against a woman plaintiff for security for defendant's costs — when she says she is not in a position to give such security and I believe her statement." This principle was approved in a later case<sup>4</sup> by the same High Court though it was recognized that "the discretion given by the rule is one of the most difficult that a Court can be called upon to exercise." In no case will a Court order a female plaintiff to give security unless grounds are made out tending to show that the defence is true.<sup>5</sup>

A suit in which there are male and female plaintiffs, cannot properly be described as a "suit in which the plaintiff is a woman."<sup>6</sup>

**10. Where leave has been granted to sue as a pauper.** — There is a conflict of opinions as to whether security can be ordered against a plaintiff who has been allowed to sue in *forma pauperis*. On the one hand, it has been held by the High Court of Calcutta<sup>1</sup> that this rule does not apply to such cases and that the Court has no power to order security against a plaintiff suing in *forma pauperis*, the reason being that to do so would be to render the leave granted under O. 33 R. 8 nugatory. The High Court of Bombay<sup>2</sup> has held that where an order is made against the plaintiff for security for costs and subsequently he is granted leave to sue as a pauper, the order as to security ceases to operate, provided the leave is granted before the time limited for giving security has expired. On the other hand, it has been held by the High Courts of Lahore,<sup>3</sup> Madras<sup>4</sup> and Rangoon<sup>5</sup> that the rule is wide enough to cover the case of a pauper plaintiff also, though, as a rule, very special grounds must be shown for granting an order for security for costs against him.

**11. Inherent power to order security for costs.** — There is a difference of opinion on the question whether, apart from the provisions of this rule, the Court can order security for costs against a plaintiff. It has been held in the undermentioned cases<sup>1</sup> that the Court has such power to act in proper cases, as for example, where

**Note 9**

1. (1884) 2 Myl & K 401 (408), *Aldbrough v. Burton*.  
(1727) 2 P Wms. 452 (452), *Goodwin v. Archer*.  
(Referred to in 28 Bom 100.)
2. ('94) 21 Cal 832 (836).
3. ('08) 32 Bom 602 (606).
4. ('10) 8 Ind Cas 1055 (1056) : 35 Bom 421.
5. ('13) 18 Ind Cas 217 (218) (Cal).  
(('99) 8 Cal W N 758 (754).  
[See also ('85) AIR 1935 Mad 280 (281). (Pauper plaintiff held to be a puppet in the hands of another—Security ordered.)]
6. ('87) AIR 1987 Cal 58 (59) : 68 Cal 809. (O. 25 imposes an exceptional disability upon plaintiffs and therefore must be strictly construed. It is not to be applied to circumstances which do not

clearly come within its purview.)

**Note 10**

1. ('08) 7 Cal L Jour 812 (813, 814).  
(('72) 17 Suth W R 68 (69).
2. ('11) 12 Ind Cas 538 (539) : 36 Bom 415.
3. ('28) AIR 1928 Lah 960 (960).
4. ('81) 3 Mad 66 (67). (Case under O. 41 R. 10.)  
(('85) AIR 1985 Mad 280 (281). (If pauper is a mere creature in the hands of persons able to find security, order for security can be passed.)
5. ('28) AIR 1928 Rang 244 (245).  
[But see ('17) AIR 1917 Low Bur 168 (164) : 8 Low Bur Rul 887.]]

**Note 11**

1. ('82) AIR 1992 Sind 88 (85) : 26 Sind L R 21.  
(('18) 20 Ind Cas 708 (704) (Cal).  
(('76) 2 Cal 283 (259) : 4 Ind App 28 (P O).

the plaintiff suing is not the real plaintiff but a mere puppet in the hands of others. A contrary view has however been expressed by Cuming, J., in the undermentioned case<sup>2</sup> to the effect that the Court has no inherent power to order security for costs apart from the provisions of this rule.

**O. 25 R. 1**  
**Notes 11-14**

**12. "Suit for the payment of money" — Sub-rule (3).** — A suit which, though not exclusively for money, will result in a decree for money on the relief sought, is a "suit for the payment of money" within the meaning of this rule.<sup>1</sup> Thus, a suit to recover possession of certain ornaments and other moveable properties, or in the alternative to obtain a decree for their value is a "suit for the payment of money."<sup>2</sup> Similarly, a suit by an actress for damages for wrongful dismissal<sup>3</sup> or a suit on which a claim is made for a share in a partnership business<sup>4</sup> is a "suit for the payment of money." But the main claim in the suit must be one for money, the other reliefs being only incidental. A suit for dissolution of partnership and accounts and for the recovery of *stridhanam* property<sup>5</sup> or a suit for the administration of an estate consisting largely of immovable property and in which it may ultimately be necessary to sell the estate and distribute the proceeds in money,<sup>6</sup> is not a "suit for the payment of money" within this rule.

**13. Claim and cross-claim.** — A defendant cannot as a general rule be ordered to give security for costs<sup>1</sup> inasmuch as he is a person *compelled* to litigate and take proceedings in defence of the claim.<sup>2</sup> But where there is a *claim and a counter-claim* the position is different. The substantial position of the parties will have to be taken into consideration.<sup>3</sup> If the claim and the cross-claim arise out of *one subject-matter* a defendant setting up a cross-claim will not be ordered to give security.<sup>4</sup> If, however, the cross-claim is in respect of a matter *wholly distinct* from the claim, an order for security may be made.<sup>5</sup> In other words, if the counter-claim is really in the nature of a *cross-action*, a defendant out of jurisdiction will as a rule be required to furnish security for costs;<sup>6</sup> but if a cross-claim arising out of the same subject-matter is, in substance, *the defence to the claim*, the Court has a discretion to refuse to order such defendant to give security.<sup>7</sup>

**14. Appeal.**—No appeal lies under the Code from an order under this rule. It is, however, appealable under Clause 15 of the Letters Patent as a "judgment."<sup>1</sup> Where

(74) 22 Suth W R 188 (148).

[See also ('88) AIR 1988 Bom 510 (512) : I L R (1988) Bom 748. (Applications under Sec. 115, O. P. Code, or under S. 75, Provincial Insolvency Act — Applicant not residing in British India nor having any immovable property in British India—Application presented by opposite party praying for order for security of costs — High Court is competent under S. 151 to pass order of the nature provided for in O. 25 R. 1.)]  
2. ('24) AIR 1924 Cal 251 (252, 254, 256) : 50 Cal 858.

**Note 12**

1. ('08) 32 Bom 602 (609, 611).  
2. ('12) 14 Ind Cas 290 (290) (Cal).  
(08) 27 Bom 100 (101, 108). (Suit for damages and return of presents.)  
(90) 17 Cal 610 (618).  
(99) 28 Bom 100 (100).  
3. ('18) 18 Ind Cas 217 (218) (Cal).  
4. ('08) 5 Bom L R 661 (662).  
5. ('28) AIR 1928 Cal 816 (817).

6. ('25) AIR 1925 Rang 300 (300) : 8 Rang 311.

(05) 7 Bom L R 495 (496, 497).

(73) 10 Beng L R App 25 (25).

**Note 13**

1. (1815) 6 Taunt 379 (379), Baxter v. Morgan.  
(1876) 2 Ch D 531 (532), Re Percy v. Mining Company.  
2. (1846) 5 Hare 320 (321), Vincent v. Hunter.  
(1854) 18 Jur 892, Wild v. Murray.  
3. (1911) 2 K B 619 (625), New Fenix Campagnie v. General Accident Assurance Corporation.  
4. (1893) 1 Q B 560 (562), Neck v. Taylor.  
(1879) 5 Q B D 144 (148), Mapleson v. Masini.  
5. (1898) 1 Q B D 560 (562), Neck v. Taylor.  
(1885) 15 Q B D 423 (425), Sykes v. Secerloti.  
6. (1885) 15 Q B D 423 (425), Sykes v. Secerloti.  
7. (1898) 1 Q B D 560 (562), Neck v. Taylor.  
(1911) 2 K B 619 (625), New Fenix Campagnie v. General Accident Assurance Corporation.

**Note 14**

1. ('08) 32 Bom 602 (609, 610).  
(03) 26 Mad 502 (503).

**O. 25 R. 1**  
**Notes 14-18**

the plaintiff deposits in Court security for costs and ultimately the suit is decreed in his favour, the defendant appealing against the decree is not entitled to an order for detaining in Court, the money deposited by the plaintiff, pending the appeal.<sup>2</sup>

**15. Revision.** — A Court will be acting “illegally” in the exercise of its jurisdiction in ordering security for costs in a case to which this rule does not apply, as where it orders security for costs in an administration suit which is not a “suit for the payment of money” within this rule.<sup>1</sup> Similarly, it will be acting with “material irregularity” in the exercise of its jurisdiction if it orders security for costs against a plaintiff suing as a pauper, in the absence of exceptional circumstances.<sup>2</sup> In such cases, therefore, a revision will lie against the orders so passed. See also the undermentioned case.<sup>3</sup>

**16. Other cases under the Code where security may be required.** — The following are some of the other provisions of the Code under which security may be required by the Court —

- (1) O. 16 R. 16 (Security from witness for his attendance).
- (2) O. 21 R. 26 (Security from judgment-debtor).
- (3) O. 22 R. 8 (Insolvency of plaintiff).
- (4) O. 32 R. 6 (Security from next friend or guardian *ad litem* of minor).
- (5) O. 37 R. 8 (Summary suits on negotiable instruments).
- (6) O. 38 Rules 1, 2 and 5 (Arrest and attachment before judgment).
- (7) O. 40 R. 3 (From receiver).
- (8) O. 41 Rules 5 and 6 (Stay of execution).
- (9) O. 41 R. 10 (Security for costs of appeal).
- (10) O. 45 Rules 7 and 10 (In Privy Council appeals).
- (11) O. 45 R. 13 (Stay of execution in Privy Council appeals).

**17. Liability of a person standing surety.** — A was surety for costs for B, and the surety bond provided that if B failed to obey the order of the Court, the property of A would be liable, and that if the property proved insufficient, A would be personally liable. There was no provision for the principal debtor being proceeded against in the first instance. It was held that a failure to execute the decree against B in the first instance did not amount to a release of the surety's liability.<sup>1</sup>

**18. Enforcement of security bonds given under this Rule.** — The proper mode of enforcing a surety bond given under this rule is the one indicated in Section 145 (c) of the Code. For decisions under the old Code, see the undermentioned cases.<sup>1</sup>

**O. 25 R. 2****R. 2. [S. 381.]** (1) In the event of such security not being

Effect of failure to  
furnish security.

furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

2. ('70) 4 Beng L R O O 92 (98).

**Note 15**

1. ('25) AIR 1925 Rang 800 (800) : 8 Rang 811.
2. ('28) AIR 1928 Lah 960 (960).
3. ('85) AIR 1985 Mad 280 (282). (Application for furnishing security—Application not disposed of at once on merits—There is irregularity in exercise of jurisdiction and order is open to revision.)

**Note 17**

1. ('26) AIR 1926 All 657 (658).

**Note 18**

1. ('80) 5 Cal 487 (488). (By assignment and institution of suit on assigned bond.)
- ('94) 19 Bom 694 (696). (Do.)
- ('08) 81 Cal 162 (165). (Do.)
- ('01) 24 Mad 687 (689).

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

[1877, Ss. 380, 381; 1859, S. 35.]

### Local Amendments

#### BOMBAY

The following shall be *added* as sub-rule (4):

"(4). The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

#### RANGOON

*Substitute* for Rule 2:

"2. Where it is proved to the satisfaction of the Court that the plaintiff is deriving assistance from, or is being maintained by a person in consideration of a promise to give to such person a share in the subject-matter or proceeds of the suit, or in consideration of having transferred his interest in the subject-matter of the suit, the Court may, either of its own motion or on the application of any defendant—

(a) award costs on a special scale to be decided by the Court, and approximating to the actual costs reasonably incurred by the defendant;

(b) at any stage of the suit, order the plaintiff, within a time fixed by it, to give security for the payment of the estimated amount of such costs or such proportion thereof as the Court may think just."

### Synopsis

- |  |                |
|--|----------------|
| 1. Scope of the Rule.                                  | 3. Notice.     |
| 2. Dismissal under this Rule, if <i>res judicata</i> . | 4. Limitation. |
|  | 5. Appeal.     |

**1. Scope of the Rule.** — The Court has power to extend the time for furnishing security under Section 148.<sup>1</sup> Sub-rule (2) enables the Court to restore a suit dismissed under sub-rule (1).<sup>2</sup> The rule applies to a suit as a *whole* and not in regard to particular plaintiff or plaintiffs alone.<sup>3</sup>

**2. Dismissal under this Rule, if *res judicata*.** — A suit dismissed under this rule for failure to furnish security for costs cannot be said to have been "heard and

#### Order 25 Rule 2 — Note 1

1. ('84) 6 All 250 (252).

('77) 2 Cal 272 (273).

('84) 10 Cal 557 (561) : 11 Ind App 7 (P C).

('76) 2 Cal 128 (129).

[See also ('90) 17 Cal 512 (515) : 17 Ind App 1

(P C). (Case of appeal.)]

2. ('86) 8 All 815 (819) : 13 Ind App 57 (P C).

3. ('87) AIR 1987 Cal 58 (59) : 63 Cal 809. (Suit by male minor and mother— On default in furnishing security, suit cannot be dismissed against mother only; in such cases security should not be ordered.)

**O. 25 R. 2  
Notes 2-5**

finally decided" within the meaning of Section 11 of the Code and cannot operate as *res judicata* in a subsequent suit between the parties.<sup>1</sup>

**3. Notice.** — The general principle is that no order affecting a party should be made without notice to him.<sup>1</sup>

**4. Limitation.** — The limitation for an application to set aside a dismissal under this rule is thirty days from the date of the dismissal, under Article 163 of the Limitation Act, 1908.

**5. Appeal.** — Under the old Code, an order under this rule was held to be a *decree* and appealable as such.<sup>1</sup> Under the present Code, the order is only an *appealable order* [See O. 43 R. 1 (n)]. No appeal will lie, however, from such an order passed in a suit in which a decree itself is not open to appeal. See Section 104.

**Local Amendments****NAGPUR**

After Rule 2, add the following new Rule 3 :

**O. 25 R. 3  
(Nagpur)**

"3. (1) Where any plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in, the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of Rule 2 shall apply *mutatis mutandis* to such application."

**RANGOON**

Add the new Rule 3 :

**O. 25 R. 3  
(Rangoon)**

"3. (1) In the event of security demanded under Rule 1 or Rule 2 not being furnished within the time fixed the Court shall make an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the order of dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant."

**Note 2**

1. ('02) 26 Bom 637 (640). (Suit.)
- ('82) 6 Bom 482 (486). (Defence.)

**Note 3**

1. ('88) 5 All 880 (882).
- ('82) 5 Mad 265 (266).

**Note 5**

1. ('86) 8 All 108 (111).



# ORDER XXVI.

## COMMISSIONS

### *Commissions to examine witnesses*

**R. 1.** [S. 383.] Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

**0.26 R.1**

Cases in which Court may issue commission to examine witness.

[1877, Ss. 383, 385; 1859, S. 175. See S. 75.]

### *Synopsis*

- |   |  |
|---|--|
| 1. Scope of the Rule.   | 4. "Who is from sickness or infirmity unable to attend." |
| 1a. Applicability to proceedings under other special or local Acts. | 5. Procedure where evidence is taken on commission.      |
| 2. "May in any suit issue."   | 6. Arbitration.  |
| 3. "Who is exempted under this Code."                               | 7. Appeal.   |
|   | 8. Revision.   |

### *Other Topics (miscellaneous)*

Commission—When Court may not issue. See Note 1.	Pardanashin ladies. See Note 3.
Notice to opposite side, whether necessary. See Note 2.	Party applying must procure attendance of witnesses. See Note 5.
	Right of opposite party to cross-examine. See Note 5.

**1. Scope of the Rule.** — The grounds upon which a commission can be issued are specified in this rule and in Rules 4 and 5 *infra*; they ought not to be relaxed or nullified because the witness is a man of rank or is a man of social status<sup>1</sup> and it will be derogatory to him to appear personally in Court.<sup>2</sup>

The Court can issue a commission even after remand.<sup>3</sup> The issue of a commission being a matter of *routine*, the successor of a Judge has power to cancel the issue of a commission made by his predecessor.<sup>4</sup>

See also Note 1 to Section 75, *ante*.

**1a. Applicability to proceedings under other special or local Acts.** — Rules 1 to 8 of this Order, dealing with the issue of commission for the examination of witnesses, have been made applicable to enquiries and proceedings under the under-mentioned Acts.<sup>1</sup>

#### **Order 26 Rule 1 — Note 1**

1. ('17) AIR 1917 Bom 155 (157): 42 Bom 136. ('08) 81 Mad 60 (61).
2. ('05) 28 Mad 28 (35, 36).
3. ('25) AIR 1925 Lah 89 (41): 5 Lah 252.
4. ('80) AIR 1980 Rang 815 (816).

#### **Note 1a**

1. The Punjab Sikh Gurdwaras and Shrines Act (VI of 1922), S. 24 (4); The Official Trustees Act

(II of 1918), S. 20; The Madras Ganjam and Vizagapatam Act (XXIV of 1893) R. 16; The Administrator-Generals' Act (III of 1913) S. 46; The Bengal Tenancy Act (VIII of 1885), S. 31 (b); The Presidency Towns Insolvency Act (III of 1909), S. 87; The Indian Naturalisation Act (VII of 1926), S. 11; The Charitable and Religious Trusts Act (XIV of 1920), S. 11; The Chota Nagpur Tenancy Act (VI of 1908), S. 265 (3).

**O. 26 R. 1**  
**Note 2**

2. "May in any suit issue." — The general trend of opinion is that the issue of a commission is a matter of *judicial discretion*.<sup>1</sup> The High Court of Madras, has, however, held in the undermentioned cases<sup>2</sup> that the word "may" must be read as equivalent to "is given authority to" and that a commission should issue as a *matter of right* unless the application for commission amounts to an abuse of the process of the Court. As a general rule, an application will not be granted unless —

- (1) the application is made *bona fide*,
- (2) the issue in respect of which the evidence is required is one which the Court ought to try,
- (3) the witness to be examined would give evidence material to the issue, and,
- (4) there are some good reasons why the witness cannot be examined in Court.<sup>3</sup>

But the Court has not the absolute discretion or inherent power to issue a commission except when authorized by the provisions of the Code; nor, according to the general trend of opinion, is the Court *bound* to issue a commission simply because all the conditions laid down in the rule exist. Where the examination on commission may result in *manifest injustice* to any party, or where it is not calculated to permit of the evidence being *tested fairly*, or when the application is made to avoid cross-examination before the Court, the Court is not bound to issue a commission.<sup>4</sup> The difference between the examination of a witness on commission and a *viva voce* examination in open Court is so greatly to the disadvantage, almost invariably, of the opposite party that the Court should very jealously inquire, in every case, into the reason for the commission.<sup>5</sup> The question is, whether the Courts can be said to have acted with jurisdiction in taking away from a litigant the right which he undoubtedly has of having the witness brought before the Court in accordance with the normal procedure.<sup>6</sup> Regard must always be had to the possibility of the witness not being a credible witness in which case the opportunity of noting his *demeanour*<sup>7</sup> and of hearing the exact and precise answers given by him would be lost.<sup>8</sup> This is specially so in a case where a party accused of fraud seeks to examine himself on commission.<sup>9</sup>

The fact that the witness sought to be examined is *interested*, or that the case of the party asking for the issue of the commission is improbable<sup>10</sup> or that the Judge thinks that no useful end would be attained by the evidence<sup>11</sup> is, however, no ground *per se* for refusing to issue a commission. See also the undermentioned case.<sup>12</sup>

As a matter of practice, notice ought to be given to the opposite party before ordering a commission.<sup>13</sup>

**Note 2**

1. ('99) 28 Bom 626 (629).  
(1862) 1 Hyde 68.
- (80) AIR 1980 Nag 27(28). (Court has a discretion in issuing commissions for examining experts.)
2. ('28) AIR 1928 Mad 821 (822) : 46 Mad 574.
- (11) 12 Ind Cas 74 (75) (Mad).
- [See ('85) AIR 1985 Mad 21 (21) : 58 Mad 400. (Madras Civil Rules of Practice—R. 59—Commission—Application for, not made at first hearing — It need not necessarily be refused if made afterwards—Party is entitled to commission subject to risk of not being completed and returned in time.)]
3. ('18) 19 Ind Cas 648 (644) (All).
4. ('06) 28 Mad 28 (85, 86).
5. ('73) 20 Suth W R 258 (255).

- (99) 26 Cal 650 (652).
6. ('27) AIR 1927 Mad 524 (525).
7. ('99) 28 Bom 626 (628).
- (88) AIR 1938 Mad 48 (58). (In cases involving large amounts even women should rarely be examined on commission.)
8. ('24) AIR 1924 Cal 971 (972, 973).
9. ('28) AIR 1928 P O 73 (76) (P O).
10. ('80) AIR 1980 Sind 88 (86).
11. ('71) 15 Suth W R 447 (448).
- (11) 12 Ind Cas 74 (75) (Mad).
12. ('84) AIR 1984 All 87 (88). (Plaintiff is entitled to refrain from giving evidence till settlement of issues—Hence, an order refusing to issue commission for the examination of the plaintiff on the ground of lapse of one year since the filing of the suit is not just and reasonable.)
13. (1865) 8 Suth W R 147 (150).

It is open to the Court to order the issue of commission on condition of the applicant depositing in Court security for the costs of the opposite party in regard to the commission.<sup>14</sup>

**O. 26 R. 1**  
**Notes 2-5**

**3. "Who is exempted under this Code."** — Section 132 of the Code recognizes the right of *pardanashin* ladies who according to their custom can claim the privilege of being examined on commission.<sup>1</sup> The fact that an allegation of immorality is made against such a lady<sup>2</sup> or that she had appeared on a former occasion in public<sup>3</sup> or in Court,<sup>4</sup> is no ground for refusing to issue a commission. In the undermentioned case<sup>5</sup> a commission was issued even though the lady was old and had entirely abandoned the *purdah*.

But where no custom of not appearing in public is made out,<sup>6</sup> or the custom alleged is of a varying and uncertain character,<sup>7</sup> the Court will not issue a commission. A *pardanashin* lady is not entitled to decline to be examined on commission at any place other than that of her choice.<sup>8</sup>

A religious preceptor is not entitled to be examined on commission on the ground of his social status.<sup>9</sup>

**4. "Who is from sickness or infirmity unable to attend."** — In the case of persons who, owing to illness, are unable to attend the Court, a commission ought not to be refused.<sup>1</sup> If sickness or infirmity is alleged, the Court will, of course, have to take into account the character and gravity of the sickness and the risk consequent upon the refusal to issue a commission.<sup>2</sup> Infancy, however, is not a ground for the issue of a commission.<sup>3</sup>

**5. Procedure where evidence is taken on commission.** — It is the duty of the party obtaining the commission to take all such steps as are necessary to secure the attendance of the witnesses before the commissioner.<sup>1</sup> The examination is on the same footing as that in Court<sup>2</sup> and the opposite party is entitled to cross-examine the witnesses,<sup>3</sup> though where the cross-examination is unnecessarily prolonged or amounts to an abuse of process, the Court can fix a time limit and order the cross-examination to be finished.<sup>4</sup> But the commissioner has no power to disallow questions and give

14. ('36) AIR 1936 Pat 83 (34).

#### Note 3

1. ('28) AIR 1928 Cal 814 (815).
- (25) AIR 1925 Mad 905 (906). (Plaintiff, a *gosha* lady applying for commission for examining herself—Application should be granted.)
- (88) AIR 1933 All 551 (553) : 55 All 666. (Order insisting on personal attendance in Court, of *pardanashin* lady, is wrong.)

[See however ('72) 18 Suth W R 230 (280). Where *pardanashin* lady can be examined in Court in a *paleki*—Court can refuse.]

2. ('01) 5 Cal W N coxxxii (coxxxii).
3. ('99) 26 Cal 650 (652).
- (99) 26 Cal 651n.
4. ('99) 8 Cal W N 753 (753). (Appearance on a prior occasion in police Court.)
- (18) AIR 1918 Cal 743 (744) : 45 Cal 697. (Do.)
5. ('18) AIR 1918 Cal 111 (112) : 45 Cal 492. [See also 2 Hyde 88.]
6. ('27) AIR 1927 Mad 524 (525).
7. ('90) 14 Bom 584 (586).
8. ('21) AIR 1921 Cal 229 (231) : 48 Cal 448. [See however ('37) AIR 1937 Pat 21 (22).

(*Pardanashin* lady living beyond jurisdiction—Commission to examine — Application requesting examination at residence — Order for examination at the place of Court held to be irregular exercise of jurisdiction.)]

9. ('17) AIR 1917 Bom 155 (157) : 42 Bom 136.

#### Note 4

1. ('23) AIR 1923 Mad 321 (322) : 46 Mad 574.
2. ('24) AIR 1924 Cal 971 (973).
- (36) 168 Ind Cas 449 (450) (Cal). (Especially so when the application is for the issue of a commission for the examination of a plaintiff or a defendant in a suit.)
3. 2 Hyde 152.

#### Note 5

1. ('70) 2 N W P H C R 210 (212).
2. Cor 7, Hoffman v. Framji.
3. ('70) 14 Suth W R 17 (19).
- (72) 8 Beng L R App 101 (101). (An attorney cannot, however, cross-examine the witness.) [See ('01) 5 Cal W N 230 (230).]
4. ('08) 80 Cal 625 (627).
- (24) AIR 1924 Pat 284 (295). (Commissioner can stop proceedings if cross-examination is abusive.)

**O. 26 R. 1**  
**Notes 5-8**

rulings as to points about admissibility of evidence.<sup>5</sup>

Where a Court issues a commission for the examination of a person by written interrogatories on behalf of a party, the opposite party is entitled to insist upon an opportunity being given to him to cross-examine the witness orally and the Court would be acting without jurisdiction if it orders such party to file cross-interrogatories.<sup>6</sup> Where the commission is for examining a witness on interrogatories, the party is entitled to a copy of the cross-interrogatories filed by the opposite party.<sup>7</sup>

**6. Arbitration.** — Where a case is referred to arbitration under Schedule II (Section 506 of the old Code), it is competent to the Court to issue a commission under this rule as the suit is still before the Court.<sup>1</sup> But the Court has no power either under Section 75 or under this rule to issue a commission for examination in the case of *private* arbitration. The consent of parties cannot confer such power nor can the Court issue a commission in such a case under its inherent powers.<sup>2</sup>

**7. Appeal.** — An order under this rule is not appealable under O. 43 R. 1 or Section 104. Nor is an order directing the issue of a commission a "judgment" within the meaning of Clause 15 of the Letters Patent.<sup>1</sup> The issue of a commission being a matter of *discretion*, neither the High Court nor the Privy Council will interfere in appeal with an order made in the proper exercise of the discretion.<sup>2</sup>

**8. Revision.** — An order made under this rule in the exercise of discretion cannot be interfered with in revision<sup>1</sup> unless there has been a wanton abuse of the process of the Court.<sup>2</sup>

In some decisions it has been held that such an order does not amount to a "case decided" within the meaning of Section 115 and hence is not revisable,<sup>3</sup> while the contrary view has been held in the undermentioned decision.<sup>4</sup> See also Note 5 to Section 115.

5. ('16) AIR 1916 P C 250 (251) (PC).

6. ('34) AIR 1984 Pat 60 (60). (Unless the opposite party consents to do so.)

7. ('17) AIR 1917 Sind 85 (35): 10 Sind L R 210.

**Note 6**

1. ('05) 7 Bom L R 560 (561).

2. ('22) AIR 1922 Bom 444 (446, 448): 47 Bom 250.

**Note 7**

1. ('09) 2 Ind Cas 157 (158) (Bom).

2. ('98) 25 Cal 807 (815): 25 Ind App 117 (PC). ('32) AIR 1932 Cal 236 (238, 239): 59 Cal 40. (Application to examine on commission filed after the close of the case.)

**Note 8**

1. ('27) AIR 1927 Sind 264 (265): 22 Sind L R 129.

('88) 1988 Mad W N 648 (649). (Application for issue of commissions for examination of witness refused under R. 57, Civil Rules of Practice, as made too late—Even though different view may be taken by High Court, it cannot revise order under S. 115, C. P. Code.)

('28) AIR 1928 Cal 421 (428): 55 Cal 748.

2. ('21) AIR 1921 Low Bur 6 (8): 11 Low Bur 65.

('14) AIR 1914 Mad 203 (203).

[See also ('87) AIR 1987 Pat 21 (22). (Application of *pardanashin* lady living beyond jurisdiction of Court for her examination on commission at her place of residence as she was ill — Court insisting on her examination at place of suit — Order rejecting application amounts to irregular exercise of jurisdiction — Order is subject to revision.)

('36) 163 Ind Cas 449 (450) (Cal). (Order for issue of commission for examination of party resident within jurisdiction—No finding as to whether he was suffering from any illness and as to the nature of the illness—Order set aside by High Court.)]

3. ('84) AIR 1934 All 87 (89). (No 'case decided' within Section 115.)

[See ('87) AIR 1987 Lah 28 (29). (Order declining to re-issue interrogatories to witness—High Court cannot interfere under S. 44, Punjab Courts Act, but can do so under S. 107, Government of India Act (1915)—But now see S. 224 of the Government of India Act of 1935.)]

4. ('88) AIR 1988 Mad 646 (648).

**R. 2. [S. 384.] An order for the issue of a commission for** **O. 26 R. 2**

**Order for commission.** the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

[1877, S. 384; 1859, S. 175.]

1. **"Either of its own motion or on the application."** — Under this rule, a commission may be issued for the examination of a witness either *suo motu* or on the application of a party.<sup>1</sup>

The rule only requires that the application of a party or of a witness is to be supported by affidavit or otherwise; it does not require that the affidavit must be made by the witness or by the party himself.<sup>2</sup>

**R. 3. [S. 385.] A commission for the examination of a** **O. 26 R. 3**

**Where witness resides within Court's jurisdiction.**

person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit

to execute it.

[1877, S. 385; 1859, S. 175.]

### *Synopsis*

1. **Scope of the Rule.**

2. **Deputy Collector, if can delegate an officer of his Court to take evidence on commission.**

1. **Scope of the Rule.** — The rule contemplates the issue of a commission to any person for examining a witness or a party residing within its local limits.

But the failure to *issue* the commission to the commissioner will not invalidate the examination actually held by him pursuant to the order of the Court; the omission to actually *issue* the commission is only an irregularity which, if not objected to before the examination commences, will be deemed to have been waived.<sup>1</sup>

2. **Deputy Collector, if can delegate an officer of his Court to take evidence on commission.** — A Deputy Collector is competent to depute an officer of his Court to examine a witness on commission, provided the place where the witness is sought to be examined is within his jurisdiction.<sup>1</sup>

**Order 26 Rule 2 — Note 1**

1. ('26) AIR 1926 Sind 84 (85).

2. ('27) AIR 1927 Rang 175 (175).

**Order 26 Rule 3 — Note 1**

1. ('21) AIR 1921 Cal 852 (854).

**Note 2**

1. ('68) 10 Suth W R 236 (237).

O. 26 R. 4

Persons for whose examination commission may issue.

**R. 4. [S. 386.]** (1) Any Court may in any suit issue a commission for the examination of —

- (a) any person resident beyond the local limits of its jurisdiction ;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and
- (c) *any person in the service of the Crown* who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

[1877, Ss. 383, 384, 385, 386 ; 1859, Ss. 175, 176.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "any civil or military officer of the Government."

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Scope and applicability of the Rule.</li> <li>2. "May issue."</li> <li>3. Plaintiff asking his evidence to be taken on commission.</li> <li>4. Defendant asking his evidence to be taken on commission.</li> </ol> | <ol style="list-style-type: none"> <li>5. Commission to England to take evidence.<br/>See Rule 5.</li> <li>6. Second commission on failure of the first.</li> <li>7. Appeal.</li> <li>8. Revision.</li> </ol> |
|--|---|

### Other Topics (miscellaneous)

Discretion of lower Court, how far will be interfered with in appeal or revision. See Notes 7 and 8.  
 "Resident beyond the limits of its jurisdiction." See Note 1.

**1. Scope and applicability of the Rule.** — The power of the Court is not more restricted under this rule than under Rule 1.<sup>1</sup> A party is entitled to the issue of a commission if it is clear that the witness is residing outside the jurisdiction of the Court.<sup>2</sup> It is not for the Court, as has already been pointed out in Rule 1, to decide whether the party will be benefited or not, as it is a matter entirely for the party.<sup>3</sup>

Where a commission is issued to a Court it should be addressed *to the Court of first instance* within the limits of whose jurisdiction the witness resides.<sup>4</sup>

#### Order 26 Rule 4 — Note 1

1. ('29) AIR 1929 Mad 192 (193).
2. ('26) AIR 1926 Mad 845 (846).
- [See however ('67) 7 Buth W R 349 (352),  
 (Commission issued to a Magistrate to examine

- a prisoner—Magistrate is not bound to do so.)]
3. ('28) AIR 1928 Mad 821 (822) : 46 Mad 574.  
 ('11) 12 Ind Cas 74 (74) (Mad).
4. 17 W R H C Rules and Orders (Civil Circular  
 Order No. 7, page 8 (8).)

This rule applies only to "suits" and does not apply to execution proceedings.<sup>5</sup>

**O. 26 R. 4**  
**Notes 1-4**

**2. "May issue."** — As has been seen in Note 2 to Rule 1 *ante*, the word "may" in this rule as well as in Rule 1 has been construed in the undermentioned decisions<sup>1</sup> of the Madras High Court to mean "is given authority to," and the issue of a commission is a matter of statutory right. But according to the general trend of opinion, the Court has a discretion to grant or refuse a commission.<sup>2</sup> The discretion must, however, be exercised *judicially*.<sup>3</sup> See also Note 2 to Order 26 Rule 1, *supra*.

**3. Plaintiff asking his evidence to be taken on commission.** — The general and accepted rule is that the evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons.<sup>1</sup> The reason is that the plaintiff has had a *choice of the forum*, and having chosen to institute his suit in a particular Court, he cannot ask for his examination elsewhere.<sup>2</sup>

**4. Defendant asking his evidence to be taken on commission.** — "But the case is entirely different," observed Mr. Justice Chitty in *Ross v. Woodford*, (1894) 1 Ch. D. 38, "when it is the defendant's application, and particularly that of a defendant lawfully resident out of the jurisdiction, according to the ordinary course of his life and business : and to compel these defendants to come over here at great expense to attend the trial, or give up their case would be oppressive and unfair, and in my opinion it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself."<sup>1</sup> Thus, where a suit was instituted in Cuttack against a defendant residing at Colombo, a commission was issued for the defendant's examination at Colombo on the ground that it would be obviously unfair to compel him to come to Cuttack or practically give up his defence.<sup>2</sup>

A defendant residing abroad should ordinarily be permitted to be examined on commission.<sup>3</sup>

5. ('39) AIR 1939 Mad 578 (579). (Application under O. 21 R. 16 by a person to be brought on record is neither a proceeding in a suit nor original proceeding in the nature of suit and this rule does not apply.)

#### Note 2

1. ('28) AIR 1928 Mad 321 (322) : 46 Mad 574.
- ('11) 12 Ind Cas 74 (75) (Mad).
2. (1864) 1 Hyde 68 (68, 69).
- ('29) AIR 1929 All 449 (451) : 51 All 341.
- ('27) AIR 1927 Rang 175 (175).
- ('99) 23 Bom 626 (629).
3. ('27) AIR 1927 Rang 175 (175).
- (1886) 21 Q B D 178 (181), *Coch v. Allcock, & Co.* (Referred in 19 Bom 749.)
- ('24) AIR 1924 Cal 971 (978).
- (1898) 9 T L R 571, *Keaby v. Vakloy*. (Referred in AIR 1920 Low Bur 68 — In this case the Court refused commission as the main question was one of damages and the evidence ought to be taken before the jury.)
- [See also ('84) AIR 1984 All 87 (89). (Issues framed after considerable time from filing of suit—Application made after settlement of issues—Dismissal of application is not justified.)]

#### Note 3

1. ('20) AIR 1920 Low Bur 68 (64).
- 1 Ind Jur N S 357, *Dowcott v. Wise*.

('85) AIR 1935 Pat 220 (221, 222). (Where it is risky to compel plaintiff to attend Court to give evidence, commission may be issued for his examination on his paying costs of defendant for making arrangements for his cross-examination.)

2. ('26) AIR 1926 Pat 277 (278).
- ('35) AIR 1935 Pat 220 (221, 222).

#### Note 4

1. ('12) 16 Ind Cas 750 (751) (Cal). — ('84) AIR 1984 Mad 399 (400) : 57 Mad 705.
- ('22) AIR 1922 Cal 42 (43, 44).
- ('24) AIR 1924 Lah 475 (476). (Defendant sole witness residing beyond 200 miles applying for a commission—Ought to be issued.)
- [See also ('24) AIR 1924 Mad 541 (541). (Plaintiff and defendant both residents of Rangoon—Suit filed in Devakottah—Plaintiff examined himself on commission at Rangoon—*Held*, the defendant ought not to be refused a commission.)]
2. ('12) 16 Ind Cas 750 (751) (Cal).
- [See also ('84) AIR 1984 Mad 399 (400) : 57 Mad 705. (In this case the defendant who was living in Malay States had also counter-claimed against the plaintiff.)]
3. ('87) AIR 1987 Mad 24 (26). (Defendant present within jurisdiction of Court for long time before

**O. 26 R. 4**  
**Notes 6-8**

**5. Commission to England to take evidence.** — See Rule 5 *infra*.

**6. Second commission on failure of the first.** — If the first commission fails for no fault of the party, a second commission can be issued.<sup>1</sup> See also Rule 10 *infra*.

**7. Appeal.** — A Full Bench of the High Court of Madras<sup>1</sup> overruling two earlier decisions<sup>2</sup> has held that an order under this rule directing or refusing to issue a commission is only an *interlocutory order* and not a "judgment" within Clause 15 of the Letters Patent and is not appealable. The High Courts of Bombay,<sup>3</sup> Calcutta<sup>4</sup> and Rangoon<sup>5</sup> have also taken the same view as that of the Madras Full Bench.

An order under this rule is *not an appealable order*. Nor will the Appellate Court interfere with the order in the regular appeal from the decree in the suit, unless the discretion is shown to have been improperly exercised which has prejudiced the party aggrieved.<sup>6</sup>

**8. Revision.** — An order under this rule can be revised when the order is one made *without jurisdiction, e. g.*, in the absence of any of the grounds mentioned in the rule<sup>1</sup> or where the Court has acted with *material irregularity, e. g.*, in refusing to issue a commission to a defendant residing outside its jurisdiction.<sup>2</sup> Where the refusal to issue a commission would be tantamount to a denial of justice or would result in manifest injury, the High Court can interfere in revision.<sup>3</sup>

The High Court of Allahabad<sup>4</sup> has held that an order under this rule refusing to issue a commission is an *interlocutory order* and is not a case decided within the meaning of Section 115 *ante*.

**O. 26 R. 5**

**R. 5. [S. 387.]** Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

[1877, S. 387; 1859, Ss. 177, 178.]

application to examine on commission — Fact that defendant could have approached Court and asked it to record his evidence before he went abroad is not sufficient ground to refuse issue of commission.)

**Note 6**

1. ('87) 8 Suth W R 448 (448).
2. ('06) 9 Cal W N 268n (268n). (Commissioner examined witnesses *ex parte* — Court ordered a fresh commission on deposit of costs.)

**Note 7**

1. ('10) 8 Ind Cas 840 (848, 844, 848, 849) : 35 Mad 1.
2. ('05) 28 Mad 28 (31).
3. ('07) 80 Mad 148 (144).
3. ('09) 2 Ind Cas 157 (158) (Bom).
3. ('84) AIR 1984 Bom 168 (169).
4. ('20) AIR 1920 Cal 894 (895).

5. ('26) AIR 1926 Rang 64 (64) : 3 Rang 605.

6. ('22) AIR 1922 Cal 42 (44).
- ('12) 16 Ind Cas 750 (751, 752) (Cal).

**Note 8**

1. ('08) 81 Mad 60 (61). (Can interfere under S. 15, Charter Act, apart from S. 622.)
2. ('24) AIR 1924 Mad 541 (541).
- ('84) AIR 1984 Mad 899 (401) : 57 Mad 705.
- ('28) AIR 1928 Mad 821 (822) : 46 Mad 574. (Witness residing outside jurisdiction — Refusal to issue commission — Revisable.)
- ('29) AIR 1929 Mad 192 (193).
- ('02) 5 Oudh Cas 151 (152). (But the discretion cannot be interfered with in revision.)
3. ('25) AIR 1925 Cal 1118 (1119).
4. ('84) AIR 1984 All 87 (89). (Order of lower Court held to be unjustified — But that was not a ground for revision.)



*Synopsis***O. 26 R. 5**  
**Notes 1-4**

1. Evidence of witnesses not residing within British India.
2. Plaintiff in foreign territory asking for a commission to examine himself.
3. "Letter of request."
4. Revision.

**1. Evidence of witnesses not residing within British India.** — This rule deals with the issue of a commission for the examination of persons residing outside British India.<sup>1</sup> For the definition of "British India," see Note 1 to Section 1 *ante*. Bangalore is not within British India.<sup>2</sup> Where the evidence of a person residing outside British India is necessary and an application is made for the issue of a commission for the examination of such person, the Court has no further discretion in the matter and the commission should be issued as a matter of course.<sup>3</sup>

Where a commission is issued for taking evidence in England, the bill of costs with respect to such commission is to be taxed by the Taxing Master in India though it is to be taxed on the same principle as would be adopted in England.<sup>4</sup> See also the undermentioned case.<sup>5</sup>

**2. Plaintiff in foreign territory asking for a commission to examine himself.** — As noticed in Note 3 to Rule 4, the Court will be very reluctant to accede to the request of the plaintiff for the issue of a commission to examine himself abroad except upon very strong grounds. The plaintiff is entitled to choose his own *forum* and having chosen the *forum*, he is not entitled to say "I reside outside the jurisdiction. Therefore examine me on commission."<sup>1</sup>

**3. "Letter of request."** — These words are new. As for the form of letter of request, see Appendix H, Form No. 8.

**4. Revision.** — Interlocutory orders passed in the exercise of discretion under this rule cannot be revised by the High Court.<sup>1</sup> See also Notes to Section 115, *ante*

**R. 6. [S. 388.]** Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

**O. 26 R. 6**

**Court to examine witness pursuant to commission.**

**Order 26 Rule 5 — Note 1**

1. ('08) 80 Cal 984 (986). (Commission issued for examination of a witness in French territory.)
- ('69) 10 Suth W R 985 (986). (Commission for examination of a witness at Mandalay can only issue from the High Court.)
- (1894) 64 L J Q B 104 (105, 106), *New v. Burns*. [See also ('88) AIR 1938 Mad 866 (367). (Witness in foreign territory within two hundred miles from Court refusing to attend Court on service of summons — Evidence should be taken on commission.)]
2. ('88) AIR 1938 Mad 646 (647).
3. ('88) AIR 1938 Mad 646 (647). [See also ('87) AIR 1937 Lah 73 (74). (Court will be fully justified in satisfying itself that the evidence is really relevant and necessary for the purposes of the case before issuing process — But a party cannot be deprived of the

opportunity of producing his evidence merely on the ground that it may involve some delay.)]

4. ('91) 15 Bom 209 (211, 214, 215).
5. ('87) AIR 1937 Lah 73 (74). (Proper procedure for examination of witnesses in England would appear to be the issue of a commission in accordance with the provisions of Statute 22, Vict., Ch. 20, as laid down in Para. I, Part E, Ch. 10 of the Rules and Orders of the Lahore High Court Vol. I (1980).)

**Note 2**

1. ('94) 1 Ch 88 (42), *Ross v. Woodford*.
- ('25) AIR 1925 Pat 125 (126) : 3 Pat 868.
- ('88) 25 Ch D 21 (29, 30), *Nadin v. Bassett*.

**Note 4**

1. ('86) 9 Mad 256 (257). [But see ('88) AIR 1938 Mad 646 (648). (Order refusing issue of commission is revisable.)]

O. 26 R. 7

**R. 7. [S. 389.]** Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

[1877, Ss. 389, 390; 1859, S. 179.]

### *Synopsis*

1. Return of commission.
2. "Duly executed."
3. Commissioner can note demeanour of witness.
4. "Shall form part of the record."

**1. Return of commission.** — The return should show that the evidence was recorded as the law requires it, *viz.*, in the language in ordinary use in the proceedings before the Court and duly read over and signed by the witness.<sup>1</sup>

The time for the execution of the commission may be enlarged on the application of a party.<sup>2</sup>

**2. "Duly executed."** — If a party to the suit dies before the examination of a witness on commission is completed and the fact of death is brought to the notice of the Commissioner, the proceedings after death are rendered illegal and consequently the commission cannot be said to have been *duly executed*.<sup>1</sup>

**3. Commissioner can note demeanour of witness.** — A Commissioner is entitled by law to note his observation as to the *demeanour* of the witness examined by him.<sup>1</sup>

**4. "Shall form part of the record."** — Evidence taken on a commission duly executed, subject to Rule 8, shall form *part of the record* and a party is entitled to refer to such evidence as a matter of record, though not tendered in evidence.<sup>1</sup>

O. 26 R. 8

**R. 8. [S. 390.]** Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless —

When depositions may be read in evidence.

(a) the person who gave the evidence is beyond the jurisdiction

#### Order 26 Rule 7 — Note 1

1. ('70) 14 Suth W R 269 (271).
2. ('70) 14 Suth W R O C 17 (18).

#### Note 2

1. ('29) AIR 1929 Pat 101 (101).

#### Note 3

1. ('18) AIR 1918 Cal 868 (879) (S B).

#### Note 4

1. (08) 85 Cal 28 (82).
- ('26) AIR 1926 Sind 84 (85).
- ('88) 12 Cal L Rep 50 (52).
- ('72) 8 Beng L R App 102 (102).
- ('99) 26 Cal 591 (592).

of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a *person in the service of the Crown* who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

[1877, S. 390 ; 1859, S. 179.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Civil or Military Officer of the Government."

### Synopsis

- |  |  |
|--|--|
| 1. Legislative changes.  | 3. Objection to admissibility of evidence. |
| 2. Evidence on commission, when may be read as evidence in the suit. | 4. Admissibility of documents.             |

### Other Topics (miscellaneous)

"Shall not be read as evidence." See Note 2. "Unless the Court, in its discretion, dispenses." See Note 2.

**1. Legislative changes.**—The words "or is a civil or military officer who cannot, in the opinion of the Court, attend without detriment to the public service" in clause (a) were newly introduced in the Code of 1908. For subsequent changes, see foot-note to the text of the rule.

**2. Evidence on commission, when may be read as evidence in the suit.**—The practice on the original side of the High Court of Calcutta is that evidence taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence by the party on whose behalf it was taken,<sup>1</sup> while the practice of the mofussil Courts in Calcutta is that such evidence is treated as evidence in the suit, though it is not formally tendered in evidence as it is part of the record.<sup>2</sup> See also the undermentioned case.<sup>3</sup>

A party wishing to rely on evidence taken on commission cannot, without the consent of the party against whom he offers it, have it read as evidence in the suit, unless he is able to show that the circumstances mentioned in clause (a) exist at the time the evidence is sought to be read, or unless he is able to persuade the Court to dispense with the proof of such circumstances.<sup>4</sup> Such evidence can be read at the

### Order 26 Rule 8 — Note 2

- |   |   |
|---|---|
| 1. ('08) 30 Cal 999 (1008).   | 4. ('80) AIR 1980 Sind 89 (90).   |
| ('05) 9 Cal W N 794 (795).  | ('84) AIR 1984 Cal 116 (117) : 60 Cal 1331. (It has to be accepted by Court after hearing opposite party.)              |
| 2. ('09) 1 Ind Cas 366 (367, 368) : 36 Cal 566.   | ('27) AIR 1927 Cal 43 (44). (Court has discretion to dispense with the proof of circumstances mentioned in clause (a).) |
| ('88) AIR 1988 Cal 412 (414).   | ('70) 5 Beng L R 252 (253).   |
| ('99) 26 Cal 591 (592).   | ('28) AIR 1928 P O 73 (76) (P C).   |
| ('08) 35 Cal 28 (32). (Pardanashin lady examined on commission.)  | ('74) 22 Suth W R 331 (333).  |
| 3. ('86) AIR 1986 Pat 6 (6). (Decision relating to mofussil Court in Patna — Formal tendering not necessary.) | ('28) AIR 1928 Cal 341 (343).   |

**O. 26 R. 8  
Notes 2-4**

instance of *either* party to the suit and not necessarily by the party who applied for a commission.<sup>5</sup>

The fact that the evidence was taken on commission in the absence of the opposite party is no sufficient ground for refusing to admit it in evidence.<sup>6</sup> But if the commission was issued for examining a particular witness and in spite of objection by the other side *another* witness was also examined, the Court would be justified in ignoring the evidence of such person.<sup>7</sup>

In the undermentioned case<sup>8</sup> it was held by the Calcutta High Court that the expression "beyond the jurisdiction of the Court" has reference to the question whether the witness is within the reach of the compelling or disciplinary powers of the Court in his capacity of a witness or potential witness and that the matter therefore would fall within the purview of O. 16 R. 19 which lays down that no witness is to be ordered to attend in person unless he is resident within a certain distance from the Court which extends to as much as 200 miles provided that for five-sixths of the distance there are adequate transport facilities for the witness in the way of railway or other communications. Hence, it was held in the above case that the mere fact that the witness was resident beyond the territorial limits of the jurisdiction of the Court is not sufficient to hold that he is beyond the jurisdiction of the Court within the meaning of this rule.

See also Note 1 to Section 75 *ante*.

**3. Objection to admissibility of evidence.** — Objection to the admissibility of the deposition of witnesses examined on commission should be taken in the trial Court itself.<sup>1</sup> See also the undermentioned case.<sup>2</sup>

**4. Admissibility of documents.** — Where a document is produced before the Commissioner and no objection is taken as to its admissibility, no such objection can be taken after the return of the commission at the time of the trial of the suit.<sup>1</sup> But if the document is objected to before the Commissioner, the party objecting is not precluded from urging other grounds of objection than those taken before the Commissioner at the time of trial.<sup>2</sup>

(1928) AIR 1928 Cal 421 (428) : 55 Cal 748.

(1968) 10 Suth W R 385 (386).

(1937) AIR 1937 Cal 168 (166) : 68 Cal 914. (Evidence taken on commission—Before using it for any other purpose, Court should first decide whether or not to use it as evidence in suit — Court should not use it to decide whether or not to order witness to attend in person.)

(1988) AIR 1988 Nag 530 (538). (Witness living beyond jurisdiction of Court, examined on commission—Consent of party not necessary to make it admissible.)

[See (1933) AIR 1933 Sind 327 (327) : 27 Sind L R 194. (Commissioner's report is only a piece of evidence — Objection to report should be considered even though the Commissioner is dead.)]

5. (1926) AIR 1926 Sind 34 (35).

6. (1968) 10 Suth W R 236 (237).

7. (1920) AIR 1920 Cal 718 (720) : 47 Cal 538.

8. (1937) AIR 1937 Cal 163 (165) : 68 Cal 914.

**Note 3**

1. (1929) AIR 1929 Cal 591 (592).

2. (1938) AIR 1938 All 551 (554) : 55 All 666. (Pardanashin lady while being examined on commission tutored by somebody — Court may exclude evidence but cannot insist on personal attendance of the lady.)

**Note 4**

1. (80) 6 Cal L Rep 109 (111, 112).

[See also (1935) AIR 1935 Mad 888 (890). (Hundi exhibited before Commissioner — He giving identifying mark — Admissibility in evidence not considered — No objection raised — Issue of admissibility pending before Court— Hundi held not 'admitted' in evidence within S. 86, Stamp Act.)]

2. (1938) 9 Cal 939 (940, 941).

**R. 9.** [S. 392.] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or, annual net profits, the Court may issue<sup>2</sup> a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the *Provincial Government* has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

[1877, Ss. 392, 393, 398, 399, 409; 1859, Ss. 180, 306.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

### Local Amendment

#### CALCUTTA

Omit Proviso.

### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Local investigation by the Judge.</li> <li>4. Power of Commissioner to take evidence.<br/>See Note 3 to Rule 10.</li> <li>5. "Such person as it thinks fit."</li> </ol> | <ol style="list-style-type: none"> <li>6. Admissibility of report of Commissioner.<br/>See Note 4 to Rule 10.</li> <li>7. Interference with the report. See<br/>Note 10 to Rule 10.</li> <li>8. Form.</li> <li>9. Appeal from order directing local investigation.</li> <li>10. Revision.</li> </ol> |
|---|--|

### Other Topics (miscellaneous)

- |  |  |
|--|--|
| <p>"May issue." See Note 2.<br/>Selection of Commissioner — Discretion of Court.<br/>See Note 5.<br/>Application, when to be made. See Note 2.</p> | <p>Commission — When should not issue. See Note 2.<br/>Local investigation — Its object and necessity. See Note 2.</p> |
|--|--|

**1. Legislative changes.** — The words "or proceeding" which occurred in the old Section, after the words "in any suit" and the words "and the same cannot be conveniently conducted by the Judge in person" have now been omitted.

**2. Scope of the Rule.** — The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot<sup>1</sup> and to elucidate any point which is left doubtful on the evidence taken before the Court.<sup>2</sup> Cases of boundary disputes and

#### Order 26 Rule 9 — Note 2

1. ('70) 2 N W P H O R 196 (197).  
(199) AIR 1929 Cal 774 (774). (Not desirable to order the scene before accident to be re-enacted in the presence of the Commissioner.)
2. ('98) 16 Mad 850 (851, 852).

- ('68) 1868 Pun Re No. 11.
- ('66) 6 Suth W R 824 (825).  
[See ('83) AIR 1938 Cal 475 (476). (Question as to whether certain structures are old or new — Commission must be issued under O. 39 R. 7 and not under this rule.)]

**O. 26 R. 9  
Notes 2-8**

disputes about the identity of lands are instances when a Court may order a local investigation under this rule.<sup>3</sup>

The Court has a *discretion* to order a local investigation or not; it is not bound to order it in all cases.<sup>4</sup> An application under this rule should be made at the hearing of the suit.<sup>5</sup> It cannot be made after the case is closed.<sup>6</sup>

The presiding officer or officers in enquiries under the undermentioned Acts<sup>7</sup> have been empowered to issue commissions for local investigation in accordance with this rule.

An Appellate Court has the power to issue a commission for a local investigation under this rule read with Section 107.<sup>8</sup>

Though this rule does not provide for the presence of the parties when a commission is issued, yet, natural justice requires that such commission should not be issued behind the back of one of the parties concerned.<sup>9</sup>

### **3. Local investigation by the Judge. — See Order 18 Rule 18.**

By Section 144 of the Oudh Rent Act (XXII of 1886), the Court may, in inquiries under that Act, make a local investigation, instead of issuing a commission under this rule.

### **4. Power of Commissioner to take evidence. — See Note 3 to Rule 10 *infra*.**

**5. "Such person as it thinks fit." —** Under the Code of 1859, a commission had to be issued, in the first instance, to an officer of the Court and only when there was no such officer, to any other suitable person.<sup>1</sup> There is no such preference under this rule. Under the General Rules of the Allahabad High Court, however, commissions other than commissions for the examination of witnesses or of accounts, should not be issued to persons other than Civil Court *amins* except when such a course is impracticable, and in every case a person other than a Civil Court *amin* is employed, the Court should record its reasons therefor.<sup>2</sup>

3. ('09) 2 Ind. Cas 347 (348) : 5 Low Bur. Rul. 1. ('72) 17 Suth W R 472 (474). (Question of possession before date of suit — Local investigation ought not to have been ordered.)

[See ('72) 17 Suth W R 230 (232). (Court not justified in ordering local investigation when the issue is whether the parties are man and wife.)]

4. ('66) 5 Suth W R 248 (248).

('68) 10 Suth W R 48 (44).

('62) 1862 Suth W R 19 (20) (FB).

(1865) 3 Suth W R Act X, 153 (154). (Court not bound to order *suo motu*.)

('86) 12 Cal 45 (47) (Do.).

('38) AIR 1938 Nag 580 (582).

[See also (1864) 1 Suth W R 102 (108). (Successor of a Judge should not interfere with order for local investigation made by his predecessor.)]

5. Bourke, O C 243.

6. ('19) AIR 1919 Oudh 126 (126).

('35) AIR 1935 Pat 56 (57, 58).

('66) 6 Suth W R Act X, 11 (11).

('35) AIR 1935 Pat 56 (57, 58). (Hearing of case coming to end and nothing remaining but arguments — Application for issue of commission held was rightly refused.)

7. The Chota Nagpur Tenancy Act (VI of 1908), S. 265 (3); the Bengal Tenancy Act (VIII of 1885), S. 31 (b) and S. 158 (2); the Orissa Tenancy Act (II of 1918), S. 36 (b) and S. 210.

8. ('32) AIR 1932 All 270 (271).

9. ('38) AIR 1938 Nag 580 (582). (But defect is only irregularity curable under S. 99 of the Code.)

### **Note 5**

1. ('87) 7 Suth W R 27 (28).

(1864) 1864 Suth W R Gap 171 (172).

('67) 8 Suth W R 6 (7).

('70) 18 Suth W R 284 (284).

('70) 18 Suth W R 118 (114).

('66) 6 Suth W R Act X 81 (81).

('67) 8 Suth W R 331 (332). (Report by sheristadar—Ministerial officer.)

('69) 12 Suth W R 209 (210). (Do.)

('82) 11 Cal L Rep 583 (587). (The District Judge can appoint Munsif to be Commissioner.)

('66) 6 Suth W R 62 (68). (Report by ministerial officer—Sheristadar.)

('72) 17 Suth W R 300 (301). (But a Sub-Judge whose judgment is in appeal cannot be ordered to go and inspect.)

2. ('29) AIR 1929 All 446 (447).

The rule does not contemplate the issue of a commission to more than one person. But if more than one is appointed, provision should be made for meeting any difference in opinion that may arise between them.<sup>3</sup>

**O. 26 R. 9**  
**Notes 5-10**

**6. Admissibility of report of Commissioner.** — See Note 4 to Rule 10.

**7. Interference with the report.** — See Note 10 to Rule 10.

**8. Form.**—For the form of commission for local investigation, see Appendix H, Form No. 9.

**9. Appeal from order directing local investigation.** — An order under this rule is not appealable under O. 43 R. 1. Nor is it a "judgment" within Clause 15 of the Letters Patent.<sup>1</sup> The discretion exercised by the Court under this rule cannot be interfered with in appeal or second appeal.<sup>2</sup>

**10. Revision.** — According to the High Court of Patna,<sup>1</sup> where the order directing a local investigation would be a calamitous waste of time and money and would be determining the rights of parties on an improper basis, the High Court would interfere in revision. But the High Court of Madras in the undermentioned case<sup>2</sup> refused to interfere with an order directing a Commissioner to ascertain the mesne profits on the ground that the applicant had a remedy by way of appeal from the final decree.

**R. 10. [S. 393.] (1)** The Commissioner, after such local **O. 26 R. 10**

**Procedure of Commissioner.**

inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

**(2)** The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit<sup>3</sup> and shall form part of the record<sup>4</sup>; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his

**Report and depositions to be evidence in suit.**

**Commissioner may be examined in person.**

3. ('91) 1 O P L R 160 (161).

**Note 9**

1. ('25) AIR 1925 Rang 290 (291) : 3 Rang 293.

('67) 7 Suth W R 425 (425).

(1862) 1862 Marsh 469.

2. ('82) AIR 1982 All 270 (271).

(1862) 1 Ind Jour (O S) 8.

(1864) 1 Suth W R 141 (142).

('74) 22 Suth W R 188 (184).

(1864) 1 Suth W R 249 (250).

(1864) 1 Suth W R 195 (196).

('69) 12 Suth W R 76 (76).

('94) 21 Cal 504 (512, 513) : 21 Ind App 89 (PC).

('12) 13 Ind Cas 194 (197) (Cal).

('39) AIR 1939 Pat 270 (272). (Commission cannot be issued in appeal simply to give opportunity to bring forth new evidence by a party who deliberately avoids it in trial Court — Superior Court has only to see if subordinate Court exercises discretion judiciously or capriciously.)

[See also ('88) AIR 1988 Nag 530 (532). (Irregularity not causing prejudice to defendant — Decree cannot be varied in second appeal.)]

**Note 10**

1. ('24) AIR 1924 Pat 761 (764).

2. ('28) AIR 1928 Mad 43 (43).

O. 26 R. 10  
Notes 1-3

report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

[1877, Ss. 392, 393, 398, 399; 1859, S. 180.]

### Synopsis

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Rule.</li> <li>3. Functions and powers of the Commissioner.</li> <li>4. Admissibility of the report of the Commissioner.</li> <li>5. Examination of the Commissioner.</li> </ol> | <ol style="list-style-type: none"> <li>6. Objections to Commissioner's report.</li> <li>7. Commissioner's report, how far binding on the Court.</li> <li>8. Further evidence after the Commissioner's report.</li> <li>9. Sub-rule (3).</li> <li>10. Interference with the report.</li> </ol> |
|--|---|

### Other Topics (miscellaneous)

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|--|--|
| <p>Evidentiary value of the Commissioner's report. See Notes 8, 4 and 10.</p> <p>Return of commission, whether should be on file before orders are passed. See Note 4.</p> | <p>"Shall be evidence in the suit." See Notes 8 and 4.</p> <p>"Shall form part of the record." See Note 4.</p> |
|--|--|

#### 1. Legislative changes. —

The words "or as to his report" have been added in the concluding part of sub-rule (2). Sub-rule (3) is new.

**2. Scope of the Rule.** — Sub-rule (2) is "intended to afford protection to the Commissioner who is a *quasi*-judicial officer and such protection is afforded on grounds of public policy so as to make it impossible for either of the parties to subject the Commissioner to a vexatious examination."<sup>1</sup>

This rule applies to suits under the Tenancy Acts.<sup>2</sup>

**3. Functions and powers of the Commissioner.** — The provisions of Order 26 do not amplify Section 75 of the Code and the Court cannot delegate to the Commissioner the trial of any *material issue* which it is itself bound to try.<sup>1</sup> In other words, a Judge cannot depute to the Commissioner functions which he can and should discharge himself.<sup>2</sup> All that the Court can depute a Commissioner to do is to inspect a disputed land, to prepare a map or to obtain information with regard to physical features of the property inspected.<sup>3</sup> It is not the intention of the Legislature to allow witnesses to be

#### Order 26 Rule 10 — Note 2

1. ('15) AIR 1915 Cal 280 (282).  
(1871) L R 5 H L 418 (438, 439), *Duke of Buccleuch v. Metropolitan Board*. (Referred to in A I R 1915 Cal 280.)
2. [See ('90) 17 Cal 277 (280).  
(('68) 1 Beng L R (S N) 2 (2).  
(('17) AIR 1917 All 70 (70) : 89 All 694. (*Agra Tenancy Act*).]

#### Note 3

1. ('22) AIR 1922 Lah 47 (48) : 3 Lah 209.  
(('98) 16 Mad 850 (851).  
(('80) AIR 1980 Pat 557 (558).  
(('13) 18 Ind Cas 440 (448) (Cal).  
(('26) AIR 1926 Lah 145 (146).

- (('74) 21 Suth W R 280 (281).  
(('85) AIR 1985 Mad 888 (890).  
[See also ('72) 17 Suth W R 469 (470).]
2. ('70) 14 Suth W R 190 (190).  
(('92) 17 Suth W R 478n (478n).  
(('75) 23 Suth W R 286 (287).  
(('75) 24 Suth W R 184 (185).  
(('28) AIR 1928 Bom 145 (147). (Question whether one of the parties is personally engaged in agricultural labour cannot be referred.)  
(('29) AIR 1929 Bom 478 (479). (Cannot enquire as to the heirs and properties of the deceased in an administration suit.)  
(('25) AIR 1925 Pat 578 (576).  
3. ('74) 21 Suth W R 281n (281n).



examined by the Commissioner in such cases, unless the nature of evidence is such that it ought to be taken only on the spot,<sup>4</sup> or unless the parties agree and accept the same.<sup>5</sup> Thus, the statements regarding a right of way, made by village officers to a Commissioner appointed to prepare a map, are not evidence.<sup>6</sup>

Any evidence taken by the Commissioner contrary to instructions cannot be looked into.<sup>7</sup> Thus, where a Commissioner who was appointed to ascertain the amount of mesne profits entered into the question of possession of the land, recorded evidence and arrived at a finding, it was held that the procedure was *ultra vires*.<sup>8</sup> If evidence is taken by him within the scope of his authority, such evidence should be reduced to writing. Information given by witnesses and not reduced to writing is not legal evidence.<sup>9</sup>

A Commissioner is bound to record the state of things as actually existing and not draw upon his own imagination or make surmises.<sup>10</sup>

Notice should be given to the parties of the time when local investigation will be held.<sup>11</sup>

**4. Admissibility of the report of the Commissioner.** — The report of the Commissioner together with the evidence, if any, recorded by him is legal evidence in the suit.<sup>1</sup> But the evidence alone without the report of the Commissioner cannot be received as evidence in the suit.<sup>2</sup> The Court is not justified in refusing to consider the report unless the local investigation is incomplete or inconclusive.<sup>3</sup>

The report, however, is not *per se* evidence in *any other suit* unless its accuracy

('72) 17 Suth W R 282 (288).

4. ('68) 9 Suth W R 89 (86).

('72) 17 Suth W R 282 (288).

5. ('21) AIR 1921 Cal 363 (367).

('69) 2 Beng L R App 3 (4).

6. (1900) 24 Bom 43 (45).

7. ('75) 24 Suth W R 208 (209).

8. ('28) AIR 1928 Pat 278 (278, 279).

('71) 16 Suth W R 294 (294).

('62) 1862 Suth W R 39 (39) (FB). (The report is of no value regarding past possession.)

('86) 40 Cal W N 582 (583). (Commissioner appointed to determine location of plot by reference to lease and settlement map—Evidence of possession recorded by him is not admissible.)

9. ('25) AIR 1925 Mad 145 (147) : 47 Mad 800.

10. ('70) 14 Suth W R 269 (270).

11. ('69) 12 Suth W R 139 (140).

[See also ('84) AIR 1984 Mad 548 (549).

#### Notes 4

1. ('67) 8 Suth W R 267 (267)

('69) 11 Suth W R 423 (424).

('69) 2 Beng L R App 3 (4).

('68) 10 Suth W R 312 (313).

('66) 6 Suth W R 51 (51).

('68) 9 Suth W R 596 (597). (Even though Court exercised its discretion unwisely and wrongly in giving Commissioner too extensive powers.)

('67) 8 Suth W R 267 (268).

('69) 12 Suth W R 136 (136, 137).

('67) 7 Suth W R 43 (44). (It is not necessary that the Commissioner's report must have de-

positions attached to it to make it legal evidence.)

('74) 22 Suth W R 350 (350).

('68) 9 Suth W R 601 (601).

('78) 19 Suth W R 218 (214).

('68) 9 Suth W R 494 (495).

(1865) 2 Suth W R 278 (278). (Commissioner's report is evidence without any specific documents corroborating his finding.)

('88) 1 O P L R 160 (161).

('71) 15 Suth W R 291 (292).

('70) 14 Suth W R 493 (494). (Report only evidence on the point to which the commission

('90) 17 Cal 281 (284). (Report cannot be rejected because amin's remuneration is not paid.)

('17) AIR 1917 All 70 (70): 39 All 694. (Report of a Commissioner appointed by an Assistant Collector to ascertain collections under S. 164 of the Agra Tenancy Act is admissible in evidence.)

('84) AIR 1984 Mad 548 (549).

('86) 163 Ind Cas 36 (37) (Mad).

[See also (1864) 1 Suth W R 93 (93). (Court is at liberty to adopt a portion of the report and reject the rest.)

('72) 17 Suth W R 521 (522).

('94) 16 All 842 (843). (Return should be before the Court, before it proceeds to determine the case.)]

2. ('70) 14 Suth W R 397 (399).

3. ('70) 13 Suth W R 412 (413).

('26) AIR 1926 Cal 290 (293).

('86) 163 Ind Cas 36 (37) (Mad).

[See also ('40) AIR 1940 PC 3 (6) (PC). (Interfer-

**O. 26 R. 10**  
**Notes 4-8**

is proved in the ordinary way.<sup>4</sup>

**5. Examination of the Commissioner.** — The parties are entitled to take objection to the report of the Commissioner and substantiate the same by examining the Commissioner or other witnesses.<sup>1</sup> But there must be some real ground for examining the Commissioner.<sup>2</sup> If the report is attacked on grounds which require explanation, it is necessary that the Commissioner also should be examined.<sup>3</sup> It is against established practice to find fault with his report behind his back and to reject it *in toto*.<sup>4</sup>

**6. Objections to Commissioner's report.** — The Court must fix a date to enable the parties to file objections, if any, to the report of the Commissioner<sup>1</sup> and is bound to enquire into such objections when filed<sup>2</sup> unless the parties agree to, or accept the report.<sup>3</sup> A party refusing to appear before the Commissioner has, however, been held not entitled to object to the report.<sup>4</sup>

Objections to the report of the Commissioner should be taken in the trial Court and cannot be raised for the first time in appeal,<sup>5</sup> although the Appellate Court has power to consider whether the report was outside or within the scope of the warrant of commission.<sup>6</sup>

**7. Commissioner's report, how far binding on the Court.** — A Commissioner's report is only *evidence* in the case. It is in no way *binding* on the Court. The Court has full power to arrive at its own conclusion even at variance with the report.<sup>1</sup> In fact, the report ought not to be made the sole basis and foundation for the judgment in disregard of the other evidence in the case.<sup>2</sup>

**8. Further evidence after the Commissioner's report.** — The rule does not contemplate the tender of further evidence after the receipt of the report of the Commissioner except the examination of the Commissioner himself. It does not however prohibit further evidence. The point has to be decided on general principles according to the facts and circumstances of each case.<sup>1</sup> It was held that the party cannot at the

ence with the result of a long and careful local investigation except upon clearly defined and sufficient grounds is to be deprecated—13 Moo Ind App 607, Relied on.)]

4. ('82) 12 Cal L Rep 50 (52).
- ('28) AIR 1928 Cal 63 (64).
- ('36) AIR 1936 Oudh 192 (192). (The report does not fall within S. 35 of Evidence Act.)
- ('34) AIR 1934 Lah 890 (892); 16 Lah 877. (Do.)

**Note 5**

1. ('17) AIR 1917 Lah 57 (58).
- ('29) AIR 1929 Lah 782 (788).
2. ('19) AIR 1919 Cal 946 (947).
3. ('20) AIR 1920 Cal 863 (864).
- ('75) 24 Suth W R 342 (342).
- ('15) AIR 1915 Cal 280 (282). (Permission cannot be arbitrarily withheld.)
4. ('17) AIR 1917 Pat 278 (279).

**Note 6**

1. ('74) 21 Suth W R 2 (8). (Court should also give notice to parties of the date so fixed.)
2. ('69) 11 Suth W R 95 (95).
- ('67) 8 Suth W R 172 (173).
3. ('18) 19 Ind Cas 870 (871); 6 Sind L R 256.
- ('69) 11 Suth W R 155 (155).
- ('70) 14 Suth W R 418 (418).
- [See also ('70) 14 Suth W R 391 (392). (Neither

party objecting to the map prepared by the Commissioner—Court cannot question its correctness.)]

4. ('20) AIR 1920 Cal 863 (864).
- ('66) 6 Suth W R 180 (180).
5. ('74) 2 Ind App 84 (37) (PC).
- ('68) 9 Suth W R 267 (267).
- ('82) 1882 Pun Re No. 161, page 485.
6. ('29) AIR 1929 Mad 492 (492).

**Note 7**

1. ('26) AIR 1926 Pat 462 (463).
- ('35) AIR 1935 Cal 28 (29); 61 Cal 886. (Trial Court accepting Commissioner's report and decreeing suit — Appellate Court accepting facts stated by Commissioner but disagreeing with his conclusion and setting aside decree—It is entitled to do so.)
- ('72) 17 Suth W R 270 (270).
- ('38) AIR 1938 Pat 569 (570); 17 Pat 358.
2. ('75) 24 Suth W R 338 (338).
- ('67) 8 Suth W R 464 (464).
- [See also ('74) 21 Suth W R 281 (281). (Value of the report depends upon the evidence on which it is founded.)]

**Note 8**

1. (1900) 27 Cal 951 (956); 27 Ind App 110 (PC

last moment adduce fresh evidence after going on with the trial of the case without objection and with the knowledge that the investigation was carelessly done.<sup>3</sup>

**O. 26 R. 10**  
**Notes 8-10**

**9. Sub-rule (3).** — The Court has a discretion to order a fresh commission or not and is not *bound* to do so in every case where the result of the local investigation is found to be unsatisfactory; it can decide the case on the evidence.<sup>1</sup>

Sub-rule (3) contemplates a *further enquiry* by the same Commissioner already appointed; it does not contemplate the issue of a fresh commission covering the same ground.<sup>2</sup> But where the Court is so dissatisfied with the whole proceedings of the Commissioner that it thinks it better to discard the whole record and start afresh, it may do so.<sup>3</sup> Thus, where the Court is of opinion, on considering the objections of the parties, if any, that the Commissioner has so misconceived his duties as to render his report valueless, it may wipe out and supersede the first report by a specific order to that effect<sup>4</sup> and may issue a fresh commission.<sup>5</sup> The mere filing of objections to the report is no ground for issuing a fresh commission.<sup>6</sup> When the Court issues a fresh commission it is not bound to wipe out off the record the report of the first Commissioner.<sup>7</sup>

**10. Interference with the report.** — The Court ought not to interfere with the result of a long and careful local investigation except upon clearly defined and sufficient grounds.<sup>1</sup> It has been laid down by their Lordships of the Privy Council (and followed in a number of decisions of the High Courts in India) that an Appellate Court should not interfere with the finding of the trial Court based on a careful local investigation except upon very strong grounds.<sup>2</sup> But disregard of the report of the

2. ('12) 16 Ind Cas 39 (40) (Cal).

#### Note 9

1. ('19) AIR 1919 Cal 96 (97).
- ('17) AIR 1917 Cal 573 (573). (The case was one which could not be decided without an investigation on the spot — The case was therefore remanded for further investigation.)
- ('19) AIR 1919 Cal 673 (673). (No error of law is committed by decision on evidence on record; and High Court will not interfere in second appeal.)
- ('98) AIR 1998 Pat 569 (570) : 17 Pat 358.
2. ('29) AIR 1929 Mad 661 (663). (Issue of successive commissions condemned.)
- ('88) AIR 1938 All 65 (65).
- ('29) AIR 1929 All 446 (447). (The practice of appointing successive Commissioners whenever objections are filed to their reports condemned.)
- ('32) AIR 1932 Mad 482 (484) : 55 Mad 656. (Issue of successive commissions condemned.)
- ('30) AIR 1930 Mad 236 (238).
- ('81) AIR 1981 Mad 78 (74) : 54 Mad 239.
- [See also ('35) AIR 1935 All 422 (423). (There is no error of law in appointing more than one Commissioner — If the report of one Commissioner is unsatisfactory in certain respect, it is permissible for the Court to remit the case to the same Commissioner or to appoint another Commissioner.)]
3. ('29) AIR 1929 Mad 661 (663).
4. ('81) AIR 1981 Mad 78 (76) : 54 Mad 239.
- ('80) AIR 1980 Mad 236 (238).

('75) 23 Suth W R 93 (93).

5. ('22) AIR 1922 Mad 219 (220) : 45 Mad 79.
- ('26) AIR 1926 Pat 159 (160).
- ('29) AIR 1929 Pat 101 (102). (Examination by Commissioner wrongly proceeded after the death of a party — Illegal — Fresh commission may be issued.)
- ('83) AIR 1983 All 65 (65).
- ('29) AIR 1929 All 446 (447).
6. ('30) AIR 1930 Mad 236 (238).
- ('22) AIR 1922 Mad 219 (220) : 45 Mad 79.
7. ('87) AIR 1937 Pat 670 (671).

#### Note 10

1. ('72) 17 Suth W R 285 (288) (PC).
- ('24) AIR 1924 Cal 620 (622).
- ('73) 19 Suth W R 361 (366).
- (1865) 3 Suth W R 219 (220). (Report by Munsif.)
- [See also ('20) AIR 1920 Cal 863 (864)..]
- ('20) AIR 1920 Pat 555 (558). (Report of the Commissioner as to the amount of work done by him can only be set aside on substantial and definite grounds.)]
2. ('70) 18 Moo Ind App 607 (617) (PC).
- ('72) 17 Suth W R 285 (288) (PC).
- ('13) 21 Ind Cas 413 (414) (Cal).
- ('72) 18 Suth W R 452 (453).
- ('06) 4 Cal L Jour 37 (39).
- ('71) 15 Suth W R 423 (424).
- ('28) AIR 1928 Cal 748 (748). (The Appellate Court may however issue a fresh commission if the investigation is unsatisfactory.)
- [See however ('01) 5 Cal W N 692 (701).]

**O. 26 R. 10  
Note 10**

Commissioner is not such an error or defect "affecting the merits of the case" within the meaning of Section 100 as to justify interference in second appeal.<sup>3</sup>

In *Kessowji Issur v. G. I. P. Railway Company*,<sup>4</sup> the Privy Council has held that an Appellate Court should not, as a result of an inspection of the spot of accident, reverse the decision of the trial Court based on recorded evidence.

## COMMISSIONS TO EXAMINE ACCOUNTS

**O. 26 R. 11**

**R. 11. [S. 394.]** In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

Commission to examine  
or adjust accounts.

[1877, Ss. 394, 395, 400; 1859, S. 181.]

*Synopsis*

1. Commissioner to examine accounts.
2. "Is necessary."
3. Power of Commissioner to decide questions of law.

4. Disobedience of order made by Commissioner.
5. Non-payment of Commissioner's fees.
6. Appeal.
7. Form.

**1. Commissioner to examine accounts.** — In a suit for accounts the usual and proper procedure is first of all to ascertain whether the defendant is *liable* to account. If the accounts are complicated and require an examination, then the Court may appoint a commission under this rule.<sup>1</sup> Where a case is remanded to the lower Court for taking accounts, it has got jurisdiction to appoint a Commissioner for such purpose.<sup>2</sup>

The Court may issue a commission even without the consent of parties.<sup>3</sup>

Under Section 265 of the Chota Nagpur Tenancy Act (VI of 1908), the Deputy Commissioner is empowered to issue commissions to examine accounts in any suit, appeal or proceeding pending before him.

**2. "Is necessary."** — Before an order for the appointment of a Commissioner can be made, the examination or adjustment of accounts must be considered *necessary*.<sup>1</sup>

**3. Power of Commissioner to decide questions of law.** — The Court cannot delegate its judicial powers to a Commissioner in the matter of taking evidence and

3. ('94) 21 Cal 504 (511, 512) : 21 Ind App 89 (P O).

4. ('07) 81 Bom 881 (899) : 84 Ind App 115 (P O).

**Order 26 Rule 11 — Note 1**

1. ('81) 7 Cal 654 (656, 657).

('26) AIR 1926 Cal 849 (850).

('72-92) 1872-1892 Low Bur Rul 809.

('97) 20 Mad 818 (816).

[See ('75) 24 Suth W R 70 (70). (The case lays down the procedure to be observed in a judicial inquiry into accounts.)]

2. ('84) AIR 1984 Pat 85 (87).

3. ('74) 1 Ind App 846 (862) (P O).

**Note 2**

1. ('25) AIR 1925 Cal 1069 (1072) : 52 Cal 766.

('81) 6 Cal 754 (758). (If taking of accounts by Judge would occasion a waste of public time, Court can issue commission with necessary instructions.)

('29) AIR 1929 Pat 626 (627). (Commission issued for taking accounts from a guardian of property.)

('78) 19 Suth W R 14 (15). (*Held*, not necessary to issue a commission.)

('87) AIR 1987 Nag 186 (186, 187) : 1 L R (1987) Nag 268. (Suit on pro-note—Defendant putting in no defence — It is impossible to say whether it is necessary to examine the accounts or not.)

determining issues.<sup>1</sup> Thus, it is for the Court and not the Commissioner to decide as to the truth or falsity of the account books<sup>2</sup> or as to whether a certain contract was or was not authorized.<sup>3</sup> Similarly, the duty of determining in whose possession the account books are cannot be delegated to the Commissioner.<sup>4</sup> So also, it is not open to the Court to refer to the Commissioner the question as to whether the dealings between the parties constituted in law, a mutual, open and current account between them.<sup>5</sup> Their Lordships of the Privy Council<sup>6</sup> have held that it is irregular to appoint a Commissioner to give *findings* on mixed questions of law and fact, such as, for instance, the nature of a contract. The Commissioner can determine *only the extent*, or the *quantum* and not the *factum* of liability.<sup>7</sup> The function of the Commissioner is to place himself as an *assistant* to the Court so as to enable the Court to understand and appreciate the accounts and come to a decision.<sup>8</sup>

A Commissioner has no power of review either under Section 151 or under Order 47 Rule 1.<sup>9</sup>

The High Court of Bombay has held in the undermentioned case<sup>10</sup> that a Commissioner appointed by a Judge on the original side of the High Court can decide questions of law arising while accounts are taken.

**4. Disobedience of order made by Commissioner.** — A Commissioner is an officer of the Court and the Court can issue an attachment to compel a party to obey his order.<sup>1</sup>

**5. Non-payment of Commissioner's fees.** — The suit should not be dismissed for failure to deposit the Commissioner's fee.<sup>1</sup>

**6. Appeal.** — An order under this rule is *not a decree* and is not appealable<sup>1</sup> nor is the order one appealable under O. 43 R. 1. The High Court of Calcutta has, however, held in the undermentioned cases<sup>2</sup> that an order giving directions to the Commissioner amounts to a decree and is appealable. See Notes to Section 2, sub-section (2).

**7. Form.** — For the form of a commission to examine accounts, see Appendix H, Form No. 9.

### Note 3

1. ('26) AIR 1926 Lah 145 (146).
2. ('25) AIR 1925 Sind 265 (265).
3. ('24) AIR 1924 Sind 9 (10) : 17 Sind L R 316.  
[See also ('24) AIR 1924 Mad 406 (408, 409).  
(Powers and functions of Official Referee as compared to a commissioner under this rule discussed.)]
4. ('86) AIR 1986 Lah 458 (460).
5. ('88) AIR 1988 Rang 270 (270, 271). (All that can be referred to the Commissioner is an enquiry into the nature and course of dealings and the amount, if any, due.)
6. ('81) AIR 1981 P O 136 (140) : 58 Ind App 173 : 58 All 190 (PO).
7. ('25) AIR 1925 Cal 1069 (1072) : 52 Cal 766.
8. ('29) AIR 1929 Cal 418 (422).  
[See ('84) AIR 1984 Pat 85 (87, 88). (But if question of quantum involves question of

liability Commissioner can determine both.)]

8. ('07) 6 Cal L Jour 105 (108).
9. ('24) AIR 1924 Bom 231 (232) : 47 Bom 598.  
(But if he re-opens an inquiry, it must be on grounds analogous to those mentioned in O. 47, Rule 1.)
10. ('16) AIR 1916 Bom 181 (182) : 41 Bom 719.

### Note 4

1. ('78) 10 Bom H O R O O 4 (6).

### Note 5

1. ('81) 8 Mad 259 (259).

### Note 6

1. ('14) AIR 1914 Bom 36 (38) : 38 Bom 392.  
[See also ('84) 8 Bom 287 (294.)]
2. ('96) 28 Cal 406 (408).  
('02) 29 Cal 758 (766, 768) (FB).  
('04) 31 Cal 722 (724). (Stay also can be granted.)

O. 26 R. 12

**R. 12.** [S. 395.] (1) The Court shall furnish the Com-

**Court to give Commissioner necessary instructions.**

missioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

## (2) The proceedings and report (if any) of the Commissioner

**Proceedings and report to be evidence. Court may direct further enquiry.**

shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

[1877, Ss. 394, 395, 400; 1859, S. 181.]

*Synopsis*

1. Scope of the Rule.

2. "Shall be evidence in the suit."

3. Objections to the Commissioner's report.

4. Powers and duties of the Appellate Court.

*Other Topics (miscellaneous)*

Commissioner's report, application to vary. See Note 3.

Evidentiary value of the Commissioner's report. See Note 2.

Instructions to Commissioner. See Note 1.

**1. Scope of the Rule.** — The Court is bound to furnish the Commissioner with the requisite proceedings and issue definite instructions as to what he should do. The Commissioner may, if necessary, apply for enlargement of time fixed for the return.<sup>1</sup>

The rule contemplates the appointment of only *one* Commissioner. But the appointment of more than one is only a mere irregularity.<sup>2</sup>

**2. "Shall be evidence in the suit."** — The report of the Commissioner together with the evidence, if any, taken by the Commissioner is *evidence* in the suit<sup>1</sup> unless the Court is dissatisfied with it and directs a further enquiry. But the report has not the effect of a *decision* in the case.<sup>2</sup>

The Court is not bound to take any other evidence than that furnished by the report, where it sees no reason to doubt its correctness.<sup>3</sup>

**3. Objections to the Commissioner's report.** — A party is entitled to file objections to the report of the Commissioner and the Court is bound to give him a reasonable opportunity to produce evidence in support of his objections.<sup>1</sup> But where

**Order 26 Rule 12 — Note 1**

1. ('92) 1892 Bom P J 818 (818).

2. ('70) 1870 Pun Re No. 40.

**Note 2**

1. ('71) 8 N W P H O R 217 (288).

('82) 1892 Pun Re 161, page 485.

[See ('78) 8 Bom 161 (170).]

2. ('01) 5 Cal W N 692 (707).

3. ('70) 1870 Pun Re No. 40.

[See however ('82) AIR 1982 All 128 (180) : 58 All 54. (There is nothing in O. 26 to prevent a Court from accepting evidence on a debatable point, though Commissioner is appointed to inspect accounts.)]

**Note 3**

1. ('39) AIR 1929 Lah 782 (788).

('84) AIR 1984 Pat 85 (88). (The Court must consider the objections and come to an independent conclusion.)

the reference to a Commissioner has been made by *consent*, the parties are bound by it and cannot go behind the consent so given.<sup>2</sup>

**O. 26 R. 12**  
**Notes 3-4**

Objections to the report must be taken in the trial Court and cannot be raised for the first time in appeal.<sup>3</sup>

**4. Powers and duties of the Appellate Court.** — While the Commissioner's report which has been affirmed by the trial Court should have great weight given to it and should not be capriciously deviated from, it is not absolutely binding on the Appellate Court.<sup>1</sup> The Appellate Court is entitled, therefore, whenever necessary, to scrutinize the report and make such further enquiries into the matter as it may deem proper.<sup>2</sup>

## COMMISSIONS TO MAKE PARTITIONS

**R. 13.** [S. 396.] Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

**O. 26 R. 13**

Commission to make partition of immoveable property.

[1877, S. 396.]

### Synopsis

1. Legislative changes.
2. Scope of the Rule.

3. "Such person as it thinks fit."
4. Appeal.

**1. Legislative changes.** — The word "person" has been substituted for the word "persons" which occurred in the old Section in order to negative the view that had been held under the old Code that the Court could not appoint a single Commissioner.<sup>1</sup>

**2. Scope of the Rule.** — As has been seen in Note 9 to Rule 10, the Court has

('22) AIR 1922 Mad 219 (220): 45 Mad 79.

('14) AIR 1914 Lah 839 (341). (Commissioner may be examined to substantiate objections.)

*Report of Commissioner for taking accounts—Objections to the report—Limitation—Practice in High Courts—Motion to vary report should be made within twenty days of the filing of the report:* ('89) 13 Bom 868 (869, 370). (But if the Court allows further time then within further time so allowed.)

('97) 24 Cal 437 (439). (Notice should be accompanied with grounds of objections.)

('85) 9 Bom 250 (252). (Court has discretion to extend time for making such motion.)

('75) 1 Bom 168 (161). (Objections to the report must be decided on the same evidence as was before the Commissioner.)

2. ('74) 1 Ind App 346 (362) (PC).

('14) AIR 1914 Lah 839 (341).

3. ('74) 2 Ind App 84 (37) (PC).

('20) AIR 1920 Low Bur 31 (34).

(1869) 1 Mad II C R 418 (419).

('69) 11 Suth W R 3 (3).

('15) AIR 1915 Lah 144 (145). (Cannot be raised in second appeal.)

### Note 4

1. ('70) 6 Mad H C R 36 (37). (1 Mad H C R 1 and 1 Mad H C R 418 dissented from as being bad law.)

2. ('01) 5 Cal W N 692 (701, 706, 707).

('27) AIR 1927 Lah 736 (737). (Decree based on incomplete report set aside.)

('69) 6 Bom H C R A C 149 (151).

[But see ('98) 8 Mad L Jour 133 (134). (Proceeds according to Rule 292 of the Rules of Practice on the Original Side.)]

### Order 26 Rule 13 — Note 1

1. ('07) 29 All 235 (238).

('04) 6 Bom L R 586 (587).

('98) 1898 Pun Re No. 124, page 481.

[But see ('81) 7 Cal 318 (320).]

**O. 26 R. 13**  
**Notes 2-4**

a discretion in the matter of issuing a commission. It is not, under this rule, bound to appoint a Commissioner in every case.<sup>1</sup>

The essential difference between an arbitrator and a Commissioner appointed under this rule is that the latter merely submits his report for the approval of the Court, whereas the former has a final authority to settle all matters of difference between the parties. Further, the former is selected by the parties and therefore his decision cannot be questioned except on the limited grounds specified in Schedule II, whereas the latter is selected by the Court and the parties are therefore at liberty to challenge his report.<sup>3</sup>

An application for the appointment of a Commissioner is not governed by any rules of limitation.<sup>3</sup>

Where an order dismissing the suit for default is passed after a preliminary decree for partition, the order though illegal cannot be ignored unless expressly set aside or revoked. Nor does an order under this rule appointing a Commissioner to make a partition amount to an order setting aside the dismissal of the suit for default.<sup>4</sup>

By Section 12 of the Bengal Estates Partition Act (V of 1897), a Civil Court passing a decree for an undivided share of an estate governed by this Act may cause the same to be executed as prescribed by this rule.

**3. "Such person as it thinks fit."** — The choice of the Commissioner lies with the Court. But a relation of one of the parties or their pleaders should not be appointed except with the consent of the other party.<sup>2</sup>

**4. Appeal.** — An order issuing a commission under this rule is not appealable under O. 43 R. 1. Nor is the order one passed in execution within the meaning of S. 47.<sup>1</sup>

**O. 26 R. 14**

**R. 14. [S. 396.]** (1) The Commissioner shall, after such

Procedure of Commissioner.

inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign

**Note 2**

1. ('09) 4 Ind Cas 1181 (1182) : 81 Mad 540.
2. ('14) AIR 1914 Oudh 188 (184).
- ('27) AIR 1927 Pat 135 (137).
- ('39) AIR 1939 Pat 526 (527) : 18 Pat 198.
3. ('05) 28 Mad 127 (129).
4. ('86) AIR 1986 Lah 875 (876).

**Note 3**

1. ('17) AIR 1917 All 148 (149).

**Note 4**

1. ('19) AIR 1919 Mad 42 (48).
- ('16) AIR 1916 Mad 809 (810). (Application for commission is only a step-in-aid in suit and is not barred by any limitation.)
- ('07) 17 Mad L Jour 144 (144).
- ('98) 20 All 811 (818, 814).
- ('97) 24 Cal 725 (735, 738) (FB).



separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds.<sup>5</sup> Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall<sup>4</sup> confirm, vary or set aside<sup>5</sup> the same. O. 26 R. 15

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

[1877, S. 396 (2) and (3).]

#### Local Amendment

##### PATNA

*Substitute* the following for sub-rules (2) and (3) :

"(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party. In the event of a plot being sub-divided, the area of each sub-plot shall be given in the schedule and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule, and the map, if any, mentioned in sub-rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. When the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit."

#### Synopsis

- |   |  |
|---|--|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Mode of effecting partition.             <ol style="list-style-type: none"> <li>3. Partition of revenue-paying immovable property.</li> <li>4. Partition of joint family dwelling-house.</li> </ol> </li> <li>5. Allotment of shares.</li> </ol> | <ol style="list-style-type: none"> <li>6. Objections to Commissioner's report.</li> <li>7. Resistance to Commissioner.</li> <li>8. Issue of a new commission.</li> <li>9. Decree.             <ol style="list-style-type: none"> <li>10. Final decree to be engrossed on stamp paper.</li> </ol> </li> <li>11. Preliminary decree in a partition suit — Appeal.</li> </ol> |
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Q. 26 R. 14  
Notes 1-4

## Other Topics (miscellaneous)

Appeal. See Note 9.

Metes and bounds. See Note 5.

"Confirm, vary or set aside." See Notes 4 and 5.

Partition Act, IV of 1893. See Note 4.

**1. Legislative changes.** — In sub-rule (1), the words "after such enquiry as may be necessary" have been substituted for "ascertain and inspect the property and shall".

Sub-rule (3) is almost new.

In sub-rule (2), the words "or the Commissioners . . . shall prepare and sign separate reports" have been newly added and the words "shall confirm, vary or set aside the same" have been substituted for the words "shall either quash the same." The object of the latter amendment was to negative the view taken in *Janki v. Gouri*, (1906) I. L. R. 28 Allahabad 75, that the Court had no power to *vary* the report.

**2. Mode of effecting partition.** — It is not contemplated by the rule that the Commissioner should propose a number of schemes and ask the Court to choose any one of them;<sup>1</sup> only the shares as ascertained by the decree have to be worked out by him. But the Court may, in the case of a joint Hindu family with the consent of all the coparceners, order that any part of the property should remain joint.<sup>2</sup> Where a partition cannot be made without destroying the intrinsic value of the property,<sup>3</sup> or where it would be inconvenient to disturb the exclusive possession of one co-sharer,<sup>4</sup> the Court may also award a money compensation instead of dividing the properties.

**3. Partition of revenue-paying immovable property.** — A partition of revenue-paying land which has the effect of breaking up the joint liability of the sharers for revenue cannot be effected by the Civil Court<sup>1</sup>: see Section 54 *ante*. Therefore, when a *revenue-paying estate* has to be partitioned into several revenue-paying estates, such partition can be done only by the Collector because the revenue is affected.<sup>2</sup> But where no *allotment of separate revenue* is asked for, the Civil Court is competent to allot the shares leaving the *whole estate liable for the whole revenue*.<sup>3</sup> The reason is that the jurisdiction of the Civil Court is excluded only on questions affecting the right of the Government to assess and collect in its own way the public revenue.<sup>4</sup>

**4. Partition of joint family dwelling-house.** — In the case of partition of non-revenue-paying immovable property such as a joint family dwelling-house, the Court can actually fix the particular area, rooms or part of the house to be allotted to the respective sharers.<sup>1</sup>

For cases under the Partition Act, IV of 1893, see the undermentioned cases<sup>2</sup>

## Order 26 Rule 14 — Note 2

1. ('04) 6 Bom L R 586 (587).
2. ('78) 3 Cal 514 (516).
3. ('84) 10 Cal 675 (676).
4. ('81) 8 Cal L Rep 259 (260). (Compensation allowed to co-sharer enhancing value of portion.)
5. ('76) 25 Suth W R 885 (842).
6. ('11) 11 Ind Cas 870 (871) (Cal).

## Note 3

1. ('89) 8 Cal 649 (651).
2. ('82) 8 Cal 537 (545).
3. ('74) 22 Suth W R 11 (11).

4. ('74) 22 Suth W R 838 (838).
5. ('76) 1876 Pun Re No. 14, page 19.
6. ('89) 16 Cal 208 (205).
7. ('78) 2 Cal L Rep 184 (186).
8. ('97) 24 Cal 725 (784, 735, 745) (FB).
9. ('81) 7 Cal 153 (155).
10. ('88) 15 Cal 198 (201).
11. ('88) 15 Cal 198 (200).

## Note 4

1. ('06) 28 All 75 (76).
2. ('08) 82 Bom 108 (105). (Power to sell.)
3. ('01) 24 Mad 689 (641). (Power to sell under Section 2.)

and for cases regarding valuation of suits, see the decisions cited below.<sup>3</sup>

**O. 26 R. 14**  
**Notes 4-8**

**5. Allotment of shares.** — The duty of the Commissioner is not to give possession but to allot the shares and prepare a report fixing the shares and distinguishing the same by metes and bounds, if so ordered.<sup>1</sup> The Court after considering the rights and objections of the different parties should make the final allotment.<sup>3</sup> A casting of lots for an equitable distribution of shares is not opposed to the rule and can be resorted to by the Courts.<sup>3</sup>

An order of the Court approving the allotment and division made by a Commissioner has been held to be binding on the parties, even though a fresh decree is not passed in accordance with the report.<sup>4</sup>

**6. Objections to Commissioner's report.** — Objections to the report can be filed within the period fixed by the Court.<sup>1</sup> When they are not so filed in the trial Court they cannot be raised for the first time in appeal.<sup>2</sup> But the High Court has power to see whether the Commissioner has exceeded his jurisdiction or acted within the scope of his warrant of commission.<sup>3</sup>

The provision in this rule requiring the Court to 'hear' the objections to the report of the Commissioner implies that evidence can be let in to support the objections.<sup>4</sup>

**7. Resistance to Commissioner.** — As already seen in Note 4 to Rule 11, Commissioners are officers of the Court and a process of attachment can be issued by the Court to enforce the orders of the Commissioner. But the Court is not justified in *dismissing the suit* when the Commissioner is resisted in executing his warrant of commission.<sup>1</sup>

**8. Issue of a new commission.** — Ordinarily a second commission ought not to be issued on the mere objection of a party.<sup>1</sup> But where the report is unsatisfactory,<sup>2</sup> or the Commissioner has so misconceived his duties as to render his report useless, a second commission may be issued in which case, however, the old report should be

(1900) 5 Cal W N 128 (180). (Power to sell under S. 2 — Preliminary decree on report of the commissioner is no bar to proceedings under S. 2.)

('08) 30 All 824 (328) (F B). (Section 4 applies to Mahomedans.)

('99) 23 Bom 77 (79). (Applicability of S. 4.)

('99) 21 All 409 (411). (Applicability of S. 10.)

3. ('06) 8 Cal L Jour 257 (259). (For purposes of S. 110, O. P. C., value of the subject-matter of the suit is the value of the whole estate which it is sought to partition.)

('85) 8 Mad 285 (286). (Value of whole property determines jurisdiction.)

('90) 12 All 506 (509). (Value of share determines jurisdiction.)

('84) 8 Bom 81 (84). (Do.)

('90) 18 Mad 25 (27). (Case of co-owners—Specific share claimed determines jurisdiction.)

#### Note 5

1. ('98) 20 All 811 (818).

('84) AIR 1984 Pat 82 (88). (He has no power to decide the shares of the parties, which is the duty of the Court.)

[See also ('97) 19 All 194 (195). (Wall cannot be

ordered to be built by aamin to separate shares.)]

2. ('08) 8 Cal L Jour 521 (523). (In this case it was held that the defendants had not sufficient reason for insisting on drawing of lots.)

3. ('15) AIR 1915 Mad 1171 (1172).

4. ('18) 20 Ind Cas 908 (910) (Mad).

#### Note 6

1. ('19) AIR 1919 All 403 (408).

('89) 13 Bom 368 (370). (Practice on the Original Side.)

2. ('20) AIR 1920 Low Bur 31 (34).

('81) 7 Cal 318 (321).

3. ('29) AIR 1929 Mad 492 (492).

4. ('35) AIR 1935 Lah 501 (502). (Commissioner should be examined first — If there is ground for further inquiry, parties should be allowed to produce evidence.)

#### Note 7

1. ('10) 5 Ind Cas 872 (878) : 32 All 819.

#### Note 8

1. ('22) AIR 1922 Mad 219 (220) : 45 Mad 79.

2. ('26) AIR 1926 Pat 159 (160).

**O. 26 R. 14** superseded.<sup>3</sup> A second Commissioner so appointed can rectify the mistakes of the first  
**Notes 8-11** Commissioner.<sup>4</sup>

**9. Decree.** — The proceedings contemplated by the rule are proceedings in the suit and not in execution<sup>1</sup> and the Court is bound to pass a *final* decree after perusing the report.<sup>2</sup> The High Court of Madras<sup>3</sup> has held that the Court can pass a final decree *suo motu* without an application by the party, the reason being that the suit must be considered *pending* until a final decree is passed. Though the *final* decree is appealable, no appeal lies against an *order* of the Court confirming or varying the report.<sup>4</sup>

**10. Final decree to be engrossed on stamp paper.** — A final decree for partition passed in accordance with the report of the Commissioner must be stamped as an instrument of partition within the meaning of Section 2, clause (15) of the Indian Stamp Act (II of 1899).<sup>1</sup>

**11. Preliminary decree in a partition suit — Appeal.** — Under Section 396, clause (1) of the old Code corresponding to Rule 13 of this Order, it was provided that the Court can issue a commission "after ascertaining the several parties interested . . . and their several rights. . . ." There was a conflict of opinions as to whether such an ascertainment amounted to a decree. It was held by the High Courts of Calcutta<sup>1</sup> and Madras<sup>2</sup> that it did amount to a decree while the Chief Court of the Punjab<sup>3</sup> held that it did not. The conflict has now been set at rest by the Legislature by using the words *preliminary decree* in Rule 13 to avoid any possible doubt in the matter.

## GENERAL PROVISIONS

**O. 26 R. 15** **R. 15.** [S. 397.] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Expenses of commission  
to be paid into Court.

[1877, S. 397; 1859, S. 182.]

3. ('22) AIR 1922 Mad 219 (220) : 45 Mad 79.

4. ('81) AIR 1981 Cal 170 (170).

### Note 9

1. ('86) 12 Cal 275 (277).

('06) 1906 Pun Re No. 47, page 168.

('95) 22 Cal 425 (432).

2. ('98) 1898 All W N 99 (99).

('05) 1905 Pun Re No. 23, page 99. (Decree.  
Effect—Is in favour of each share-holder.)

3. ('08) 18 Mad L Jour 23 (24).

('10) 8 Ind Cas 893 (898) (Mad).

4. ('26) AIR 1926 Oudh 195 (196).

### Note 10

1. ('05) 29 Bom 366 (368).

('05) 82 Cal 488 (491).

### Note 11

1. ('86) 12 Cal 209 (212).

('86) 12 Cal 278 (275).

('99) 19 Cal. 463 (467) (F B).

[See also ('86) 12 Cal 275 (278). (In this case there was no declaration as to the rights and hence it was held that no appeal lay.)]

2. ('95) 18 Mad 78 (87).

3. ('96) 1896 Pun Re No. 37, p. 100.

('98) 1898 Pun Re No. 124, p. 481.

[But see ('02) 1902 Pun Re No. 49, p. 210.]

## Local Amendment

O. 26 R. 15  
Note 1

## MADRAS

*Re-number* the existing Rule 15 as Rule 15 (1) and *insert* the following as sub-rule (2):

"(2) Before executing and returning any commission issued by foreign Courts under the provisions of Section 78, the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under Rule 2 of Order 16."

*Synopsis*

1. Expenses of commission.
2. Reduction of Commissioner's bill, when justified.

**1. Expenses of commission.**—The rule provides that the Court may, if it thinks fit, order the party requiring the commission to deposit the necessary expenses therefor.<sup>1</sup> The rule is not exhaustive and does not prevent the Court from imposing any terms that it chooses as a condition precedent to the issuing of a commission.<sup>2</sup> Nor does an omission on the part of the Court to require the deposit of the expenses prevent the Commissioner from recovering his remuneration from the party at whose instance he was engaged.<sup>3</sup>

The object of requiring the expenses to be deposited beforehand is, that the Commissioner who is an officer of Court ought not to be driven to a separate suit or execution to get his fees.<sup>4</sup> As to whether an order directing the deposit of fees to the Commissioner is capable of execution, the High Court of Madras<sup>5</sup> has held that it is not capable of execution. The decisions of the High Courts of Calcutta<sup>6</sup> and Lahore<sup>7</sup> are conflicting. An order directing one of the parties to pay a certain sum to the Commissioner cannot be made a part of the decree, the reason being that the Commissioner is not a party to the suit.<sup>8</sup>

But failure to deposit the required fees can afford no ground for rejecting the report<sup>9</sup> or for dismissing the suit.<sup>10</sup>

**Order 26 Rule 15 — Note 1**

1. ('27) AIR 1927 Cal 907 (908).

('24) AIR 1924 Bom 90 (92).

('86) AIR 1986 Pat 33 (34).

[See also ('88) AIR 1988 Rang 254 (256).

('86) 63 Cal L Jour 563 (565). (Commissioner's fees — Determination — Matters to be considered by Court — Commissioner doing work but dying without submitting report — Application by widow for fees — Order by Court calling on party to deposit amount — Order set aside in peculiar circumstances of case.)]

[See however ('80) 5 Cal 866 (867). (In case of *pardanashin* lady, Court will not direct payment by her.)]

2. ('27) AIR 1927 Cal 907 (907).

3. ('82) 4 Mad 899 (401).

(1865) Bourke 24. (But the Commissioner has no lien.)

('29) AIR 1928 Cal 486 (487, 488). (But a Commissioner ought not to take a mortgage from the party for his fees.)

4. ('11) 9 Ind Cas 318 (314) (Cal).

('86) 63 Cal L Jour 563 (565).

5. (1900) 10 Mad L Jour 241 (242).

('96) 6 Mad L Jour 124 (124, 125).

6. ('25) AIR 1925 Cal 57 (58) : 52 Cal 269. (Can be executed.)

[See ('06) 10 Cal W N 284 (236). (Case under the old Code.)]

('18) 21 Ind Cas 191 (191) (Cal). (Cannot be executed.)]

7. ('26) AIR 1926 Lah 62 (62). (Order cannot be executed.)

('34) AIR 1934 Lah 46 (46). (Order can be executed—Following AIR 1925 Cal 57.)

8. ('88) AIR 1988 Rang 254 (256).

9. ('90) 17 Cas 281 (284).

10. ('81) 3 Mad 259 (259).

[See ('90) 18 Mad 510 (511). (Suit dismissed for plaintiff's failure to deposit fees—No issues framed in the suit—No time prescribed for payment of fees — Plaintiff again suing defendant on the same cause of action — *Held*, suit was not barred by *res judicata*.)]

**O. 26 R. 15**  
**Note 2**

**2. Reduction of Commissioner's bill, when justified.** — The reduction or disallowance of a Commissioner's bill is a matter for the trial Court.<sup>1</sup> The Court will not be justified in re-opening or reducing the fees fixed in the presence of the parties and paid into Court.<sup>2</sup> See also the undermentioned cases.<sup>3</sup>

**O. 26 R. 16**

**Powers of Commissioners.**

**R. 16.** [S. 399.] Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment, —

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;
- (b) call for and examine documents and other things relevant to the subject of inquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order.

### *Synopsis*

- 1. **Powers of Commissioner.**
- 2. **Review.** See Note 3 to Rule 11.

**1. Powers of Commissioner.** — The provisions of O. 26 R. 16 are permissive in the sense that they vest a discretion in the Commissioner to examine or not to examine a witness.<sup>1</sup> See Note 3 to Rule 10, *supra*.

**2. Review.** — See Note 3 to Rule 11, *supra*.

**O. 26 R. 17**

**Attendance and examination of witnesses before Commissioner.**

**R. 17.** [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses and to the remuneration of, and penalties to be imposed upon, witnesses, shall

### **Note 2**

- 1. ('19) AIR 1919 Cal 889 (889).
- ('84) AIR 1984 Pat 816 (818). (It is not right to extend any indulgence to inefficient commissioners whether they are pleaders or professional surveyors — For worthless or nominal work by Commissioner no remuneration can be allowed.)
- 2. ('20) AIR 1920 Pat 555 (558).
- ('38) AIR 1938 Pat 681 (688).
- 3. ('86) 40 Cal W N 928(929). (Commissioner doing work inaccurately—No finding of incompetence,

negligence or improper motive — Fees held cannot be disallowed.)

('87) AIR 1987 Pat 614 (614). (Pleader of standing and experience appointed Commissioner — Commissioner's fees not mentioned—Previous direction by District Judge not to allow more than Rs. 8 per day to Commissioners in ordinary cases — Held there was no implied contract to work on Rs. 8.)

### **Order 26 Rule 16 — Note 1**

- 1. ('88) AIR 1988 All 215 (216).

apply to persons required to give evidence or to produce documents under this order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

**O. 26 R. 17**  
**Notes 1-2**

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

[1877, S. 399.]

### *Synopsis*

#### 1. Scope of the Rule. | 2. Sub-rule (2).

**1. Scope of the Rule.** — Under this rule the Commissioner is given the powers of Court in regard to the summoning and procuring the attendance of witnesses. The reason is that the Commissioner is a delegate of the Court acting under its authority.<sup>1</sup> Although under O. 26 R. 16 it is in the discretion of the Commissioner to examine or not to examine a witness, yet, once the Commissioner has decided to examine a witness, the mandatory provisions of this rule come into play and those provisions in their turn attract the provisions of Order 18 of the Code and Section 138 of the Evidence Act. Hence, the parties must be afforded an opportunity of examining, cross-examining and re-examining the witnesses and it is not open to the Commissioner to examine the witnesses in the absence of the parties without giving them sufficient notice of the time and place when he proposes to examine the witnesses.<sup>2</sup>

**2. Sub-rule (2).** — Sub-rule (2) is new. In the absence of a similar provision under the old Code it was held that if a witness residing outside jurisdiction refused to appear before the Commissioner pursuant to his notice, the only course left to the Commissioner was to return the warrant of commission.<sup>1</sup> Such a contingency has now been obviated.

**R. 18.** [S. 400.] (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

**O. 26 R. 18**

Parties to appear before Commissioner.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

[1877, Ss. 394, 395, 400; 1859, S. 181.]

**O. 28 R. 18**  
**Notes 1-2**

### Local Amendments

#### ALLAHABAD

In clause (1) *after* the words "agents or pleaders" *substitute* a comma for the full stop, and add the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

#### ODDH

In sub-rule (1), *after* the words "agents or pleaders" *substitute* a comma for the full stop, and *add* the following words:

"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

#### RANGOON

The following shall be *substituted* for sub-rule (1):

"(1) When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

### Synopsis

1. Parties to appear. | 2. Form. See Appendix H, Form No. 7.

1. Parties to appear. — Under this rule it is obligatory on the part of the Court to order the parties to appear before the Commissioner either in person or by their recognized agents or pleaders. Where a party fails to appear in pursuance of the order of Court, the Court can proceed under O. 17 R. 2.<sup>1</sup>

2. Form. — See Appendix H, Form. No 7.

*\*Commissions issued at the instance of foreign tribunals.*

**O. 28 R. 19**

Cases in which High Court may issue commission to examine witness.

**R. 19.** [New.] (1) *If a High Court*

*is satisfied —*

(a) *that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,*

(b) *that the proceeding is of a civil nature, and*

(c) *that the witness is residing within the limits of the High Court's appellate jurisdiction,*

*it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.*

Order 26 Rule 18 — Note 1

1. ('71) 16 Suth W R P C 28 (28) (PC).  
 (1862) 1862 Suth W R Sp. No. 1 (2).



(2) *Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1) —* **O. 26 R. 19**

- (a) *by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the <sup>b</sup>[Central Government], or*
- (b) *by a letter of request issued by the foreign Court and transmitted to the High Court through the <sup>b</sup>[Central Government], or*
- (c) *by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.*

a. Rules 19 to 22 and the heading were inserted by the Code of Civil Procedure (Amendment) Act, 1932 (X of 1932), Section 3.

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."

Application for  
commission.

**R. 20. [New.]** *The High Court may issue a commission under rule 19 —* **O. 26 R. 20**

- (a) *upon application by a party to the proceeding before the foreign Court, or*
- (b) *upon an application by a law officer of the <sup>a</sup>[Provincial Government] acting under instructions from the <sup>a</sup>[Provincial Government].*

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

**R. 21. [New.]** *A commission under rule 19 may be issued To whom commission may be issued. to any Court within the local limits of whose jurisdiction the witness resides, or, where <sup>a</sup>[ \* \* \* ] the witness resides within the local limits of <sup>b</sup>[the ordinary original civil jurisdiction of the High Court], to any person whom the Court thinks fit to execute the commission.* **O. 26 R. 21**

a. The words "The High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and" repealed by the Government of India (Adaptation of Indian Laws) Order, 1937.

b. Substituted by *ibid* for "its ordinary original civil jurisdiction."

O. 26 R. 22

**R. 22.** [New.] *The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the "[Central Government]", along with the letter of request for transmission to the foreign Court.*

Issue, execution and return of commissions, and transmission of evidence to foreign Court.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, for "the Governor-General in Council."

### Local Amendments

#### MADRAS

Insert the following as Order 26 A (new) :

#### "ORDER XXVIA

O. 26A R. 1  
(Madras)

Rule 1. The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court.

O. 26A R. 2  
(Madras)

Rule 2. The report of the Commissioner shall be evidence in the suit and shall form part of the record.

O. 26A R. 3  
(Madras)

Rule 3. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

#### RANGOON

The following shall be added as Rules 19 to 30. (This is added before the amendments of Rules 19 to 22 by the Indian Legislature in 1932) :

*"Fees to commissioners for local investigation, and commissioners of partition, or to take accounts or for examination of witnesses.*

O. 26 R. 19  
(Rangoon)

19. Civil Courts in issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission.

O. 26 R. 20  
(Rangoon)

20. Under Government of India Resolution in the Home Department (Judicial, No. 10-1101, dated 21st July, 1875), Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

O. 26 R. 21  
(Rangoon)

21. It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official act which judicial officers are bound to perform when called upon and is not work undertaken for a private body.

O. 26 R. 22  
(Rangoon)

22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

Refund of unexpended balance of expenses.

Fees to commissioners of partition or to take accounts or to examine witnesses.

23. The following fees are to be allowed, to commissioners of partition or to take accounts, or for the examination of witnesses, namely :

**O. 26 R. 23**  
(Rangoon)

Commissioner's fees for every effective meeting shall not exceed three gold mohurs for the first two hours, and one gold mohur for each succeeding hour.

*Fees to commissioners for administering an oath or solemn affirmation to a declarant of an affidavit.*

24. When under the orders of a Court in the Town of Rangoon, or of a District Court, an oath or solemn affirmation is administered to a declarant of an affidavit, at his request elsewhere than at the Court, a fee of Rs. 16 shall be paid by the said declarant :

**O. 26 R. 24**  
(Rangoon)

Provided that —

(a) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorised by the Court by order in writing ;

(b) if more than one affidavit is taken at the same time and place, the fee shall be Rs. 8 for each affidavit after the first ;

(c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs. 80 ;

(d) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged.

25. Affidavits taken under Rule 24 shall be taken out of Court hours. The fees shall be retained by the Commissioner for administering the oath or solemn affirmation.

**O. 26 R. 25**  
(Rangoon)

No fee for administration of oath under the order of a Court.

26. No fee shall be charged for the administration of an oath under the order of any Court other than those specified in Rule 24.

**O. 26 R. 26**  
(Rangoon)

*Commissions issued at the instance of Foreign Tribunals.*

27. (1) If a High Court is satisfied —

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it ;

(b) that the proceeding is of a civil nature ; and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of Rule 28, issue a commission for the examination of such witness.

**O. 26 R. 27**  
(Rangoon)

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1) —

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Governor-General in Council ; or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Governor-General in Council ; or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.

28. The High Court may issue a commission under Rule 27 —

(a) upon an application by a party to the proceeding before the foreign Court ; or

**O. 26 R. 28**  
(Rangoon)

**O. 26 R. 28**  
(Rangoon)

(b) upon an application by a law officer of the Local Government acting under instructions from the Local Government.

**O. 26 R. 29**  
(Rangoon)

29. A commission under Rule 27 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original civil jurisdiction, to any person whom the Court thinks fit to execute the commission.

**O. 26 R. 30**  
(Rangoon)

30. The Provisions of Rules 6, 15, 16, 17 and 18 of this order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence, taken under it, to the High Court, which shall forward it to the Governor-General in Council along with the letter of request for transmission to the foreign Court."

## ORDER XXVII.

### SUITS BY OR AGAINST *the Crown* OR PUBLIC OFFICERS

#### IN THEIR OFFICIAL CAPACITY.

**O. 27 R. 1**

**R. 1. [New.]** In any suit by or against *the Crown*, the plaintiff or written statement shall be signed by such person as *the Crown* may, by general or special order, appoint in this behalf, and shall be verified by any person whom *the Crown* may so appoint and who is acquainted with the facts of the case.

[See Sections 79 and 80.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1987, for "the Government."

b. Substituted by *ibid* for "the Secretary of State for India in Council."

### *Synopsis*

1. Suits by or against the Crown.
2. Notice in suits against the Crown or public officer. See Section 80.

1. Suits by or against the Crown. — In suits by or against the Crown the authority to be named as plaintiff or defendant is as provided for by Section 79.

2. Notice in suits against the Crown or public officer. — See Section 80.

**O. 27 R. 2**

**R. 2. [S. 417.]** Persons being *ex-officio* or otherwise authorized to act for *the Crown* in respect of any judicial proceeding shall be deemed

to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of *the Crown*.

**O. 27 R. 2**  
**Notes 1-2**

[1877, S. 417; 1859, S. 17, cl. (3). See O. 3 R. 2.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government." . . .

### *Synopsis*

1. Scope of the Rule.
2. Collector, if can sue without power of attorney from Financial Commissioner.

**1. Scope of the Rule.** — As to recognized agents generally, see O. 3 R. 2. Collectors and Personal Assistants to Collectors have been authorized to act for the Government in judicial proceedings. But a Personal Assistant is not agent of the Collector. It is not permissible for the Personal Assistant to sign a vakalat which purports to be executed by the Collector.<sup>1</sup>

**2. Collector, if can sue without power of attorney from Financial Commissioner.** — In the Punjab a Collector is competent to institute a suit on behalf of the Secretary of State for India in Council without obtaining a power of attorney from the Financial Commissioner.<sup>1</sup> All Government Pleaders in the Punjab are also authorized to act for Government as their recognized agents.<sup>2</sup>

**R. 3.** [S. 418.] In suits by or *against the Crown*, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert *the appropriate name as provided in section 79, or, if the suit is against the Secretary of State, the words "the Secretary of State."*

Plaints in suits by or against Crown.

**O. 27 R. 3**

[1877, S. 418; 1859, S. 36.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "against the Secretary of State for India in Council."

b. Substituted by *ibid* for the words "the Secretary of State for India in Council."

**\*R. 4.** [S. 419.] *The Crown pleader in any Court shall be the agent of the Crown for the purpose of receiving processes against the Crown issued by such Court.*

Agent for Crown to receive process.

**O. 27 R. 4**

[1877, S. 419; 1859, Ss. 52, 67.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the original rule.

#### **Order 27 Rule 2 — Note 1**

1. ('28) AIR 1928 Mad 96 (96).

#### **Note 2**

1. ('05) 1905 Pun Re No. 84, page 258.
2. ('28) AIR 1928 Lah 774 (775) : 10 Lah 360.

**O. 27 R. 4**  
**Note 1**

1. Service of notice where no Crown pleader has been appointed. — See the undermentioned case.<sup>1</sup>

**O. 27 R. 5**

**R. 5.** [S. 420.] The Court, in fixing the day for *the Crown* to answer to the plaint, shall allow a reasonable time for the necessary communication *with the Crown* through the proper channel, and for the issue of instructions to the *Crown pleader* to appear and answer on behalf of *the Crown* or the Government, and may extend the time at its discretion.

Fixing of day for appearance on behalf of *the Crown*.

[1877, S. 420; 1859, S. 67. See O. 5 R. 6.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Secretary of State for India in Council."

b. Substituted by *ibid* for "Government."

c. Substituted by *ibid* for "with the Government."

d. Substituted by *ibid* for "Government pleader."

e. Substituted by *ibid* for "the said Secretary of State for India in Council."

#### Local Amendment

#### MADRAS

Substitute the following:

"5. The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion."

Note. This local amendment was made before the rule was amended by the Government of India (Adaptation of Indian Laws) Order, 1937.

**O. 27 R. 6**

**R. 6.** [S. 421.] The Court may also, in any case in which the *Crown pleader* is not accompanied by any person on the part of *the Crown*, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

Attendance of person able to answer questions relating to suit against Crown.

[1877, S. 421; 1859, S. 67. See O. 10 R. 4.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Government pleader."

b. Substituted by *ibid* for "the Secretary of State for India in Council."

#### Order 27 Rule 4 — Note 1

1. ('89) AIR 1989 All 277 (278, 279): I L R(1989) All 892. (Agent for the Secretary of State in

respect of cases concerning East India Railway — Absence of a Crown pleader—Service on Agent of East India Railway held sufficient.)

**R. 7. [S. 423.]** (1) Where the defendant is a public officer and, on receiving the summons, considers it

**O. 27 R. 7**

Extension of time to enable public officer to make reference to Crown.

proper to make a reference to *the Crown* before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

[1877, S. 423; 1859, S. 69. See S. 2, sub-section 17.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government."

**1. Suit against public officer.** — A suit against a public officer should be brought in his personal and not in his official name.<sup>1</sup>

**R. 8. [Ss. 426, 427.]** (1) Where *the Crown* undertakes the defence of a suit against a public officer,

**O. 27 R. 8**

Procedure in suits against public officer.

*the Crown pleader*, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by *the Crown pleader* on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

[1877, S. 427; 1859, S. 71.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 for "the Government."

b. Substituted by *ibid* for "the Government pleader."

**1. Scope of the Rule.** — As to the maintainability of suits against public officers, see Section 9, Note 58.

**Order 27 Rule 7 — Note 1**

1. ('27) AIR 1927 Bom 521 (523, 525) : 51 Bom 749.

O. 27 R. 8A

**\*R. 8A. [New.]** *No such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Crown or, where the Crown has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.*

No security to be required from Crown or a public officer in certain cases.

[ O. 41 R. 7 ; 1882, S. 547 ; 1877, S. 547 ; 1859, S. 340 ]

a. Inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

O. 27 R. 8B

Definitions of "Crown" and "Crown pleader."

**\*R. 8B.** *In this Order "Crown" and "Crown pleader" mean respectively —*

- (a) *in relation to any suit by or against the Secretary of State or the Central Government, or against a public officer in the service of that Government, the Central Government and such pleader as that Government may appoint whether generally or specially for the purposes of this Order ;*
- (b) *in relation to any suit by or against the Crown Representative, or against a public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative and such pleader as he may appoint, whether generally or specially for the purposes of this Order ; and*
- (c) *in relation to any suit by or against a Provincial Government or against a public officer in the service of a Province, the Provincial Government and the Government pleader, or such other pleader as the Provincial Government may appoint, whether generally or specially, for the purposes of this Order.*

a. Inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

#### Local Amendment

#### ALLAHABAD

Add the following to Order 27, as Rule 9 :

O. 27 R. 9  
(Allahabad)

"9. In every case in which the Government pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of Rule 8 (1), the defence of a suit against an officer of the Government,



he shall, in lieu of a *vakalatnama*, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :

**O. 27 R. 9**  
(Allahabad)

**TITLE OF THE SUIT, ETC.**

I, A. B., Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be) Respondent (or etc.), in the suit :

Or, on behalf of the Government [which, under O. 27, R. 8 (1) of Act V of 1908 has undertaken the defence of the suit], respondent (or, etc.), in the suit."

*Note.* This local amendment was made before Rule 8 was amended by the Government of India (Adaptation of Indian Laws) Order, 1937.

**ORDER XXVIII.**

**SUIT BY OR AGAINST MILITARY <sup>a</sup>or Naval MEN <sup>b</sup>or Airmen**

**R. 1. [S. 465.]** (1) Where any officer, <sup>a</sup>*soldier, sailor or airman* actually <sup>a</sup>*serving under the Crown*

**O. 28 R. 1**

Officers, <sup>a</sup>[soldiers, sailors or airmen] who cannot obtain leave may authorize any person to sue or defend for them.

in <sup>a</sup>*such capacity* is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit

in person, he may authorize any person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer, <sup>a</sup>*soldier, sailor or airman* in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer, <sup>a</sup>*soldier, sailor or airman* is serving in military, <sup>a</sup>*naval, <sup>b</sup>or air force* staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, <sup>a</sup>*soldier, sailor or airman* by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

*Explanation.* — In this Order the expression "commanding officer" means the officer in actual command for the time being of

**O. 28 R. 1**  
**Note 1**

any regiment, corps, *'ship*, detachment or depot to which the officer, *'soldier, sailor or airman* belongs.

[1877, S. 465; 1859, S. 19.]

- a. Inserted by the Amending Act, XXXV of 1984, Section 2 and Schedule.
- b. Inserted by the Repealing and Amending Act, X of 1927, Section 2 and Schedule I.
- c. The words "soldier or airman" were substituted by Section 2 and Schedule I *ibid*, for "or soldier" and the word "sailor" was inserted by Act XXXV of 1984, Section 2 and Schedule.
- d. Substituted by the Government of India (Adaptation of Indian Laws), Order, 1987 for "serving the Government."
- e. Substituted by Act XXXV of 1984, Section 2 and Schedule for "a military or air force."
- f. The words "soldier or airman" were substituted by the Repealing and Amending Act, X of 1927, for "or soldier" and "or a soldier," and the word "sailor" was inserted by the Amending Act, XXXV of 1984.
- g. Inserted by Act XXXV of 1984, Section 2 and Schedule.
- h. Inserted by Act X of 1927, Section 2 and Schedule I.

### Local Amendment

#### RANGOON

For the heading, the words "Suits by or against the members of His Majesty's Military, Naval or Air forces" shall be *substituted*.

In Rule 1, for the words "officer, soldier, sailor or airman" wherever they appear, the words "member of His Majesty's military, naval or air forces" shall be *substituted*.

**1. Amendments after 1908.** — The following amendments have been introduced by the Repealing and Amending Act, X of 1927 :

(1) The words "or Airmen" have been added after the words "Military Men" in the heading.

(2) The words "soldier or airman" have been substituted for the words "or soldier" wherever they occur and the words "or air force" have been inserted after the word "military."

See also foot-notes to the text of the rule.

**O. 28 R. 2**

**R. 2.** [S. 466.] Any person authorized by an officer,

Person so authorized  
may act personally or  
appoint pleader.

*'soldier, sailor or airman* to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, *'soldier, sailor or airman* could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, *'soldier, sailor or airman*.

[1877, S. 466; 1859, S. 20.]

- a. The words "soldier or airman" were substituted by the Repealing and Amending Act, X of 1927, for "or soldier" and the word "sailor" was inserted by the Amending Act, XXXV of 1984.

**Local Amendment****RANGOON****O. 28 R. 2  
Note 1***For Rule 2, the following shall be substituted :*

"Any person authorized by a member of His Majesty's military, naval or air forces to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as such member of His Majesty's forces could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such member of His Majesty's forces."

**1. Amendments after 1908.** — See the foot-note to the text of the rule.

**R. 3.** [S. 467.] Processes served upon any person authorized by an officer, *soldier, sailor or airman* under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

**O. 28 R. 3**

Service on person so authorized or on his pleader, to be good service.

[ 1877, S. 467; 1859, S. 20. See O. 3 R. 5. ]

a. See the foot-note to the text of Rule 2 above.

**Local Amendment****RANGOON***For Rule 3, the following shall be substituted :*

"Processes served upon any person authorized by a member of His Majesty's military, naval or air forces under Rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person."

**1. Service on soldiers.** — *Vide* Notes under O. 5 Rules 28 and 29.

For changes in the rule, see the foot-note to the text of Rule 2 above.

**ORDER XXIX.****SUITS BY OR AGAINST CORPORATIONS**

**R. 1.** [S. 435.] In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

**O. 29 R. 1**

Subscription and verification of pleading.

[ 1877, S. 435; 1859, S. 26. See O. 6 R. 14. ]

O. 29 R. 1  
Notes 1-2*Synopsis*

- |  |   |
|--|---|
| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Suits by or against corporations.</li> <li>3. Suit by or against unregistered company.</li> <li>4. Companies authorized to sue and be sued in the name of an officer or secretary.</li> </ol> | <ol style="list-style-type: none"> <li>5. Foreign corporation.</li> <li>6. "Other principal officer of the corporation."</li> <li>7. "Who is able to depose to the facts of the case."</li> <li>8. Subscription and verification of pleadings.</li> </ol> |
|--|---|

*Other Topics (miscellaneous)*

"Company authorized to sue and be sued in the name of an officer or trustee." See Note 1.

Suit should be dismissed. See Note 3.

**1. Legislative changes.** — The words "or by a company authorized to sue or be sued in the name of an officer or of a trustee" which occurred in the old Section after the word "corporation" have now been omitted. The reason for the omission is that most companies nowadays are registered, and companies which are *unregistered* but which are authorized by law to sue must be very few, if any indeed exist, and no special treatment is necessary in respect of these.<sup>1</sup>

**2. Suits by or against corporations.** — This Order deals with the subscription and verification of pleadings in suits by or against corporations; it says nothing about the manner in which the suit itself is to be framed.<sup>1</sup> There is nothing in this rule or Order to suggest that the cause title of the plaint should also contain the particulars showing the names and description or place of residence of the person who purports to verify or sign the pleadings.<sup>2</sup>

A "corporation" is a fictitious or imaginary person invested by law with the attribute of perpetuity.<sup>3</sup> For the purposes of this Order it may be stated to be a body authorized by law to act as one individual and constituted either by prescription, by the Letters Patent, or by an act of the Legislature.<sup>4</sup> A corporation by prescription is one which has existed as a corporation "from a time whereof the memory of man runneth not to the contrary, and therefore, is looked upon in law to be well created." In other words, it is a corporation of such antiquity that the consent of the sovereign may be presumed.<sup>5</sup> A *registered* company under the Companies Act is a corporation,<sup>6</sup> but not an *unregistered* one, unless it is authorized by law to act as an individual. Unregistered companies so authorized are, as has been seen in Note 1, now practically non-existent.

A corporation must sue or be sued, not *in the names* of its agents or servants but in its *own corporate name*,<sup>7</sup> and, in the case of registered companies, in the form

**Order 29 Rule 1 — Note 1**

1. See Notes on Clauses.

**Note 2**

1. ('21) AIR 1921 Pat 485 (485).
2. ('88) AIR 1988 Sind 102 (102) : 26 Sind L R 481.
3. Goodeve's Law of Real Property, 5th Edn., page 89.
4. Digby's Law of Real Property, 5th Edition page 218, foot-note 1.
4. ('17) AIR 1917 Low Bur 86 (87).

[See also ('90) 14 Bom 286 (289, 290).]

5. ('98) 20 All 167 (169).
  6. ('86) 12 Cal 41 (44).
  - ('85) 1885 Pun Re No. 48, page 81.
  7. ('95) 17 All 292 (298).
  - ('69) 10 Suth W R 866 (867).
  - ('88) AIR 1988 Lah 208 (206) : 14 Lah 880.
  - ('71) 15 Suth W R 584 (585).
  - ('16) AIR 1916 Cal 818 (819) : 43 Cal 441 (445).
  - ('18) 19 Ind Cas 595 (596) (Lah). (Amendment not allowed as the error was persisted in even after objection.)
- [See however ('28) AIR 1928 Pat 553 (560).]

given in Appendix A, First Schedule, Form No. 2<sup>8</sup> and described as "the A. B. Company, Limited, having its registered office at" or as "A. B. a public officer of the C. D. Company."<sup>9</sup> A description given as "A. B., agent of C. D. Company" is not in conformity with the rule.<sup>10</sup> Where in a suit against two companies, the description given was "the Indian General S. N. R. Co., Ltd., and the Rivers S. N. Co., Ltd., by their joint agent A. B. Rogers" it was held that the suit was substantially against A. B. Rogers and not against the companies referred to.<sup>11</sup> Where, however, relief is really sought against the company, and the error is *merely one of misdescription*, a suit, though nominally against the agent, may be treated as in substance one against the company.<sup>12</sup> Similarly, where in a suit by a municipal body, the plaintiff was described as "A. B., Chairman of the Municipal Board of . . . ." but the intention was clear that it was the *Municipal Board* that was suing, it was held that the defect was merely one of form and could not be a ground in appeal for the reversal of the decree.<sup>13</sup>

This rule merely authorizes the persons mentioned therein to sign and verify pleadings on behalf of a corporation. The rule does not authorize such persons to *institute* suits on behalf of the corporation.<sup>14</sup>

Where the manager of a company is authorized by the articles of association to file suits with the previous sanction of the executive board, a suit instituted by him without such sanction is unauthorized and the fact that the act of the manager is ratified after the period of limitation by a resolution of the board of directors is of no avail.<sup>15</sup>

**3. Suit by or against unregistered company.** — A suit by or against an unregistered company or unincorporated body of persons must be brought in the names of, or against *all* the members of the company or body.<sup>1</sup> Thus, an unregistered club or society cannot sue in the name of its secretary.<sup>2</sup> A suit brought in the names of some only of the members of such a society will be dismissed.<sup>3</sup> It was observed by the High Court of Calcutta in the undermentioned case<sup>4</sup> that where it appeared that the plaintiff did not know of what persons the company in question was composed, he might sue the company in the name under which it was carrying on the business, provided he had stated in the plaint that he was unable to give a better description of the defendant.

8. ('21) AIR 1921 Pat 485 (485). (Amendment disallowed and suit dismissed.)

9. ('23) AIR 1923 Bom 452 (453) : 47 Bom 785. (Amendment allowed as one of mis-description.)

10. ('25) AIR 1925 Cal 716 (718) : 52 Cal 783.

11. ('16) AIR 1916 Cal 818 (819) : 43 Cal 441.

[See also ('83) AIR 1933 Sind 102 (103) : 26 Sind L R 431.]

12. ('26) AIR 1926 Pat 40 (42) : 5 Pat 128.

13. ('24) AIR 1924 Oudh 809 (310).

[See also ('89) AIR 1989 Cal 178 (179). (Where the plaintiff, in a suit against a municipality, sues the chairman only instead of the municipal commissioners as required by the local Municipal Act it is merely a technical flaw and no importance should be attached to it, specially when the municipal commissioners duly appear and defend the suit in the Court.)]

14. ('85) AIR 1985 Lah 845 (846) : 17 Lah 85.

15. ('86) AIR 1986 Lah 321 (322).

#### Notes 3

1. ('25) AIR 1925 All 887 (888) : 47 All 842.

('33) AIR 1933 Lah 98 (99).

('33) AIR 1933 Lah 456 (457). (State Bank of Native State which is not corporation cannot sue in British Indian Court through its secretary or manager.)

('27) AIR 1927 All 789 (789).

('85) AIR 1985 All 872 (873). (Unregistered association cannot sue nor be sued unless all members are impleaded.)

2. ('98) 20 All 497 (498) (Club.)

('98) 20 All 167 (170).

('94) 16 All 420 (422). (Board of foreign Missions of the Presbyterian Church of New York.)

('84) 6 All 284 (285). (Majlis Islamia.)

('91) 14 Mad 862 (862, 863).

('96) 1896 Pun Re No. 29, page 80.

('86) 12 Cal 41 (44).

('17) AIR 1917 Low Bur 86 (87).

('29) AIR 1929 Cal 445 (447). (Brahma Samaj.)

[See also ('91) 1891 Pun Re No. 15, page 98.]

3. ('98) 20 All 167 (170).

('94) 16 All 420 (422).

4. ('67) 8 Suth W R 45 (46).

**O. 29 R. 1  
Notes 3-6**

This view has, however, not been followed, but has, on the other hand, been expressly dissented from by the Allahabad High Court.<sup>5</sup>

Where the company consists of numerous persons the suit may, under the provisions of O. 1 R. 8, be instituted by one or more of such persons on behalf of all with the permission of the Court.

**4. Companies authorized to sue and be sued in the name of an officer or secretary.** — As has been seen in Note 2, the authority of a company or a body of persons to sue or be sued in the name of an officer or trustee thereof can only be created by prescription or by Letters Patent or by an Act of the Legislature. The Indian Companies Act is one of such Acts of the Legislature.<sup>1</sup> See also Act VII of 1890 under which a company such as the *Comptoir National Decompte de Paris* may be sued in the name of its chief manager.<sup>2</sup>

Where a gift was made to the members of an unincorporated society by a deed and the society was subsequently registered, the registered society can enforce the gift without a formal deed of transfer from the unincorporated society.<sup>3</sup>

**5. Foreign corporation.** — It is an established rule of Private International Law, that a corporation duly created according to the law of one State may sue or be sued in its corporate name, in the Courts of other States<sup>1</sup> and it is not necessary that it should be registered under the Indian Companies Act before it can claim the benefit of this rule in India.<sup>2</sup> Thus, a plaint filed in the Delhi Court on behalf of the Singer Manufacturing Company which is incorporated in the United States of America may be verified by an agent holding a general power of attorney from the company as a "principal officer" of the company within the meaning of this rule.<sup>3</sup> The fact that the agent also acts for another is not material.<sup>4</sup>

**6. "Other principal officer of the corporation."** — The official liquidator of a registered company in liquidation is competent to sue on behalf of the company.<sup>1</sup> Where a branch of a bank was conducted by a manager holding a power of attorney under the seal of the company, and such a manager had in his absence delegated, in pursuance of such power, all his authority to an accountant, but such substituted power omitted words giving power to sue, it was held by the Privy Council that such substitute was a "principal officer of the corporation" and could sign and verify a plaint by the company.<sup>2</sup> The signing of the plaint by the "principal officer of the corporation" is not

5. ('99) 21 All 346 (347).

**Note 4**

1. ('86) 12 Cal 41 (44).
2. ('10) 7 Ind Cas 982 (985) (Bom).
3. ('97) 1897 Pun Re No. 41, page 182.

**Note 5**

1. ('02) 80 Cal 103 (105).
2. ('02) 80 Cal 103 (106).
3. ('11) 10 Ind Cas 141 (142): 1912 Pun Re No. 8.
4. (1911) 2 K B 516 (522, 523), *Saccharin Corporation, Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft*.

**Note 6**

1. ('96) 18 All 198 (201, 202, 208) (F B).
  2. ('18) AIR 1918 Mad 862 (864): 41 Mad 694.
  3. ('94) 21 Cal 60 (65): 30 Ind App 189 (F O).
- [See also ('25) AIR 1925 Lah 888 (889).

('87) AIR 1937 Lah 751 (752). (Suit filed by secretary — Secretary authorized to file suit by chief officer holding management of limited company — Suit held, to be properly instituted.) ('87) AIR 1937 Nag 879 (880): ILR (1939) Nag 682. (Power to delegate, when can be implied, stated—M general manager of company given power to prosecute all necessary legal proceedings and generally to do and cause to be done all things necessary for proper conduct and management of business of company—M executing power of attorney empowering K to sign and verify plaints and to appear, act and plead—Directors not dissenting—Power of attorney held could be construed as giving power to delegate — In any case signing of plaint by K was not material irregularity.) ('86) AIR 1936 Bom 418 (420): ILR (1937) Bom 85. (A *de facto* secretary of a firm who verifies

invalid merely because he happens to be an *am-mukhtear* of the corporation.<sup>3</sup>

**O. 29 R. 1**  
**Notes 6-8**

Where the plaint is signed and verified by an officer other than those specified in the rule, the Court may, in its discretion, allow the plaint to be amended by filing a properly signed and verified copy of the plaint.<sup>4</sup>

**7. "Who is able to depose to the facts of the case."** — It is not necessary that the principal officer of the corporation should verify the plaint from actual *personal* knowledge; he may verify upon his information and belief.<sup>1</sup> According to the rules of the Calcutta High Court,<sup>2</sup> it is necessary that the fitness of the person verifying the pleading on behalf of the corporation should be proved by an affidavit at the time of presenting the pleading. But, the Bombay High Court<sup>3</sup> has held that it is not necessary, in a suit by a corporation, that the plaintiffs should state in the body of the plaint or by an affidavit that the person verifying was a principal officer of the plaintiffs able to depose to the facts of the case. An insufficiency of verification is not a ground in appeal, for dismissing the proceedings had in the first Court, in the absence of any prejudice caused to any person by such defect.<sup>4</sup>

**8. Subscription and verification of pleadings.** — A plaint, on behalf of the corporation, may, under this rule, be signed and verified either —

- (a) by the secretary, or
- (b) by a director of the corporation, or
- (c) by other principal officer of the corporation.<sup>1</sup>

A Registrar of a Joint Stock Company is not a proper person to represent the company, he not being one of the persons specified.<sup>2</sup> There is a conflict of opinions as to whether the provisions contained in O. 6 R. 14 apply to cases within this rule, so as to enable a plaint by a corporation to be signed and verified by a person duly authorized by it, where, by reason of absence or other good cause it could not be signed by the persons specified in this rule. In *Delhi and London Bank, Ltd. v. Oldham*,<sup>3</sup> their Lordships of the Privy Council observed as follows :

"Their Lordships are of opinion that Section 51 of the Code (now O. 6 R. 14), which regulates proceedings taken by or on behalf of *ordinary* plaintiffs does not apply to such a case as the present, but that this case must be decided with reference only to Section 435, which expressly applies to corporations."

The High Court of Bombay<sup>4</sup> has held that the said decision of the Privy Council must be taken to apply to the particular facts of that case and that it is not an authority for the proposition that O. 6 R. 14 does not apply to cases governed by this rule; and they have consequently held that an agent holding a power-of-attorney is entitled to sign and verify the plaint on behalf of a corporation under the provisions

a plaint in the absence of the secretary is a principal officer.))

#### Note 8

3. ('14) AIR 1914 Cal 782 (782).
4. ('27) AIR 1927 Sind 263 (263). (Reversed on another point by AIR 1931 Sind 178.)

#### Note 7

1. ('05) 9 Cal W N 608 (609, 610).
2. ('27) AIR 1927 Cal 780 (780, 781). (22 Cal 268, Dist.)
3. ('86) AIR 1986 Bom 418 (421) : I L R (1987) Bom 85.
4. (1900) 5 Cal W N 91 (98).

1. ('86) 12 Cal 41 (44).
- (‘88) AIR 1948 Sind 102 (102) : 26 Sind L R 431.
- (‘66) 6 Suth W R Civ. Ref. 21 (25). (Secretary of a Government aided school can maintain an action.)
- (‘87) 9 All 188 (191).
- [See however ('86) 1886 Pun Re No. 55, p. 121. (Secretary of an Association cannot under S. 435, sue on behalf of the Association unless it is laid down in the Articles of Association.)]
2. ('29) AIR 1929 Nag 185 (190).
3. ('94) 21 Cal 60 (65) : 20 Ind App 189 (P O).
4. ('80) AIR 1980 Bom 566 (567).

**O. 29 R. 1  
Note 8**

of Order 6 Rule 14. The High Court of Lahore<sup>5</sup> and the Judicial Commissioner's Court of Sind<sup>6</sup> are also of the same opinion.

To enable a principal officer of a corporation to verify a plaint or a written statement, it is not necessary that permission of the Court should be obtained for that purpose; but, according to the Calcutta High Court,<sup>7</sup> it should be shown by a statement in the plaint or in the written statement or by an affidavit, that the person purporting to verify is a principal officer of the corporation and is able to depose to the facts of the case. See also Note 7.

Where the defence raises the question of the competency of the director to sign and verify the plaint, the defendants are entitled so to cross-examine him as to expose all the facts bearing on that question.<sup>8</sup>

**Local Amendment****MADRAS**

*Insert the following as Rule 1A:*

**O. 29 R. 1A  
(Madras)**

"1A. In suits against a local authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

**O. 29 R. 2**

**R. 2.** [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served —

*Service on corporation.*

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

[1877, S. 436; 1859, S. 63. See O. 5.]

**1. Service on corporation.** — The mode of service provided by this rule can be availed of only in cases where there is no mode of service provided by any other

(189) AIR 1989 Bom 847 (849): I L R (1989) Bom 295. (O. 29 R. 1, O. P. Code, is only a permissive rule and does not exclude the operation of O. 6 Rr. 14 and 15 of the Code. A plaint signed by the constituted agent of a party, who holds a power of attorney is properly signed.)

[See also (186) AIR 1986 Bom 418 (420): I L R (1987) Bom 85. (O. 29 R. 1 does not exclude the operation of the provisions of O. 6 Rr. 14 and 15—De facto secretary of a firm who verifies a plaint in the absence of secretary is a

principal officer.)]

5. (125) AIR 1925 Lah 388 (389).

(182) 185 Ind Cas 41 (41) (Lah).

6. (181) AIR 1981 Sind 178 (179): 26 Sind L R 58. (Reversing A I R 1927 Sind 268.)

7. (195) 22 Cal 268 (269).

(185) AIR 1985 Cal 770 (771). (Where there is an averment in the plaint to the effect referred to above, no affidavit is necessary to establish the authority for verification.)

8. (181) AIR 1981 Rang 54 (55).



statute.<sup>1</sup> In the case of foreign companies the place where the corporation carries on business means the *principal place of business* in British India.<sup>2</sup> A Railway Company must be deemed to dwell at its principal office.<sup>3</sup> Service at the registered office of a company is essential,<sup>4</sup> though the Secretary may accept service elsewhere than at the registered office.<sup>5</sup> But a service on the solicitor of the company is not sufficient unless the company accepts service and enters appearance.<sup>6</sup>

O. 29 R. 2

The mode of service prescribed by the rule can be availed of only after the suit has been properly framed and the person on whom the service is effected must be a person entitled to receive the notice in respect of the company or the companies sued.<sup>7</sup> The Judicial Commissioner's Court of Sind has held in the undermentioned case<sup>8</sup> that where a corporation is sued as a defendant, the plaint should be accompanied by an application under this rule duly stamped, stating in what manner and on whom the plaintiff wishes the summons to be served.

**R. 3.** [S. 436.] The Court may, at any stage of the suit, require the personal appearance of the secretary

O. 29 R. 3

Power to require personal attendance of officer of corporation.

or of any director, or other principal officer of the corporation who may be able to answer

material questions relating to the suit.

[1877, S. 436; 1859, S. 63.]

## ORDER XXX.

### SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN

**R. 1.** [New. ' ) Any two or more persons claiming or

O. 30 R. 1

Suing of partners in name of firm.

being liable as partners and carrying on business in British India may sue or be sued in the

name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of

#### Order 29 Rule 2 — Note 1

1. ('28) AIR 1928 Sind 111 (118, 114). (Foreign Company.)
- ('10) 7 Ind Cas 992 (985) (Bom). (Company registered under the Indian Companies Act.)
2. ('28) AIR 1928 Sind 111 (118).
3. (1862) 1 Hyde 217 (217).
4. (1902) 1 K B 91 (93), *Pearks Gunston and Tea*

v. Richardson.

- (1909) 53 S J 716, *Vignes v. Stephens Smith & Co. Ltd.*
5. (1878) 8 Ch D 183 (189, 190), *In Ex parte Railway Steel and Plant and Co. Re Taylor.*
6. (1890) 68 LT 96, *Re Denver United Breweries.*
7. ('16) AIR 1916 Cal 818 (819) : 43 Cal 441.
8. ('33) AIR 1933 Sind 102(103); 26 Sind LR 481.

**O. 80 R. 1**  
**Note 1**

the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

[R. S. C., O. 48A, R. 1.]

### Local Amendments

#### LAHORE

Add the following Explanation :

"*Explanation.*—This rule applies to a joint Hindu family trading partnership."

#### N.-W. F. P.

Add the following Explanation :

"*Explanation.*—The rule applies to a joint Hindu family trading partnership."

#### SIND

Add the following as an Explanation :

"*Explanation.*—This rule applies to a joint Hindu family trading partnership."

### Synopsis

1. Scope of the Rule.
2. "Any two or more persons."
3. "Firm," meaning of.
4. Minor.
5. Suit against manager and owner of the firm. See O. 80 R. 10.
6. "Carrying on business in British India."
7. "May sue or be sued in the name of the firm."
8. Firm as "agriculturist."

9. Suit by firm on promissory note.
10. "At the time of the accruing of the cause of action."
11. Suit against firm — Reference to arbitration.
- 11a. Suit in name of firm — Compromise.
12. Statement of names and addresses.
13. Subscription and verification.
14. Death of partner before suit.
15. Suit against individual partners.

### Other Topics (miscellaneous)

Foreign firm. See Note 6.

Partners and partnership. See Notes 1 and 2.

**1. Scope of the Rule.**—It is a general principle of law that a plaintiff who wishes to obtain a decree against several persons must make them all parties to the suit. Where *A* makes a promise to *B*, *C* and *D* the right to enforce the promise rests with them all, under the provisions of the Contract Act, Section 45, so that all of them are necessary parties to a suit to enforce such promise.<sup>1</sup> It was accordingly held under the old Code, which did not contain any provisions corresponding to this Order, that in suits by or against firms, all the members composing the firm were necessary parties.<sup>2</sup>

#### Order 30 Rule 1 — Note 1

1. ('28) AIR 1928 Bom 191 (193).
2. ('76) 25 Suth W R 118 (119).
- ('06) 7 Cal L Jour 266 (267).

- ('07) 4 Low Bur Rul 28 (24).
- ('68) 9 Suth W R 190 (192).
- (1862) 1 Bom H O R 65 (66).
- ('67) 8 Suth W R 45 (46).

This Order has been newly introduced into the present Code and provides, as it were, an exception to the provisions of Section 45, Contract Act, in that it allows two or more partners alone to sue, provided the suit is brought *in the name of the firm*.<sup>3</sup> A firm as such, has no existence in law; it is a mere abbreviated name for the partners of which it consists, and not a *legal entity* as a corporation,<sup>4</sup> and when a suit is brought against a firm, it is precisely as though it were brought in the name of *all* the partners.<sup>5</sup> The effect of using the name of the firm is simply to bring all the partners before the Court and the procedure indicated in this rule is adopted only as a convenient method for denoting the persons who constitute the firm at the time of the accrual of the cause of action.<sup>6</sup> A decree against a firm in the name of the firm has the same effect as a decree against all the partners.<sup>7</sup> This is made clear by the various rules of this Order. Thus, Rule 2 provides that in a suit brought in the name of the firm, the plaintiff shall, on a written demand of the defendants, declare, in writing, the names and residences of the partners and that, on such a declaration being made, the suit will proceed *as if all the partners had been named* as plaintiffs in the plaint. Rule 6 provides that where persons are sued as partners in the name of their firm, they *shall appear individually* in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm. But the Order merely provides a new procedure and does not affect the plaintiff's right of bringing a suit against a firm by impleading all or any of the members as defendants thereto in conjunction with the firm.<sup>8</sup> Where a suit is to be brought against *A* and *B* as partners of the firm *A, B & Co.*, the proper form is not to sue them as "*A, B & Co.*, by partners *A* and *B*" but to sue as follows —

- "1. *A, B & Co.*, a firm
2. *A*, a partner in the firm
3. *B*, a partner in the firm."<sup>9</sup>

Where the plaint describes the plaintiff as the "firm *X* through *B*, the proprietor of the said firm," and the plaint is signed by *B*, the plaintiff cannot be deemed to be

(99) 21 All 846 (847).

[But see ('82) 6 Bom 700 (702). (Suit upon a contract made by partnership firm—Plaintiff may select as defendants those partners of the firm against whom he wishes to proceed.)]

3. ('27) AIR 1927 Lah 115 (116) : 8 Lah 1.

('17) AIR 1917 Pat 246 (246).

[See ('19) AIR 1919 Mad 957 (959) : 41 Mad 928.]

4. ('27) AIR 1927 Bom 428 (430).

('26) AIR 1926 All 238 (241) : 48 All 239.

('26) AIR 1926 Sind 75 (76).

('28) AIR 1928 Bom 191 (193).

('22) AIR 1922 Cal 408 (409) : 49 Cal 524.

(1910) 1 K B 868 (889), *Sadler v. Whiteman*.

('11) 9 Ind Cas 712 (715).

('88) AIR 1938 All 69 (72) : I L R (1938) All 100.

('86) AIR 1986 Pat 194 (195).

5. ('27) AIR 1927 Lah 115 (116) : 8 Lah 1.

('26) AIR 1926 Sind 75 (76).

('83) AIR 1938 All 528 (534) : 55 All 719.

('27) AIR 1927 Bom 255 (256).

(1891) 1 Q B 804 (814), *Western National Bank v. Perez, Triana and Co.*

('22) AIR 1922 Cal 408 (409) : 49 Cal 524.

('86) AIR 1986 Pat 194 (195).

6. ('27) AIR 1927 Lah 115 (116) : 8 Lah 1.

('26) AIR 1926 Sind 75 (76).

[See also ('88) AIR 1938 All 69 (71) : I L R (1938) All 100. (The policy underlying O. 30 is no more than to afford facilities in the joinder of parties who may be numerous.)]

7. ('26) AIR 1926 Sind 75 (76).

[See also ('82) AIR 1932 Bom 375 (378). (Same rule holds good in the case of an award)]

8. ('30) AIR 1930 Pat 239 (240) : 9 Pat 717.

9. ('25) AIR 1925 Bom 494 (495).

('31) AIR 1931 Sind 121 (122) : 25 Sind LR 104.

[See ('24) AIR 1924 Bom 155 (156).

('85) AIR 1935 Rang 209 (209). (The correct way of bringing a suit under O. 30 R. 1 is to bring it in the name of the firm as plaintiff, and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the person signing and verifying should describe himself as one of the partners of the firm which brings the suit.)]

[See also ('36) AIR 1936 Cal 353 (355). (*M*, a partner in a firm, suing in name of firm — Proper form of suit would be to name only the

**O. 80 R. 1**  
**Notes 1-3**

suing in the *firm's* name but in his own name and the mere fact of the firm's name being mentioned in no way affects the matter.<sup>10</sup>

The provisions of this Order apply only to a firm or contractual partnership and do not apply to a joint Hindu family business. Therefore an undivided Hindu family carrying on business is not entitled to sue as a firm under this Order.<sup>11</sup> Further, the provisions of this Order assume that the "firm" is legally constituted and do not have any bearing on the question of the maintainability of a suit against an illegal association.<sup>12</sup>

This Order applies only to *suits* by or against partners and persons carrying on business in names other than their own. The *execution* of decrees against firms and the attachment of partnership property are dealt with in O. 21 Rules 49 and 50.

Where a decree is obtained in the name of a firm, as to whether a payment of the decree amount to one of the partners is a valid discharge, see Note 8 to Order 21, Rule 15, *ante*.

**2. "Any two or more persons."** — This rule applies only where there are *two or more persons* carrying on business in the name of a firm. One *single* person carrying on business in the name of a firm cannot sue in the name of the firm.<sup>1</sup> Nor can one of several partners carrying on business in the name of a firm, *sue in his own name* on a cause of action which has arisen in favour of the firm.<sup>2</sup> But he can institute a suit in the name of the *firm* in such cases, and this rule does not bar him from doing so.<sup>3</sup>

**3. "Firm," meaning of.** — Under Section 4 of the Indian Partnership Act, IX of 1932, (Section 239 of the Contract Act, 1872), "persons who have entered into partnership with one another are called individually 'partners' and collectively a 'firm'." In the earlier part of the same Section it is enacted that "partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. A "firm" is thus a short, collective name for the individual members who constitute the partners<sup>1</sup> and, as has been seen in Note 1 above, is not a legal entity or an artificial person as a corporation. It follows that a

firm in the cause title as the plaintiff without saying "through M" but the addition of those words does not matter.])

10. ('86) AIR 1986 Pat 140 (141). (What is contemplated by O. 80 R. 1 is that two or more persons under a firm name may sue without mentioning the names of the individuals.)

11. ('84) AIR 1984 Cal 810 (812) : 61 Cal 975.

('88) AIR 1988 Lah 568 (564). (Such a firm must sue and be sued in the name of its members.)

('86) AIR 1986 Nag 292 (292) : 1 L R (1987) Nag 428.

('88) AIR 1988 Pat 270 (270).

[See also ('88) AIR 1988 Bom 804 (805).

('85) AIR 1985 All 280 (281).]

12. ('84) AIR 1984 Lah 882 (883). (Suit against such an illegal association is not maintainable as its existence cannot be recognized by law.)

**Note 2**

1. ('14) AIR 1914 All 474 (474).

('84) AIR 1984 Lah 157 (157). (The defect in form can be removed by amendment and suit should

not be thrown out on the technical ground.)

(1892) 8 T L R 805, Mason and son v. Mogridge.

('80) AIR 1980 Bom 216 (216).

('82) AIR 1982 Bom 516 (518).

('86) AIR 1986 Pat 140 (141).

('86) 88 Bom L R 529 (580). (He can, however, be sued in a firm name.)

('85) AIR 1985 Rang 240 (248). (But where a sole proprietor brings a suit in a firm name, the plaint can be amended, even at the appellate stage in proper cases.)

2. ('25) AIR 1925 Sind 181 (182) : 17 Sind L R 324.

('10) 6 Ind Cas 488 (488) (Mad).

3. ('86) AIR 1986 Cal 858 (855), (Sealand Edgellow v. Kingston, (1908) 2 K B 579, Followed. But if the other partners want an indemnity against costs from the suing partner, the Court can stay the suit till the indemnity is furnished.)

**Note 3**

1. ('24) AIR 1924 Bom 109 (110).

('88) AIR 1988 All 528 (524) : 55 All 719.

('82) AIR 1982 Cal 768 (769).

firm cannot, as such, enter into a contract and be a member of a partnership<sup>3</sup> nor can it be a party to a reference under the Arbitration Act.<sup>3</sup> It cannot appear in any suit *as a firm*; if, however, a partner is made a co-defendant along with the firm he may put in a separate defence for himself and one on behalf of the firm.<sup>4</sup>

**O. 30 R. 1**  
**Notes 3-6**

*A, B and C* carry on business as a firm *X*. They enter into a partnership with *D*. Then *A* sues *D* in the name of the firm *X* for a dissolution of the partnership with *D* and for accounts. Such a suit is maintainable. Though the firm *X* as such cannot enter into a partnership with another, the individual partners therein, *A, B* and *C* can do so and the suit as brought must be deemed to be one on behalf of all three of them.<sup>5</sup>

Before the passing of the Partnership Act of 1932, the insolvency of one of the partners in a firm did not cause a dissolution of the firm and hence, a suit could be instituted in the name of the firm even after the insolvency of one of the partners.<sup>6</sup>

**4. Minor.** — Section 30 of the Indian Partnership Act, IX of 1932 (Section 247 of the Contract Act, 1872) provides that a person, who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such a minor in the property of the firm is liable for the obligations of the firm. The person under the age of majority cannot, under the Indian law, become a partner by contract, and cannot be one of that group of persons called a "firm," inasmuch as a contract by a minor is void.<sup>1</sup> In this view, the share, of which S. 247 speaks, is no more than a right to participate in the property of the firm after its obligations are satisfied.<sup>2</sup> If a suit is brought under Order 30 against a firm where a minor has been admitted to some kind of benefit, the minor cannot be regarded as a party to the suit.<sup>3</sup> Where a suit is brought against a firm, the mere fact that there is a minor member of the firm, does not bring the suit within the purview of Order 32 and no sanction is necessary under the provisions thereof where the matter in dispute in such suit is referred to arbitration.<sup>4</sup> According to the law of England a contract by a minor is only *voidable* and not void. He may be a partner<sup>5</sup> though he cannot be made *personally* liable for the debts of the firm. A judgment against the firm may be executed against the partnership property including the share of the minor.<sup>5</sup>

**5. Suit against manager and owner of the firm.** — See O. 30 R. 10, *infra*.

**6. "Carrying on business in British India."** — The rule clearly indicates that an action can only be brought by or against a firm in the firm name in which the

2. ('24) AIR 1924 Cal 74 (77) : 50 Cal 549.

('82) AIR 1982 Cal 768 (769).

('38) AIR 1938 All 69 (70, 71) : I L R (1938) All 100. (But there is nothing to prevent the individual members of a firm from being included in a larger partnership in another firm.)

('36) AIR 1936 Lah 78 (79).

3. ('27) AIR 1927 Bom 428 (430).

4. (1889) 51 L J Ch 858 (854), *Taylor v. Collier*.

5. ('38) AIR 1938 All 69 (73) : I L R (1938) All 100.

6. ('87) AIR 1987 Nag 814 (816) : I L R (1987) Nag 28. (In this case it was observed that even if the firm is dissolved, it continues to exist for all purposes necessary for its winding up, including the recovery of moneys due to it, by suit or otherwise.)

**Note 4**

1. ('86) AIR 1986 Mad 707 (708, 709) : I L R (1987)

Mad 28. (When all the owners of a business are minors, there is no partnership as contemplated by the Partnership Act and a suit against them in the firm name cannot be brought.)

2. ('22) AIR 1922 P C 287 (289, 240) : 49 Cal 560 : 49 Ind App 108 (PO).

3. ('36) AIR 1936 Mad 707 (708, 709) : I L R (1937) Mad 28.

4. ('28) AIR 1928 Lah 103 (104).

('23) AIR 1923 Lah 212 (213). (Suit by one firm against another — Reference to arbitration by representatives.)

5. (1894) 1894 A C 607 (611), *Lovell v. Bean-champ*.

(1898) 2 Q B 534 (535, 536), *Harris v. Bean-champ Bros*.

[See also ('86) AIR 1986 Oudh 245 (246).]

**O. 30 R. 1**  
**Notes 6-7**

persons claiming or being liable as partners are carrying on business in British India.<sup>1</sup> A foreign firm may carry on business in British India in which case this Order will apply to suits by or against it, even though the partners themselves are residing outside British India.<sup>2</sup> The partners of a foreign firm *who do not carry on any business in British India* cannot sue<sup>3</sup> or be sued<sup>4</sup> in the firm name, but must proceed or be proceeded against *individually*.<sup>5</sup> But, where in such a case a suit is originally instituted in the name of the firm and the plaint is subsequently amended showing the names of the partners, it cannot be said that until the amendment the suit must be treated as not instituted at all. Further, the suit as originally instituted is only a suit by or against the partners constituting the firm even though their names were not disclosed and when their names are subsequently disclosed, there is no substitution or addition of new parties so as to attract the application of S. 22 of the Limitation Act.<sup>6</sup>

The question whether a firm is carrying on business within jurisdiction is one of fact depending upon the circumstances of each case. The words "carrying on business" must be understood in their ordinary sense and not as having any special significance.<sup>7</sup> Thus, if a firm has an office of its own within jurisdiction at which a partner or a manager is in control carrying on the business, that is sufficient to bring it within the rule.<sup>8</sup> If the firm has only an office within the jurisdiction, at which the business is done for the firm by an *agent*, the question whether it is carrying on business within jurisdiction depends on the *powers* and the *authority* of the agent. If the agent merely has authority to take orders and transmit them to the firm, that is not carrying on business.<sup>9</sup> If, however, the agent has the power to *conclude contracts on his own initiative* on behalf of the firm, the latter will be taken to be carrying on business through the agent within the jurisdiction.<sup>10</sup>

See Section 20 Note 8 for a full discussion as to the meaning of the words "carrying on business."

**7. "May sue or be sued in the name of the firm."** — As has been seen in Note 1, two or more partners can sue *in the name of the firm* and it is not necessary that the other partners should be named in the plaint as plaintiffs or should sign it.<sup>1</sup> A suit brought in the name of the firm cannot, therefore, be dismissed on the ground of non-joinder of other partners; all that the defendant is entitled to is the

**Note 6**

1. ('28) AIR 1928 Bom 191 (192, 193).  
(84) AIR 1984 Bom 467 (469).
2. ('92) AIR 1932 Nag 114 (116): 28 Nag LR 118.
3. ('28) AIR 1928 Bom 191 (193).
4. (1914) 1 Ch 748 (758), Von Hellfeld v. Rechner.  
(27) AIR 1927 Bom 428 (430).
5. (1891) 1 Q B 304 (312), Western National Bank of New York v. Perez Triana and Co.  
(1891) 2 Ch 81 (41, 46), Indigo Co. v. Ogilvy.
6. ('85) AIR 1935 Sind 225 (227).  
[See also ('88) AIR 1988 Lah 718 (718). (Suit by firm against firm working in Patiala State — Opposite party described as 'firm S' at Patiala through C, manager and proprietor — Amendment by substituting name of C, sole proprietor and manager in place of firm S held should be allowed.)]
7. (1892) 1 Q B 108 (117), Grant v. Anderson and Co.

8. (1894) 1 Q B 784 (788), Worcester, etc. Co. v. Firbank.
9. (1892) 1 Q B 108 (117), Grant v. Anderson and Co.  
[See (1886) 33 Ch D 604 (607, 608), Ballie v. Goodwin and Co.]
10. (1899) 1899 A C 431 (438), La Bourgogne.  
(1902) 1 K B 342 (347), Dunlop etc. Co. v. Actien-Gesellschaft etc.

**Note 7**

1. ('28) AIR 1928 Nag 187 (187).  
(85) AIR 1985 Sind 225 (228).
- (85) AIR 1935 Peah 44 (47). (Plaintiffs constituting firm and also being partners in another firm — Plaintiffs can sue on cause of action accruing in favour of latter firm.)
- (88) AIR 1988 Lah 828 (824). (If a partner's name is added it is mere surplusage.)  
[See also ('88) AIR 1988 Sind 102 (102): 26 Sind LR 481. (Pleadings need not give particulars of the person who signs it.)]

disclosure of the names of those partners under Rule 2.<sup>3</sup> An addition of one of the partners after the period of limitation, or the correction of the name of a wrong representative of the firm who has been made a party to the suit, will not amount to an addition or substitution of a new party to the suit within the meaning of Section 22 of the Limitation Act.<sup>3</sup>

The cause of action in respect of a contract with a firm vests in all the partners jointly, and if, after the contract, one of the partners retires and a stranger comes in, the new partnership cannot enforce the contract entered into by the old. Nor can it, by substituting the names of the old partners, alter the period of limitation for instituting the suit or avoid the bar of limitation.<sup>4</sup> Where a firm continues to be known by its old name even after the original partners are dead though occasionally the name of the actual head of the firm is also added to the old name, the omission of the latter's name in a suit by the firm does not amount to any misdescription.<sup>5</sup> It has been held in the undermentioned case<sup>6</sup> that in a suit for libel made against a firm all the partners should join as plaintiffs.

**8. Firm as "agriculturist."** — A firm can be an "agriculturist" within the meaning of Section 2, Dekkhan Agriculturists' Relief Act (XVII of 1879), only when, by itself, or by its servants, or by its tenants it earns its livelihood wholly or principally by agriculture carried on within the limits of a district to which the Act extends. The mere fact that an individual partner or even all the partners of the firm earn their livelihood from an agricultural income does not make the firm an "agriculturist." A plaintiff suing a firm which, by itself, does not earn its livelihood by agriculture must be sued only at the place where it carries on business and not where the individual partners reside.<sup>1</sup>

**9. Suit by firm on promissory note.** — Where a promissory note is executed to A, a partner of a firm, for a debt due to the firm, A is personally entitled to sue on the note although the benefit of the decree would result to the partnership firm.<sup>1</sup> The firm is also entitled to sue on the note, though it is advisable, before suit, to get the instrument endorsed in its name.<sup>2</sup> Where A sues individually to recover a debt due to the firm consisting of partners A and B, the correct procedure, if B will not join A as co-plaintiff, is to make him a defendant.<sup>3</sup>

**10. "At the time of the accruing of the cause of action."** — A suit may be brought under this rule in the name of a firm which has been dissolved before the date of the suit, provided the cause of action has arisen before the date of the dissolution.<sup>1</sup>

**11. Suit against firm — Reference to arbitration.** — Where a reference is made to arbitration in a suit in which a firm is a party, all the members of the firm who are sought to be bound, must join in making the reference; sub-rule (2) of this

2. ('16) AIR 1916 Mad 649 (649).

3. ('16) AIR 1916 Mad 649 (649).

('28) AIR 1928 Nag 819 (821).

[See also ('35) AIR 1935 Sind 225 (226, 227).

(Suit by or against firm is suit by or against parties who are members of firm — Disclosure and placing on record of their names subsequently does not amount to substitution or addition of names as to attract applicability of Section 22.)]

4. ('22) AIR 1922 Sind 18 (14); 15 Sind L R 152.

5. ('18) AIR 1918 Lah 819 (819).

6. ('09) 8 Ind Cas 881 (888); 86 Cal 907.

**Note 8**

1. ('29) AIR 1929 Bom 378 (379); 58 Bom 787.  
(81) AIR 1981 Sind 121 (122); 25 Sind L R 104.

**Note 9**

1. ('29) AIR 1929 Bom 177 (177); 58 Bom 110.  
2. ('28) AIR 1928 Cal 148 (150, 151); 55 Cal 551.  
3. ('25) AIR 1925 Lah 504 (505).

**Note 10**

1. ('21) AIR 1921 Cal 722 (725).  
(22) AIR 1922 Cal 390 (390); 49 Cal 394.  
(28) 112 Ind Cas 715 (717) (All).  
[See also ('87) AIR 1937 Nag 314 (316); 1 I L R (1937) Nag 28. (In spite of dissolution firm con-



**O. 30 R. 1**  
**Notes 11-16**

rule does not empower one partner alone to refer the case to arbitration so as to bind the other partners who have not agreed to, or joined in, the application for reference.<sup>1</sup> A proceeding before an arbitrator under the Arbitration Act is not a suit and, therefore, the provisions of Order 30 do not apply thereto.<sup>2</sup>

**11a. Suit in name of firm — Compromise.** — Although a suit is instituted in the name of a firm, all the partners are in reality plaintiffs and it cannot be compromised by one of the partners alone.<sup>1</sup>

**12. Statement of names and addresses.** — Both Rules 1 and 2 provide for the disclosure of the names of partners. Under Rule 1 *any party* may apply to the Court for a statement of the names and addresses of the partners to be furnished as directed by the Court. Under Rule 2, a *defendant* may, on demand in writing, without recourse to Court, ask the plaintiff or his pleader to declare in writing the names and places of residence of the partners. Where a statement under Rule 1, or a declaration under Rule 2 is made, the Court cannot direct a cross-examination on such statement or declaration; nor can it direct the trial of an issue as to who were the partners of the firm at the time of the accruing of the cause of action. But the statement or declaration, as the case may be, will be treated as embodied in the plaint and will be a necessary part of the cause of action.<sup>1</sup>

**13. Subscription and verification.** — It is quite sufficient, under the provisions of sub-rule (2), that, in suits by or against a firm, the pleading on behalf of the firm is signed and verified by *one* of the partners composing the firm; it is not necessary that it should be signed by *two or more* persons, though under sub-rule (1) no suit can be brought in the name of a firm unless it consists of two or more partners.<sup>1</sup>

**14. Death of partner before suit.** — A suit may be brought against a firm in the name of the firm, even though one of the partners is dead before the institution of the suit,<sup>1</sup> inasmuch as the suit must be deemed to be against the surviving partners. The judgment so obtained against the firm, though enforceable against the partnership property, cannot be enforced against the *private estate* of the deceased partner, unless his legal representatives are actually made parties.<sup>2</sup>

**15. Suit against individual partners.** — This rule does not affect, in any way, the operation of Section 43 of the Contract Act. In a suit upon a contract made by a partner on behalf of the partnership, the promisee can compel all or any one of the partners to perform the whole of the promise.<sup>1</sup> As has been seen in Note 1, an individual partner may be sued personally along with the firm.<sup>2</sup>

tinues to exist for all purposes necessary for winding up of the firm.)]

**Note 11**

1. ('26) AIR 1926 All 238 (240) : 48 All 289.
2. ('82) AIR 1982 Bom 516 (519).
2. ('29) AIR 1929 Lah 228 (229, 230).

**Note 11a**

1. ('88) AIR 1988 Lah 618 (620).

**Note 12**

1. (1905) 1 K B 46 (50, 51), Abrahams and Co. v. Dunlop Pneumatic Tyre Co.

**Note 13**

1. ('14) AIR 1914 All 474 (474).
2. ('87) AIR 1926 Nag 187 (187).

('11) 9 Ind Cas 450 (450) (Low Bur).

('74) 12 Beng L R 85 (86).

('70) 5 Beng L R 89 (90).

('82) AIR 1982 Nag 187 (188) : 28 Nag L R 116.

('85) AIR 1985 Rang 209 (210). (Correct way of bringing the suit is to mention only the firm at the head of the plaint but subscription and verification to be by a partner in the firm describing himself as such.)

**Note 14**

1. ('28) 112 Ind Cas 715 (717) (All).
2. ('24) AIR 1924 Bom 109 (111).

**Note 15**

1. ('27) AIR 1927 L A R 319 (321) : 9 Lah 227.
2. (1882) 30 W R (Eng) 701, Taylor v. Collier & Co.



**R. 2. [New.]** (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

O. 30 R. 2

Disclosure of partners' names.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

[R. S. C., O. 48A, R. 2.]

### Synopsis

1. Scope of the Rule.

2. Disclosure of partners' names.

3. Proceedings to continue in the name of firm. See Rule 6 Note 2.

**1. Scope of the Rule.** — This rule applies only to suits instituted *by* and *not* against partners in the name of the firm; in other words, it applies only to the case of plaintiffs suing in the name of the firm.<sup>1</sup> Sub-rule (2) of this rule does not control the provisions of O. 21 R. 50 and does not apply to anything that follows after the suit has reached the stage of a decree,<sup>2</sup> nor does it in any way contradict the provisions of O. 30, Rule 4 and it is therefore not necessary to join the legal representatives of a deceased partner as parties to the suit.<sup>3</sup>

**2. Disclosure of partners' names.** — An incomplete disclosure or a wrong declaration of the names of the partners is not a fatal defect to the suit; the proper procedure in such a case is not to dismiss the suit but to allow a further declaration making a full disclosure.<sup>1</sup> The effect of such a fresh declaration is equivalent to that of the addition of a party and therefore it should be made before the expiry of the period of limitation.<sup>2</sup> A suit for dissolution of a partnership existing between an individual on the one hand, and a different partnership on the other, may be instituted against such

#### Order 30 Rule 2 — Note 1

1. ('27) AIR 1927 Bom 447 (448) : 51 Bom 794.
2. ('27) AIR 1927 Bom 447 (448) : 51 Bom 794.
3. ('29) AIR 1929 Cal 11 (14).
- ('21) AIR 1921 Cal 722 (726).

#### Note 2

1. ('30) AIR 1930 Bom 150 (150) : 54 Bom 285.
- ('34) AIR 1934 Cal 258 (258) : 60 Cal 1217.
- ('14) AIR 1914 Cal 58 (54) : 21 Ind Cas 886 (888):

41 Cal 581.

2. ('84) AIR 1984 Cal 258 (255) : 60 Cal 1217.  
[See however ('37) AIR 1937 Rang 137 (138).  
(Person suing as managing partner of firm — Names of partners asked for — Initials and addresses and respective shares given — Defendant not objecting—Court should stay proceedings until full names are given — Suit however cannot be dismissed as bad for non-joinder — AIR 1984 Cal 258, Distinguished.)]

**O. 30 R. 2** partnership without disclosing in the plaint the names of the individual partners  
**Notes 2-3** thereof.<sup>3</sup>

**3. Proceedings to continue in the name of firm.**—See Rule 6, Note 2 *infra*.

**O. 30 R. 3**

**R. 3.** [New.] Where persons are sued as partners in the name of their firm, the summons shall be served either —  
**Service.**

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India :

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

[R. S. C., O. 48A R. 3.]

### Synopsis

1. Scope of the Rule.
2. Dissolution of partnership before suit.
3. Service by registered post.
4. "Person having... partnership business."
5. Successive services.

6. "Principal place at which the partnership business is carried on."
7. "As the Court may direct."
8. Mortgage suit.
9. Ex parte decree against firm.
10. Notice as to capacity in which partner is sued. See Rule 5.

### Other Topics (miscellaneous)

Deemed good service. See Note 1.  
 First service on manager—Subsequent service on partners—Time for appearance to be counted from what date stated. See Note 5.

Proviso—Dissolved firm. See Note 2.

Whether all or any of the partners are within or without British India. See Note 1.

**1. Scope of the Rule.**—This rule applies to suits against partners *in the name of their firm* and provides for the mode of service of summons in such suits. It has no application to suits against partners not brought in the name of their firm.<sup>1</sup> Where

**3.** ('29) AIR 1929 Sind 7 (9).

[See also ('36) AIR 1936 Lah 78 (79). (Suit by firm, partners in which have become partners in another firm, for dissolution of latter partnership—Names of partners in plaintiffs' partnership disclosed under R. 2.—The suit can proceed as if the partners had been originally

joined as plaintiffs in the suit.)]

### Order 30 Rule 3 — Note 1

**1.** ('25) AIR 1925 Cal 1186 (1187).  
 ('89) AIR 1989 Pesh 9 (11). (Notice under O. 21, R. 66 must be served on the judgment-debtors in such cases.)

the firm is an existing one or has not been dissolved to the knowledge of the plaintiff before the date of suit, there are two modes of service prescribed by this rule :

- (a) upon any one or more of the partners ; or
- (b) upon the manager of the business at the principal place thereof within British India.

A service effected in one of the above modes is a good service *against the firm*, and a decree can be passed against it;<sup>2</sup> it is immaterial that all the partners are not individually served,<sup>3</sup> or that all or any of them resides outside British India.<sup>4</sup> If the summons be not served in either of the two modes mentioned above, the service is irregular and no decree can be passed against the firm.<sup>5</sup> But though the firm is properly served by adopting the above modes of service, it is not sufficient to make a member who has not been *actually* served, a person "who has been individually served as a partner" within the meaning of O. 21 R. 50.<sup>6</sup> That rule provides that a decree obtained against a firm may be executed —

- (a) against the *partnership assets* ;
- (b) against any person *personally* who has been individually served with summons and has failed to appear ;
- (c) against any person *personally* who has appeared in his own name under Rules 6 and 7 of Order 30, or who has admitted in the pleadings that he is, or who has been adjudged to be, a partner ;
- (d) *with the leave of the Court*, against any person *personally* as being a partner of the firm, even though he has not appeared or been individually served in the prescribed manner.

As to the mode of service to be adopted in cases where the firm has been dissolved before the institution of the suit and the effect of not complying with the rule of service so prescribed, see Note 2 below.

See also the undermentioned cases.<sup>7</sup>

**2. Dissolution of partnership before suit.** — The proviso to this rule deals with the method of service to be adopted where the firm has been dissolved before the date of the suit. If the plaintiff, at the time of instituting the suit, is not aware of the dissolution, the proviso has no application and a service effected in one of the modes mentioned in clause (a) or clause (b) of the rule is good service against the firm, and a decree passed against it can be executed against the partners in the manner prescribed by O. 21 R. 50. If, however, the plaintiff is aware of the fact of dissolution before the date of the suit, he must, if he seeks to make any person liable as a partner, serve it on such person *individually*. If instead of doing so the service is effected as prescribed by clause (a) or clause (b) only, there will no doubt be a decree *against the firm*, but it cannot be executed, even with the leave of the Court, personally against the partner not

**O. 30 R. 3**  
**Notes 1-2**

2. ('15) AIR 1915 Cal 298 (240).  
(82) AIR 1932 Sind 199 (200) : 26 Sind L R 228. (Rule contemplates service of summons upon an individual on behalf of and as representing a firm — Provisions of Order 5 are controlled by provisions applicable to special suit.)  
3. ('25) AIR 1925 Bom 381 (332).  
(26) AIR 1926 Sind 75 (76).  
(71) 7 Beng L R App 68 (58). (Service on one partner for his co-partner is good service.)  
4. ('15) AIR 1915 Cal 298 (240).  
(24) AIR 1924 Bom 366 (367).  
5. (1894) 1 Q B 784 (788, 790), Worcester City and

County Banking Co. v. Firbank Pauling & Co.  
6. (1886) 17 Q B D 755 (758), In Re Ide.  
(27) AIR 1917 Bom 581 (592) : 51 Bom 986.  
7. ('33) AIR 1933 Sind 102 (103) : 26 Sind L R 481. (Sind Judicial Commissioner's Court has directed that in suits against corporations plaint should be accompanied by an application under this rule duly stamped stating where, in what manner and on whom plaintiff wishes the summons to be served.)  
(85) 62 Cal 833 (836). (Award against firm—Filing — Notice to individual partners not necessary— R. 3 does not apply to such a case.)

**O. 20 R. 3**  
**Note 2**

individually served, under sub-rule (2) of O. 21 R. 50.<sup>1</sup> To this extent the proviso to this rule overrides O. 21 R. 50, which allows a decree against a firm to be executed against a partner personally with the leave of the Court, even though he has not been served individually.<sup>2</sup>

Where a partner *dies* before the institution of the suit, the partnership gets dissolved under the provisions of Section 42 of the Partnership Act, IX of 1932 (Section 253 of the Contract Act). If the plaintiff is aware of the death at the date of the suit, he must, if he wishes to make the *private estate* of the deceased partner liable, implead the legal representatives as parties and obtain a decree against them.<sup>3</sup> But the proviso to this rule does not imply that if the plaintiff was not *aware* of the dissolution by the death of the partner, the latter's legal representatives can be treated as partners themselves and proceeded against under sub-rule (2) of O. 21 R. 50 in respect of the private estate of the deceased partner. It has accordingly been held by a Full Bench of the High Court of Madras<sup>4</sup> that the fact that the plaintiff had no knowledge of the death of the partner before the suit does not affect the question of the liability of the legal representatives in respect of the private estate of the deceased partner and that the scope of O. 21 R. 50 sub-rule (2) cannot be enlarged by a reference to the rule of service prescribed by the proviso. A different view has been taken by the High Court of Bombay. According to that High Court the legal representatives can be proceeded against under sub-rule (2) of O. 21 R. 50, in respect of the private estate of the deceased partner.<sup>5</sup> The Sind Judicial Commissioner's Court has also held a similar view.<sup>6</sup> It is submitted that the Bombay view is not correct. Sub-rule (2) of O. 21 R. 50 applies only to execution against a person *as being a partner* of the firm, and the legal representatives are, in no sense, the partners of the firm.<sup>7</sup>

In *Ellis v. Wadeson*,<sup>8</sup> Romer, L. J., observed as follows :

"Suppose a partner dies before action is brought and an action is brought against the firm in the firm's name. The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case . . . . If the legal representatives of the deceased partner are not added expressly as defendants and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets . . . . I have so far dealt with the case of the death of a partner before action. Now what happens if a partner dies between service of writ and the trial of the action and judgment? *In that case equally, the dead man's estate is not bound.* Judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets."

Where a suit is instituted against a firm which has been dissolved before the date of the suit, the date of the institution, for the purpose of limitation, is the date of the suit and not the date of the *service* of summons individually upon a partner, subsequent to the institution of the suit.<sup>9</sup>

**Note 2**

1. ('25) AIR 1925 Bom 331 (332).  
(1894) 1 Q B 792 (795), *Wigram v. Cox & Co.*  
(1883) 10 Q B D 486 (449, 450), *Davis v. Morris*.  
(188) 42 Cal W N 820 (821).  
(186) AIR 1936 Sind 84 (89). (Property of dissolved firm can be proceeded against.)  
[See also ('86) AIR 1936 Sind 206 (207); 30 Sind L R 296.]
2. ('27) AIR 1927 Bom 581 (592) : 51 Bom 986.
3. ('24) AIR 1924 Bom 109 (111).  
(1927) AIR 1927 Bom 581 (584, 593) : 51 Bom 986.  
(1929) AIR 1929 Mad 733 (737) : 52 Mad 885 (FR).

4. ('29) AIR 1929 Mad 733 (737) : 52 Mad 885 (FR).  
[See also ('81) AIR 1981 All 65 (69) : 52 All 964.]
5. ('28) AIR 1928 Bom 66 (67).  
[See also ('27) AIR 1927 Bom 581 (593) : 51 Bom 986. (Observations of Blackwell, J.)]
6. ('27) AIR 1927 Sind 130 (131) : 23 Sind L R 137 (FB). (AIR 1925 Sind 298 set aside.)  
(186) AIR 1936 Sind 211 (212) : 30 Sind L R 6.
7. ('29) AIR 1929 Mad 733 (736) : 52 Mad 885 (FR).  
(1927) AIR 1927 Bom 581 (584) : 51 Bom 986.
8. (1899) 1 Q B 714 (718, 719).
9. ('28) AIR 1928 Sind 57 (60) : 23 Sind L R 64.

The mere fact that in cases covered by the proviso, service of summons individually on all the partners in the dissolved partnership is required does not mean that in such cases there cannot be a decree both against the firm as well as against the individual partners who have been served.<sup>10</sup>

**3. Service by registered post.** — As has been seen in Note 1, a summons can be served in suits against a firm only in the modes specified in clauses (a) and (b) of the rule. Therefore, where service by registered post has been ordered, the registered letter should be addressed to a *partner* or to the *manager* of the business and not to the *firm name* at the place where the business is carried on.<sup>1</sup>

**4. "Person having . . . partnership business."** — The person "having at the time of service, the control and management of the partnership business" must be a *servant* of the firm; a receiver or a manager appointed by the Court is not such a person as is referred to in clause (b) of the rule.<sup>1</sup>

**5. Successive services.** — Where more than one service is effected, the time for appearance by the firm runs from the last service. In a case where service was effected on the person in control of the business and five days later, upon a partner, and judgment in default of appearance was signed on the first service before the eight days had elapsed from service on the partner, the judgment was set aside.<sup>1</sup>

**6. "Principal place at which the partnership business is carried on."** — Where a suit is filed against a firm, service on an agent at the principal place of business of the firm within jurisdiction is good service on the firm, whether any members of the firm are within jurisdiction or not.<sup>1</sup> But where the mandate to the bailiff is to serve the summons *at the place of the business* of the firm on the manager or managing partner, without specifying the name of the person to be served, it is not within the competence of the bailiff to effect service by the affixture of summons at the *residence* of the managing partner.<sup>2</sup> Where the manager at the place of business refuses to accept service, a copy of the summons may be affixed on the premises.<sup>3</sup>

**7. "As the Court may direct."** — These words do not occur in the corresponding English rule. According to the latter, the plaintiff has an *option* to serve the summons upon a partner or upon the manager. Under the present rule, the plaintiff has no such option but should obtain the directions of the Court as to the method of service to be followed. If the method prescribed in each particular case is followed and service is so effected, then *prima facie* there has been good service on the firm.<sup>1</sup>

**8. Mortgage suit.** — A mortgage suit by or against a firm is on the same footing as other suits relating to the properties of the firm and service of summons or notice on the manager of the firm is service on all the partners of the firm.<sup>1</sup>

**9. Ex parte decree against firm.** — An *ex parte* decree passed against a firm

10. ('86) AIR 1986 Sind 206 (208); 80 Sind L R 296.

**Note 3**

1. ('22) AIR 1922 Cal 390 (390, 391); 49 Cal 394. (Service of summons in suit against a dissolved firm is by serving on the partner charged as liable as principal.)

**Note 4**

1. (1897) 1 Q B 14 (15, 16), In re Flowers & Co.

**Note 5**

1. (1890) 25 Q B D 543 (544), Alden v. Beckley.

**Note 6**

1. ('14) AIR 1914 Mad 556 (559); 18 Ind Cas 189

(191); 37 Mad 163.

2. ('26) AIR 1926 Sind 208 (209).

3. ('09) 1 Ind Cas 118 (120) (Cal).

**Note 7**

1. ('27) AIR 1927 Cal 758 (759); 54 Cal 1057.

[See also ('82) AIR 1982 Cal 541 (542); 59 Cal 496. (But due service on partner, though without Court's directions, is not a defect or irregularity which affects the jurisdiction of the Court.)]

**Note 8**

1. ('11) 12 Ind Cas 629 (630) (All).

**O. 30 R. 3**  
**Notes 9-10**

after due service under this rule cannot be set aside on the allegation of a partner that he was not duly served. "It can never be said that a decree against the firm is *ex parte* against one of the partners because he has not appeared."<sup>1</sup>

10. Notice as to capacity in which partner is sued. — See Rule 5 *infra*.

**O. 30 R. 4**

**R. 4. [New.]** (1) Notwithstanding anything contained in

Right of suit on death  
of partner.

section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have —

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

1. Joinder of legal representatives. — Under Section 45 of the Contract Act, where a person has made a promise to two or more persons, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives and after the death of any of them, with the representative of such deceased person, jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly. Where therefore a contract is made in favour of A and B, A alone cannot enforce the contract without impleading the legal representatives of B, in case B dies before suit. In applying this rule to cases of suits by or against *partners* in respect of partnership debts, there was, however, a conflict of opinions among the High Courts. All the High Courts except the Calcutta High Court held that in the case of such suits the legal representatives of a deceased partner need not be impleaded as parties.<sup>1</sup> The High Court of Calcutta<sup>2</sup> held that the general rule applied to this class of suits also and that the legal representatives were necessary parties. This conflict has now been set at rest by the enactment of O. 30 R. 4, modifying the operation of Section 45 of the Contract Act so far as the frame of suits relating to partnership is concerned, and making it clear that the Calcutta view ought not to prevail.<sup>3</sup> But the rule will enable a decree to be obtained only against the *partnership assets*, and cannot be carried further so as to alter the substantive law laid down in Section 45 and fix liability on the *private estate*

#### Notes 9

1. ('24) AIR 1924 Bom 866 (867).

#### Order 30 Rule 4 — Notes 1

1. ('87) 9 All 486 (490, 491).

('98) 20 All 865 (866).

('98) 17 Bom 6 (14).

('94) 17 Mad 108 (117).

('07) 4 Low Bur 99 (100).

('09) 4 Ind Cas 1066 (1067) (Upp. Bur).

[See ('97) 21 Bom 412 (421, 422).]

2. ('93) 18 Cal 86 (90).

[See also ('09) 1 Ind Cas 254 (256) (Cal).]

3. ('27) AIR 1927 Bom 581 (585, 586, 591) : 51 Bom 986.

('14) AIR 1914 Low Bur 58 (60, 61) : 8 Low Bur 180.

('87) 1987 Mad W N 1812 (1812). (Surviving partner can sue without joining as parties legal representatives of deceased partner.)

of the deceased partner. If the plaintiff wishes to fix such liability, he is bound to make the legal representatives of the deceased partner also parties.<sup>4</sup>

**O. 30 R. 4**  
**Note 1**

There is a conflict of opinions as to whether this rule applies where the suit is not brought *in the name of the firm*, but by one or more partners in respect of the partnership. It was held by the Calcutta High Court in the undermentioned case<sup>5</sup> that the suit need not be brought in the name of the firm, and that this rule was enacted to simply uphold the view of the High Courts under the old Code, that, in suits on behalf of a partnership the legal representatives of a deceased partner were not necessary parties. The High Court of Rangoon<sup>6</sup> has held that where the suit could not be brought in the firm name by reason of the firm having no name at all, this rule does not become inapplicable. The High Courts of Allahabad,<sup>7</sup> Lahore<sup>8</sup> and Patna<sup>9</sup> and the Judicial Commissioner's Court of Sind,<sup>10</sup> and the Calcutta High Court itself in a later case,<sup>11</sup> have held that the rule applies only when the suit is brought in the name of the firm.

Sub-rule (2) of this rule is intended to safeguard the rights of the legal representatives in case, for instance, there should be any collusion between debtors to the estate and the surviving partners. Similarly, sub-rule (2) (b) may enable them to claim contribution from the surviving partners under Section 43 of the Contract Act, in the event of there being a partnership liability.<sup>13</sup>

It follows from what has been stated in the above paragraphs that where a partner dies during the pendency of the suit, the suit does not abate but can be proceeded with by or against the firm.<sup>13</sup> This principle will not, however, apply unless two or more persons constituted a firm; where the sole proprietor dies, the suit will abate, unless the legal representatives are brought on the record within the limitation period.<sup>14</sup>

A person who sues some of the partners in their individual capacity, cannot be permitted to prove his case against them as partners of the firm.<sup>15</sup>

The rule does not apply to a joint Hindu family firm.<sup>16</sup>

**R. 5. [New.]** Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed

**O. 30 R. 5**

Notice in what capacity served.

by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

[R. S. C., O. 48A, R. 4.]

4. ('27) AIR 1927 Bom 581 (587) : 51 Bom 986.  
(81) AIR 1981 All 65 (69) : 52 All 964.

5. ('18) 21 Ind Cas 509 (510) (Cal).

6. ('29) AIR 1929 Rang 810 (811) : 7 Rang 558.

7. ('32) 185 Ind Cas 245 (246) (All).

8. ('27) AIR 1927 Lah 115 (117) : 8 Lah 1.

(88) AIR 1988 Lah 856 (859) : 14 Lah 548.

(O. 30 R. 1 is merely permissive. If it is followed, O. 30 R. 4 applies but not otherwise.)

9. ('85) AIR 1985 Pat 121 (122). (Suit could not have been brought in this case in the name of

firm by reason of its having ceased to exist on the date of suit.)

10. ('26) AIR 1926 Sind 81 (82, 88).

11. ('18) AIR 1918 Cal 160 (160, 161).

12. ('27) AIR 1927 Bom 581 (586) : 51 Bom 986.

13. ('29) AIR 1929 Cal 11 (12).

14. ('27) AIR 1927 Lah 556 (557).

(22) AIR 1922 Cal 408 (409) : 49 Cal 524.

15. ('15) AIR 1915 Lah 167 (168) : 1915 Pun Re No. 76.

16. ('86) AIR 1986 Nag 292 (298) : ILR (1987) Nag 423.



O. 30 R. 5  
Notes 1-5*Synopsis*

- |   |  |
|---|--|
| 1. Notice, in what capacity served.           | 4. Appearance under protest. See Rule 8. |
| 2. Service on manager. See Rule 8.            | 5. Form of notice.                       |
| 3. Person served both as manager and partner. |  |

**1. Notice, in what capacity served.** — "The object of the notice as to the capacity of the person served is obvious, namely, the Legislature intended to remove the possibility of dispute as to the character in which a particular person has been served. If there is a notice in writing, the person served is apprised of the character in which he is sought to be made liable. It is worthy of note that the language used is, not that the person served shall be *presumed* to be served as a partner, but that the person shall be *deemed* to be served as a partner . . . . In the absence of a notice consequently, the person must be deemed to have been served as a partner, and if in reality not a partner he should proceed in accordance with R. 8."<sup>1</sup> The failure to give notice under this rule will expose the plaintiff to the risk of being liable for costs in case the defendant appears under protest under Rule 8.<sup>2</sup>

**2. Service on manager.** — See Rule 3 *ante*.

**3. Person served both as manager and partner.** — Where there is doubt whether the person appearing denying that he is a partner, judgment can still be signed in both as a partner and as manager. This double form of notice has this advantage, namely, the partner of the firm will be liable in execution. Order applies only to suit under decree. The assets in execution proceedings to two or more persons than the manager or controller.

As to the contract, the notices served on the judgment-debtor during the course of arbitration proceedings as a managing partner of the firm will not enable the decree-holder to take execution at once against him without leave of the Court under Order 21, Rule 50, sub-rule (2).<sup>1</sup>

**4. Appearance under protest.** — See Rule 8, *infra*.

**5. Form of Notice.** — See Form Nos. 23C and 23D of Appendix B to the English Rules of the Supreme Court.

## O. 30 R. 6

**R. 6. [New.]** Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

[R. S. C., O. 48A, R. 5.]

*Synopsis*

- |   |                                    |
|---|------------------------------------|
| 1. Appearance of partners.  | 3. Defence in suits against firms. |
| 2. "All subsequent proceedings shall continue in the name of the firm." | 4. Decree in suits against firms.  |
|   | 5. Revision.                       |

**1. Appearance of partners.** — As has been seen in Note 1 to Rule 1 *ante*, a firm, as such, has no existence in law. It cannot, consequently, appear as such in a suit

Order 30 Rule 5 — Note 1

1. ('15) AIR 1915 Cal 288 (240).  
(1928) AIR 1928 Lah 528 (529).

2. ('26) AIR 1926 Sind 51 (58).

3. Note 3.  
1. ('29) AIR 1929 Lah 228 (229, 230).



against partners in the name of the firm. It is, therefore, enacted by this rule that the partners should appear *individually* in their own names, though all the subsequent proceedings should continue in the name of the firm. The word "individually" does not mean "in person" and, therefore, no partner can be compelled to appear *in person*.<sup>1</sup> He can appear by an agent or a solicitor or a pleader and such appearance will be an *individual* appearance within the meaning of the rule.<sup>2</sup> Under this rule the appearance of one partner is appearance of the firm, that is, of all the partners of the firm.<sup>3</sup> The fact that the firm has been represented by the appearance of one partner does not disentitle another partner from putting in his appearance; the reason is that if such partner considers that his rights will not be adequately represented by the other partner who has appeared or who has been impleaded, or that his interests are adverse to those of such partner, it is just and fair that he should be allowed to appear individually and assist the claim.<sup>4</sup>

Where a partner does not appear in the suit and has not also been served individually with a summons in the suit, the decree obtained against the firm cannot be executed against him *personally* except with the leave of the Court under O. 21 R. 50, sub-rule (2). If he does appear under the provisions of this rule, execution can at once issue against him personally under O. 21 R. 50 sub-rule (1).

The only persons who can appear under this rule are persons who allege that they are partners of the firm sued against and persons who are sued as partners but who deny that they are such (see Rule 8). A person merely served as manager cannot appear under this rule (see Rule 7).

## 2. "All subsequent proceedings shall continue in the name of the firm."

— Where persons are sued as partners in the name of their firm, they should under this rule appear individually in their own names, but all subsequent proceedings are nevertheless to continue in the name of the firm.<sup>1</sup>

**3. Defence in suits against firms.** — Each partner appearing individually can put in a separate written statement but each written statement is the written statement of the firm. It is only when a person is sued personally along with the firm that he may put in a personal defence.<sup>1</sup> Where a person was served as a partner and not individually and he put in a written statement in his *own name*, but there was nothing individual in the defence, it was held that there was only a technical flaw which could be corrected by the Court.<sup>2</sup>

Where several partners individually appear and put in separate written statements and such written statements are inconsistent with one another, the plaintiff is bound to meet all the defences and is bound to show that none of the defences prevents decree being passed against the firm.<sup>3</sup>

### Order 30 Rule 6 — Note 1

- (19) AIR 1919 Lah 296 (297) : 1918 Pun. Re No. 732.  
(8) AIR 1926 Lah 528 (529).  
(1938) AIR 1938 Lah 528 (529). (Appearance by power of attorney agent.)  
(1939) 1 Q B 886 (889), Tomlinson v. Broodsmith. (Appearance by solicitors.)  
(1938) AIR 1938 Cal 877 (388) : 62 Cal 510. (Where warrant of attorney is given by one partner to enter appearance on his behalf, the warrant of attorney is and is intended to be on behalf of the firm.)  
(1930) AIR 1930 All 701 (702) : 52 All 951.  
(1938) AIR 1938 All 528 (529) : 55 All 719. (Where

written statement on behalf of firm is signed by one partner, another partner entering appearance can take part in the conduct of the case by examining or cross-examining witnesses., etc.)

### Note 2

1. (1925) AIR 1925 Bom 494 (496).  
(1938) AIR 1938 All 528 (524) : 55 All 719.  
(1921) AIR 1921 Cal 722 (725). (Even though the names of the partners are disclosed as required by R. 2, the proceedings continue in the name of the firm.)

### Note 3

1. (1925) AIR 1925 Bom 494 (496).  
2. (1929) AIR 1929 Sind 192 (193).  
3. (1899) 1 Q B 714 (717), Ellis v. Wadeson.

**O. 20 R. 6**  
**Notes 4-5**

**4. Decree in suits against firms.** — The firm being sued in the *firm name*, judgment can be passed against it only in *that name* and not against the individual partners, though it may be *enforced* against them personally under O. 21 R. 50. The judgment must follow the writ, *i.e.*, the decree must be against the firm in the firm name and if one of the partners fails to appear no decree can be passed against him separately for default of appearance.<sup>1</sup> But the judgment has the effect of a judgment against all the partners as partners<sup>2</sup> and therefore, the assets of the firm are primarily liable to satisfy the decree. Whether a particular partner is also personally liable to satisfy the decree can only be decided in execution under O. 21 R. 50.<sup>3</sup> A judgment entered against a firm may be a ground for a valid cause of action against an individual partner and an action may be brought upon it against him.<sup>4</sup>

**5. Revision.** — Where a Court refuses to allow a partner, who has entered appearance but has not filed a separate statement, to take part in the conduct of the case against the firm, it acts illegally in the exercise of its jurisdiction and the order is open to revision.<sup>1</sup>

**O. 30 R. 7**

**R. 7. [New.]** Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

[R. S. C., O. 48A, R. 6.]

**1. Scope of the Rule.** — A person served as manager is under no obligation to appear in Court unless he is a partner.<sup>1</sup> This rule is to be read subject to Rule 5 above. It contemplates only a case where a person is served as a manager and not a case where the person served is deemed to be served as a partner.<sup>2</sup>

The object of the rule is to avoid unnecessary delay caused by the appearance of persons who are neither partners nor their agents.

**O. 30 R. 8**

**R. 8. [New.]** Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

[R. S. C., O. 48A, R. 7.]

(1927) AIR 1927 Cal 758 (759); 54 Cal 1057.

[See also (1938) 42 Cal W N 820 (822). (Each partner may file a separate defence, one partner may defend, while another admit.)]

**Notes 4**

1. (1882) 8 Q B D 474 (477, 478), Jackson v. Litchfield.

2. (1899) 1 Q B D 566 (570), In Re Frances Handford & Co.

3. (1924) AIR 1924 Bom 304 (307).

4. (1882) 9 Q B D 335 (355), Oake & Co. v. Cullen.

**Notes 5**

1. (1938) AIR 1938 All 523 (525); 55 All 719. (The order is a case decided within the meaning of S. 115, C. P. C.)

**Order 30 Rule 7 — Note 1**

1. (1924) AIR 1924 Bom 311 (313).

2. (1925) AIR 1925 Cal 232 (243).

## Synopsis

O. 30 R. 8  
Notes 1-3

## 1. Scope of the Rule.

## 2. Party appearing under protest not entitled to file written statement on his own behalf.

## 3. Party appearing under protest, if can question liability of firm.

## 4. Defence of party entering appearance under protest in proceeding under Order 21, Rule 50.

**1. Scope of the Rule.** — This rule enables a person who is served with summons as a partner under Rule 3 to appear under protest and deny that he is a partner. The effect of such an appearance has nothing to do with the merits of the suit but it nullifies the service altogether as regards the firm.<sup>1</sup> But the plaintiff is not precluded thereby from otherwise serving the summons on the firm. He may disregard the appearance of the person denying that he is a partner and may again effect a service upon a partner or partners or upon the manager of the business as required by Rule 3, or he can contend that the person served *was* a partner at the time the cause of action accrued, and apply on that basis either to have the appearance entered struck out, or to have the denial of partnership struck out of the appearance.<sup>2</sup> According to the High Court of Bombay<sup>3</sup> the person protesting that he is not a partner has a right to have the issue as to whether he was a partner of the defendant firm, tried in the suit itself and not be left hanging over him until execution proceedings are taken out against him under O. 21 R. 50. On the other hand in the undermentioned case of the Calcutta High Court,<sup>4</sup> Mr. Justice Buckland was of the opinion that an inquiry of the kind prior to judgment is not within the contemplation of the rule, inasmuch as there is an express provision in O. 21 R. 50 for the decision of the question before according leave to proceed in execution. The Judicial Commissioner's Court of Sind has, also, taken the same view.<sup>5</sup> See also the case cited below.<sup>6</sup>

**2. Party appearing under protest not entitled to file written statement on his own behalf.** — A party who has been served as a partner under Rule 3, and entered appearance under protest, is not entitled to file a written statement on his own behalf denying that he is a partner.<sup>1</sup>

**3. Party appearing under protest, if can question liability of firm.** — A defendant entering appearance under protest is not precluded from taking alternative defences, namely, that he is not a partner and that, assuming that he is a partner, the firm is not liable.<sup>1</sup> It was held in England in the undermentioned case<sup>2</sup> that under the corresponding rule (O. 48A R. 7) of the Rules of the Supreme Court, such a defence was not open to the defendant. That rule, however, has been substituted by a new

## Order 30 Rule 8 — Note 1

1. ('26) AIR 1926 Bom 585 (587) : 50 Bom 665.

('27) AIR 1927 Cal 758 (759) : 54 Cal 1057.

2. ('25) AIR 1925 Bom 494 (496).

('21) AIR 1921 Bom 48 (49).

('26) AIR 1926 Bom 585 (587) : 50 Bom 665. (As to appearance of a person who wishes to enter appearance under protest in a summary suit under O. 27.)

('27) AIR 1927 Cal 758 (759, 760) : 54 Cal 1057. But if plaintiff does not apply to strike off appearance under protest, it is open to Court to make provision for the costs of protesting party in the suit.)

3. ('21) AIR 1921 Bom 48 (49).

[See however ('82) AIR 1982 Bom 269 (269, 270).]

4. ('27) AIR 1927 Cal 758 (759, 760) : 54 Cal 1057.

5. ('82) AIR 1982 Sind 199 (200, 201) : 26 Sind L R 228.

[See however ('86) AIR 1986 Sind 206 (207) : 30 Sind L R 226.]

6. ('87) AIR 1987 Rang 351 (353). (Suit on mortgage—Parties—Suit against firm—Mortgagees claiming certain persons are not partners—Persons concerned equally denying same—Their names should be struck out—Court not deciding issue—There is no irregular exercise of jurisdiction.)

## Note 2

1. ('27) AIR 1927 Cal 758 (760) : 54 Cal 1057.

## Note 3

1. ('26) AIR 1926 Sind 154 (154, 156).

[But see ('32) AIR 1932 Sind 199 (201) : 26 Sind L R 228.]

2. (1925) 2 K B 127 (134), Weir and Co. v. McVicar &amp; Co.

**O. 21 R. 8**  
**Notes 2-4**

rule in 1929 under which such a defence is now permitted in England. That English case, therefore, has now been rendered obsolete in England.

**4. Defence of party entering appearance under protest in proceeding under O. 21 R. 50.** — *A* files a suit against a firm and serves *B* with a summons as a partner of the defendant firm. *B* appears under protest stating that he is not a partner, and a decree is passed in his absence against the firm. *A* then seeks to execute the decree personally against *B* under the provisions of O. 21 R. 50, sub-rule (2). *B* can, in such proceedings, defend himself on the ground that he is not a partner of the firm. He can also take any other defence that is open to him, unless, to allow him to do so would be to negative any rule of procedure.<sup>1</sup>

**O. 30 R. 9**

**R. 9. [New.]** This Order shall apply to suits between a firm

Suits between co-partners.

and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

[R. S. C., O. 48A, R. 10.]

**1. Scope of the Rule.** — The general rule of procedure is that a person cannot be both a plaintiff and a defendant.<sup>1</sup> This rule provides an exception to that rule<sup>2</sup> and makes this Order applicable to suits between firms and one or more of the partners therein, and to suits between firms having one or more partners in common.<sup>3</sup> A suit may also lie by one firm against another when all the members of one firm are members of the other.<sup>4</sup> The rule does not alter the substantive law as it existed before,<sup>5</sup> and does not lay down when and under what circumstances suits can be laid as between partners.<sup>6</sup> It only lays down the possibility of such suits and the procedure to be followed therein.<sup>7</sup> No suit will lie as between partners or between firms having common partners for recovery of moneys due on accounts without asking for accounts.<sup>8</sup> But an action for the balance of a settled account will not be barred merely because there are other unsettled accounts between the parties.<sup>9</sup>

One of the directors of a company who has been excluded from acting as a director by the other directors can maintain an action in his own name on the ground of individual injury to himself.<sup>10</sup>

#### Notes 4

1. ('80) AIR 1980 Cal 58 (54); 55 Cal 704. (Alternative personal defence under the U. P. Court of Wards Act allowed as such defence would not be a challenge of the decree itself.)
- (104) AIR 1932 Bom 334 (335). (Plea of not being a partner, and in the alternative, that partnership had no authority to borrow — Alternative plea unsustainable as challenging the decree.)
- AIR 1980 Cal 58, Distinguished.

#### Order 30 Rule 9 — Note 1

1. ('29) AIR 1929 Sind 492 (194).
- (18) AIR 1918 Mad 255 (259, 262).
2. ('29) AIR 1929 Sind 192 (194).
- [See also ('17) AIR 1917 Lah 410 (410).]
3. ('27) AIR 1927 Mad 1096 (1098).
4. ('29) AIR 1929 Sind 192 (194).

5. (1928) 4 Ch 421 (425); *Mayer & Co. v. Faber* (No. 2).

(36) AIR 1936 Bom 245 (250). (Agreement of firm between firm and one member — Suit for specific performance not maintainable.)

6. ('18) AIR 1918 Mad 167 (168).

7. ('18) AIR 1918 Mad 167 (168).

(88) AIR 1938 Mad 167 (168).

8. ('18) AIR 1918 Mad 167 (168).

(29) AIR 1929 Sind 192 (194).

(18) AIR 1918 Mad 167 (168).

9. ('36) AIR 1936 Bom 245 (248, 249). (Firm doing business with firm on its own behalf — Balance struck in favour of firm after settling accounts — Suit by firm for balance in its favour.)

— AIR 1918 Cal 162, Followed.

10. ('26) AIR 1926 Mad 242 (243).

**R. 10. [New.] Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.** **O. 30 R. 10**

Suit against person carrying on business in name other than his own.

permit, all rules under this Order shall apply.

[R. S. C., O. 48A, R. 11.]

### Synopsis

1. Scope of the Rule.
2. Non-resident foreigner.
3. "All Rules under this Order shall apply."

**1. Scope of the Rule.** — In order to maintain a suit against a firm in the name of the firm, there must be *two or more persons* who are alleged, or who claim, to be partners therein.<sup>1</sup> A *single* person cannot constitute a firm, though he is carrying on business in a name or style other than his own. This is made clear by the use of the words "as if it were a firm" and "so far as the nature of the case will permit" in this rule.<sup>2</sup> Such a person cannot, therefore, *sue* in the name of a firm, but must sue in his own name.<sup>3</sup> Where, however, he files a suit in the name of the firm, but is willing to amend the plaint by inserting the words "(plaintiff) carrying on business under the name and style of (firm)," the amendment should be allowed on terms that he should pay all the costs incurred up to the date of the amendment.<sup>4</sup> Where the title of the plaint mentioned the plaintiff as "A, owner of the shop O," there is no misdescription inasmuch as the plaintiff is A and not the shop O.<sup>5</sup>

But though a single person trading in a firm name cannot *sue* in the name of a firm, he *can be sued* in that name under the provisions of this rule.<sup>6</sup> But the business must be carried on in British India and must be an *existing* one at the time when the suit is instituted.<sup>7</sup> If the sole proprietor dies, no suit can be brought against him in the name of the firm, for such a suit will be only a suit against a dead person and therefore a nullity.<sup>8</sup> The proper form of the suit will be against the legal representatives of the deceased proprietor.<sup>9</sup> Similarly, if he dies pending the suit, it will abate unless his legal representatives are brought on the record within the prescribed period of limitation (90 days from the date of his death).<sup>10</sup>

This rule only applies to the case of a *single* individual carrying on business in a name or style other than his own. Where the sole proprietor of a business dies and the business is then carried on by the guardian of his minor sons on their behalf, this rule does not apply.<sup>11</sup>

#### Order 30 Rule 10 — Note 1.

1. See Notes to Rule 1 *ante*.
2. ('86) AIR 1936 Bom 216 (215).
3. ('24) AIR Bom 109 (111).
4. ('30) AIR 1930 Bom 246 (216).
5. ('86) AIR 1936 Pat 194 (196).
6. ('29) AIR 1929 Bom 112 (115); ILR (1929) Kar 275.
7. ('24) AIR 1924 Lah 147 (147). (Person carrying on business in another name suing in that name by mistake — Appeal by defendant. Plaintiff dying and legal representatives brought on record — Appeal does not abate.)
8. ('21) AIR 1921 Cal 770 (771).
9. ('29) AIR 1929 Bom 285 (288).
10. ('22) AIR 1922 Bom 516 (516).

(('86) AIR 1936 Pat 194 (196).

[See also ('84) AIR 1934 Mad 886 (887): 57 Mad 978. (If such person is a minor, plaintiff must have a guardian *ad litem* appointed for him.)]

7. ('26) AIR 1926 All 151 (158).

8. ('24) AIR 1924 Bom 109 (111).

9. ('29) AIR 1929 Lah 149 (150).

[See also ('36) AIR 1936 Oudh 245 (246). (Sole proprietor dying — Business carried on under old name by his son — Suit against son under this rule maintainable.)]

10. ('22) AIR 1922 Cal 408 (409): 49 Cal 524.

(('30) AIR 1930 Cal 937 (928): 57 Cal 931.

11. ('86) AIR 1936 Mad 707 (709): I L R (1937) Mad 28.

O. 25 R. 10  
Notes 2-3

**2. Non-resident foreigner.** — It has been held in England that English Courts cannot seek to exercise jurisdiction over a single trader residing in a foreign country, notwithstanding the fact that he carries on business within the jurisdiction.<sup>1</sup> In this country, it has been held by the High Court of Calcutta<sup>2</sup> that, there is nothing in this rule which says anything about residence either within or without the jurisdiction of the Court, and that a Court can exercise jurisdiction over persons who carry on business within its local limits though they are resident outside it. The same question came for consideration before the Privy Council in the undermentioned case<sup>3</sup> where the Courts below had assumed they had such jurisdiction. Their Lordships of the Privy Council did not, however, decide the point but left it with the remark that the assumption appeared to their Lordships to require more attention than it had received.

**3. "All Rules under this Order shall apply."** — All the rules of this Order relating to suits against firms have been made applicable by the latter part of the rule to suits properly laid against a person trading in a name other than his own so far as the nature of the case will permit. Thus, the business must be carried on in British India and the defendant may be asked to disclose his real name and address (Rules 1 and 2). Service may be effected as provided under Rule 3 and the Court has got power to order substituted service when no person having control or management of the business can be found.<sup>1</sup> Rule 4 will not apply (see Note 1). The defendant must appear *individually* in his own name though the subsequent proceedings might continue in his assumed name. Judgment can be passed against him in the firm name and execution will issue as provided by O. 21 R. 50. Where the service has only been effected upon the person having the management and control of the business, it may be that execution can issue without leave only against the property found at the business premises unless the person so traded has appeared. Where appearance has been entered or the person has been served personally or an order for substituted service has been obtained, execution may be issued against the business assets and against the defendant personally.

(See however (196) AIR 1986 Oudh 245 (248). (In this case it seems to have been assumed that this rule will apply to a case in which the sole proprietor of a business dies and after him the business is carried on by his heirs.)]

#### Note 2

1. (1908) 3 Q.B. 96 (102), *St. Gobain Chauny & Ciry Co. v. Hoyer-mann's Agency*.  
 (1917) 127 W.N. 941 (841), *Taylor Brothers & Co., Ltd. v. A. Johnson & Co.*  
 (1905) 2 O.R. 680 (635), *Maciver v. Burns*.

2. (11) 10 Ind Cas. 895 (896) (Cal). (On appeal from this decision, 1908 Ind Cas 708, the plea as to jurisdiction was abandoned.)

3. (193) 36 Mad. 544 (552) : 80 Ind App 220 (P.O.).

#### Note 3

1. (1933) 1933 W.N. 206 (206), *Phillips v. Child & Co.*







